CHITTY'S INDEX

TO

ALL THE REPORTED CASES

DECIDED IN THE SEVERAL

COURTS OF EQUITY IN ENGLAND,

THE PRIVY COUNCIL, AND THE HOUSE OF LORDS.

WITH A SELECTION OF IRISH CASES;

ON OR RELATING TO

THE PRINCIPLES, PLEADING, AND PRACTICE

OF

Equity and Bankruptcy;

FROM THE EARLIEST PERIOD.

THE FOURTH EDITION.

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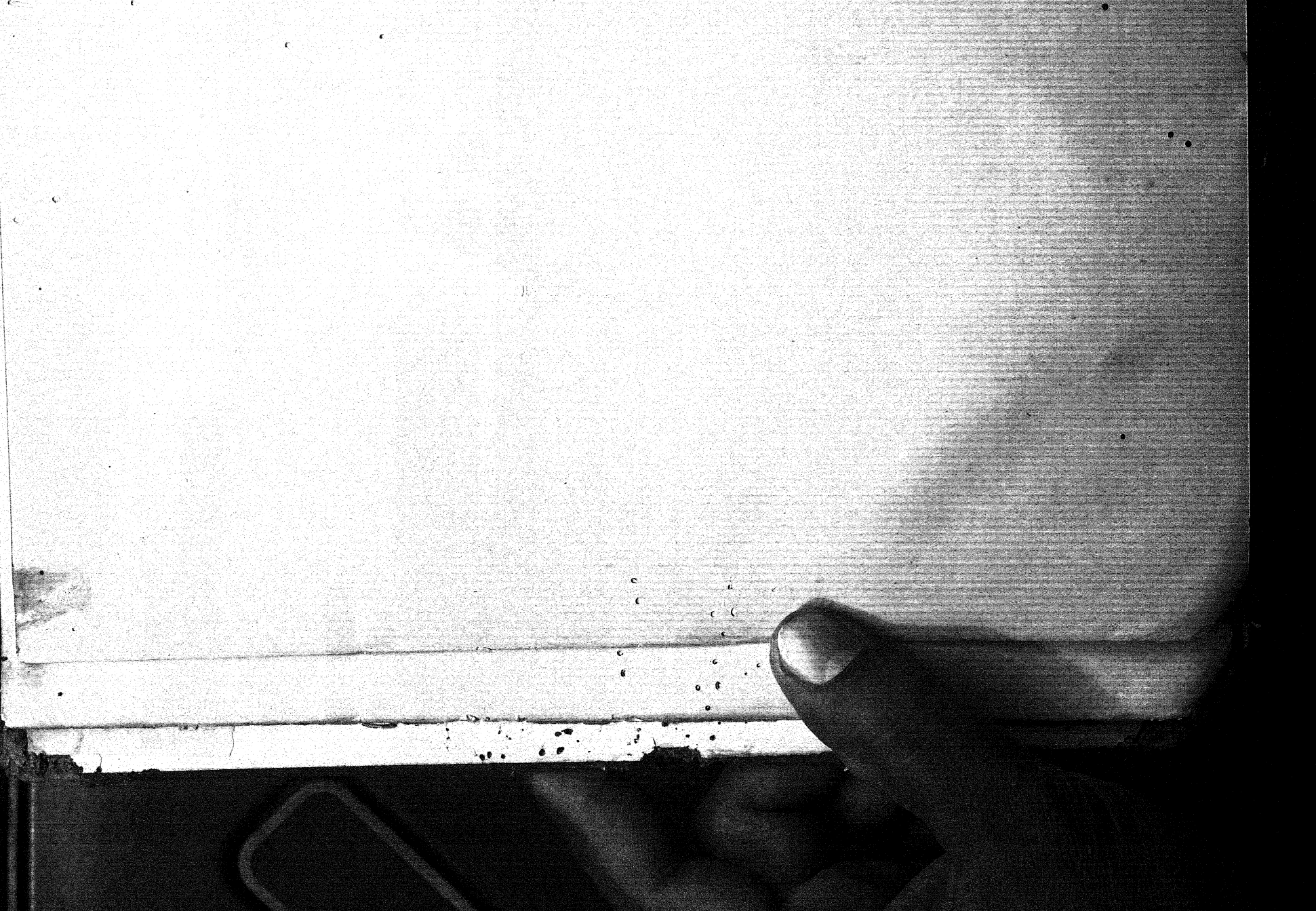

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I. GENERAL PRINCIPLES.

1. The distinction between vested and contingent legacies is, that a vested legacy, immediately on the death of a testator, attaches as a debt upon his real or personal estate, whereas a contingent legacy does not attach upon either till the contingency happens. In the first case, the legacy is *debitum in præsenti solvendum in futuro*, but where the legacy is merely contingent, *non constat* whether under the will the fund will ever be charged with it. *Kerly* v. *Monck*, 3 Ridgw. P. C. 255.

2. The rule, taken from the Ecclesiastical Court, that a direction postponing the payment of a legacy does not prevent the vesting, prevails in courts of equity as to personal legacies; unless a contrary intention can be inferred, as where the time of payment forms part of the description of the person to take. The vesting of a residuary bequest is especially favoured to prevent an intestacy; and a direction, that the interest should accumulate and be paid with the capital, after a deduction for maintenance and preferment, is not sufficient to prevent it. As to real estate, the contrary rule prevails, but subject to exceptions. *Bolger* v. *Mackell*, 5 Ves. 509.

3. Legacy to A., if he be living, and in case of his death before the decease of B. to C., is contingent, viz., if A. survives B. *Hodges* v *Peacock*, 3 Ves. 735.

4. The vesting of a legacy is not prevented by a provision for survivorship among the legatees in case of the death of any under the age of twenty-one. *Deane* v. *Test*, 9 Ves. 446; 1 Smith 112.

5. A legacy payable as soon as legal proceedings connected with the fund out of which it is to be paid should be terminated, is neither a reversionary interest nor a contingent legacy. *Luff* v. *Lord*, 34 Beav. 220.

6. A legacy, not as an independent bequest, with a time for payment or distribution, appointed afterwards, but the time annexed to the substance of the bequest: the interests do not vest before that period. *Sansbury* v. *Read*, 12 Ves. 75.

7. The intention of a testator that his gift should not vest in the legatee until it should be actually remitted to him, will prevail when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law* v. *Thompson*, 4 Russ. 92; 6 L. J., Ch., 56.

8. Where a vested legacy is directed to accumulate for a certain period, or the payment is postponed for the benefit of the legatee, he is not bound to wait for the expiration of the period, but may, if he have an absolute interest in the legacy, have it paid to him so soon as he can give a valid discharge. *Saunders* v. *Vautier*, 4 Beav. 115. Affirmed Cr. & Ph. 240; 10 L. J., N. S., Ch., 354.

9. When a certain time is appointed for the payment of a legacy, and afterwards a contingent clause is added, touching the same legacy, all the words of the will must stand together, which can never be, unless the contingency happen within the period of time appointed for the payment of the legacy. *Colhoun* v. *Thompson*, Beat. 248.

10. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn: a subsequent direction that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and, therefore, upon the

death of the first tenant for life under twenty-five, the accumulation belonged to his personal representative. *Montgomerie* v. *Woodley*, 5 Ves. 522.

1. A bequest of 100*l.* to the testator's daughter, and in case she should die under twenty-one, to her mother. The mother married and died, and afterwards the daughter died under twenty-one:—Held, that the 100*l.* should go to the personal representative of the mother. *Jones* v. *Aiken*, Wall. Lyn. 328.

2. The year allowed for executors, etc., is only for convenience, and does not prevent the vesting. *Garthshore* v. *Chalie*, 10 Ves. 13.

3. The Courts lean towards vesting, and seek to find the earliest date at which persons interested take a vested interest. Where property is once vested under a will, it must not be divested except upon strong grounds. *Re Wood, Moore* v. *Bailey*, 43 L. T. 730; 29 W. R. 171.

4. Where there is a doubt the Court inclines to the construction that a gift by will vests on the testator's death. *King* v. *Isaacson*, 17 Jur. 434; 22 L. J., Ch., 455; 2 Sm. & G. 371; 1 W. R. 209.

5. Unless there is in a will, or some codicil thereto, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised until they attain twenty-five, but that some other person is to have that enjoyment; or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five, as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy; the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five. *Gosling* v. *Gosling*, Johns. 265; 5 Jur., N. S., 910.

Expressions in a codicil of a testator's devise that real and personal property given by his will should not be enjoyed by any of the successive devisees till twenty-five, and direction to accumulate in the meantime:—Held, inoperative, there being no gift over. *Ib.*

6. A testator gave the interest arising from a sum of stock to V. D., which interest he was to enjoy along with his wife M. D., during their respective lives, but in the event of either dying and the survivor marrying again, then the capital to be divided, share and share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. The testator then directed that the money should not be removed from the English funds during the lifetime of V. D. and M. D. nor until the period arrived "for its distribution (after their death) among their children surviving, share and share alike":—Held, that the interests of the children were not contingent on their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent. *Re Duke, Hannah* v. *Duke*, 16 L. R., Ch. D., 112; 29 W. R. 341.

II. LEGACY ON AN UNCERTAIN EVENT, OR AT AN INDEFINITE TIME.

7. A residue to be divided by executors at an indefinite time, vests at the death of the testator unless an intention is manifest to the contrary upon the face of the instrument. *Stapleton* v. *Palmer*, 4 Bro. C. C. 490

8. E., being on bad terms with his eldest son, bequeaths him a trifling annuity, and bequeaths to M., the daughter of his said son, "if unmarried, and if she does not marry without the consent of the trustees, the sum of 400*l.*, one moiety to be paid her upon her marriage, with such consent, the other moiety in one year after; but if said M. was then married, or should marry without consent, said sum to sink into his personal fortune." M., being unmarried, is not entitled immediately either to principal or interest. *Ellis* v. *Ellis*, 1 Sch. & Lef. 1.

9. Legacy to A., if he be living, and in case of his death before the decease of B., to C., is contingent, viz., if A. survives B. *Hodges* v. *Peacock*, 3 Ves. 735.

10. Legacy in trust, to pay out of the interest 60*l.* a year to the testator's wife for life, and remaining interest during her life to R., Duke of M., and in case of his death to his eldest or only son, and for want of issue male to his eldest or only daughter, for want of such issue female to sink into the residue; and after the death of his wife, the testator gave the principal to the said duke, if then living, but if then dead to his eldest or only issue male then living, and for want of such issue male to his eldest or only daughter, for want of such issue female to sink into the residue. R., duke of M., died, leaving two sons and a daughter; both the sons died; the eldest left a son, Duke of M., who filed the bill; the plaintiff is entitled to the surplus interest, but the principal is contingent till the death of the testator's widow. *Manchester* (*Duke*) v. *Bonham*, 3 Ves. 61.

11. A testatrix gave specific legacies absolutely to her sister, and directed her executors to pay out of her general estate to her said sister's two daughters, A. and B., 5,000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of her death. She gave the income of the residue to H., at whose death the whole was to be equally divided between the grandchildren of the father of the testatrix. The testatrix died in 1825. Twenty-one years from the decease of the testatrix expired in 1846. In 1849 A. died. The tenant for life of the residue died in 1838. On a bill by the grandchildren against the executors and the representatives of A. and H., and against B., for a declaration by the Court of the rights under the will:—Held, that the legacies to A. and B. were contingent, and that the representative of H. was entitled to the income of A.'s legacy till the death of H., but that the capital and subsequent accumulations fell into the residue. *Morgan* v. *Morgan*, 4 De G. & Sm. 164; 15 Jur. 319; 20 L. J., Ch., 109, 441.

12. A mother bequeathed to each of her four daughters 500*l.*, to be paid by her son to each of them upon the day of her marriage, or on the day of her taking the veil as a professed nun; and directed that her daughters should reside with her son so long as they should agree to do so, and that, during such residence with him, he should provide them with maintenence and clothing; and should any separation take place between her son and any of

his sisters, each such sister so disagreeing should be paid by him 25*l.* a-year until she became entitled to be paid the principal sum of 500*l*, to be paid quarterly and in advance: —Held, that the legacies did not vest until marriage or taking the veil. *Corr* v. *Corr*, 7 Ir. R., Eq., 397.

1. W. bequeathed one-third of his real and personal estate in trust for his son and daughter, to be divided between them in equal proportions as tenants in common, and not as joint tenants; the share of the son to be vested in him at twenty-four, and the share of the daughter to be vested in her on her marriage, with the consent of her guardians. But in case his son should die under twenty-four, and without leaving issue, or his daughter should die without having been married with such consent, he declared that the share of him or her so dying should go to the survivor, and be vested in him or her at the same age as his or her original share. The son attained twenty-four, and the daughter twenty-one, and was unmarried:—Held, that the daughter took a vested interest on her attaining twenty-one. *West* v. *West*, 9 Jur., N. S., 400; 32 L. J., Ch., 240; 7 L. T., N. S., 779; 1 N. R. 258; 4 Giff. 198.

2. Testator bequeathed to E. 200*l.*, to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of his two sons; E. died, after twenty-one, but unmarried:—Held, that her representative was not entitled to the legacy. *Atkins* v. *Hiccocks*, 1 Atk. 500.

In all cases where the condition of marrying is annexed, marriage is necessary to vest the legacy. *Ib.*

3. Legacy to be paid on marriage with consent, and given over in case of death before twenty-five or such marriage with consent:—Held, that the legacy was only intended to go over, in the event of death before twenty-five and such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop. *temp.* Brough. 73; 2 Madd. 349.

4. By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one the whole to be paid to such only child, or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them as aforesaid on their attaining twenty-one if sons, or if daughters on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the bonds in question, either on her attaining twenty-one or her marriage under that age. *Lang* v. *Pugh*, 1 Y. & Coll. C. C. 718; 6 Jur. 939.

5. A father, by will, gave to each of his younger sons 1,000*l.*, "which I charge on my estate at A., hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male. The eldest son died before F., and without coming into possession of the M. estate:—Held, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the M. estate; and that as that event had not happened they failed and sank into the residue. *Taylor* v. *Lambert*, 2 L. R., Ch., D., 177; 45 L. J., Ch., 418; 24 W. R. 691; 34 L. T., N. S., 567.

6. Testator gave legacies to his daughters, to be paid on marriage, with interest from his death, until same should be paid; he directed that if any of the daughters married a man who did not settle on her a jointure of a certain amount, the interest only of the legacy should be paid to the husband during his life; and at his death, if the wife survived him, he directed the principal to be paid to her, and if she died in his lifetime, leaving children, the principal to be paid to them; but if she left no children, the principal to be paid to his son and to his surviving daughters equally; the shares of the latter to be paid at the same time, and subject to the same restrictions, as their original shares. The residue of his estate, "after payment of his legacies," he gave to his said son. Two of the daughters died unmarried:—Held, that the legacies to the daughters were vested and transmissible to their personal representatives. *Vize* v. *Stoney*, 1 Dr. & War. 337; 4 Ir. Eq. R. 64. Affirming 2 Dr. & Wal. 659.

7. Residuary bequest to trustees upon trust to pay the dividends, etc., equally between the testator's two great-nieces, until their respective marriages, and from and immediately after their respective marriages, to assign and transfer their respective moieties or shares thereof unto them respectively:—Held, a vested interest before marriage, being taken out of the general rule from the civil law, that *dies incertus in testamento conditionem facit*. One of the legatees being dead, without having been married, the Court directed one moiety to be paid to her executors, but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage, or her death before marriage. *Booth* v. *Booth*, 4 Ves. 399.

Where the whole property is devised with a particular interest given out of it, it operates by way of exception out of the above absolute property. *Id.* 408.

8. P. devises to J. 200*l.*, provided she marries with the consent of her father and mother, or the survivor of them. J., before marriage, and during the lives of her father and mother, brings her bill against the executor to have this legacy paid, the father and mother, by their answers, consenting. Marriage is here a condition precedent; plaintiff, therefore, too early, the bill dismissed. *Garbut* v. *Hilton*, 1 Atk. 381; 1 Ves. 5; 9 Mod. 210.

III. GIFT WITH DIRECTION TO PAY AT A FIXED TIME.

9. Legacy to be paid at a particular time is *debitum in præsenti solvendum in futuro*, and vested. *Crichett* v. *Dolby*, 3 Ves. 13.

Legacy payable at twenty-one, before which time the legatee dies, a person claiming by limitation over takes immediately, but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given. *Id.* 16.

1. Legacy to be paid at a future day is vested, but not where the sum not certain. *Maddison* v. *Andrew*, 1 Ves. 59

2. Distinction between a legacy given at a future time, and a legacy given to be paid at a future time; the latter vested, and payment only postponed, the time being annexed, not to the legacy, but to the payment only. *Huxon* v. *Oliver*, 13 Ves. 113.

3. Legacy of 1,000*l.* which devisor had on mortgage on college lease to be paid when devisee came of age:—Held, that it was vested. *Chambers* v. *Jeoffery*, 2 Eq. Abr. 541.

4. Bequest of 400*l.* to R., to be paid in a year, and of a further sum of 100*l* at the death of his mother; the latter held also a vested legacy. *Jackson* v. *Jackson*, 1 Ves. 217.

5. Legacy when apprenticeship is served:—Held, on construction of will to be only directory as to time of taking, and not a condition. *Sidney* v. *Vaughan*, 2 Bro. P. C. 254.

6. F. by will gave to R. legacy of 1,000*l.* to be put out at interest till twenty-one, and in case of death before, then to go to M., his daughter; but if R. lived to attain twenty-one then 500*l.*, part of 1,000*l.*, to go to M., and be paid her when R. should arrive at that age M. died before that time:—Held, that M. took a vested interest. *Wingfield* v. *Newton*, 9 Mod. 428.

7. Legacy given to a child, payable when twenty-one; the child dies before; his administrator shall have the legacy, but shall stay for it till such time as the child, if he had lived, would have come to twenty-one. *Anon.*, 2 Vern. 199; 2 Vent. 344.

8. A portion given to one payable at a certain age, and if he dies, to another, without mentioning any age; if the first dies before the time of payment, it vests in the second immediately. *Boycot* v. *Cotton*, 1 Atk. 555.

9. Where there was first a distinct gift of a legacy, and then a direction that it should be paid within six months, and a general declaration that all legacies should be vested only when payable, and the legatee died within six months —Held, that the legacy had vested. *Lucas* v. *Carline*, 2 Beav. 367.

10. P. gives by will "to his three daughters 500*l.* each, to be paid them severally within five years after his decease, if then alive, or any issue of their several bodies, to be paid by son, the residuary devisee, the interest from his death at 4 per cent. for so many of the five years as the son should keep it in his hands; but if there should be no issue living of any of the daughters at end of five years, then annuity for life of 20*l.* each, and the several sums of 500*l.* to be paid to them so dying without issue, should be equally divided between the survivors and their issue." One of the daughters dies within five years, leaving issue; having previously assigned her interest, the assignee held entitled to the 500*l.* *Oseland* v. *Oseland*, 3 Anstr. 628.

11. If legacy be given to B. payable at two years after death of testator, B. takes a vested interest, though he dies before that time. *Sheldon* v. *Sheldon*, 9 Mod. 211.

12. A legacy "given" to daughters equally to be divided between them, with a devise also thus: "And all my estate at St C. to be equally divided between them," when they arrive at twenty-four years of age; the legacy held to be vested immediately, and only the time of payment postponed. *May* v. *Wood*, 3 Bro. C. C. 471.

13. Legacy in trust for testator's mother and sister for life, and after the death of the survivor, for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one, and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. *Wadley* v *North*, 3 Ves. 364.

14. Testatrix gave the interest of 500*l.* to her sister, and at her death the said 500*l.* to be divided between her children, share and share alike. The sister had three children at the death of the testatrix, but only one survived her:—Held, that the three children took vested interests. *Chaffers* v. *Abell*, 3 Jur. 578.

A testator bequeathed certain sums of stock to trustees to pay 40*l.* per annum to his daughter for life, and after her decease, "to pay, assign, and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of his daughter, share and share alike, to be paid and transferred when and as soon as the youngest should attain his or her age of twenty-one years." At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived her daughter:—Held, that the four children took vested interests. *Id.* 577.

15 Where there is a gift to trustees within three months after the testator's decease, in case any child or children of his son should be then living, to invest a sum of money in trust for such children, equally, who should attain twenty-one, the dividends to be payable to and become vested in the meantime, with absolute discretion in the trustees as to maintenance, it is not a condition precedent but merely pointed at the time of investment; the limitation is not too remote, and that though the son had no children there must be an investment and accumulation for the benefit of the children of the son, the dividends going with the capital. *Edmunds* v. *Waugh*, 6 W. R. 589; 4 Drew. 275.

16. A legacy to be paid to the legatee "when or if" he attained twenty-one:—Held, to be vested at the death of the testator, and not to be contingent upon the legatee attaining twenty-one. *Lester* v. *Bradley*, 1 Hare 10; 11 L. J., N. S., Ch., 49; 5 Jur. 1034.

17. Under a pecuniary bequest in trust for a niece for life, with remainder in trust for all her children, equally, the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage, with executory trusts over in case any of the children should die before they should become entitled, without lawful issue:—Held, that the children were entitled to the income of their shares before attaining twenty-one. *Williams* v. *Clark*, 4 De G. & Sm. 472.

1. A testator devised his real and personal estate to trustees to convert and invest, and pay the income to his daughter for life; and after her decease, to divide the fund among "all her children then living," provided all such children may then have attained twenty-one; if not, he directed the fund to be placed out at interest, and the interest to be applied for the maintenance and bringing up of all such children until the youngest should attain twenty-one, when the fund was to be divided amongst such children as should be then living and the issue of such of them as should be dead, the issue to take the parent's share:—Held, that a child who survived the mother and attained twenty-one, but died before the youngest attained twenty-one, took an absolute vested interest. *Brocklebank* v. *Johnson*, 20 Beav. 206; 3 W. R. 311; 1 Jur., N. S., 318; 24 L. J., Ch., 505.

2. A testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother; and in case the wife should outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother; there were daughters of the brother then living:—Held, that the representatives of the son, and not the daughters of the brother, are entitled to the fund. *Clutterbuck* v. *Edwards*, 2 Russ. & M. 577.

3. Upon a special case as to the construction of a will, legacies thereby bequeathed were held to be vested in the legatees, as the words of the bequest, importing a contingency, referred only to the time of payment of the legacies; and as the legatees were entitled to maintenance out of the legacies, they were directed to be invested, and the interest applied accordingly. *Moore* v. *Moore*, 9 W. R. 916; 5 L. T., N. S., 198.

4. A testator bequeathed a legacy of 300*l.* to A. to be paid to him, his executors, etc., within twelve months after the death of B., *in case B. shall happen to survive my wife.* Held, that the latter words were to be construed with reference only to the time of payment, and that they did not make void the legacy, B. having died in the lifetime of the testator's wife. *Massey* v. *Hudson*, 2 Meriv. 130.

5. A testator gave all his property to trustees in trust to sell, and out of the proceeds to pay legacies, and as to the residue, directs that they shall divide the income equally between his two daughters, until one should marry; and then upon trust to pay the interest of 3,000*l.* to such as should first marry for her separate use, without power of anticipation, with a gift over to the husband and children, and a like gift to the other daughter's husband and children. There was a proviso that if either daughter should die in the lifetime of the other unmarried and without issue, the interest of an additional sum of 2,000*l.* should be paid to the survivor for life, and, subject to the sums aforesaid, in trust to pay 500*l.* to J., and 500*l.* to E. J. and E. both died in the lifetime of the two daughters, one of whom then also died unmarried, leaving all her property to her sister, who was still unmarried also. On the question what interest the surviving daughter took, and whether the legacies of 500*l.* and 500*l.* to J. and E. were vested or contingent:—Held, that the surviving daughter took one moiety of the residue only, and that the legacies were vested. *Hill* v. *Hill*, 8 W. R. 536.

6. A testator having grandchildren, procured their father to give up his profession and reside near him, and supported them. By will he left them 5,000*l.* each, to be invested and set apart, and payable as they attained twenty-five, with a proviso that if they intermarried with particular families their legacies should be void; and if they did not do so before actual payment, they should covenant by deed to refund if they did so. The estate was deficient, and the father was unable to maintain the legatees without borrowing money and selling his own property. On a petition by one of the legatees for past maintenance:—Held, that the testator put himself *in loco parentis*; that the legacies were vested subject to be divested (the condition being subsequent), and the father entitled to past maintenance to the extent of money borrowed and due, and property sold for the special purpose. *Parsons* v. *Peters*, 13 W. R. 214.

7. A testator devised his real and personal estate in trust for his wife for life, and after her decease he devised a real estate to his brother for life, with remainder to his children. He proceeded thus "And as the residue of my estate and effects not hereinbefore disposed of, or which may remain after satisfying the trusts of this my will, I give the same to my brother (if then living), his heirs, etc. But in case my brother shall then be dead, then in such case I give the residue of my estate and effects to his children." The brother died in the lifetime of the widow:—Held, that the residue vested in him at the testator's death. *Birds* v. *Askey*, 24 Beav. 615.

8. Testator bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter Sarah for life, and upon her death to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining twenty-five, but in case his daughter should have but one child her surviving, then the whole of the one-third part to go to such only child on his attaining twenty-five, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should not attain twenty-five, then over:—Held, that the children were not intended to take vested interests until they attained twenty-five, and that, therefore, the bequest to them was void for remoteness. *Judd* v. *Judd*, 3 Sim. 525. S. C. *nom. Judd* v. *Hobbs*, 8 L. J., Ch, 119. And see S. C. *nom. Hunter* v. *Judd*, 4 Sim. 455, on a further hearing and new bill filed.

9. A testator bequeathed his residuary estate to trustees, upon trust to assign the same to and amongst all such children of M. as should be living at his decease, to be equally divided among them, if more than one, when they should attain the age of twenty-one, and if there should be but one child who should attain that age, then the whole to such one:—Held, that the attainment of the age of

twenty-one was a condition precedent, and that no child who did not attain that age could take. *Merry* v. *Merry*, 17 W. R. 985.

Words of Division preceding Words of Gift.]

1. A testator, by his will, directed the investment of 2,000*l.*, and the payment of the interest to his daughter for life, and from and after her death declared that the trustees should hold the fund upon trust to pay the same, or assign the sureties whereon the same might be then placed or invested, unto, between, and amongst all and every the child and children of his said daughter as and when they should severally attain the respective age of twenty-one years, in equal shares and proportions, share and share alike, "to whom I give and bequeath the same accordingly":—Held, that these words contained a direct gift independently of the direction to pay, the words "to whom" referring to all and every the child and children of the testator's daughter; and consequently that a child of the testator's daughter, dying under twenty-one, took a vested interest in the legacy. *Re Bartholomew's Trust*, 1 Macn. & G. 354; 1 H. & Tw. 565; 19 L. J., N. S., Ch., 237; 14 Jur. 181. Affirming 16 Sim. 585; 13 Jur. 380.

IV. GIFT AT A FUTURE TIME WITHOUT DIRECTION AS TO PAYMENT.

2. Devise of 1,500*l.* to a granddaughter, to be at her own disposal if she married with consent of her father and mother or trustees, and not otherwise. She dies at thirteen intestate and unmarried: it is not vested nor transmissible. *Elton* v. *Elton*, 1 Ves. 4; 3 Atk. 504.

3. Distinction between a legacy given at a future time, and a legacy given to be paid at a future time, the latter vested, and payment only postponed; the time being annexed, not to the legacy, but to the payment only. *Hixon* v. *Oliver*, 13 Ves. 113.

4. Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a cross remainder, implied from the general intention, reversing a decree that it vested at twenty-one. *Mackell* v. *Winter*, 3 Ves. 536.

The distinction between a legacy given at twenty-one and payable at twenty-one, is a positive rule of the Ecclesiastical Court, adopted as to personal legacies, but not as to real estate, and not approved or to be extended. *Id.* 543.

5. Where a legacy is given generally at twenty-one or marriage, the vesting and time of payment are the same. *Heath* v. *Perry*, 3 Atk. 102.

6. Devise and bequest until a certain period, from nature of purpose and circumstances:—Held, not transmissible to representative. *Exp. Davies*, 6 Ves. 147 *a*.

7. Where a time is annexed to legacy, and not to the payment, and legatee dies before that time, it is lapsed. *Smell* v. *Dee*, 2 Salk. 415.

8. Legacy to A. at twenty-one, and if he die before twenty-one, to B. B. dies, then A. dies before twenty-one; the administrator of B. takes. *Anon.*, 2 Vern. 347.

9. The word "when," in will, alone and unqualified, is conditional, but it may be controlled by expressions, etc. *Hanson* v. *Graham*, 6 Ves. 239.

10. A testator gave the dividends on stock to H. for her life, and after her decease the principal to her children on their attaining twenty-one. H. had one child, who died before attaining twenty-one:—Held, that the child did not take a vested interest in the principal. *Re Wrangham*, 1 Dr. & Sm. 358; 7 Jur., N. S., 15; 3 L. T., N. S., 722; 30 L. J., Ch., 258; 9 W. R. 156.

11. Testator directed the rents of his estates to be accumulated for five years "at the end of which time I leave as follows: to H. G. 200*l.*; and to W. B., W. C., E. M., or as many as are living, 100*l.* each; and to M. N., S. H., S. S., or as many as are then living, 50*l.* each; and the same sum to be given at the expiration of ten years from the time of my death, and ditto at the end of fifteen and twenty years from my death." Two of the legatees died between the end of the tenth and fifteenth years after the testator's death, having received the payments which became due to them at the end of the fifth and tenth years:—Held, that the rights of the legatees named in the will to receive the payments were contingent on their surviving the times of payment, and, consequently, that the executors of the then deceased legatees could not claim any payment at the end of the fifteenth year. *Bruce* v. *Charlton*, 13 Sim. 65; 6 Jur. 594. Affirmed 13 L. J., N. S., Ch., 97.

12. Real and personal estate given to trustees upon trust to pay the income to the testator's wife for her life, and, within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons, for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, with exceptions, ratably and in proportion to the amount of their respective legacies. The wife survived the testator:—Held, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years; that annuitants for life, not having other legacies, were legatees of shares in the residue; that the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies; that annuitants who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies; that a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named;" that the widow of the testator did not take under the residuary gift; that the annuities which ceased at the expiration of the ten years were not legacies in respect of which the annuitants took any

share in the residue. *Bromley* v. *Wright*, 7 Hare 334.

10. A testatrix gave the rents of certain leaseholds to J. R. and C. R. She then gave to T. J. R. 100*l.* bank stock when he attained twenty-one, but in case of his death to J. R. On the question what was the period of division:—Held, that the contingency was T. J. R.'s dying under twenty-one. *Bignell* v. *Rose*, 3 W. R. 77; 24 L. J., Ch., 27.

V. NO GIFT BUT IN THE DIRECTION TO PAY OR DIVIDE.

1. *In General*, 7373.
2. *Where Gift preceded by a Life Interest*, 7374.

1. In General.

2. Testator gave certain real and personal property upon trust to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, upon his, her, or their attaining twenty-five if a brother or brothers, and if a sister or sisters, at such age or marriage with consent; and the trustees were authorised to apply the rents, profits, and interest, or so much as they should think fit, for their maintenance in the meantime:—Held, that the gift was only to attach to children that should attain twenty-five. *Leake* v. *Robinson*, 2 Meriv. 363.

3. Testator bequeathed to his wife the use of his furniture, etc., which he desired might be distributed amongst his children, when the youngest attained twenty-one, at her and his executor's discretion, such part to be reserved for her use as might be deemed reasonable, and at her death to be distributed as above directed —Held, that those children who died before the youngest attained the age of twenty-one did not take vested interest. *Ford* v. *Rawlins*, 1 Sim. & S. 328; 1 L. J., Ch., 170.

4. There is no absolute rule that in a case where there is no bequest distinct from the direction to pay, the vesting is postponed till the time of payment, but the construction will depend upon the nature of the event or contingency upon which the payment is to be made, as importing or not importing a condition. Accordingly, where a residue of real and personal estate was given to trustees to sell, get in, and divide among the testator's children, so soon as the youngest should attain twenty-one, and in case of the death of any leaving lawful issue, such issue to take the parent's share: it was held that the share of one of the children who attained twenty-one, and then died without issue before the youngest had attained that age, was vested and passed to his representatives. *Leeming* v. *Sherratt*, 2 Hare 14; 11 L. J., N. S., Ch., 423; 6 Jur. 683.

Semble, no child who did not attain twenty-one was intended to take any interest in the residue. *Ib.*

5. Testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one; and after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go among all his nephews and nieces, except two by name. He charged his rents with an annuity to A., and with payment of bond debts, but did not otherwise dispose of them:—Held, that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. *Parker* v. *Sowerby*, 1 Drew. 488; 17 Jur. 752; 22 L. J., Ch., 942; 1 Eq. Rep. 217.

6. On the particular wording of a will the Court thought it doubtful whether personal estate did not vest immediately in a legatee, though the gift was only in the direction to pay at twenty-one or marriage, and there was no disposition of the income during minority. *Lang* v. *Pugh*, 1 Y. & Coll. C. C. 718; 6 Jur. 939.

7. A testator, after devising and bequeathing all his real and personal estates to trustees, on trust from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust that, when and as soon as any son of either of his nephews A. and B. should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust as to one equal moiety for his eldest son and his heirs, executors, etc.; and as to the other moiety for the rest of his children and their heirs, executors, etc., in equal proportions, and if but one child both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had another son born afterwards:—Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore

void; and the testator's real estates upon his death became vested in his heir. *Boughton* v. *Boughton*, 1 H. L. Ca. 406. Affirming with a variation S. C. *nom. Boughton* v. *James*, 1 Colly. 26; 8 Jur. 329.

1. Bequest to trustees, in trust to pay, assign, and transfer, "unto and between the children of A., when and as they should respectively attain twenty-one, or be married with the lawful consent of parents or guardians," with maintenance in the meantime. A child died under twenty-one, having married without consent:—Held, that her representative took no share in the property. *Gardiner* v. *Slater*, 23 Beav. 509.

2. Testatrix gave a share of residue upon trust for her son for life, and after his death upon trust to transfer and pay the capital of the said trust funds unto and amongst the children, if only one, or both or all the children, if more than one, of her said son, in a manner thereinafter mentioned. Then followed a direction, making the gift to the son void, if he alienated or encumbered it, and giving over the dividends to the parties entitled in remainder. Then followed another direction of some length, and then a declaration that the shares should be payable at twenty-one or marriage.—Held, the context of the will not repelling, but rather supporting that construction, that this was not a substantive gift, with a simple direction to pay, but one general direction to pay at twenty-one or marriage; and the interests of the son's children were not vested. *Shum* v. *Hobbs*, 3 Drew. 93; 24 L. J., Ch., 377; 3 W. R. 221.

3 Bequest of leaseholds, upon trust to assign unto all the children of A. B. on their respectively attaining twenty-one; and if one child, to assign to such child (omitting on attaining twenty-one). An only child, who died an infant, was held to take a vested interest. *Walker* v. *Mower*, 16 Beav. 365.

4. A testator directed his property to be settled upon his daughter H., in such manner that, in case of her death, it should devolve upon her children, if she had any, and, if she should not have any, then that she should bequeath it to any person she might think fit: the word devolve imports transmission to children living at the death of the mother, and, upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will. *Parr* v. *Parr*, 1 Myl. & K. 647; 2 L. J., N. S., Ch., 167.

2. Where Gift preceded by a Life Interest.

Not Vested.] 5. When the only gift to a class consisted of a direction to divide and pay upon the death of the tenant for life:—Held, upon the context, that those only took who survived such tenant for life. *Beck* v. *Burn*, 7 Beav. 492; 13 L. J., N. S., Ch., 319; 8 Jur. 348.

Where the testator made no direct gift to the children of, etc., but after the death of the wife, tenant for life, directed his executors to "divide and pay equally amongst the children of, etc., and the issue of such as should die in the lifetime of the wife":—Held, to apply only to such children as were living at the time of the distribution, and that the class to take consisted of such children or issue as were living at the death of the wife, and the issue of any who died in her lifetime leaving issue living at her death. *Ib.*

6. Bequest in trust for A. for life, and after his death in trust to transfer the whole to A.'s children on the day of their attaining twenty-one, in such shares as A. should by deed or will appoint, and in default of appointment, in the manner therein mentioned. Held, that the time of payment was annexed to the gift, and that A. could not, by the exercise of his power, accelerate the vesting. *Murray* v. *Tancred*, 10 Sim. 465.

7. Testator bequeathed an estate to trustees in trust to pay the interest to his niece for life, and directed that after her death the trustees should pay, apply, transfer, and dispose of the residue amongst her children, equally to be divided between them, share and share alike, to be paid to sons at twenty-one and to daughters at that age or on their marriage; and he empowered the trustees after his niece's decease, or in her lifetime with her consent, to raise, pay, and apply, for the preferment and advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid:—Held, that there was no gift to the children except in the direction to pay to them, and therefore their portions did not vest in them until such of them as were sons attained twenty-one, and such of them as were daughters either attained that age or married. *Chevaux* v. *Aislabie*, 13 Sim. 71.

8 L. gave 4,000*l.* bank stock to trustees, in trust, to pay the dividends to his daughter E. for life; and after her death he directed the principal to be divided equally between her children at their ages of twenty-one or marriage; but if they should die before, then to his son L.; the daughter had two children, who both attained twenty-one, but one of them died in her lifetime:—Held, that this legacy did not vest absolutely in the children of E on their attaining twenty-one, but only in such of them as should be living at the time of her death. *Randall* v. *Metcalfe*, 3 Bro. P. C. 318.

9. Testator bequeathed to his daughter Eliza 2,000*l.* for life, the principal to be equally divided among her children, should they have attained twenty-one; and to the two children of his late daughter Jemima 1,000*l.* each, to be paid on their attaining twenty-one:—Held, that the legacies to the children were contingent on their attaining twenty-one, and that they were not entitled to interest in the meantime. *Young* v. *Macintosh*, 13 Sim. 445; 7 Jur. 383.

10. A testator bequeaths certain capital sums to trustees, upon trust to pay the interest to W. B. for his life, and after his decease, upon trust to pay, transfer, and assign the capital sums, and all arrears of interest, to the children, if more than one, of the body of the said W. B., lawfully to be begotten, share and share alike; and in case of only one child, to pay, transfer, and assign the same to such one child, the share and shares of such of the said children, if more than one, as shall be a son or sons, at his and their age, or respective ages, of twenty-one years; and to such of them as shall be a

daughter or daughters, at her or their age, or respective ages, of twenty-one years, or day or respective days of marriage, which shall first happen next after the decease of the said W. B.:—Held, that the children of W. B. did not take vested interest till the time when they were entitled respectively to payment arrived. *Bentinck* v. *Portland*, 4 L. J., Ch, 13.

Where Legacy vested] 1. Devise of personal estate to wife for life, several legacies after her death, residue at her decease to be divided between A, B., C, and D.; B. and C. die in life of wife:—Held, to take vested interests. *Corbett* v. *Palmer*, 2 Eq Abr. 548.

2. Residue of testator's estate directed to be invested in Government securities, and the interest paid to his wife; and after her death to be sold, and the money thereby arising to be divided amongst his daughters and grandchildren:—Held, that the share of a daughter dying in the lifetime of the wife was vested. *Hatch* v. *Mills*, 1 Eden 342.

3. Bequest of all testator's estate to A., to pay the income to testator's mother for life, and after her decease, I then give to A., etc, the residue to B. with power to dispose of it by will; the legacy to A. vested immediately, and was transmissible. *Benyon* v. *Maddison*, 2 Bro. C. C. 75.

4. Devise of the residue of personal estate to the wife for life, if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead, to the survivor. They both died in the life of the wife. The legacy was vested in both as joint tenants, and therefore goes to the representative of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

5. Legacy on death of tenant for life does not lapse by death of legatee before that period. *Goodwin* v. *Munday*, Dick. 551.

6. Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. *Burton* v. *Hodsall*, 2 Sim. 24.

7. Testator gave the use of 800*l.* to his wife for life, and, after her decease, made a disposition of parts of the principal; he then gave several other devises, and afterwards to J. 100*l.*; J. died, living a widow:—Held, that his legacy was vested and transmissible. *Monkhouse* v. *Holme*, 1 Bro. C. C. 298.

8. Devise of real and personal estate to trustees, to pay, etc., to testator's wife for life, then to pay a legacy to his daughter; this is a vested legacy in the daughter, and transmissible. *Molesworth* v. *Molesworth*, 4 Bro. C. C. 408. Reversing 3 Bro. C. C. 5.

9. Testator "desires" J. "to leave" D. 500*l.* at her death, out of money bequeathed her:—Held, to amount to a legacy from the original testator, and not to lapse by D.'s death in J.'s lifetime, he having survived the testator. *Medlicot* v. *Bowes*, 1 Ves 207.

10 Legacy at the decease of a person entitled to the fund out of which it is given, vested immediately, and payment only postponed. *Blamire* v. *Geldart*, 16 Ves. 314

11. Legacy to A. for life, and to her children at her decease, vests in all the children as they come *in esse*; but upon the circumstances of this case it vested in those living at the death of the mother only. *Spencer* v. *Bullock*, 2 Ves. 687.

12. Bequest of residue of personal estate, after a life interest, to the use of all and every the children of testator's daughter, equally to be transferred, delivered, and paid to them severally, when by law able to receive and give discharges.—Held, to be vested in each child on coming into being; and transmissible, though subject to be varied by the birth of others. *Evel* v. *Wallace*, 2 Ves. 118. Affirmed *Id* 318.

13. Trust by will subject to an interest for life, to pay and transfer to the testator's nephew and nieces equally at twenty-one, with survivorship, in case any should die before his or their shares should become payable, and a limitation over in case all should die, etc Vested interest at the age of twenty-one, before the death of the tenant for life. *Halifax* v. *Wilson*, 16 Ves. 171.

Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brothers and sisters of the testatrix, and in like manner to the survivors or survivor of them; the share of those who died in the life of the niece passed to their representatives. *Ib.*

14. Testatrix gave the interest of 500*l.* to her sister, and at her death the said 500*l.* to be divided between her children, share and share alike. The sister had three children at the death of the testatrix, but only one survived her:—Held, that the three children took vested interests. *Chaffers* v. *Abell*, 3 Jur. 578.

A testator bequeathed certain sums of stock to trustees to pay 40*l.* per annum to his daughter for life, and after her decease, "to pay, assign, and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of his daughter, share and share alike, to be paid and transferred when and as soon as the youngest should attain his or her age of twenty-one years." At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived her daughter:—Held, that the four children took vested interests. *Id.* 577.

15. Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death, but only one of them survived the annuitant:—Held, that the capital of the stock, which had been provided to answer the annuity, did not vest in the surviving child on the annuitant's death, but vested on the testator's death in all the children then

living, as tenants in common. *Watson* v. *Watson*, 11 Sim. 73.

1. A testator bequeathed 10,000*l.* to his brother, to be paid in twenty equal half-yearly payments, but in case his brother should die before all the payments became due, then the remainder should be placed out at interest, to be paid to the children of his brother till they attained twenty-one, and then the principal to be divided amongst them. The brother died after three payments had been made, leaving five children, one of whom was supposed to be dead, not having been heard of for thirty years Four of the children received their shares, and filed a bill praying that the remaining share might be divided amongst them. There was no evidence of the brother's marriage:—Held, that there was sufficient evidence of the legitimacy of the children, and that each was entitled, upon attaining twenty-one, to a share in the residue, but inquiries were directed as to the death of the child who had not been heard of. *Gaches* v. *Warner*, 16 L. J., N. S, Ch., 281.

2. Devise to testator's wife for life, and from and after her decease, to trustee on trust to sell, and, among other bequests, to lay out 500*l.* in annuity for life of a son:—Held, a vested interest in son, if surviving the testator. *Bayley* v. *Bishop*, 9 Ves. 6.

3. Testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life, and directed that, at the end of twelve months after her death, 1,000*l.* should be laid out in trust for his daughter for life, and after her decease to divide the capital amongst her children when they should attain twenty-one. One of the children attained twenty-one, and died in the lifetime of testator's widow:—Held, that his representatives were entitled to a share of the 1,000*l.* *Cousins* v. *Schroder*, 4 Sim. 23.

4. A testator bequeathed the residue of his personal estate to trustees, upon trust to pay three annuities, and after the death of the survivor of the three annuitants, for the children of his two brothers and sisters as tenants in common at twenty-one; but if any of them died under twenty-one, their shares to go to the survivors:—Held, that one of the children having attained twenty-one, and died in the lifetime of the annuitant, his personal representatives were entitled to his share. *Morgan* v. *Williams*. 14 L. J., N. S., Ch., 449.

5. Testatrix bequeathed a sum of stock to trustees, upon trust to pay the dividends thereof to her granddaughter for life, and after her decease in trust to assign, transfer, and dispose of the capital unto and among the children of her said granddaughter, share and share alike, at their ages of twenty-one, or sooner if the trustees should think proper; and in case the said granddaughter should die without leaving any child or children, or, leaving such, all of them should die before they or any of them should become entitled to the trust moneys, then in trust to assign and transfer the capital to A. The will contained no clause of survivorship among the children:—Held, that the children dying in the lifetime of the granddaughter, but having attained twenty-one, took vested interests in equal shares. *Mair* v. *Quilter*, 2 Y. & Coll. C. C. 465.

6. The testator gave the residue of his property to his widow during her life, and at her demise to the eldest surviving son of A., upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or failing such male issue, to the daughters of A. living at the demise of the last of such male issue: the only son of A. died under twenty-five in the lifetime of the widow, leaving two daughters of A. him surviving:—Held, that if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five. *Murray* v. *Addenbrook*, 4 Russ. 407; 8 L. J., Ch., 79.

7. A bequest of residue to trustees on the trusts after-mentioned, followed, first, by a trust to provide for annuities, then by a trust to pay interest to the legatees for life, and then a trust to "pay and transfer" the capital to the children of the tenants for life, gives those children an interest which vests immediately on the testator's death. *Salmon* v. *Green*, 11 Beav. 453: 18 L. J., N. S., Ch., 166; 13 Jur. 272, 617.

A testator bequeathed his residuary estate to trustees, upon trust to provide a fund (which was subsequently to sink into the residue) for the payment of annuities, and then to pay the income to his children and grandchild for life; and after the decease of either of them, upon trust to pay and transfer the share of the party dying in the principal amongst all and every the child and children of the party dying, and if but one, to such one child:—Held, that the gift to trustees, followed by trusts directing payment and transfer of the capital, gave immediate vested interests to the children of the tenants for life living at the decease of the testator, and that the shares of two of the children who survived the testator, but died in the lifetime of the tenant for life, passed to their legal personal representatives. *Ib.*

8. Residuary gift upon trust for the testator's wife for life, if she should so long continue his widow; and from and after her death or marriage upon trust to pay and divide the whole thereof equally amongst all and every the testator's nephews and nieces, share and share alike, within six months after they should become entitled thereto:—Held, that the residuary share of one who died in the lifetime of the widow, passed to his representatives. *Packham* v. *Gregory*, 4 Hare 396; 13 L. J., N. S., Ch., 191; 9 Jur. 175.

9. A testator gave the interest of money in the funds to his wife during her life, after which his daughter Maria, if unmarried, was to receive the same until her death or marriage, when the principal was to be divided between his eight sons and daughters, including his daughter Maria, or amongst such of them as should be living at the death of Maria. The testator also gave the children power to take possession of their respective shares, upon giving security for the payment of interest to the widow for her life. Maria married during the testator's life, and died after the widow. One son, Charles, died after the testator, but before the widow:—Held, that the representatives of Charles were entitled to one-eighth part of the property. *Baynes* v. *Prevost*, 13 L. J., N. S., Ch., 377.

1. Bequest in trust for testator's niece for life, with remainder in trust to pay and divide "unto and amongst the children of my said niece, in equal shares and proportions":—Held, that all the children who survived the testator took vested interests in the fund. *Re Wilson's Trusts*, 14 Jur. 263.

2. Testatrix, by her will, gave to each of her four nieces (naming them) a legacy of 50*l.*, and, after bequeathing other legacies, gave the residue of her property to her three sisters, and, after their deaths, to be divided between her nieces above-mentioned:—Held, that the nieces of the testatrix took a vested interest in the residue immediately upon her death, and that one-fourth of such residue belonged to the husband and personal representative of one of the four nieces, who, after surviving the testatrix, had died in the lifetime of the tenant for life. *Cochrane* v. *Wiltshire*, 11 Jur. 426; 16 L. J., N. S., Ch., 366.

3. Testator directed the dividends of his residue to be paid to his three children, A., B., and C., in certain shares, and that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents should go to their respective children; and that, after the decease of his surviving child, the capital of the residue should be divided amongst the children of his said children, *per capita*. A. died first, B. next, and C. last. Both A. and C. left children, some of whom were living at C.'s death. B. had children, but they all died in her lifetime:—Held, nevertheless, that they took vested transmissible interests in the dividends of B.'s share of the residue, which accrued between B.'s and C.'s deaths. *Homer* v. *Gould*, 1 Sim. N. S. 541; 20 L. J., N. S., Ch., 657; 15 Jur. 457.

4. A testator, after directing payment of his debts, etc., gave specific legacies and an annuity to his wife during the time she should remain his widow, and charged the same on his real and personal estate. He then made specific devises, and gave the residue of his property to his trustees to sell, and pay, and divide the proceeds among his children; as to the specified devises bringing those into hotch-pot, subject to the annuity to his wife, share and share alike, provided that none of the children should enter into the possession or enjoyment of his property until his wife died or married again, or his youngest son attained twenty-one. The testator had ten children; four died infants in his lifetime, and one died after the youngest attained twenty-one:—Held, that the shares were vested of all that attained twenty-one, and were payable after providing for the annuity, the income from that time, and the capital when the youngest attained twenty-one. *Fawthorp* v. *Craven*, 3 W. R. 275.

5. Real and personal estate given to trustees upon trust to pay the income to the testator's wife for her life, and, within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons, for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, with exceptions, ratably and in proportion to the amount of their respective legacies. The wife survived the testator:—Held, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years; that annuitants for life, not having other legacies, were legatees of shares in the residue; that the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies; that annuitants who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies; that a class described as "the children" of B, but not otherwise named, came within the description of "legatees before named;" that the widow of the testator did not take under the residuary gift; that the annuities which ceased at the expiration of the ten years were not legacies in respect of which the annuitants took any share in the residue. *Bromley* v. *Wright*, 7 Hare 334.

6. A testatrix appointed property to trustees to sell all the property except certain real estate and to hold the proceeds to pay the legacies thereinafter given, and to pay an annuity to A. for life, and subject thereto for B. and her children, and after B.'s death without children to sell the real estate not before sold, and out of the proceeds to pay A., his executors, administrators, and assigns, a legacy in lieu of the annuity, and to hold the residue for all the children of C. and the issue of such as should be then dead, equally to be divided between such children and issue, share and share alike, but so that such issue should take such share only as their respective parents would if living have been entitled to. A. died in the lifetime of B., who had no children.—Held, that in the events which had happened the legacy to A. was payable; that it was a demonstrative legacy; and that the issue of the deceased children of C. took as tenants in common. *Hodges* v. *Grant*, 36 L. J., Ch., 935; 4 L. R., Eq., 140; 15 W. R. 607.

7. Where there is a gift of dividends, to one for life, and after his death the whole principal to be paid and divided between and among his children, in equal shares, on their respectively attaining the age of twenty-one years, those only who attain twenty-one take. *Fitzwilliams* v. *Long*, 6 W. R. 819.

8. Bequest of residue to A. for life, and after her decease, a gift of 3,000*l.* each to B. and C. (granddaughters), for their absolute use; and if either of them should be dead at the decease of A., her 3,000*l.* was to go to the granddaughter who should be then living; but in case such granddaughter should have left children, they were to take her legacy. B. died first, leaving children; C. then died without issue, leaving A. surviving. On the death of A.:—Held, that C.'s legacy was vested and passed to her representatives. *Re Bright*, 21 Beav. 67; 3 W. R. 544.

9. C., in 1854, after directing that the

whole of his estate should be converted, and the interest paid to his wife for life, directed that 1,500*l.* should be set apart, and the interest paid to his daughter A. for life, and that after her death the capital should be divided amongst her children; and in case she should have no child or children, then he directed that the same should be applied for the benefit of his son M and his children in like manner. The testator then directed that a like sum should be set apart for the benefit of M. for life, and that the capital should after his death be divided amongst his children; and in case he should have no child, the same was to be applied for the benefit of A. and her children in the same manner as the bequest to her was then limited; and in case both M. and A. died without leaving issue surviving, he desired that 1,500*l.* should be divided amongst his next of kin, and the other amongst his wife's next of kin. A married B., by whom she had one child only, who died an infant in her lifetime. A. died, leaving her husband and her brother M. surviving:—Held, that the child of A. took a vested interest in the 1,500*l.*, and that B. was entitled to it as her legal personal representative. *Whyte* v. *Collins*, 6 Jur., N. S., 1281; 3 L. T., N. S., 263.

1. A testator bequeathed to S. 1,000*l.*, to be placed out on real security, and the interest to be paid to her during her life, and he directed that at her death the principal should be called in, and distributed equally among her children, and that if any children were living, from son or daughter being dead, such child or children should take the share their parent would have been entitled to if living:—Held, that the representatives of such children of S. as survived the testator, and died without issue in the lifetime of S., were entitled to shares. *Strother* v. *Dutton*, 1 De G. & J. 675.

2. A testator declared that the bequest to one daughter C. should be enjoyed by her for life, and then be put in trust for the benefit of the children she might leave, and to be divided at twenty-five. And he in like manner directed the bequest of his second daughter M. should be paid to her for life, and after her death "may be continued in trust, and may be divided equally between her children after they have attained the age of twenty-five":—Held, that the bequest to the children of M. was not remote, and they took vested interests at their birth. *Saumarez* v. *Saumarez*, 34 Beav. 432.

3. Bequest of stock to be divided, after the death of annuitant, between all the children of A. as they should attain his or her age of twenty-one years:—Held, that the fund was to go to such of the children of A. as were living, when the first attained twenty-one, and who had attained, or who should attain, twenty-one. *Locke* v. *Lamb*, 4 L. R., Eq., 372; 15 W. R. 1016; 16 L. T. N. S., 616.

4. The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent: the true criterion is, what was the reason for the postponement? If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent. *Re Bennett*, 3 Kay & J. 280.

A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. and B. for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living (A. and B. excepted), would have been entitled to:—Held, first, that the bequest in remainder vested at the testator's death. *Ib.*

Held, secondly, that the whole fund belonged to the testator's children other than A. and B., and to the children living at the death of such as had died leaving children *Ib.*

Held, thirdly, that the shares of such as had died without leaving children belonged to their representatives. *Ib.*

5. A., by will, gave personal estate to trustees for B. for life, and after her death to pay and divide the fund unto and equally between and among all and every the child and children of B., on his or her attaining twenty-one, and he declared that his mind and will was, that if any or either of his grandchildren should die during the life of B., leaving issue them surviving, then that such issue should be entitled to his, her, or their respective deceased parents' share:—Held, that all the children of B. took vested interests, whether they attained twenty-one or not. *Re Allen*, 10 L. T., N. S., 812.

6. A testator directed the trustees of his will, upon the decease of A., to whom he had given a life estate, to convey, pay, assign, transfer, and make over the residue of his realty and personalty unto and amongst all and every the child and children of A. as and when they should severally and respectively attain their several and respective age and ages of twenty-one years, to and for their own absolute use and benefit, as tenants in common; if but one child, to such only child, his or her heirs, executors, administrators, or assigns, according to the nature and quality of such estates, and to whom he gave the same accordingly:—Held, that the children of A. on their respective births took an interest vested and not contingent. *King* v. *Isaacson*, 1 W. R. 209; 22 L. J., Ch., 455; 17 Jur. 434; 2 Sm. & G. 371.

Where there is a doubt the Court inclines to the construction that a gift by will vests on the testator's death. *Ib.*

7. S. L. directed that a moiety of the residue of his property should be divided between J. H. and four others in equal shares; but as to the share of J. H., he desired that the same should be retained in the hands of his executors, upon trust to invest the same, and to pay the proceeds to J. H. for life; and from and after his decease, to pay, assign, and transfer the said moneys, or the stocks, etc., upon which the same should be invested, unto all the children of J. H. equally between them, part and share alike, at their respective ages of twenty-one years; and if there should be

but one such child, then wholly, to such one child at his or her age of twenty-one; and in case any one or more of the children should die under twenty-one leaving lawful issue, then such issue should be entitled to the share or shares to which his, her, or their father or mother would have been entitled:—Held, that the shares of the children of J. H. were vested on their attaining twenty-one, and not contingent on the event of their surviving their father. *Marshall* v. *Bentley*, 1 Jur, N. S., 786.

1. B. devised freehold and leasehold estates to trustees, upon trust for his wife for life, remainder for his two nieces, A. and S., for their lives, and if either of such nieces should die without leaving issue, upon trust for the survivor for life. The testator then proceeded: "But if either of my nieces shall happen to die, and leave any lawful issue, then upon trust that they, my trustees, do and shall stand possessed of and interested in the freehold and leasehold estates to and for the benefit of all and every the child and children of my nieces; that is to say, one moiety to the children of my niece A., and one moiety to the children of my niece S., and to their respective heirs, executors, and assigns as tenants in common, the children to become beneficially interested on the death of their respective parents." A. having had eleven children, of whom eight only survived her:—Held, that the eleven children acquired vested interests respectively at their birth. *M'Lachlan* v. *Tait*, 6 Jur., N. S., 1269; 9 W. R. 152; 3 L. T., N. S., 492; 2 De G. F. & J. 449; 30 30 L. J., Ch., 276. Affirming 28 Beav. 407.

Bequest of 2,000*l.* in trust for A.'s life, and from and after her decease "to convey, transfer, and assure" it unto all and every the child and children of A.:—Held, that A.'s children took vested interests at their births. *Ib.*

2. A. gave his residue to his wife for her life, to be expended by her in and about the maintenance of herself and her children; and after her decease unto and amongst his children, to be paid to them as they should severally attain the age of twenty-one years, with benefit of survivorship:—Held, that each child, on attaining twenty-one, took a vested interest, but that his presumptive share would not be paid to him with the consent of the mother, as there was a trust for maintenance of the others. Part, however, was paid out, the rest being reserved as security for payment of the life income. *Berry* v. *Bryant*, 2 Dr. & Sm. 1; 8 Jur., N. S., 69; 10 W. R. 242; 5 L. T., N. S., 818; 31 L. J., Ch., 327.

3. A testator, by his will, gave real property to trustees, upon certain trusts during the lives of his two sons W. and T., and the life of the survivor, and from and after the decease of the survivor upon trust to sell and "to pay and divide the money arising thereupon unto and amongst all and every the child and children of W. and T., and the issue of such of them as should be then dead, share and share alike, such issue taking only the part or share of his, her, or their deceased parent."—Held, that two children of W. and T., who were living at the testator's death, but died without issue before the period of distribution, had vested shares in the proceeds of sale, which passed to their representative. *Re Wood, Moore* v. *Bailey*, 43 L. T. 730; 29 W. R. 171.

VI. EFFECT OF GIFT OVER ON VESTING.

4. A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving any issue, is not void as too remote, but gives a present vested interest with an executory bequest over in case of death under twenty-four without leaving issue. *Bland* v. *Williams*, 3 Myl. & K. 411; 3 L. J., N. S., Ch., 218.

5. A testator gave a sum of money in trust for E. for life, and after her death for R., should he survive E. Should he not survive E. nor attain twenty-one, then over. R. attained twenty-one, but did not survive E.:—Held, that the gift vested absolutely in R. on his attaining twenty-one, subject to the life interest of E. *Re Thompson*, 19 W. R. 196; 11 L. R., Eq., 146; 25 L. T., N. S., 693.

6. A testator bequeathed the residue of his personal estate to trustees, upon trust for his daughter B. for life; and after her death, the trust money, interest, dividends, and produce thereof, in trust for all and every the children and child of B., equally amongst them, share and share alike, to the son or sons when they shall have attained twenty-one, and for the daughter or daughters at that age or marriage, with a gift over in case B. should die without having any child or children, or, having any, such children should die before attaining twenty-one, being a son or sons, and being a daughter or daughters should die before they attained that age or married. B. died, leaving C., a daughter, her only child. C. died under twenty-one:—Held, that the trust property vested in C., so that the income between the deaths of B. and C. belonged to the estate of C. *Ridgway* v. *Ridgway*, 20 L. J., N. S., Ch., 256; 15 Jur. 960.

7. A gift of personalty to trustees for A. for life, and after his death in trust for the children of A., "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, etc., with a gift over, in case no child of A. should live to attain twenty-five:—Held, to be vested, and not too remote. *Davies* v. *Fisher*, 5 Beav. 201; 11 L. J., N. S., Ch., 338; 6 Jur. 248.

8. Testator gives his personal estate to trustees, upon trust, to pay the interest to his daughter E. S. for her life, and after her decease to pay and divide the principal among the children of his said daughter and the issue of a deceased child as she should appoint, and in default of appointment to go to, and be equally divided among them, and if but one, then to such only child; the portions of sons to be paid at the respective ages of twenty-one, and of daughters at their respective ages of twenty-one or marriage. If no issue, or all die before their respective portions become payable then over.

The shares are so given as to vest immediately in the children of E. S., though liable to be devested by all dying under twenty-one without issue. The share of a child so dying was therefore held to pass to his representatives. *Skey* v. *Barnes*, 3 Meriv. 335.

A devise over upon a contingency does not of itself prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass. *Id.* 340.

1. Legacy to the children of A., to be equally divided among them, and if either of them die before twenty-one their share to go to the survivors, a vested interest in the children living at the testator's death, subject to be devested in the event pointed out; after-born children, therefore, excluded. *Davidson* v. *Dallas*, 14 Ves 576.

2. A testator bequeathed personal property to his trustees and executors, upon trust to pay the dividends to his daughter, during her life, to her separate use, and after her decease to pay the principal unto all and every her children, who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age; with limitations over in case there should be no child or children, or being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age in the daughter's lifetime. The bequests to the children, and the subsequent limitations, were too remote *Bull* v. *Pritchard*, 1 Russ. 213; 7 L. J., Ch., 1.

3. A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime, apply the profits to their maintenance; but in case of the death of any of them unmarried, and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew, and then a niece die, under twenty-five, unmarried, and without issue; the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker* v. *Lea*, T. & R. 413.

4. Under a devise of the entire residue real and personal to A., B., and C. (children of the testator), and all their younger children, their heirs, executors, etc., for ever; A., B., and C. to receive the yearly interest for their respective lives of such parts thereof as were intended for their respective younger children, and in case of the death of A., B., and C., the share of any of them so dying, to go to his or her younger children; and in case of the death of A., B., and C., or any of them, without leaving younger children, the share of such child so dying to go to the survivors and their younger children, with powers of appointment amongst their respective younger children; and in case of the death of any of the younger grandchildren before twenty-one, or day of marriage, the shares of such to go to the brethren of the child so dying. At the time of the will, and of the testator's death, A. had one younger child; B. several; C. none; each had several since; on bill by after-born grandchildren:—Held, that a younger grandchild dying in the lifetime of its parent under twenty-one, and unmarried, had not a vested interest in its share transmissible to its representatives. *Crone* v. *Odell*, 1 Ball & B. 449, 450. Affirmed 3 Dow 61.

5. A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate, then to be sold; and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age she died, leaving a child:—Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Murkin* v. *Philipson*, 3 Myl. & K. 257; 3 L. J., N. S., Ch., 148.

6. A legacy was directed to be held on trust for D., "should he survive my sister T.; should he not survive her, nor attain his twenty-first year," over:—Held, that an absolute gift to D. at twenty-one must be implied. *Re Thomson*, 11 L. R., Eq., 146; 25 L. T., N. S., 693.

7. Testatrix bequeathed 3,000*l.* to trustees upon trust to pay the interest to B. for life, and after the decease of B. the testatrix willed that the said 3,000*l.* should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the 3,000*l.* should be paid to C.:—Held, that the children of B. took vested interests in the 3,000*l.* at her death, and, consequently, that the share of one who died after B. under the age of twenty-one devolved to her father as administrator. *Bree* v. *Perfect*, 1 Colly. 128; 8 Jur. 282.

8. A testator bequeathed money in trust for A. for life, and after her death for the children of A., when and as they should attain the age of twenty-one years; but if A. should die without lawful issue, then over:—Held, that the gift to the children was contingent upon their attaining the age of twenty-one years. *Kidman* v. *Kidman*, 40 L. J., Ch., 359.

9. A. gave to his daughter the interest and dividends of all moneys which should be standing in his name in the three per cent. reduced annuities, for her separate use; and after her decease, the principal of the stock to the child or children of his daughter in equal portions, on their attaining twenty-one. In case of the daughter's decease before her husband, the interest of the stock to be enjoyed by him during his life; but should the daughter die without having any issue, then, after the decease of the husband, the principal to revert to the testator's eldest son absolutely. The testator's daughter died before the testator, leaving one daughter, who, after the death of the husband, died under age and without issue:—Held, that the gift to the children of the testator's daughter was

contingent, and upon the death of the only daughter under twenty-one the testator's son became entitled to the stock. *Re Wrangham*, 30 L. J., Ch., 258; 9 W. R. 156; 1 Dr. & Sm. 358; 7 Jur., N. S., 15; 3 L. T., N. S., 722.

1. Gift of residue, on trust, to pay the dividends to the testatrix's son for life (except what was required for education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but, should all his children die before himself, at his death, then over:—Held, that a child who died an infant, in the lifetime of the son, had not acquired a transmissible interest. *Chadwick* v. *Greenall*, 3 Giff. 221; 7 Jur., N. S., 959; 5 L. T., N. S., 232.

2. Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and L., share and share alike, as they should come of age; and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great-granchildren of T. and L.:—Held, that the children of T. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue; not absolutely, but according to the gift of the original share. *Wetherell* v. *Wetherell*, 4 Giff. 51.

3. The rule that the Court leans to a construction that gives a portion to each child that lives to require it applies to wills as well as settlements. *Re Knowles, Nottage* v. *Buxton*, 21 L. R., Ch. D., 806; 51 L. J., Ch., 851; 47 L. T. 161; 31 W. R. 182.

A testatrix, after giving a life interest in real estate to her three daughters, directed the share of each daughter to be applied in the maintenance of the children of such daughter who survived her until they attained twenty-one, then the share to be theirs. In case of the death of all the children of a daughter under twenty-one, the testatrix gave the share to the other daughters:—Held, that a child of a daughter who attained twenty-one, and died in his mother's lifetime, took a vested interest. *Ib.*

4. A stock legacy, and a share of residuary personalty expectant on the death of a tenant for life, bequeathed to a minor, payable at twenty-one, with a limitation over in the event of his death under twenty-one, are interests which, prior to the 4th July 1870, were forfeitable to the Crown on the conviction of the minor for felony. *Re Bateman*, 15 L. R., Eq., 355; 42 L. J., Ch., 553; 21 W. R. 435; 28 L. T., N. S., 395.

VII. GIFT TO A CLASS WHO ATTAIN TWENTY ONE AND TO A CLASS AT TWENTY-ONE.

5. A testator bequeathed personal property to his trustees and executors upon trust, to pay dividends to his daughter during her life, to her separate use, and after her decease to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age, with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age, in the daughter's lifetime. The bequests to the children, and the subsequent limitations, were too remote. *Bull* v. *Pritchard*, 1 Russ. 213; 7 L. J., Ch., 41.

6. A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, and pay the proceeds of such sale to and amongst all and every such child or children, share and share alike, if more than one, and if but one, then the whole to such only child:—Held, that one of several children who survived the testator, having died under twenty-one, took no share. *Lloyd* v. *Lloyd*, 3 Kay & J. 20.

7. A gift of residuary estate in trust for such child or children of A., as being a son or sons should live to attain the age of twenty-five years, or being a daughter or daughters should live to attain that age, or marry, equally to be divided between them, if more than one; but if but one, then the whole to that one, their, his, or her heirs, executors, administrators, or assigns, according to the nature and quality thereof; provided that if any of them should die under such age or time as aforesaid, leaving issue him or her surviving, such issue should take the same share as his, her, or their parents, attaining such age as aforesaid, would have done; with provision for applying the income of the share of every such child, or his or her issue, or a sufficient part thereof, in their maintenance and education, and for an application of a reasonable part of the expectant share of any such child or their issue, to his, her, or their advancement, notwithstanding their minority:—Held, to be void for remoteness. *Boreham* v. *Bignall*, 8 Hare 131; 19 L. J., N. S., Ch., 461; 14 Jur. 265.

8. A testatrix bequeathed her residuary estate upon trust for her sister for life, and after the sister's death to pay, divide, and apply the trust fund in manner following; that is to say, one-tenth to or for the use of R. H., and another one-tenth to or for the use of C. R., for their respective lives; and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children, as they should attain twenty-one:—Held, that a child of C. R., who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest. *Boulton* v. *Beard*, 3 De G. M. & G. 608.

9. In considering the validity of limitations, the state of the family at the death of the testator (and not at the date of his will) is to be regarded; and therefore if a gift be to such of the children of a particular parent as shall

attain a greater age than twenty-one years, and the parent die in the lifetime of the testator, and the class be ascertained at the testator's death, the gift is valid. A limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator. *Williams* v. *Teale*, 6 Hare 239.

1. Gift to trustees for E. W. for life, and after his decease to assign, etc, to all his children who should be living at his decease, and who should be or live to attain twenty-five, and to apply the income in the meantime for their maintenance. E. W. died in 1837, leaving eleven children; the testator died in 1845 Four only of the children of E. W. survived; the youngest attained twenty-five in 1848:—Held (following *Williams* v. *Teale*, 6 Hare 239), that the gift was not void for remoteness. *Southern* v. *Wollaston*, 22 L. J., Ch., 664; 16 Beav. 276; 1 W. R. 86.

2. Testatrix bequeathed 3,000*l.* to trustees upon trust to pay the interest to B. for life, and after the decease of B. the testatrix willed that the said 3,000*l.* should be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the 3,000*l.* should be paid to C.:—Held, that the children of B. took vested interests in the 3,000*l.* at her death, and, consequently, that the share of one who died after B., under the age of twenty-one, devolved to her father as administrator. *Bree* v. *Perfect*, 1 Colly. 128; 8 Jur 282.

3. A testator devised property to trustees, for the maintenance of his four children until they severally attained twenty-five, at which time he devised "unto such of his said children as should attain that age" one-fifth of the property to hold to them and their heirs. There was a gift over to the "survivors or survivor," if any died before attaining twenty-five and left no issue, or if they should die after attaining twenty-five and should leave no lawful issue:—Held, first, that their interests did not vest until twenty-five; and, secondly, that the words "survivors or survivor" were not to be read "other or others." *Stead* v. *Platt*, 18 Beav. 50.

4. Gift of residue of real and personal estate to A. for life, and after her decease in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply annual income or fund for their maintenance or benefit during their minority:—Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

VIII. GIFT TO A CLASS WHEN YOUNGEST ATTAINS TWENTY-ONE.

5. Testator bequeathed to his wife the use of his furniture, etc., which he desired to be distributed among his children when the youngest attained twenty-one at her or his executor's discretion, such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above:—Held, that those children who died before the youngest attained twenty-one did not take vested interests. *Ford* v. *Rawlins*, 1 Sim. & S. 328; 1 L. J., Ch, 170. And see *Re Hunter's Trusts*, 1 L. R., Eq, 295.

6. A testator gave all his real and personal estate to trustees, upon trust to convert and pay the income thereof to his daughter for life; and after her decease to divide the capital equally among all her children then living, provided the youngest should have attained twenty-one; but if he should not then have attained that age, then upon trust to apply the income towards the maintenance and education of all such children until the majority of such youngest child, and when that event should happen, the capital to be divided among all the children then living, and the issue of such of them as should be dead, the issue to take their parent's share. One of her children survived his mother and attained twenty-one, but died without issue before the majority of the youngest:—Held, that he took an absolute vested interest upon his attaining twenty-one, payment to be deferred until the youngest should have attained that age. *Brocklebank* v. *Johnson*, 1 Jur, N. S, 318; 24 L. J., Ch, 505; 20 Beav. 206; 3 W. R. 341.

7. A testator bequeathed 3,000*l.* to trustees, upon trust to apply the income thereof towards the maintenance of S. S. and C. S. during their minority; and "when and so soon as the youngest of his said two children should have been born twenty-one years," then he directed the principal to be divided equally between them, if they should both be living; but if either of them should then be dead, the moiety of such deceased child was to be divided equally between the children of M. B. C. S. died an infant. S. S. attained twenty-one, but died before the period when, if living, C. S would have been born twenty-one years:—Held, that they took vested interests in the legacies, to be paid to them when they respectively attained twenty-one, but liable to be divested in case of their death before the period of payment; and consequently that the legal personal representative of S. S. was entitled to one moiety of the fund. *Re Smith's Will*, 1 Jur, N. S., 220; 24 L. J., Ch., 466; 3 W. R. 277; 20 Beav. 197.

8. A. devised real estate to trustees, to apply the rents and profits for the maintenance of his children till the youngest should have attained twenty-one, and then to sell the real estate, and divide the proceeds "among my children in the following shares and proportions; that is to say," two-fifth parts to his eldest son, one one-fifth part to each of his other children, naming them:—Held, that the children took vested interests upon his death, and that the share of a daughter dying before twenty-one passed to her representatives. *Cooper* v. *Cooper*, 7 Jur., N. S., 178; 9 W. R. 354; 3 L. T., N. S, 800; 29 Beav. 299. And see *Re Lyman's Trust*, 2 L. T., N. S., 662.

9. A devise of real estate to trustees to pay the rents and profits to C. for her life during widowhood; and after her decease or second marriage, "to pay the rents and profits to all and every the child and children of his late sister until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then on trust to sell the real estate, and to

divide the moneys equally between and among the said children, share and share alike":—Held, that all the children were tenants in common until the youngest attained twenty-one. *Re Grove*, 3 Giff 575; 9 Jur., N. S., 38. S. C. *nom Re Groves*, 6 L. T., N. S., 376.

Held, also, that the share of each child of T. in both funds became vested at the death of the testator, whether such child lived to attain twenty-one or not. *Ib.*

1. Devise in trust for A. for life, and, after her decease, to apply the rents for the benefit of her children, until the youngest attained twenty-five; and, as soon as the youngest should have attained twenty-five, to sell and "pay and divide" the produce equally "among such of the children of A. as should be then living, and issue of such, if any, of her children as might be then dead," such issue to take their parents' share only:—Held, that the gift of the income was valid, but that the gift of the corpus was void for remoteness. *Read* v. *Gooding*, 21 Beav. 478; 4 De G. M. & G. 510.

2. A positive direction that the shares of all the testator's children should vest at twenty-five and not before was followed by a declaration that the funds "shall not become divisible, although vested, until the youngest of my children shall have attained the age of twenty-one years":—Held, that the youngest child's share vested at twenty-five and not at twenty-one. *Re Parker*, *Parker* v. *Storer*, 26 W. R. 349.

3. A testator devised Blackacre to trustees, out of the rents and profits to pay an annuity to J. and A. his wife jointly, and a similar annuity to the survivor, and upon trust to accumulate the residue for the benefit of the children of J., and divide the same among such children when the youngest attained thirty; and if any such children should die under thirty leaving issue, such issue was to take their parents' share:—Held, that all the children who survived J. took vested interests. *Knox* v. *Wells*, 2 Hem. & M. 674.

4. Testator directed the proceeds of his estate to be invested and accumulated till the youngest child of his brother should attain twenty-one, and then to be in trust for all the children who should then be living, or their issue. All the children except the second in age died without issue before the youngest if living would have attained twenty-one:—Held, that the second, who had attained twenty-one, was entitled to the fund in possession upon the death of the last of the other survivors who died under twenty-one. *Evans* v. *Pilkington*, 10 Sim. 412.

5. Devise to trustees in fee upon trust to demise until the testator's youngest child attained twenty-one, and during the minority of such youngest child to pay the rents to the testator's wife for the maintenance of herself and children, and when and so soon as the youngest surviving child should attain twenty-one to sell and divide the produce "between and amongst the testator's wife and all his children who should be then living, in equal shares." And in case of the death of any child before the estates became salable, his children were to take his share. The children all died under twenty-one without issue:—Held, that the wife was entitled to the whole estate. *Castle* v. *Bate*, 7 Beav. 296; 8 Jur. 280.

6. There is no absolute rule that in a case where there is no bequest distinct from the direction to pay the vesting is postponed till the time of payment, but the construction will depend upon the nature of the event or contingency upon which the payment is to be made, as importing or not importing a condition. Accordingly, where a residue of real and personal estate was given to trustees to sell, get in, and divide among the testator's children, so soon as the youngest should attain twenty-one, and in case of the death of any leaving lawful issue, such issue to take the parent's share it was held that the share of one of the children who attained twenty-one, and then died without issue before the youngest had attained that age, was vested and passed to his representatives *Leeming* v. *Sherratt*, 2 Hare 14; 11 L J., N. S., Ch., 423; 6 Jur. 683.

Semble, no child who did not attain twenty-one was intended to take any interest in the residue. *Ib.*

7. Testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one; and after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go among all his nephews and nieces, except two by name. He charged his rents with an annuity to A, and with payment of bond debts, but did not otherwise dispose of them:—Held, that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. *Parker* v. *Somerby*, 1 Drew. 488; 17 Jur. 752; 22 L. J., Ch., 942; 1 Eq. Rep. 217.

IX. GIFT TO CHILDREN SURVIVING THEIR PARENTS.

8. Legacies of 1,000*l.* each to the three children then living of A., the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees, upon trust for A., for her life; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that, if any one or more of the children of A. should die under twenty-one without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration that if all the children of A. should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* a piece should not be raisable; but from and after the decease of the last surviving child, the said legacies, and from and after the decease of her daughter the 2,000*l.*, should sink into the residue:—Held, that the rights of the children of A. in the legacy of 2,000*l.* were contingent upon their surviving their mother. *Farrer* v. *Barker*, 9 Hare 737.

Some of the reasons which have influenced the Court in decisions in favour of vesting legacies in children have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself *in loco parentis*. *Ib.*

Cases in favour of vesting carried to their full extent. *Id.* 744.

1. Bequest upon trust for all and every the daughters and daughter of A. living at the time of his death who should attain twenty-one or marry, in equal shares:—Held, that during A.'s life the interests of the daughters were contingent. *Atcherley* v. *Du Moulin*, 2 Kay & J. 186.

2. A testator bequeathed specific articles between his two sons equally; then he gave certain freeholds to his two sons and their heirs, as joint tenants; then he gave all his real, leasehold, and other estates and effects, upon trust, that his wife should receive an annuity while unmarried, and his sons to receive the rents and profits while between twenty-one and twenty-five, and afterwards for them as tenants in common; then he gave the residue upon trust for such of his sons as should be living at the decease or second marriage of his wife, as tenants in common; but if either died under twenty-one without issue, his share to go to the survivor; then he gave his partnership property in trade in trust till his sons should attain twenty-one, and afterwards for their individual benefit. One son attained twenty-one, but died in his mother's lifetime, without issue:—Held, that the son so dying took no vested interest in the residue, although the testator may have used a different mode of disposition in all the previous and the subsequent gifts. The partnership property in trade was vested at twenty-one. *Woodhouse* v. *Woodhouse*, 5 Jur. 404.

3. Legacy to Anne, the wife of Peter, for life, remainder to Peter the husband for his life, and after the death of the husband and wife upon trust to pay the interest for the maintenance of such children of Anne as should be living at her death, until they should respectively attain twenty-one, and when and as they should severally and respectively attain their said ages of twenty-one years, upon trust to pay and transfer the legacy equally unto and amongst all the children of Anne when and as they should severally and respectively attain their said ages of twenty-one years, and if any of the said children should die under twenty-one, then unto such as should attain that age share and share alike, and in case all and every of the said children should die under age then to pay the legacy to the testator's next-of-kin. The children of Anne who attained twenty-one years of age acquired vested interest in the legacy, notwithstanding such children died in the lifetime of Anne, the tenant for life. *Bradley* v. *Barlow*, 5 Hare 589.

4. Bequest of 2,000*l.* in trust, to pay one-half of the interest to Nathaniel for life, and the other to Thomas for life, and afterwards to their wives for life, and in case at the death of Nathaniel and wife there should be issue of Nathaniel, to transfer a moiety to the children at twenty-one, and in case there should be no such issue, or they should die under twenty-one, then over. "And so in like manner upon the decease of Thomas and wife, the other half to be transferred to his lawful issue;" and in case of no such issue, or they shall all depart this life before they shall attain twenty-one, then over:—Held, that a child of Thomas who attained twenty-one, but died in the life of her mother, took no interest. *Wilson* v. *Mount*, 19 Beav. 292; 2 W. R. 448.

5. In construing a will equally with a settlement made by a person *in loco parentis*, the Court leans to the presumption that the intention is to vest the portions in the children when they most require it, whether they survive the tenant for life or not; and where there is any reasonable ground for supposing such an intention, the benefit of any doubt is to be given in favour of the vesting. *Jackson* v. *Dover*, 10 Jur., N. S., 630; 12 W. R. 855; 10 L. T., N. S., 489; 2 Hem. & M. 209; 4 N. R. 136.

A testatrix, after giving property upon trust for J., her adopted daughter, for life, and after her death for the benefit of all her children, in the same manner as thereinafter declared respecting one moiety of the residue, bequeathed the residue upon trust for J. for life, and after her decease, as to one moiety, for all the children of J. who should be living at the time of her decease, to be paid to them at the age of twenty-one or marriage; but if such times should happen in the lifetime of J., the payment to be postponed till after her decease; but the testatrix directed that the same should become a vested interest in each of the children of J. at twenty-one or marriage. There was a similar limitation of the other moiety, and a gift over in case of the death of all the children under twenty-one or marriage. One of the children attained twenty-one in the lifetime of the testatrix, but predeceased her:—Held, that the representative of such child was entitled to his share. *Ib.*

6. A testator gave his residuary personalty to a niece for life, and directed his trustees after her death to pay and divide it unto and amongst all and every the children of his niece who should be living at the time of her decease, if more than one, equally; and if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one, but not to be transferred until after the decease of my niece," with maintenance clauses:—Held, that the representatives of children of the niece who attained twenty-one, but died in her lifetime, took no share, for that the words "but not to be transferred until after the decease of my niece" were not contradictory to the previous expression, confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class. *Williams* v. *Haythorne*, *Williams* v. *Williams*, 6 L. R., Ch., 782.

7. A testator gave the interest arising from a sum of stock to V. D., which interest he was to enjoy along with his wife, M. D., during their respective lives, but in the event of either dying and the survivor marrying again, then the capital to be divided, share and share alike, between their children; an arrangement ultimately to take place at the death of their parents, should neither marry again. The testator then directed that the money should not be removed from the English funds during the lifetime of V. D. and M. D., nor until the period arrived "for its distribution (after their death) among their children surviving, share and share alike":—Held, that the interests of the children were not contingent on

their surviving their parents, the concluding words not being sufficient to render the previously vested gift contingent. *Re Duke, Hannah* v. *Duke*, 16 L. R., Ch. D., 112; 29 W. R. 341.

1. A testator directed his trustees to hold and apply the residue of his estate for behoof of his nieces and their children in certain proportions, viz.: one-third to A. in life-rent, and her children in fee; one-third to B. in life-rent, and to her children in fee; and one-third to C., D., E., and F. equally among them in life-rent, and to their children equally among them *per stirpes* in fee. He further provided that in case A. and B. died unmarried, or without issue, or in the event of such issue existing, but afterwards deceasing before attaining the years of majority, or being married, then the two-third shares destined to them and their issue should fall and accrue to C., D., E., and F., and their children respectively in life-rent and in fee, and equally among them *per stirpes* as provided with respect to their own shares of the residue. A. and B. died without issue. C. died leaving one child, married and of age, but who had died without issue before A. and B.:—Held, that the representatives of the child of C. were entitled to participate in the division of the fee of the two-third shares which were life-rented by A. and B. *Taylor* v. *Graham*, 3 L. R., App. Cas. (Sc.), 1287.

2. The rule that the Court leans to a construction that gives a portion to each child that lives to requite it applies to wills as well as settlements. *Re Knowles, Nottage* v. *Buxton*, 21 L. R., Ch. D., 806; 51 L. J., Ch., 851; 47 L. T. 161; 31 W. R. 182.

A testatrix, after giving a life interest in real estate to her three daughters, directed the share of each daughter to be applied in the maintenance of the children of such daughter who survived her till they attained twenty-one, then the share to be theirs. In case of the death of all the children of a daughter under twenty-one, the testatrix gave the share to the other daughters:—Held, that a child of a daughter who attained twenty-one, and died in his mother's life, took a vested interest. *Ib.*

See also next Subdivision, and III. *post.*

X. GIFT TO PERSONS "THEN LIVING." VESTING OF INTERESTS AND CLASS OF OBJECTS WHEN ASCERTAINED.

3. The clear expression of a bequest after the death of the tenant for life, to the children then living:—Held, not to be controlled by other general expressions in the will, so as to vest any interest in one dying before the tenant for life. *La Roche* v. *Davies*, 3 Y. & Coll. 612. n.; 1 Jur. 574. And see *Exp. Hunter*, 3 n. & Coll. 640.

4. A testator having three children gave his property to his wife, so long as she lived unmarried, and if she married, and her children resided with her, an allowance was to be made to her, and "after her decease the testator bequeathed his property equally between his children then living;" he directed his farm to be allotted as part of his son Thomas's share, and "he wished, whoever might enjoy his farm, if unfortunately his children should fail of heirs," should take his name; and he directed his daughter's share to be secured for her separate use. The son died in the lifetime of the mother:—Held, that he took no interest in the property. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., N. S., Ch., 319.

5. "And when my youngest child for the time being shall have attained the age of twenty-one years, then upon trust to pay, assign, and transfer the said residue of my personal estate unto all my children who shall be then living, and the issue of such of them as shall be then dead leaving issue," etc.:—Held, from a former part of the will, to mean, in the event of the testator's widow having married again, or having died before the youngest child attained twenty-one. And that the youngest child, having attained twenty-one, and having died before the widow married again, did not take a vested interest, but her children took as tenants in common. *Ruffell* v. *Norman*, 8 Jur. 819.

6. Testator bequeathed the dividends of 10,000*l.* stock to his wife for her life, and after her decease he gave and bequeathed the principal into and amongst A., B., C., and D., and all and every the child and children of N. that might be living at the decease of his said wife, to be transferred and paid to them respectively on their attaining the age of twenty-one years, with benefit of survivorship in case any of them should die under that age. N. never had any other children than those named in the will. They all attained twenty-one, and died in the lifetime of the widow:—Held, that they took vested interests in the 10,000*l.* stock. *Roberts* v. *Burder*, 2 Colly. 130.

7. Legacy to the testator's wife, of the dividends of stock for her life, which he directed shall be continued in the same stock, and then to be shared equally, share and share alike, to his children that shall be then living; he also gave to his wife a leasehold house, of which fifty years were unexpired, for her life, and then to be let during the time of the lease to C, and the next produce thereof to be equally placed in the stocks for the benefit of his children that shall be then living, equally; and as to the residue of his estate, whatsoever and wheresoever the product, he gave, etc., the same, to be collected yearly, to his wife and children equally, share and share alike, that are then living; in other dispositions, the words "then" and "then living" were used with reference to some period expressed, viz., the age of twenty-one, or the death of the person to take for life. The stock and house vested, at the wife's death, in those children who survived her; the residue vested, at the testator's death, in his wife, and all the children, equally. *Reeves* v. *Brymer*, 4 Ves. 692.

8. Devise to A. for life, and after her decease to B. and her children, or such of them as shall be then living; the children take vested interests, and if any die in the lifetime of A., the whole goes to the survivors. *Dansen* v. *Hawes*, Ambl. 276.

9. Testator gave 1,000*l.* to M. and the issue of her body, and in default of such issue he gave the said 1,000*l.* to be equally divided

between the daughters then living of J. and E. his wife. This devise takes in daughters of J. and E. born after the testator's death, and therefore the limitation is too remote. *Jee* v. *Audley*, 1 Cox 324.

1. S. gives 20*l.* long annuities for the maintenance of H. H. until twenty-one, and then for her separate use for life; and then to her children, for their maintenance until twenty-one, and then to be assigned and transferred to them; but if she should die without lawful issue, or, leaving such, they should die under twenty-one, then for the maintenance of R. H. and E. H. until twenty-one equally; and then to assign and transfer the same equally to them, if both living; but if either should be then dead, the whole to the survivor. H. H. survived R. H. and E. H., who both attained twenty-one; and upon the question whether the representative of the survivor or the residuary legatee was entitled:—Held, that the word "then" had reference to the death of H. H. without issue; and that the residuary legatee, and not the representatives of R. H. and E. H was entitled. *Widdicombe* v. *Muller*, 1 W. R. 223; 1 Drew. 443.

2. A testator bequeathed a sum of stock to trustees, in trust for the separate use of his sister for life, and after her death for her husband for life, and from and immediately after his decease for the children of his said sister, who should be then living, in equal shares. The husband died in the lifetime of the wife:—Held, that all the children of the testator's sister, who were living at the death of the husband, were entitled to a distributive share of the trust fund; and one of those children having afterwards died in the lifetime of the mother, the representatives of the child so dying were held entitled to her share. *Archer* v. *Jegon*, 8 Sim. 446; C. P. C. 173; 6 L. J., N. S., Ch., 340; 1 Jur. 792.

3. A testator directed his executors to invest a sum of money, and to pay the interest to his daughter for life, and after her death to her husband if he should survive her, during his life, or until he should become bankrupt or insolvent, and after his death or becoming bankrupt or insolvent, to lay out such interest in the maintenance or education of any child or children of the marriage who should be "then living" until such child or children should attain twenty-five; and on his, her, or their attaining that age, then to pay the principal to such children, if more than one, in equal shares. The husband died in the wife's lifetime, leaving two children, who had since died under twenty-one:—Held, that the children took vested interests, and that their mother, as their representative, was entitled to the fund. *Powis* v. *Matthews*, 11 W. R. 662.

4. The words "then living," though in one clause of a will they referred to the general period of distribution, were in a subsequent clause of the same held to refer to the immediate antecedent, viz., the death of a tenant for life. *Beasman* v *Pearse*, 10 L. R., Ch., 258; 11 L. R., Eq., 522; 24 L. T., N. S., 864; 19 W. R. 873.

A testator gave his real estate to trustees (after the determination of estates tail following estates for life) on trust for sale, and (in the events which happened) to hold a moiety of the proceeds of sale, on trust for J. for her life, and after her death to pay and divide the same unto and amongst all and every the children of his sister J., who should be then living, and the issue of such of her children as should be then dead leaving issue, share and share alike, but so as such issue should have no greater share thereof than such as their, his, or her parent would have had if living. The will contained a further proviso by which the testator, to prevent all doubts which might otherwise possibly arise, directed that, if his real estate should ever be sold, and the money thereby arising should ever become payable to the issue of his late sister A. and his sister J., or the issue of his nephew, or any of them, and any one or more of such issue should be then dead having left issue, then the issue of such issue as should be so dead should have and receive the part or share to which their, his, or her parent would have been entitled if living:—Held, that the children and issue of J. who were to take were to be ascertained at her death. S. C. 20 W. R. 876; 7 L. R., Ch., 660; 27 L. T. N. S, 89.

5. Testator bequeathed the residue of his real and personal estate, upon trust for his daughter absolutely upon her attaining twenty-one; provided that, in case his said daughter's decease should happen before the said age of twenty-one, and his, the testator's, wife should then be living, then in further trust to pay her the whole interest of the residue of his estate and effects; and, on her decease, his said daughter being dead before the age of twenty-one, he devised to his wife the house in S Street, her heirs and assigns, for ever; then in further trust to pay the produce of his residuary estate unto and amongst his nephews and nieces, the children of his sister Ann, and such of them as should be then living; the daughter died without issue in the lifetime of the wife; the sister had five children living at the death of the daughter, and one only, Isaac, living at the death of the wife:—Held, that Isaac was entitled to the whole residue. *Hetherington* v. *Oakman*, 2 Y. & Coll. C. C. 299; 7 Jur. 570.

6. A. devised an estate to his sons Phineas and John equally, during the life of Phineas, and until his youngest child attained twenty-one, and on the death of Phineas, and on the youngest child attaining twenty-one, to sell it and pay one half of the money to John and his heirs, and the other half among the then living children of Phineas. But in case of John's death without lawful issue before the division takes place, then I give his half share to and amongst my then living grandchildren, share and share alike. John died without issue in 1827, Phineas died in 1858:—Held, that the grandchildren were to be ascertained at the death of Phineas, and that the representatives of a grandchild who died in 1856 took no share. *Gill* v. *Barrett*, 29 Beav. 372.

7. Gift to a niece for life, and afterwards to her children, and, in default, to the niece's mother for life; and, on such default, and after the death of both, to the children of A. A. (deceased) "then living," and the issue then living of any child of A. A. "dying in the lifetime of the niece," such issue to take the

parent's share:—Held, first, that the words "then living" referred to the period of distribution. Secondly, that the issue of the children of A. A. took as objects of the gift, and not by substitution for their parent. Thirdly, that no child of A. A. could take who did not survive both the niece and her mother. Fourthly, that issue of a child who survived the niece did not take, they not fulfilling the condition of being issue of a child "dying in the life of the niece." Fifthly, that the issue of a child of A. A. who was dead at the making of the will would take "if then living." *Coulthurst* v. *Carter*, 15 Beav. 421; 16 Jur. 632; 21 L. J., Ch., 555.

1. Limitation over after a life interest to husband for life, or until bankruptcy, remainder to the wife for life, remainder in case of the wife dying in the husband's lifetime, then after the husband's death, or sooner in case of his becoming bankrupt, to the children "then living":—Held, these words referred to the period of the wife's death, and not of the bankruptcy. *Re Edington's Settlement*, 3 Drew. 202.

2. A testator bequeathed 1,000*l.* to G. for life with remainder to her issue, and in default of issue to O. absolutely. But if O. should die before the death of G., then he gave the sum to such of her children as should be "then living":—Held, that "then living" meant living at the death O. *Drew* v. *Drew*, 22 W. R. 314.

3. A testatrix gave all her personal estate to a trustee, upon trust to pay two annuities, and directed that the sum of 800*l.* should be raised and invested, and that the same should be held upon trust to pay thereout the two annuities. And she directed her trustees to sell the remainder of her personal estate, and the moneys arising therefrom, and the residue of her estate, except the 800*l.*, after paying certain legacies, to pay, distribute, and divide equally unto and amongst A., B., C., and D., or such of them as should be living at her decease; and in case D. should be living at her death, her share of and in her said personal estate and the residue of her property should go amongst D.'s children; and after the decease of the two annuitants, the testatrix directed her trustee to pay and distribute the said sum of 800*l.*, and all and singular the rest, residue, and remainder of her said personal estate, unto and amongst A., B., C., and D., or unto and amongst such of them as should be then living; and in case D. should not be then living, the testatrix directed that her share of and in the said residue should go amongst D.'s children. At the death of the surviving annuitant, A., B., C., and D. were dead, but D. had left two children, who claimed the whole of the testatrix's property:—Held, that they were entitled to the 800*l.*, but that the residue did not go exclusively to them. *Hammatt* v. *Ledsam*, 9 Jur. 173.

4. A fund was bequeathed upon trust for a daughter of the testator for life, and after her death for her husband for life, and after the death of the survivor, for the daughter's children who should be living at her decease equally, and the children of such children as should be dead, such children to have their parent's shares only; and if there should be no such child or grandchild, in trust to transfer the fund to all the testator's children who should be then living equally, and the children of such of them as should be dead, such children to have their parent's share only:—Held, that under the last-mentioned clause only such grandchildren of the testator took as survived the tenant for life. *Re Kirkman*, 3 De G. & J. 558.

5. The testator devised and bequeathed his real and personal estate, subject to certain trusts for the benefit of his wife, to his son absolutely, but if the son should die under twenty-one without issue the testator gave the same to his wife during her widowhood, with remainder, subject to certain legacies, as she should by will appoint, and in default of appointment, or in case she should marry again after testator's decease, he directed that from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then living of his sister, Mary Miles, and the issue then living of such of them as should be dead, equally amongst them *per stirpes*. The testator's son died under twenty-one without issue in the testator's lifetime, and the testator's wife also died in his lifetime:—Held, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled *per stirpes* to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles, such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator, were also entitled *per stirpes* to an equal share of the said moiety of such residuary estate: and that the share of the child of a daughter would not lapse by the death of such child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell* v. *Holmes*, 3 Hare 438; 8 Jur. 396.

6. A testator gave a life interest in his residue to three of his children equally, and after the decease of his three children respectively, he gave one-third part of the residue unto such of their children as should be then living:—Held, that on the decease of each, the gift over as to his third part operated in favour of all the children of the three who were actually living at the time. *Brown* v. *Thompson*; *Brown* v. *Dewick*, 11 Jur., N. S., 922; 14 W. R. 76; 13 L. T., N. S., 395.

7. Residuary bequest in trust for A. for life, and after her decease to be distributed "between the testator's brothers and sisters, and such of their children as should be then living, the parents and children to be classed together, and to share in equal proportions":—Held, that those brothers and sisters and children only who survived A. were entitled, and that they took *per capita*. *Turner* v. *Hudson*, 10 Beav. 222; 16 L. J., N. S., Ch., 180.

8. A devise and bequest to trustees to pay the income of real and personal estate to A.

for life, and after her death to sell, and to pay the residue unto the testator's nephews and nieces (nine in number) then living. One of the persons named died before tenant for life:—Held, that the residue became distributable in eight shares. *Ireland* v. *Trembath*, 11 Jur., N. S., 479; 12 L. T., N. S., 630.

1. When the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the Court leans strongly in favour of early vesting; but when a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period. *Re Deighton*, 2 L. R., Ch. D., 783; 45 L. J., Ch., 825; 34 L. T., N. S., 81.

A husband directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:—Held, that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing. *Ib.*

2. A gift of residue, after conversion, as soon as conveniently might be after the testator's death and investment, to all and every the grandchild and grandchildren of the testator "who should be then living," means such grandchildren who should be living at a time thereafter mentioned, that is, upon their respectively attaining the age of twenty-one, and lets in all such grandchildren as were living when the first of the class attained his majority. *Hilliard* v. *Fulford*, 28 L. T., N. S., 892; 42 L. J., Ch., 624.

The residue of a testator's real and personal estate was given to trustees upon trust to convert and get in as soon as conveniently might be after his death, and to invest the proceeds and assign the same unto all and every his grandchild or grandchildren (except T., or such grandchild as should then be in possession of certain real estates before specifically devised) as should "then be living," to be divided between them when and as such grandchild or grandchildren should respectively attain twenty-one:—Held, that the period of ascertaining the legatees was the time when the eldest of the grandchildren, who were to share in the residue, attained twenty-one. *Ib.*

3. Bequest of personal estate to A. for life, remainder to the children of A. equally, and in default of issue of A., upon trust to sell and divide equally amongst B. and C. and all their children "then" living, share and share alike:—Held, that the gift was not too remote, and that B. and C. and their children living at the death of A. alone took the personal estate as tenants in common absolutely. *Cormack* v. *Copous*, 17 Beav. 397.

B. died before A., but, nevertheless, she was held to take a share. *Ib.*

4. A testator gave a legacy of 200*l.* to each of his twelve first cousins, *nominatim*, and then, noticing that one was dead, he gave the legacy intended for him to his children. He gave his wife a life interest in his residuary and personal estate, to be enjoyed in specie; and, from and immediately after his wife's decease, he gave his executors full power to collect all his property together, and sell the houses and other estates, and to convert into money all his funded property, and then to pay first certain legacies, and then the whole of the remainder of his property was to be divided, share and share alike, among his aforesaid twelve first cousins and their children. By a codicil he took away the legacy given by his will to his cousin, Mrs. B, but expressed his intention not to exclude her children from the benefit she might thereafter possess in the final division of his property after his wife's decease:—Held, that the cousins who survived the testator took vested interests absolutely, subject, as to those who died leaving issue, to be divested for the benefit of their children, by way of substitution. And that the children of the cousin alluded to by the testator as already dead were entitled to a twelfth share of the residuary estate, as representing such deceased cousin. *Burrell* v. *Baskerfield*, 13 Jur. 311; 18 L. J., N. S., Ch., 122; 11 Beav. 525.

5. A testator who was entitled to a reversion expectant on the deaths of A. and B, without issue living at their death, devised it in trust to sell, and divide the produce between his six daughters, or such of them as should be then living, and the children of such of them as should be dead, the children taking their parents' share. But if only one daughter survived A. and B., she was to take the whole, and the heir-at-law was to take if no daughter or child of a daughter should be living at the death of A. and B.:—Held, that the shares of the children of the daughters vested, not at their mother's death, but at the death of the survivor of A. and B. *Lewis* v. *Templer*, 33 Beav. 625.

6. A testator made a series of specific devises upon trust for each of his children for life, with remainder to the children of such tenant for life as tenants in common in tail, with cross remainders between them, and failing such issue of the tenant for life, in trust for the testator's other children equally, and the heirs of their respective bodies as tenants in common, or if there should be only one of his said children "then living," in trust for that child, and the heirs of his or her body; he afterwards gave a share of his residuary real and personal estate upon such trusts as should correspond with those declared concerning his specifically-devised estate, which gift was followed by a provision for the event of any child dying in the testator's lifetime, leaving children:—Held, that the gift over, on failure of the issue of a tenant for life, was in favour of children who, or whose issue, were living at the time when the gift over took effect. *Cooper* v. *Macdonald*, 16 L. R., Eq., 258; 42 L. J., Ch., 539.

See also WILL LVIII. v.

XI. EFFECT OF GIFT OF INTERIM INCOME, INTEREST, OR MAINTENANCE.

1. Gift of Interest. In General.

1. Legacy at twenty-one with interest in meantime is a vested legacy. *Harrison* v. *Buckle*, 1 Stra. 238. And see *Fonnereau* v. *Fonnereau*, 3 Atk. 645.

2. Gift of a residue to children not to be claimed till twenty-two, but the interest given in the meantime is vested. *Dodson* v. *Hay*, 3 Bro. C. C. 404.

3. Direction for interest is evidence of vesting in legatary cases. *Hubert* v. *Parsons*, 2 Ves. 263.

Trust "to raise" 5,000*l.* portion, "and pay it," to such younger child as the father should appoint; for want of appointment, to the younger children at twenty-one, with interest for their maintenance, etc., in the meantime, etc., etc. The only younger child died at two years old:—Held, not to be vested in him, so as to be claimed by the father as his representative. *Id.* 261.

4. A legacy devised to S. when of the age of sixteen, and interest in the meantime. S. dies before sixteen. The legacy vested, and shall go to the executor of S. *Stapleton* v. *Cheele*, 2 Vern. 673; Pre. Ch. 317.

5. Legacy to A. payable at twenty-one or marriage with interest is a vested legacy, and executor having become bankrupt, it might have been proved under the commission; his certificate therefore a bar, and the residuary legatees not liable. *Walcott* v. *Hull*, 2 Bro. C. C. 305.

6. Devise of a portion to a child with interest, but not to be paid to the child till twenty-one; child dies under twenty-one; portion shall go to the administrator of the child. *Collins* v. *Metcalfe*, 1 Vern. 462.

7. If a legacy is payable, or given at a certain time, out of personal estate, with interest in the meantime, it is a vested legacy; but if out of a real estate, and the party dies before the time, it sinks into the inheritance, and the construction is the same, if charged on a mixed fund, where it is given or payable at a certain time. *Van* v. *Clark*, 1 Atk. 510.

8. Bequest to be for his second daughter that he shall have born, for her education, till she shall attain the age of twenty-one, and after she shall attain the age of twenty-one to her and her heirs, she being christened Z., and in default of such issue over; another bequest to A. till the said second daughter shall attain twenty-one, and after she shall attain twenty-one, to her and her heirs: both held vested in second daughter, the third child, christened Z., though she died under twenty one. *Lane* v. *Goudge*, 9 Ves. 225.

9 Where an absolute property is given by will, and a particular interest is given in the meantime, it is not a condition precedent, but a description of the time when possession is to be taken. *Booth* v. *Booth*, 4 Ves. 409.

10 By a will, stock was, after the death of a tenant for life, to be divided and paid amongst the children of such tenant for life; if more than one, equally, on attaining twenty-four; and if but one, the whole to be paid to such one child on attaining twenty-four, and in the meantime the interest and dividends to be applied for the use and benefit of such children or child, as the case might be:—Held, that the gift was not void for remoteness, the children taking vested interests as they came *in esse*. *Bell* v. *Cade*, 2 John. & H. 122; 10 W. R. 38; 5 L. T., N. S., 523; 31 L. J., Ch., 383.

11. A testator gave his residuary real and personal estate to his daughter for life, and after her death he directed it to be paid to her surviving children as soon as they should arrive or come to the ages of twenty-two respectively, with a direction that the share of the child or children dying under twenty-two should go to the other child or children who should attain twenty-two; and directed that only the interest of the share of the child or children who died under the age of twenty-two should be paid to them respectively:—Held, (affirming 11 Jur., N. S, 791), that the gift was contingent upon the children attaining twenty-two, and therefore void for remoteness. *Re Bulley*, 11 Jur., N. S., 847; 13 L. T., N. S., 264.

12. A gift to a class or an individual on attaining a given age, which standing alone is contingent, is vested if accompanied by a gift of the whole income for the benefit of the class or individual during the interval. *Re Holt*, *Bolding* v. *Strugnell*, 45 L. J., Ch., 208; 24 W. R. 339; 34 L. T., N. S., 120.

A testatrix directed the trustees of her will, after the death of a tenant for life, to transfer a fund to the children of A. in equal shares upon their respectively attaining twenty-one, the interest of the fund to be applied for their maintenance until they should respectively attain that age:—Held, that the gift of the interest created a vested interest in the capital. *Ib.*

2. Mixed Gift of Interest and Principal. Gift of Interest itself Contingent, or Direction to Accumulate.

13. Legacy to A., as soon as she attain twenty-one, with interest:—Held, to be contingent, and no interest payable till legatee attains twenty-one, and is then to be computed from end of a year after testator's death. *Knight* v. *Knight*, 2 Sim. & S. 490.

14. A bequest, by a testator, of one-third of his personal estate to his daughter, and in case of his decease to have the interest therein, and principal when she attained the age of twenty-five:—Held, to give a vested interest to the daughter, though she died under that age.

Breedon v. *Tugman*, 3 Myl. & K. 289; 3 L. J., N. S., Ch, 169.

1. Testatrix directed the trustees of a fund (over which she had a power of appointment) and the survivor of them, his executors, administrators, and assigns, to pay, assign, or transfer the same to R. M., in trust for his daughter, to be vested in her on attaining the age of twenty-one, or day of marriage, which should first happen, and the interest and dividends thereof to accumulate for her benefit, and be paid to her with the principal at the time before mentioned:—Held, that she did not take a vested interest in the fund. The daughter died under age and unmarried. *Re Thruston's Will*, 17 Sim. 21; 18 L. J., N. S, Ch., 437.

2. Bequest of 120*l.* per annum, that is to say, the interest of 4,000*l.* stock, to A., with direction that interest, as it becomes due, be added to the principal till twenty-one, except 20*l.* per annum for clothes, gives a vested interest. *Stretch* v. *Watkins*, 1 Madd. 253.

3. Testator, after giving his residuary personal estate simply to A. an infant, went on to direct his executors to place it out at interest, to accumulate, and to pay the principal to A. at twenty-four, and in the meantime to allow him 60*l.*, which was very much less than the interest of the fund, a-year for his maintenance, and the residue was given over on his dying under twenty-one:—Held, that A. was entitled at twenty-one to have the fund transfeared to him. *Josselyn* v. *Josselyn*, 9 Sim. 63.

4. Bequest of the interest of the residue to the widow for the maintenance of the testator's children, and after her decease the property "to be shared equally amongst all his children, if they should have attained twenty-one, and if they had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age." A child who died under twenty-one, in the lifetime of the widow, held not to have a vested interest. *Butcher* v. *Leach*, 5 Beav. 392; 7 Jur. 74.

5. A testatrix appointed a trust fund to two trustees, in trust to pay the dividends to A for life, and after his decease she gave the dividends to two others, B. and C., for life; and after the decease of the survivor, she gave, bequeathed, willed, and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years:—Held, that the gift to the children was void for remoteness. *Chance* v. *Chance*, 16 Beav. 572.

6. A gift in terms importing a present vested interest with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives. *Bleese* v. *Burgh*, 2 Beav. 221; 9 L. J., N. S., Ch., 226.

Bequest of residuary estate to accumulate in trust for all the children of J. B. (except the eldest), to be paid at twenty-three, and in the event of the death of all under that age, then over; J. B. had two children born in the lifetime of the testatrix, one of whom died an infant, and a third born after her death, who being born before the time of distribution, and having attained twenty-three, became the personal representative of his mother:—Held, that the legacies were vested, although the payment was postponed; and that the direction to accumulate did not vary the question; the latter was therefore entitled to take in his own right and as the representative of his deceased brother the whole fund. *Ib.*

7. Bequest of residue to trustees upon trust for testatrix's brother's children and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees, as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years. M. was herself one of the children of the testatrix's brother.—Held, that the children born at the death of the testatrix took vested interests.—Held, also, that the testatrix did not mean to include M. as one of the children of his brother. *Bull* v. *Johns*, Taml. 513.

8. A bequest of residuary estate to be invested in consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease:—Held, to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator, subject to be opened, and let in grandchildren who might be born before the expiration of the twenty years. *Oppenheim* v. *Henry*, 10 Hare 441.

9. A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that on their deaths the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit, of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal, with limitations over, in the event of the death of any of them under that age:—Held, that the children of the sisters were not to take a vested interest till they attained twenty-two, and that all the gifts subsequent to the life estates given to the sisters were void as being too remote. *Vawdry* v. *Geddes*, 1 Russ. & M. 203; Taml. 361; 8 L. J., Ch., 63.

3. Immediate Severance of Principal.

10. Bequest of a particular stock upon trust to accumulate the dividends until A. attained twenty-five, and then to pay him over the whole:—Held, to give to A. an immediate vested interest, on the ground that the subject of the legacy was severed and set apart, although the trustees were also the executors, and on his attaining twenty-one the stock was ordered to be transferred to him. *Saunders* v. *Vautier*, Cr. & Ph. 240; 10 L. J., N. S. Ch., 354. Affirming 4 Beav. 115.

11. Legacies to be paid to the legatees "when or if" they attained the age of twenty-one, but which were to be severed from the estate and set apart in trust for legatees, immediately on death of testator, and the legacy of each

invested on a separate deed:—Held, to be vested at death of testator. *Lister* v. *Bradley*, 1 Hare 10.

1. A. by will gave all his personal estate to trustees until W. should attain twenty-four, and from henceforth in trust for him, his executors, etc. W. lived till twenty-one, but died before twenty-four:—Held, a vested interest in W. at A.'s death, and that age of twenty-four was only directory as to time of payment. *Love* v. *L'Estrange*, 5 Bro. P. C. 59.

2. Where a fund is severed immediately from a testator's death for the benefit of the objects of the gift, the interests are vested and carry the interim income, though the only gift is in a direction to pay at a future time. *Dundas* v. *Murray*, 1 Hem. & M. 425; 32 L. J., Ch., 151; 11 W. R. 359.

Therefore, where, under a power of appointment over a fund, a testatrix directed the trustees, immediately after her death, to raise 5,000*l*., and to pay the same equally between five nephews and nieces, the shares of sons to be payable on their respectively attaining twenty-one, and of daughters at twenty-one or marriage respectively, with benefit of survivorship, and upon trust to apply the residue for the benefit of certain other persons:—Held, that the interests vested immediately on the death of the testatrix, and that the nephews and nieces were entitled to the interim income arising from their respective shares. *Ib.*

3. Bequest of a residue for life to A., who had no child, and at his death leaving a son 5,000*l*. to be deposited in the hands of trustees to accumulate for such son for his use on his attaining the age of thirty years, and the rest to be equally shared between him and the other children; the general division to take place as each respectively attained the age of twenty-four years:—Held, not void in any part, as the 5,000*l*. vested at the time of the severance, and the shares of the residue must be taken to vest at the same time. *Greet* v. *Greet*, 5 Beav. 123.

4. A testator, by will, made in 1821, bequeathed the residue of his personal estate and effects to trustees, upon trust to accumulate until the principal with the accumulations should amount to 3,000*l*. or thereabouts; and when and so soon as such principal and accumulations should amount to 3,000*l*. or thereabouts, then he directed them to invest the same, and distribute the interest among certain persons for life; and after the decease of the survivor, to distribute the principal amongst the issue of such persons:—Held, that the gift of the fund was not void for remoteness, as, although the sum named might not be accumulated within the period allowed by law, there would be no suspension of vesting; the residue and accumulations, whatever the amount be, would vest immediately on the death of the survivor of the tenants for life. *Oddie* v. *Brown*, 5 Jur., N. S., 635; 28 L. J., Ch., 54; 4 De G. & J. 179. Reversing 4 Jur., N. S., 605; 6 W. R. 531.

5. A testator left all his real and personal estate to G., his executor, upon trust to raise out of the personal estate 1,500*l*., and invest that sum, in the events which happened, for the use of his son, to be paid to him with interest on his attaining twenty-one; and in trust to raise 1,000*l*., and hand it over to his wife in certain amounts therein specified; and he authorised G. to permit his wife to carry on his business, and to dispose of the profits for the maintenance of herself and his children; but if his wife should be desirous to retire from business, or in the event of her marrying, then upon trust to convert all his property not theretofore disposed of in raising the two sums of 1,500*l*. and 1,000*l*., and invest the same for the use of his son, to be paid to him on attaining twenty-one; and in the event of his son's death before twenty-one without leaving issue, to the use of his daughter, with provisions for maintenance; and, in the event of the death of both of his children before they attained twenty-one, to pay the wife 500*l*., in addition to the sum of 1,000*l*.; and upon further trust, upon such events and contingencies, that G. should retain to his own use and benefit all the residue of his real and personal estate for his own sole use and benefit. G. proved the will and assented to all the bequests; the testator's son and daughter died in 1834, both infants, the son being the survivor, and administration to the son was granted to the plaintiff in 1871: the widow died in 1836, having married a second time, and G. died in 1869:—Held, first, that the testator's son took a vested interest in the 1,500*l*. *O'Reilly* v. *Walsh*, 6 Ir. R., Eq., 555.

Held, secondly, that G., by assenting to the legacy of 1,500*l*., was an express trustee of it, so as to save the bar of the Statute of Limitations. *Ib.*

Held, thirdly, that G. was entitled to the residue for his own benefit. *Ib.*

6. A testatrix gave money, to become due on a policy, to trustees, one of whom she afterwards made her executor, to invest, and so long as her nephew should be solvent to pay him the dividends, until he attained twenty-five, so that his receipts alone might be good discharges, and that he might not deprive himself thereof by anticipation. If he attempted to do so, he was to lose the benefit of the provision, which was to go over to his family, if he had any, if not, to the testatrix's residuary estate. The payment of the dividends was to be half-yearly, and there was to be an apportionment of interest in case of the nephew's death between two days of payment. In case the policy moneys should not be paid immediately after her death, the trustees were to make up the first half-year's income out of her residuary personalty. The principal was to be paid to her nephew at twenty-five. There was a declaration that if the nephew should die under twenty-five, leaving children, the principal and interest should go to such children. There was also a clause for the advancement of the nephew. The nephew died a minor, and without having been married:—Held, that the legacy passed to his personal representative; and immediate payment was ordered, though at the date of the decree the nephew, if alive, would have been between twenty-one and twenty-five. *Pearson* v. *Dolman*, 15 W. R. 120; 36 L. J., Ch., 258; 3 L. R., Eq., 315.

4. Gift of Income followed by Gift of Principal.

7. Testatrix gave to A. the dividends of 500*l*. stock, till he should attain the age of thirty-

two, at which time she directed her executors to transfer the principal to him; the legacy does not vest till the age of thirty-two. *Batsford* v. *Kebbell*, 3 Ves. 363.

1. If the interest and dividends of a legacy are alone the subject of the bequest until a particular time, and the principal is not sooner taken out of the residue, but is directed for the first time to be taken out of it, and paid to the legatee at the end of that period, the intermediate gift of the interest or dividends will not vest the capital. *Cromek* v. *Lumb*, 3 Y. & Coll. 565

2 A. gave B., his brother, the interest of 1,500*l.* for life, and the principal, after his decease, among the younger sons and daughters of B.; but if he should leave daughters only, then to be paid to them at twenty-one. B. had two daughters, one of whom married, and died in B.'s lifetime:—Held, that her husband is not entitled to her share as administrator. *Billingsley* v. *Wills*, 3 Atk. 219.

3. Construction of an obscure will; first, that the income only, not the capital, was disposed of; secondly, that the disposition was in favour of the younger children, excluding the eldest. A legacy, not as an independent bequest, with a time for payment or distribution appointed afterwards, but the time annexed to the substance of the bequest, the interests do not vest before that period. *Sansbury* v. *Read*, 12 Ves. 75.

4. Testator desired his executor to pay 25*l.* yearly for the maintenance and education of his natural daughter until twenty-one or marriage, and then to pay her 500*l.* The daughter died under age and unmarried. Legacy held not vested. *Watson* v. *Hayes*, 5 Myl. & C. 125; 9 L. J., N. S., Ch., 49; 4 Jur. 186. Reversing on this point 9 Sim. 500; 8 L. J., N. S., Ch., 169; 3 Jur. 143.

5. Gift to two executors and the survivor of 1,000*l.* stock, in trust for A. and B., to pay them the dividends thereof from time to time, and from and after the decease of the executors, the 1,000*l.* to A. and B., their executors, etc., equally:—Held, that they took absolute equitable interest in the stock as tenants in common during life of executors, and on their death absolute legal interests. *Gardiner* v. *But*, 3 Madd. 425.

6. A bequest of residuary estate to trustees to apply the interest to the education and maintenance of A. during her minority, and, when she has attained the age of twenty-one years, to the use of A. absolutely, does not give A. any vested interest till her full age is attained; and, if she dies during her minority, the residue goes to the next-of-kin of the trustee. *Russell* v. ——, 1 L. J., Ch., 69.

7. A testator, who had two sons and one daughter, gave the interest, dividends, and annual proceeds of 3,000*l.* stock, standing in his name, to W., one of his children, for life, and, after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of W., to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to be paid or transferred to him, her, or them, on his, her, or their attaining twenty-one, and the interest to be in the meantime applied for maintenance and education. He gave similar legacies to each of his other two children and their children; "and upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends, and produce so as aforesaid given and bequeathed to him, her, or them, so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions." The testator's son W. survived him, and had one child, who predeceased him —Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of W. took a vested interest at his birth, but liable to be divested by the death of W., without leaving issue living at his death; and that the gift over therefore took effect. *Westwood* v. *Southon*, 2 Sim. N. S. 192; 16 Jur. 400; 21 L. J., Ch., 473.

8. A testator gave all his real and personal estate to trustees to convert into money, and out of the proceeds of the conversion to pay various legacies and annuities, and he directed his trustees to hold the residue of his personal estate so converted into money, upon trust to pay the income for the benefit of his four natural children, or such of them as might be living at his death, until they should attain twenty-one or marry, and when they attained that age upon trust to pay or transfer the residue of his personal estate unto the four children in equal shares as tenants in common:—Held, that the shares of the four children did not vest till twenty-one, and that the share of one child who died under twenty-one was undisposed of, and passed as to the realty to the heir-at-law, and as to the personalty to the next-of-kin of the testator. *Spencer* v. *Wilson*, 16 L. R., Eq., 501; 42 L. J., Ch., 751; 29 L. T., N. S., 19.

9. A testator gave 5,000*l.* to trustees upon trust to invest, and to apply the income to or for the maintenance of a nephew till he should attain his age of twenty-four, and directed that when he attained that age the principal should be paid to him, and he made a gift over in case of the death of the nephew under that age. The legatee was an infant at the testator's death, and died an infant some years afterwards. The trustees raised the fund, and applied part of the income to his maintenance and education, and at his death they had in their hands an accumulation of income unapplied:—Held, that the legacy was vested at the testator's death, subject to be divested in the event which happened of the death of the legatee under the specified age, and that the whole of the income belonged to him during his life, and that his personal representative was entitled to the accumulations. *Re Peck*, 16 L. R., Eq., 221; 42 L. J., Ch., 422; 21 W. R. 820.

5. Income Expressly given for Maintenance.

10. Giving the interest of a legacy to the legatee, or for his maintenance, vests the legacy. *Heath* v. *Heath*, 2 Bro. C. C. 3.

11. A. devises 4,000*l.* to his son, to be paid at the age of twenty-five, and interest in the meantime, and he to have a maintenance

thereout; and directs the 4,000*l.* to be raised out of a trust estate; this is a vested legacy. *Cave* v. *Cave*, 2 Vern. 508.

1. A direction for maintenance has not the same effect in favour of vesting, as giving interest. *Hanson* v. *Graham*, 6 Ves. 249.

2. A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as, and when, the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and upon his attaining the age of twenty-one years, upon trust to assign the said premises, together with the lease and the accumulation of rents, unto the said son, his executors, etc., for the remainder of the term:—Held, son took a vested interest in lease, and on his death that it passed to his personal representatives. *Stephens* v. *Frost*, 2 Y. & Coll. 302; 6 L. J., N. S., Exch. Eq., 41.

3. Bequest to A. for his second daughter that he shall have born, for her education, till she shall attain the age of twenty-one, and after she shall attain the age of twenty-one to her and her heirs, she being christened Z.; and in default of such issue over. Another bequest to A. till the said second daughter shall attain twenty-one, and after she shall attain twenty-one to her heirs. Both held vested in second daughter, the third child, christened Z., though she died under twenty-one. *Lane* v. *Goudge*, 9 Ves. 225.

4. A husband bequeathed the residue of his personalty to trustees in trust to permit his wife to carry on his business until his son should attain twenty-one, the wife maintaining all his children in the interim, and then after a trust to pay her 100*l.*, in trust for the son for his own use and benefit:—Held, that the son's attaining twenty-one was a condition precedent, and that as he died under that age he took no vested interest in the bequest. *Sullivan* v. *Edgell*, *Dimond* v. *Edgell*, 23 W. R. 722.

5. Gift to A. for life, and after his death to all his children who should be living at his death, and who should attain the age of twenty-five years; with a direction to apply the whole income in maintenance:—Held, that the gift was not void for remoteness, the tenant for life having died in the lifetime of the testator. *Southern* v. *Wollaston*, 22 L. J., Ch., 664; 16 Beav. 176; 1 W. R. 86.

6. A testator gives 3,000*l.* to trustees, upon trust to pay the interest to A. during her life, and, after her decease, to apply the interest to the maintenance of the children she had at the date of the will, and the survivors of them, till they attained twenty-four respectively, and, upon their respectively attaining that age, to transfer their shares to each of them; the share of any one dying to go to the survivors, upon their attaining twenty-four; with a direction, that, if none of the children should be living at A.'s death, or if none of them should attain twenty-four, the 3,000*l.* should go over: of those children only one attained twenty-four, but he died in A.'s lifetime:—Held, that the fund vested in him absolutely. *Langslow* v. *Butts*, 5 L. J., Ch., 166.

7. Bequest of 1,000*l.* to A., upon trust to lay the same out in consols and pay the interest and dividends to B. for life; and immediately after her decease, upon trust that the said stock should be transferred to B.'s daughter C., in case she should then have attained the age of twenty-one years, for her absolute use and benefit; but in case the said C. should not have attained the age of twenty-one years at the decease of her said mother, then upon trust to pay and apply the said interest and dividends, as the same should become due and payable, for the maintenance and support of the said C., until she should attain the age of twenty-one years, and upon the attainment thereof, upon trust to transfer the said stock or fund to the said C. for her use and benefit. B. and C. survived the testator. Afterwards C. died in the lifetime of B. without having attained the age of twenty-one years:—Held, that C. took a vested interest in the 1,000*l.* *Hammond* v. *Maule*, 1 Colly. 281; 13 L. J., N. S., Ch., 386; 8 Jur. 568.

8. Bequest of a sum to trustees to pay the interest to his son's wife, for the benefit of herself and husband and children during his son's life, and after his death for the benefit of the wife and children, and at her death to be equally divided among the latter if they should have attained twenty-one, and if not the interest to be applied for their maintenance; and in case of the wife marrying again, the children were to receive their shares at twenty-one:—Held, that their shares did not vest until they attained twenty-one. *Taylor* v. *Bacon*, 8 Sim. 100.

9. A testator directed that certain funds should be payable to children on their arriving at the age of twenty-one, and that his trustee should in the meantime pay and apply the interest towards the maintenance of such children until their respective shares should become payable; and that it should be lawful to apply the whole or any part of the principal to which any infant might be entitled under the provisions thereinbefore contained, at any earlier period than the same would become vested or payable by virtue of such provision, for the advancement of such infant:—Held, that the representatives of a child who died under the age of twenty-one were not entitled to the interest accrued during his minority. *Shafto* v. *Stewart*, 10 Jur. 299.

10. Testator gave 5,000*l.* to trustees, in trust, for his daughter E. for life, and after her death, in trust to apply the interest for the maintenance of all her children who should be living at her death, during their minorities, and on their attaining twenty-one, in trust to transfer the same equally between them. But if E. should die without leaving any such child, or, leaving such, they should all die under twenty-one, then to transfer the same unto such children of F. as should be living at E.'s death without issue. One of E.'s children attained twenty-one, but died in E.'s lifetime:—Held, that that child did not take a vested interest. *Tucker* v. *Harris*, 5 Sim. 538; 2 L. J., N. S., Ch., 18.

11. A testator directed his trustees to pay the interest of 2,500*l.* to his daughter for life for her separate use, and after her death

for the maintenance of all her children until they should attain twenty-one, and then the principal to be equally divided amongst her said children; and if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one:—Held, nevertheless, that the legacy vested in them. *Parker* v. *Golding*, 13 Sim. 418.

1. Gift by will to daughters for life, and afterwards to "pay and divide" amongst their issue (children) then living, at twenty-five, the whole interest being given in the meantime for their maintenance during minority:—Held, that the age of twenty-five referred to the period of distribution and not of vesting. *Tatham* v. *Vernon*, 29 Beav. 604; 7 Jur. N. S. 815; 9 W. R. 822; 4 L. T., N. S., 531.

2. A gift of personalty to trustees for A. for life, and after his death in trust for the children of A., "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, etc., with a gift over, in case no child of A. should live to attain twenty-five:—Held, to be vested, and not too remote. *Davies* v. *Fisher*, 5 Beav. 201; 11 L. J., N. S., Ch., 338; 6 Jur. 248.

3. Testator gave his real and residuary personal estate in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease during his, her, or their minority; and when the youngest should have attained twenty-five, to pay, assign, and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one then to pay and assign the share of such child to such his or their child or children; and the testator then expressed his further will to be, that his trustees should, immediately after his nephew's decease, convey, release, and assign all his freehold and leasehold estates unto the heir or heirs, who should be legally entitled thereto; and in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income, together with the whole residue, unto and equally between his next-of-kin. The daughter left five children living at her death, all of whom attained twenty-five:—Held, that the trust for them was not void for remoteness, but that they took vested interests in the trust property on their mother's death. *Milroy* v. *Milroy*, 14 Sim. 48; 13 L. J., N. S., Ch., 266; 8 Jur. 234.

4. A testator gave the residue of his real and personal property to trustees to sell and stand possessed of the proceeds to pay the dividends and interest to his wife for life, to be by her expended in or about the maintenance of herself and the maintenance and education of his children, and after the decease of his wife he gave the principal of the estate unto and amongst all his children equally, and to be paid to them as they should severally attain twenty-one, with benefit of survivorship amongst them. There were seven children; and two of them upon attaining twenty-one, while four of the others were yet infants, petitioned jointly with the mother that the amount of their shares might be paid to them for their advancement in the world:—Held, that the shares became vested upon the children attaining twenty-one, and though the Court would not usually sanction the payment of the shares, where the whole income was not ample for the maintenance of the children, yet such a course might be adopted here upon the undertaking of the two children to secure to the mother the dividends which would have accrued in respect of those sums. *Berry* v. *Bryant*, 31 L. J., Ch., 327; 2 Dr. & Sm. 1; 8 Jur., N. S., 69; 10 W. R. 212; 5 L. T., N. S., 818.

5. A testator directed that a residuary fund should be held in trust for the children of his two nieces, M. and E., "to be equally divided amongst the children, or the survivors of them, as they attain their majority; and in the meantime," that the interest of such ultimate residue should be "from time to time paid to my two nieces in proportion to the number of the children each may have at the time such interest becomes due and payable, for the use and education of such children":—Held, that the children took vested interests, defeasible in the event of their not attaining full age. *Vining* v. *Wright*, 3 L. T., N. S., 287.

6. A testator directed the interest of his residue to be applied to the maintenance and support of his son, and his son's wife and children, and after the death of the survivor of his son and wife, he directed such interest to be applied by his executors, in the support of and bringing up the child and children of his son during their minority or minorities, and as they severally attained twenty-one he gave and bequeathed the share of each to be paid to her or him, and in case only one of such children should live to attain twenty-one, then he gave the whole to such one child absolutely:—Held, that the gift to the children was contingent on their attaining twenty-one. *Tracey* v. *Butcher*, 24 Beav. 438.

7. A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that on their deaths the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulate for the benefit, of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal, with limitations over in the event of the death of any of them under that age:—Held, that the children of the sisters were not to take a vested interest till they attained twenty-two, and that all the gifts subsequent to the life estates given to the sisters were void, as being too remote. *Vandry* v. *Geddes*, 1 Russ. & M. 203; Taml. 361; 8 L. J., Ch., 63.

8. A testator bequeathed his residuary personal estate to trustees in trust for conversion and investment, and to pay the income to B. for his maintenance and until he should attain the age of thirty; and upon his attaining that age to pay or transfer the capital to him abso-

lutely. B. survived the testator and died under thirty:—Held, that B. took a vested interest. *Re Bunn, Isaacson* v. *Webster*, 16 L. R., Ch. D., 47; 29 W. R. 348.

1. A testator gave all his real estate to his mother for life, and after her death to his executors, upon trust to sell, and to stand possessed of the proceeds of such sale upon trust to pay to his natural daughter H. 500*l.* when she should attain twenty-five; and the testator "directed that the legacy should carry interest from the time of his mother's decease, which interest should be paid in and towards the maintenance, education, and support of his natural daughter until she should attain the age of twenty-five." He then gave two other legacies; and, subject as aforesaid, he directed that the trust moneys should be for the benefit of the persons mentioned in his will. He died in 1849, and his mother died in 1850. After the death of his mother the real estate was sold. H. died in 1857, at the age of twenty-three:—Held (reversing 4 Jur., N. S., 1094), that the legacy was vested in H., although she died under twenty-five. *Re Hart*, 4 Jur., N. S., 1264; 28 L. J., Ch., 7. S. C. *nom. Re Hart, Exp. Block*, 3 De G. & J. 195.

2. A testator devised his real and personal estate to trustees to sell and invest, and to pay the interest to his wife, to be applied in support of herself and her children until they should respectively attain twenty-one; and upon their severally attaining twenty-one, to divide the capital between his wife and children:—Held, that a child who died under twenty-one had attained a vested interest. *Bird* v. *Mayhury*, 33 Beav. 351.

3. A testator directed the proceeds of his real estate to be invested in stock upon trust to pay the dividends to his two daughters in equal shares during their natural lives, and "from and after their decease to go to their respective children for their support and maintenance until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age, in equal shares;" should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them:—Held, that the children took vested interests. The divesting clause was held to be void. *Hobbs* v. *Parsons*, 2 Sm. & G. 212; 2 W. R. 347.

4. A testator gave real estate in trust for his daughter E. for life, and on her death to sell and divide the produce among her children, with a direction to pay to the children on their attaining twenty-one, and a gift of the income in the meantime for maintenance; and in case E. should die without leaving any children, he gave the property over. He afterwards gave other real estate to his sons T. and M., and the survivor for life, remainder in trust to sell and divide among their children, in the same manner at the same ages, and the interest to be applied in the meantime in a similar manner in every respect, as in the case of the trust for E.'s children:—Held, that children, whether of E., T., or M., took vested interests at birth. *Shrimpton* v. *Shrimpton*, 11 W. R. 61; 31 Beav. 425.

5. Bequest of residue upon trust to apply such part as the trustees should think fit for maintenance of A. until twenty-one, then to pay her out of income 500*l.* a-year until twenty-five, and then A. for life, and after her death for all her children until they should respectively attain twenty-five, then for such children so attaining twenty-five, with a gift over. Similar bequests of leaseholds, except that it concluded with an absolute life interest in A.:—Held, that the children of A. took vested interests at birth, and that the gift over was void for remoteness. *Hardcastle* v. *Hardcastle*, 1 Hem. & M. 405; 7 L. T., N. S., 503; 1 N. R. 83.

6. A testator bequeathed leaseholds in trust for his wife for life, and, after her decease, to apply the rents for the maintenance and education of all his children living at his decease; and after all his children should attain twenty-one, upon trust to sell, and pay, and divide amongst all his children; and if but one, or but one surviving child, the whole to such child:—Held, that all the children who survived the father took vested interests. *Boulton* v. *Pilcher*, 29 Beav. 633; 7 Jur., N. S., 767; 9 W. R. 626.

7. B. by his will gave to wife certain property for life or during widowhood, with remainder to trustees upon trust to pay the rents to M. C. for life, and after her death for the maintenance of any children she might have until the youngest attained twenty-one, with remainder upon trust to sell, to distribute, and divide the proceeds among such children equally; and if but one, the whole to such one. But in case M. C. should die without issue, or such issue should not attain twenty-one, then the testator gave such property to his son W. B. in fee. Then followed gifts of other property charged in various ways, with a general gift of residuary realty and personalty, upon trust to lay out the same and pay the interest to M. C. for life, her receipt to be a good discharge; and after her decease, for the education of her children until the youngest attained twenty-one, when the moneys should be equally divided among them, and if but one, the whole to that one; but in case M. C. should die without issue, or if such issue should not attain twenty-one, the whole to go over to testator's son W. B. absolutely. On the question whether M. C.'s children, dying under twenty-one, took:—Held, that they did not. *Davenhill* v. *Davenhill*, 5 W. R. 18.

8. A father devised his property upon trust for his daughter for life, and after her death upon trust to sell and invest, and to pay the income "during the minorities of her children towards their respective maintenance," and declared that as and when his grandchildren should severally attain twenty-one years, or, if females, marry, his trustees should pay, assign, and transfer unto such grandchild so attaining twenty-one, or marrying, an equal share of the trust funds *per stirpes* according to the number of grandchildren living at the death of his daughter. She had five children, all of whom survived her, and two of whom died in infancy:—Held, that all her children took absolute vested interests, and that the legal personal representative of the two who died was entitled to their shares. *Perrott* v. *Davies*, 38 L. T., N. S., 52.

9. Gift to one for life, remainder to four persons named, with a proviso that the share

of any legatee in remainder, who should die in the lifetime of the tenant for life leaving lawful issue, should be "assigned and transferred to such issue respectively, in equal shares and proportions on their attaining twenty-one; and the dividends and proceeds in the meantime to be applied in or towards their maintenance and education":—Held, that the gift of income, being to an entire class, for maintenance only, was not sufficient to vest the legacy in the issue before twenty-one. *Re Ashmore*, 39 L. J., Ch., 202; 9 L. R., Eq., 99.

1. The bequest of a fund upon trust for a class or for individuals on their attaining the age of twenty-one years, with a gift of the income in the meantime as maintenance, is an immediately vested legacy, the time of payment only being postponed. *Re Holt*, 45 L. J., Ch., 208; 34 L. T. 120; 24 W. R. 339.

2. A gift "to be transferred" to the legatee on his attaining twenty-one, with provisions for maintenance out of the income meanwhile, and a gift over on death under twenty-one, such gift being afterwards referred to by the testator as a contingent gift, is vested before twenty-one, so as to be forfeitable on conviction for felony. *Re Bateman*, 42 L. J., Ch., 553; 15 L. R., Eq., 355; 21 W. R. 435; 28 L. T., N. S., 395.

6. Fixed Sum given for Maintenance.

3. Direction to executors to apply 25*l.* per annum for the maintenance of testator's natural daughter, till twenty-one or marriage, which should first happen, when his executors were thereby required to pay to her 500*l.* She died under twenty-one, and unmarried:—Held, that the legacy failed. *Watson* v. *Hayes*, 5 Myl. & C. 125; 9 L. J., N. S., Ch., 49; 4 Jur. 186. Reversing on this point, 9 Sim. 500; 8 L. J., N. S., Ch., 169; 3 Jur. 143.

4. A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters, J. and E., to their separate use, with a direction to pay to, and apply for the benefit of A., the son of E., 200*l.* annually, when he attained the age of twenty-one years; and before that period, such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of the principal given to E, and from which the interest is to arise to my grandson on 4,000*l.*, which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the daughter, her children, or grandchildren. A. having attained twenty-one, and died in his mother's lifetime:—Held, that the annuities ceased upon his death, that the 4,000*l.* never vested in him. *Livesey* v. *Livesey*, 3 Russ. 287. But on appeal, held that the 4,000*l.* did vest. S. C. *id.* 542. And see S. C. 6 L. J., Ch., 138; 7 L. J., Ch., 120.

5. Bequests of "120*l.* per annum, (that is to say) the interest of 4,000*l.* of 3 per cent. consols" to A., and direction that interest, as it becomes due, be added to principal, till A. attains twenty-one, except 20*l.* per annum for clothes, gives a vested interest. *Stretch* v. *Watkins*, 1 Madd. 253.

6. Legacy payable at twenty-one, with a certain allowance in the meantime; the legatee dies before twenty-one; his administrator not entitled to the legacy till such time as he would have attained twenty-one. *Roden* v. *Smith*, Ambl. 588.

See also next Subdivision.

7. Part of Income given for Maintenance (Outstanding Charges).

7. A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate to trustees, in trust, to pay the interest of one moiety to his daughter for her separate use during her life and after her death to pay 100*l.* a-year to her husband during his life, and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively, and when they attained their respective ages of twenty-one, upon trust, to pay the principal to them in equal shares; the mother survived the testator, and left two children, who died under twenty-one. The moiety of the residue vested in these children. *Jones* v. *Mackilwain*, 1 Russ. 220.

8. Devise charged with debts to trustees and their heirs, in trust to receive, etc., the rents, etc., and thereout to support and educate the devisor's son, till the age of twenty-one, and then to him:—Held, not a use executed in son before twenty-one. *Bailey* v. *Ekins*, 7 Ves. 322.

9. A testator gave a portion of his personal property to trustees, to invest the same in the securities therein mentioned, and pay out of the proceeds an annuity of 5*l.* to P., and apply the residue of the interest towards the maintenance and education of C. until twenty-one; and on his attaining that age, to transfer the principal and the trust moneys charged with the annuity of 5*l.* unto C. absolutely. But if C. should die before twenty-one, and during the life of P., then the trustees were to pay P. for life an annuity of 10*l.* in lieu of the 5*l.*, and to pay the remainder of the interest during the life of P., as well as the principal after her death, to a third person absolutely. P., the annuitant, died before C., but C. died a minor:—Held, that the gift to C. was an absolute vested interest in him, notwithstanding he died under twenty-one; the estate was not divested, since the precise contingency of C. dying under twenty-one, and during the life of P., never happened; that consequently the representatives of C. were entitled to the property. *Potts* v. *Atherton*, 28 L. J., Ch., 486.

8. Power or Discretion to Apply Whole or Part of Income for Maintenance.

10. Testator devised to trustees, in trust for N. and the heirs of his body, and to pay such

sums out of rents for maintenance as B. should appoint: by codicil, he directs trustees, during N.'s minority, to pay rents to plaintiff, so much as she pleases for his maintenance, and the residue to her own use: by another codicil, he directs trustees shall not settle the estate on N. and the heirs of his body, till twenty-six, and till then such maintenance as trustees and plaintiff shall think fit:—Held, that rents vested in N. at twenty-one, and the time of receiving only prolonged till twenty-six; and trustees decreed to account for rents, etc., from N.'s age of twenty-one to twenty-six. *Smith* v. *Newport*, 2 Atk. 344.

1. Bequest to trustees, upon trust to pay to each of the testator's children who should be living at his death, as and when they attained twenty-five, the sum of 3,000*l.* absolutely, with a power for the trustees to apply all or any part of the income of the shares of the children for their maintenance or education till twenty-five:—Held, to give the children vested interests at the testator's death. *Eccles* v. *Birkett*, 4 De G. & Sm. 105; 14 Jur. 800; 19 L. J., Ch., 280.

2. Bequest to A. for life, with remainder to her children who should attain twenty-five, with a clause for maintenance during minority and for accumulation of surplus income:—Held, that the gift to the children was not void for remoteness. *Bute* (*Marquis*) v. *Harman*, 9 Beav. 320.

The marginal note of *Bute* (*Marquis*) v. *Harman*, 9 Beav. 320, is incorrect, the bequest having been held void for remoteness. *Ib.* See 16 Beav. 166.

3. A testator bequeathed the residue of his property to trustees to assign and transfer the same to and amongst all and every such child or children of M. as should be living at his (testator's) decease, to be equally divided among them if more than one when they should attain the age of twenty-one; and if there should be but one who should attain the age of twenty-one, then the whole to such child absolutely. Power of maintenance during minority was given to the trustees; and during the suspense of absolute vesting the residue of the annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal:—Held, that no child of M. who did not attain twenty-one could take a vested interest. *Merry* v. *Hill*, 8 L. R., Eq., 619.

4. Testator gave to trustees a sum of money upon trust to pay the income unto A. B. and his wife during their joint lives, and to the survivor for life, and after the decease of the survivor to apply the income thereof, or of so much thereof as they should think proper, in the maintenance, education, and bringing up of their child or children during their minorities, and upon their attainment of the age of twenty-one years to pay and divide the principal sum, with the accumulations thereof, unto and equally amongst such child or children, and in case there should be no child, unto A. B., his executors, etc. Two out of four children, the issue of the marriage, died infants without having been married, and one child attained the age of twenty-one years, and died intestate without having been married:—Held, that the shares of the children did not vest till they attained the age of twenty-one years, and that the surviving child, who attained the age of twenty-one years and married, was entitled to the deceased children's shares. *Re Grimshaw's Trusts*, 11 L. R., Ch. D., 406; 48 L. J., Ch., 399; 27 W. R. 544.

5. A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson for his life: and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over:—Held, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance; that the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulation during the minority. *Re Rouse's Estate*, 9 Hare 649.

6. Gift to trustees upon trust to permit A. to take the rents and profits for life, and after his decease in trust for all and every the children or child of A. who should live to attain twenty-five, but not otherwise: with a direction to the trustees to apply the annual income of the trust estates and premises for the use and benefit of the children of A. until they should severally attain the age of twenty-five:—Held, void for remoteness. *Cam* v. *Salmon*, 5 W. R. 31.

7. Gift of residue of real and personal estate to A. for life, and after her decease, in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply the "annual income or fund" for their maintenance or "benefit" during their "minority":—Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

8. Where a testator gave residue to his four children, with a gift over to the survivors or survivor, in the event of any of them dying under twenty-five, and appointed guardians "during their respective minorities," and gave a power to apply accumulations of income of each child's share, "during his minority," in maintenance, etc.:—Held, that the word "minority" was used in its ordinary sense, and that each child was absolutely entitled to the income of his share, between the ages of twenty-one and twenty-five years. *Fraser* v. *Fraser*, 1 N. R. 430.

9. A testator directed his trustees to raise 15,000*l.*, and after the determination of certain prior life interests given to T. and his widow to divide and transfer one-fifth of the fund to and amongst the children of T. equally as and when they should attain the age of twenty-five, applying from time to time the income of the

presumptive share of each child, or so much as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid; but if T. should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one, then to pay and transfer the fifth part to the other persons therein referred to:—Held, that the children of T. took vested interests, and consequently that the gift to them was not void for remoteness. *Fox* v. *Fox*, 19 L. R., Eq., 286; 23 W. R. 314.

1. A testatrix gave her residuary real and personal estate to trustees in trust for sale and conversion and investment of the proceeds, and to hold the investments upon trust to pay the income thereof, "or such part thereof as her said trustees" should "from time to time deem expedient," in or towards the maintenance and education of her children until they should attain their respective ages of twenty-one years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay and transfer the capital to her said children in equal shares, and to settle each daughter's "share whether original or accruing"; and the testatrix empowered her trustees to dispose of any competent part, not exceeding one-half, of "the presumptive share of any of her children," for their advancement in life. The testatrix left three children, of whom two attained twenty-one, and the third died an infant:—Held, that the infant did not take a vested interest in his one-third share of the residuary estate of the testatrix. *Fox* v. *Fox* (19 L. R., Eq., 286) distinguished. *Re Parker*, *Barker* v. *Barker*, 16 L. R., Ch. D., 44.

2. A testator directed his trustees to hold a trust fund upon trust for "all his children or any his child who being sons or a son should attain twenty-five, or being daughters or a daughter should attain twenty-one or marry, and if more than one, in equal shares, and to be divided and paid on the youngest of his said children attaining twenty-one;" and he empowered his trustees to apply "the whole or such part as they should think fit of the annual income to which any child should be entitled in expectancy towards the maintenance or education of such child." The testator had only two children, the elder a son, and the younger a daughter. Upon petition by the son, presented after the daughter had attained twenty-one, but before he had himself attained twenty-five:—Held, that his interest under the will was not vested, but contingent on his attaining twenty-five. *Fox* v. *Fox* (19 L. R., Eq., 286) distinguished. *Dewar* v. *Brooke* or *Brock*, 14 L. R., Ch. D., 529; 49 L. J., Ch., 374; 28 W. R. 613.

3. Where a testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, and to the exclusion of any one or more of them, his trustees should think fit and proper, for the maintenance and education, or otherwise for the advancement of "my nephew A. W. and my nieces, the son and daughters of my late sister A.," and after the decease of his mother to pay an annuity, which he had given her, "for the benefit of my nephew and nieces," in the same manner, and for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, and provided that, "in case my said nephew, or any or either of my said nieces," should marry under twenty-one, and die leaving issue, his trustees should make advances out of income for the benefit of such issue "as they may deem expedient or think fit," and directed that, immediately after the decease of his mother, and upon his nephew and nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, and provided that, in the event of his nephew or either of his nieces dying under twenty-one, married and leaving issue, the issue should take their parent's share.—Held, that the gift to the nephew and nieces was made to them nominatim, and not as a class. *Re Barnshaw*, 15 W. R. 378.

Held, that the nephew and nieces who died under twenty-one, did not take vested interests. *Ib.*

4. A testator gave the residue of his property to A. for life, with remainder to her children as she should appoint, and subject thereto, in trust for all the children of A. who should attain twenty-three or marry under; the will contained provisoes giving a discretionary power to the trustees to apply all or any part of the income of any share for maintenance and education during minority, and directing that the surplus income should be accumulated, such accumulation to be added to the principal of the share whence the same should have arisen, with a further discretionary power to apply the accumulated fund or any part thereof also for maintenance and education:—Held, that the gift to the children of A., in default of appointment, was void for remoteness. *Bowyer* v. *West*, 19 W. R. 598; 24 L. T., N. S., 414.

5. A testator gave the residue of his property to trustees to pay the income of a moiety to one of his daughters for life, and after her death as to such moiety, and the income thenceforth to become due for the same, for all her children who should be alive at her death, when and as they should attain twenty-one, in equal shares, with powers of maintenance and advancement:—Held, that the shares vested at the testator's death, and accordingly that the share of a child who was alive at his death, but died under twenty-one, was payable to her representative. *Re Downe*, 23 L. T., N. S., 588.

9. Power to make Advances.

6. Held, that a bequest of personal estate, to be equally divided among the children of the testator, as a class, "on their attaining twenty-one," with a power of advancement to them "out of their respective portions," carried an immediate vested interest. *Vivian* v. *Mills*, 1 Beav. 315; 8 L. J., N. S., Ch., 229.

7. Bequest of residuary estate upon trust for testator's wife during her widowhood, and after her decease or second marriage, in trust for all and every his child and children who should be living at his decease as tenants in common, to become vested in them respectively after the decease or second marriage of his

wife, when and as they should severally attain twenty-one, with interest on their respective shares for maintenance and education in the meantime, and with equal benefit of survivorship in case of the death of any of them under age and without issue, with gift over in case of the death of any of the testator's children in his lifetime, or during the widowhood of his wife leaving issue, who should survive the decease or second marriage of testator's wife, to such issue of their parent's share. And the testator empowered his wife to advance to all or any of his children such sums as she might think advisable for their advancement in life, and to take their promissory note or receipt for the same; and declared that such advances should be received by his children, and accounted for to his executors as part of their share of the estate, to which they would be entitled at the decease or second marriage of his wife, such advances not to exceed one-half of what they would at the time of such advances be considered as likely to be entitled to at the death or second marriage of testator's wife:—Held, that having regard to the proviso for advancement, and to the circumstance that any other decision would have resulted in intestacy as to the share in question, that one of five children of the testator who attained twenty-one and died leaving issue, which died during the widowhood of the testator's wife, took a vested interest in one-fifth of the estate, which passed on his death to his personal representatives. *Walker* v. *Simpson*, 1 Kay & J. 713; 1 Jur., N. S., 675.

1. A testator, by his will, gave all his real and personal estate to trustees, upon trust, to invest the same, and thereout to pay an annuity, and subject thereto to pay to each of his children 3,000*l.* as and when they should respectively attain the age of twenty-five years; and he declared that it should be lawful for his trustees to apply all or any part of the income of each share of his said children for their maintenance and benefit until he or she should attain that age, and also to apply any part, not exceeding 200*l*, for his or her advancement:—Held, that the legacies vested in the children at the death of the testator. *Eccles* v. *Birkett*, 19 L. J., Ch., 280; 14 Jur. 800; 4 De G. & Sm. 105.

2. Bequest to A. for life, with remainder to such of his children as should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance and a discretionary power of advancement.—Held, void for remoteness. *Southern* v. *Wollaston*, 16 Beav. 166.

3. A testator directed his executors to invest his personal estate, and pay the dividends of one-third part to his daughter for life for the maintenance of herself and what issue she should have; and after her death his executors were to pay, apply, and divide one-third of the principal moneys unto and amongst all and every the children of his said daughter "when and as" they respectively attained the age of twenty-six years, with benefit of survivorship among them; and in case either of such children, at the time of his daughter's decease, should be under twenty-one, then the executors were to invest the principal share of such child, and during minority apply the interest for its maintenance; they were also empowered to apply any part of such child's share for advancement:—Held, that a direction to pay to an indefinite class "when and as" they attained a certain age, did not prevent any from becoming entitled, and that the intention of the testator, to be collected from other parts of the will, was to give the children of his son and daughter immediate vested interests. *Harrison* v. *Grimwood*, 12 Beav. 192; 18 L J., N. S., Ch., 485; 3 Jur. 864.

4. A. bequeathed his property to his four children in equal proportions, but the capital not to be divided until all his children should have become settled in life, except so much as should be required for their equipment in life or in professions, or until they severally became thirty years old, when the capital was to be placed at their own disposal respectively:—Held, that the children, on their attaining twenty-one, took vested interests, and were entitled to be paid their respective shares. *Re Jacobs*, 7 Jur., N. S., 302; 9 W. R. 474; 4 L. T., N. S., 104.

II. Legacies Charged on Real Estate.

I. GENERAL RULE. NOT VESTED.

5. Charge upon land payable at a futur eday. not vested till the time of payment. *Phipps* v. *Mulgrave* (*Lord*), 3 Ves. 614.

6. Legacy charged on real estate and payable at a future day sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled. *Pearce* v. *Loman*, 3 Ves. 135.

7. A legacy payable out of land at a future day, although given with interest in the meantime, shall not be raised if the legatee die before the time of payment. *Gawler* v. *Standerwick*, 2 Cox 15.

8. A legacy charged on land to be purchased with the residue of a personal estate will lapse by the death of the legatee before the day of payment, as if charged upon lands actually purchased. *Harrison* v. *Naylor*, 2 Cox 248; 3 Bro. C. C. 108.

9. One devises 100*l.* to his daughter for her portion, charged upon a real estate, and payable at twenty-one. Daughter dies before twenty-one. The portion shall sink in the land; otherwise if no time had been limited for the

payment of the portion, for in that case it goes to the executor of the daughter. No difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable. In either case it sinks into the lands. *Smith* v. *Smith*, 2 Vern. 92.

1. A., having entailed his land on his son, subject to a mortgage, by will devises his leasehold and personal estate to pay his debts and legacies, and directs, if his personal estate is applied to pay the mortgage, it should be kept on foot to make good his daughter's portion, and gives her 3,000*l.* to be paid at twenty-one or marriage, if married with consent, if not but 1,000*l.* She died at six years of age; the portion shall not be raised for the benefit of her administrator. *Yates* v. *Phettiplace*, 2 Vern. 416. S. C. *nom. Yate* v. *Fettiplace*, Pre. Ch. 140.

2. A devises lands to B., his son and his heir, and declared that out of the lands he shall pay 200*l.* to his daughter at her age of twenty-one. She marries and dies under age; legacy not vested. *Carter* v. *Bletsoe*, 2 Vern. 617; Pre. Ch. 267; Gilb. 11.

3. Lands devised in fee in trust to raise 300*l.* as portion to be paid at twenty-one or marriage, lapses, by death of legatee, before those times. *Langley* v. *Oates*, 2 Eq. Abr. 541.

4. Whether portion charged on land be given with or without interest by deed or by will, if the person die before it becomes payable it shall sink in the estate. *Boycot* v. *Cotton*, 1 Atk. 555.

5. Testator, being entitled to the reversion after the death of his wife, devised to A. in fee on condition that he paid to E. 1,000*l.* within six months after the reversion came into possession. He died before the reversion came into possession:—Held, that her representative was not entitled. *Hall* v. *Terry*, 1 Atk. 502.

Where money is given to be paid out of real estate at a future time, if the person die before the time, it shall sink into the estate. The same as to personal estate, where the time of payment is annexed to the legacy. *Id.* 503.

Whether a sum of money be given as a portion, or a legacy, if charged upon land, and the party die before the time, it cannot be raised. *Quære. Id.* 504.

A trust upon land for raising and paying a sum of money, within six years after testator's death, to his second son, who died within the time, construed to be for maintenance only, and not transmissible. *Ib.*

6. A testator directed a sum of 5,000*l.* to be raised for each of his children, and the rest of his estate to accumulate till 1848, when he directed 3,000*l.* to be raised and paid to each of his children then living, or to their issue if dead, etc. And he declared that if any child should die, etc., before his share became payable, his share should be equally divided among the survivors:—Held, on the construction of the whole will, that no sum of 3,000*l.* was to be raised in respect of the share of a deceased child. *Little* v. *Daniel*, 12 Jur. 167.

7. A. gave a legacy of 400*l.*, charged upon his real and personal estate, to be divided upon the death of his granddaughter, equally between her children, if more than one, or if but one, then the whole to that child, the same to be paid to such children at the age of twenty-one; and if any child died before attaining twenty-one, then his share to go to the survivors and to the executor or administrators of such as should have lived to attain twenty-one; and the testator declared that the shares of such of the children as, upon the death of his granddaughter, should be under twenty-one, should bear an interest at the rate of 5*l.* per cent. per annum from her decease, such interest to be paid towards their maintenance until their respective shares should become payable. No child lived to attain twenty-one, and the personalty was insufficient:—Held, that the legacy could not be raised out of the real estate, which had become freed from the charge. *Parker* v. *Hodgson*, 7 Jur., N. S., 750; 30 L. J., Ch., 590; 9 W. R. 607; 4 L. T., N. S., 762; 1 Dr. & Sm. 568.

8. A testator, in pursuance of a power, appointed by his will the sum of 5,000*l.* amongst his five daughters, in equal shares, and, reciting that he was possessed of certain lands for a term of twenty-one years, with a *toties quoties* covenant for renewal, bequeathed the same, together with the sum of 1,000*l.*, to trustees in trust, to pay the interest, proceeds, rents, and profits to his wife for life, and from and after her death or in her lifetime, if she should so direct, to raise by sale, mortgage, or otherwise, such a sum of money as, together with the provision thereby made for them, should make up to each of his five daughters on marriage, if in the lifetime of his wife, with her consent, and, if unmarried at the time of her death, then upon their attaining the age of twenty-one or being married, the sum of 2,000*l.*; and until payment of the additional provision thus made for his daughters, he directed the trustees, on the death of his wife, to pay to each daughter, out of the rents of the land and the interest of the 1,000*l.*, so much as together with the interest of the 1,000*l.* would produce 120*l.* a year; and after the death of the wife and payment of the additional portions, to assign over the residue to his son. The wife did not direct the additional provision to be raised during her life:—Held, that a daughter who attained twenty-one, but died in the lifetime of the wife, did not take a vested interest in the additional provision. *Re Brabazon*, 13 Ir. Eq. R. 156.

9. A testator gave his daughter a life annuity of 50*l.*, and from and immediately after her death he bequeathed 1,000*l.* unto her children, share and share alike, payable twelve months after the daughter's death. This was payable exclusively out of the testator's real estate:—Held, that those children alone of the daughter who survived her participated in the 1,000*l.* *Re Cartledge*, 29 Beav. 583.

10. A testator devised real estate to A. in fee, charged with an annuity to B. for life, and directed that after the death of B. the estate should be charged with the payment of 100*l.* apiece to X., Y., and Z., and that the same should be paid to them respectively within six calendar months after the death of B., or such of them as should be then living. X. died in the lifetime of B.:—Held, that the legacy to X. had not vested, and was not payable to his representatives. *Goodman* v. *Drury*, 21 L. J., Ch., 680.

1. A father, by will, gave to each of his younger sons 1,000*l.*, "which I charge on my estate at A. hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled on F. for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male. The eldest son died before F., and without coming into possession of the M. estate:—Held, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the M. estate; and that as that event had not happened they failed and sank into the residue. *Taylor* v. *Lambert*, 2 L. R., Ch. D., 177; 45 L. J., Ch., 418; 24 W. R. 691; 34 L. T., N. S., 567.

II. CONTRARY INTENTION. WHEN VESTED.

2. The rule, that future legacies payable out of real estate do not vest till the time of payment, will be made to give way when an opposite intention can be clearly implied from the will. *Brown* v. *Wooler*, 2 Y. & Coll. C. C. 134.

3. Devise to testator's wife for life, and from and after her decease to trustee on trust to sell, and, among other bequests, to lay out 500*l.* in annuity for life of a son:—Held, a vested interest in son, if surviving the testator. *Bayley* v. *Bishop*, 9 Ves. 6.

4. Testator devised real estates to A. for life, remainder to B. in fee. And he gave a legacy to C. to be paid to her by B. within twelve months after A.'s death; and he charged his estate with the legacy, and appointed A. his executrix; C. died in A.'s lifetime:—Held, that the legacy did not lapse. *Pool* v. *Terry*, 4 Sim. 294.

5. A. devised lands to his son B., but if he should die without issue male of his body then living, or which might be afterwards born, that then his daughter M. should receive at her age of twenty-one, or day of marriage, which should first happen, 3,500*l.* over and above 2,500*l.* before given her, and in case the contingency of his said son's dying without issue male should not happen before his daughter's said age, or day of marriage, that then she should receive the said 3,500*l.* whenever such contingency might happen; and the testator charged this legacy or portion on his real estate. M. having attained twenty-one, married, and died in the lifetime of her brother B., who afterwards died without issue male:—Held, that the husband and administrator of M. was entitled to this legacy, for it was vested in her at the time of the marriage, and that it was a subsisting charge on the testator's estate. *Wither* v. *King*, 3 Bro. P. C. 135. Affirming S. C. *nom. King* v. *Withers*, Pre. Ch. 348; Gilb. 26; 3 P. W. 414; Ca. *temp.* Talb. 117.

6. Bequest to two daughters, 1,000*l.* each, to be raised and paid to them immediately after decease of testator's wife, out of rents, etc., of his manors, etc., or by sale or mortgage, with interest after the rate of 6 per cent. from the decease of his wife until the sums should be duly paid to his daughters or their respective executors, administrators, or assigns, and in case either of his said daughters died before him, then the survivor, her executors, etc., were to receive all the sums before devised out of his said lands, to be raised in a manner thereinbefore appointed, and the part of the daughter so dying should not cease or sink into the estate for the benefit of his heir, but should remain and be raised for the benefit of his surviving daughter. Both daughters survived testator, and one of them died before her mother, and the representative, after the mother's death, applied to have her legacy raised:—Held, that it should be raised. *Lowther* v. *Condon*, 2 Atk. 127; Barnard. 329.

Where a legacy upon lands depends on two contingencies, though one of them does not happen, the legacy shall be raised. *Ib.*

Where the postponing the time of payment of a legacy has been owing to the circumstances of the testator's estate, and not to the circumstances of the legatees, that is not so strong a case for a legacy's sinking into the estate as where the postponing the payment of it has appeared to have arisen from circumstances on the part of the legatee. *Ib.*

An inference may be drawn in the plaintiff's favour from the direction that the legacy shall be paid to the daughters or their respective executors, administrators, and assigns. *Ib.*

The clause on which Lord Hardwicke principally founded his opinion was the direction that, if one daughter died before him, her part should not sink into the estate. *Ib.*

7. Devise of freehold houses to A. for life, remainder to B., he paying thereout, to C. and D., legacies three months after the death of his wife; C. and D. died leaving the wife:—Held, raisable for their representatives. *Jeale* v. *Titchener*, Ambl. 703.

8. Devise to A. of house, he paying thereout 20*l.* to B, with interest after three months from death, is a charge, and vested legacy, and transmissible. *Seal* v. *Tichener*, Dick. 444.

9. As to administration of interests absolutely vested in deceased party, see *Hutchins* v *Foy*, 2 Com. 716.

10. One charges his lands with 6,000*l.* for the child of which his wife was *privement enciente*, if it proved a daughter, with a clause of entry for non-payment. A daughter is born and dies; the 6,000*l.* shall go to her administrator. *Norfolk* v. *Gifford*, 2 Vern. 208.

11. Lands devised to be sold for payment of portions; one of the children dies after the portion becomes due, and before the land sold; the administrator is entitled to the money. *Bartholomew* v. *Meredith*, 1 Vern. 276.

12. A., by will, gives 500*l.* to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of his real; and if not raised by that time, the executors to stand seised, and take the rents till the 500*l.* was raised, and after payment gives the land to his son; the daughter marries at eighteen, and dies under twenty-one; the husband takes administration:—Decreed, the portion to be raised, and that by a sale, though the land, by reason of the incumbrances, would produce little more than the 500*l.* *Jackson* v. *Farrand*, 2 Vern. 424; Pre. Ch. 109.

13. One by his will devises that all his debts

and legacies shall be paid by his executor out of his personal estate, if that shall be sufficient, but if not, then that his executor, within twelve months after his death, shall sell or mortgage so much of his real estate as shall be sufficient for that purpose, and *(inter alia)* gives a legacy of 1,000*l.* to S., who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land, for the words "within twelve months" denote the ultimate time, but the executors may pay the legacy sooner. *Wilson* v. *Spencer*, 3 P. W. 172.

1. Devise of lands to trustees in fee in trust, within six years after the testator's death, to raise and pay 1,500*l.* to his daughter A. A. dies within the six years; the 1,500*l.* shall go to her administrator, there being no certain time limited when, but only the ultimate time within which, it shall be raised. *Cowper* v. *Scott*, 3 P. W. 119.

2. One having two sons, G. and C., and a daughter, devises several estates to his two sons and their issue, with cross remainders, and declared, that if either of them should die without issue living at his death, so that his estate should come to his brother, the surviving brother should pay 2,000*l.* to his daughter within one year after his brother's death, and charged the estate with it; G. died leaving two sons; afterwards C. died without issue:—Held, that the 2,000*l.* should be raised. *Tollett* v. *Tollett*, Ambl. 177.

3. A. devises a college lease for twenty years to wife for life, remainder to his son, she paying 10*l.* per annum to his son during her life; the son dies in the lifetime of his mother; the rent continues during the life of the wife, and shall go to the executor of the son, and the wife is compellable to pay her proportion for a renewal of the lease. *Lock* v. *Lock*, 2 Vern. 666.

4. A testator who was seised of a freehold estate, and was also possessed of a term for years with a *toties quoties* covenant for renewal, bequeathed to his daughter a legacy of 600*l.*, charged both upon the freehold estate and the term for years, and directed same to be paid to her on her attaining the age of twenty-one years or day of marriage, whichever should first happen, with interest from the day of his death:—Held, that this legacy, so far as it was charged upon the term for years, was vested, and that, consequently, upon the death of the legatee intestate before she attained the age of twenty-one years, and without having been married, it became divisible in equal shares among her next of kin. *Re Hudsons*, Dr. 6.

5. Devise of estate to second son, J., after the decease or marriage of the wife, charged with 100*l.* to testator's daughter M. M. died, living the wife; but held the legacy vested in M. and transmissible. *Godwin* v. *Munday*, 1 Bro. C. C. 191; Dick. 551.

6. Devise of lands to wife for life, and after her death to the son, he paying out of such lands 600*l.* to testator's daughters, within six months after death of wife; with power of entry in case of non-payment: the daughters died in the life of testator's wife:—Held their legacies vested, and on his death to be raised for their representatives. *Manning* v. *Herbert*, Ambl. 575.

7. A legacy out of real estate, to be paid within twelve months after the death of A. The legatee survives A. but one month; it does not lapse, but goes to the representative. *Hodgson* v. *Rawson*, 1 Ves. 44.

8. Legacy given charged on real estate, to vest immediately on testator's death, but to be paid at twenty-one, vests, though legatee dies before twenty-one. *Watkins* v. *Cheek*, 2 Sim. & S. 199.

9. Testator devised lands to wife for life, remainder to S., till his grandson attained twenty-three, and when he attained twenty-three, testator devised to him in fee, on condition that he paid H. 60*l.* within two years after he attained twenty-three, and testator gave H. power of entry. H. lived till the grandson attained twenty-three, but died within the two years after he attained that age:—Held, that the 60*l.* should be raised and paid to the representative of H. *Emes* v. *Hancock*, 2 Atk. 507.

10. R., by will, gave an estate to his wife for life, and if there should be no issue between them, to defendant, charged with two sums to be paid to M. and W. Afterwards, M. being dead, by codicil he ordered the legacy to be paid to W., and R. died, living the wife; the charge was vested, and transmissible to his representatives. *Dawson* v. *Killet*, 1 Bro. C. C. 119.

11. Devise of lands to his sister, paying 100*l.* a year to his wife for life, and several legacies within twelve months after the death of his wife; several of the legatees died in the lifetime of the wife, and held, their representatives were entitled. *Tunstall* v. *Brachen*, Ambl. 169; 1 Bro C. C. 124. n.

12. A testator gave legacies of 50*l.* each to six grandchildren, when the youngest grandchild should come of age, payable from the produce of a real estate, then to be sold; and if either of those children should not live to come of age, nor have an heir born in wedlock, he directed the 50*l.* to be equally divided among the surviving children. E. M., one of the six grandchildren, married during her minority, but afterwards attained twenty-one, and before the youngest grandchild attained that age she died, leaving a child:—Held, that her legacy of 50*l.* was a vested interest, and belonged to her personal representatives. *Murkin* v. *Phillipson*, 3 Myl. & K. 257; 3 L. J., N. S., Ch., 148.

13. A legacy was charged on real estate, and payable when the brother and sister of the legatee had attained twenty-one, and the rents of the estate were up to that time given for their maintenance:—Held, that the legacy did not lapse by the death of the legatee before the time of payment, being postponed for the convenience of the estate only. *Goulbourn* v. *Brooks*, 2 Y. & Coll. 539; 7 L. J., N. S., Exch. Eq., 33; 1 Jur. 354.

14. A testator, by his will, gives 2,000*l.* to a daughter to be secured on land until paid as thereinafter mentioned, and charges certain estates with the payment. In a subsequent passage he directs the daughter to let her legacy remain in the hands of the executors at interest till she should happen to marry, and then, and in such case, the legacy should be paid by certain instalments by the executors, they contributing to the payment equally.

He then devises the property charged, subject to the payment of the legacy, to three of his sons, whom he appoints his residuary legatees and executors, they paying his debts, funeral expenses, the legacy above mentioned, and certain annuities:—Held, that the bequest was a vested legacy of 2,000*l.*, and not merely a gift of the interest, while the daughter remained single, with a contingent gift of the principal in the event of marriage. *Hudson* v. *Forster*, 2 M. D. & De G. 177. S. C. *nom. Re Forster*, 10 L. J., N. S., Ch., 340. Affirming S. C. *nom. Exp & Re Forster*, 1 M. D. & De G. 418; 10 L. J., N. S., Bky., 24; 5 Jur. 176.

1. Legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment, but, upon the death of the legatee or portioner before that time, lapse or sink into the inheritance. *Remnant* v. *Hood*, 6 Jur., N. S., 1173; 30 L. J., Ch., 71; 3 L. T., N. S., 485; 2 De G. F. & J. 396.

But if the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the convenience of the estate, the legacy or portion will vest, notwithstanding the legatee or portioner dies before the time of payment. *Ib.*

Where, therefore, a devised estate was charged under a settlement with portions for younger children, to be raised and levied within three months after the death of the tenant for life, and to be forthwith paid and payable:—Held (affirming 27 Beav. 74; 5 Jur., N. S., 1090), that a younger child of the settlor, who attained twenty-one and died in his lifetime, took a vested interest in her portion. *Ib.*

2. A testator gave an annuity, charged on land, to A. for her life, and directed the annuity, at her decease, "to go to the child of which she was then pregnant if it be alive, to it and its heirs for ever if it attaineth the age of twenty-one, if not, the money to be divided" amongst a class. The child was born alive, and attained the age of twenty-one, but died before A.:—Held, that the annuity vested absolutely in the child at twenty-one. *Baines* v. *Ibbotson*, 15 W. R. 56.

3. By a will made in 1857, R., after giving all his lands, stock, and cattle to his son M., bequeathed his farm at F. to his (the testator's) daughter G., "and also the sum of 1,000*l.* to be charged on my estate, and to lie out at 4*l.* per cent. for ten years. In the event of her decease, the said sum to go to her children, share and share alike." G. died in 1867, within ten years after R.:—Held, that the legacy of 1,000*l.* was indefeasibly vested in G., the time of payment only being postponed in ease of the estate, and that the words of contingency pointed to her death in the testator's lifetime. *Re Neary's Estate*, 7 L. R., Ir., 311.

III. LEGACIES CHARGED ON A MIXED FUND.

4. A. devised all his lands to B. and C., and their heirs, in trust to sell part of his lands, and pay his debts, as far as the produce would go; and as to the rest in trust to receive the rents and make leases for ninety-nine years, determinable on three lives, and therewith to pay his debts and legacies, then to the use of D.'s wife for life, remainder to her issue; and he made the trustees executors; he likewise gave 500*l.* to his nephew E., to be paid at twenty-one or marriage, who died under twenty-one. The lands directed to be sold were insufficient to pay the debts, and testator's personal estate was only 700*l.*—Held, the nephew's legacy being charged on real as well as personal estate, cannot be raised, as he did not live to attain twenty-one. *Prowse* v. *Abingdon*, 1 Atk. 482.

The resolutions that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, are so strong that they are not to be shaken. *Id.* 415.

Whether charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations or others, if the party die before the day of payment, it cannot be raised. The reason is, that the Court of Equity governs itself by the rules of the common law, for then if A. covenant to pay money to B. at a future day, and B. die before the day, the money is not due to his representative. *Ib.*

5. A., by will, devised all her real and personal estate to B., to pay her legacies thereout, and then she gave to C. 2,000*l.*, in trust for his daughter D., to be paid within eighteen months after her decease, which he should place out at interest, and pay the same, with the produce thereof, to his daughter, for her own use at eighteen or marriage. C. died in the lifetime of testatrix, and his daughter died six months after. This legacy is a charge on both funds, and as the Court always goes as far as possible to hinder the raising of portions out of land for the benefit of representatives, it was decreed that this portion should not be raised, though if D. had survived the eighteen months, her representative would have been entitled, notwithstanding C. was dead. So, if she had died under eighteen or unmarried, provided she outlived the eighteen months. If a legacy is payable or given at a certain time out of a personal estate with interest in the meantime, it is a vested legacy, but if out of a real estate, and the party dies before the time, it sinks into the inheritance; and the construction is the same if charged on a mixed fund, where it is given or payable at a certain time. *Van* v. *Clark*, 1 Atk. 510.

Where testator gave 300*l.* to trustee in trust, to be paid within three years after his decease to W., for her separate use, and after her decease, 200*l.* thereof to her son T., and the other 100*l.* to her son C., and W. and T. die within the three years:—Decreed, that the money should be paid, though charged on both funds. *Id.* 511.

Where residue was directed by testator to be divided among six persons, at the death of his wife, and two died before her:—Held, that the interest of the two was vested and transmissible, and depended not on surviving the wife. *Ib.*

6. A testator, who was seised of a freehold estate, and was also possessor of a term for years, with a *toties quoties* covenant for renewal, bequeathed to his daughter a legacy of 600*l.* charged both upon the freehold estate and the

term for years, and directed the same to be paid to her on her attaining the age of twenty-one years, or day of marriage, whichever should first happen, with interest from the day of his death:—Held, that this legacy, so far as it was charged upon the term for years, was vested, and that consequently, upon the death of the legatee intestate, before she attained the age of twenty-one years, and without having been married, it became divisible in equal shares among her next-of-kin. *Re Hudsons*, Dr. 6.

1. A testator devised lands to A. for life, remainder to his sons successively in tail, remainder to B. for life, remainder to his sons successively in tail, remainder to his testator's nieces, C. and D., and the survivor, for their respective lives as tenants in common; he also bequeathed to D. a sum of 1,000*l.*, charged upon his real and personal estate, to be by her distributed among her younger children, in such shares as she should think proper, provided always that if D. should, under the foregoing limitations in the will, get into possession of the lands, then the said sum of 1,000*l.* should not be paid unto her for the purpose aforesaid. D. survived the testator, but died, her life estate in the lands never having taken effect in possession:—Held, that she took a vested interest in the legacy of 1,000*l.*, at the death of the testatrix, subject to be divested on the happening of the contingency; and, accordingly, that interest was payable upon the legacy from the testator's decease. *Finucane* v. *Studdert*, 1 Ir. Ch. R. 140.

2. A testator bequeathed to his four daughters a legacy or 500*l.*, to be paid to them respectively on the days of their respective marriages, with the consent of his wife and executors, with power to each of them to dispose thereof by will or deed as they might think proper; such four legacies to be charged on his personal estate, and the deficiency to be raised out of his real estate, which he empowered his trustees to do by demise, sale, or mortgage; and he directed his executors to pay not less than 30*l.* or more than 40*l.* a year for his daughters' maintenance until their respective marriages, out of his personal estate, and on a deficiency, out of his real estate. By a codicil to his will, he devised four additional legacies of 500*l.*, to be paid to each of them at the time and in the manner in his will mentioned. One of the daughters died unmarried, having bequeathed her legacies to the survivors:—Held, first, that the legacies of the daughter who died could not be raised out of the testator's real estate. *Bolton* v. *Bolton*, 12 Ir. Ch. R. 233.

Held, secondly, that the legacies to the surviving daughters were not raisable out of the real estate, before their marriage with consent. *Ib.*

III. Portions and other Interests Created by Deed.

See also POWER XI.

I. *When Charged on Land*, 7404.
II. *Gifts to Children contingent on Surviving their Parents*, 7406.

See also V. *post.*

III. *Effect of Gift of Interest or Maintenance*, 7415.
IV. *Other Cases*, 7416.
V. *Meaning of word "Vest" as used by Settlor.* See V. *post.*
VI. *As to Fluctuation between Eldest and Younger Children.* See YOUNGER CHILDREN.
VII. *As to Portions generally.* See PORTION.

I. WHEN CHARGED ON LAND.

3. If I secure a portion to a child by deed, payable at twenty-one, out of land, and the child dies before twenty-one, the portion shall sink into the land, and not go to the executor; so, if I devise a portion to a child out of land, payable at twenty-one, and the child dies before twenty-one, the portion shall sink; also, the portion shall sink as well for the benefit of *hæres factus*, as of the *hæres natus*. So, though the money given to the child be not said to be for a portion, if it appear to be so in fact, if by the will the portion be given out of a real and personal estate payable to the child at twenty-one, and the child die before twenty-one, then so much as will arise out of the personal estate shall go to the executor or administrator, but what would arise out of the land must sink. *Jennings* v. *Looks*, 2 P. W. 276.

4. Term of 1,000 years to secure daughters' portions, payable at sixteen, proviso if no daughter at the time of failure of issue male the portion to sink; there is a daughter who attains to sixteen, and marries without consent, and no son by the marriage; but the daughter dies in the lifetime of the father and mother, and consequently, while there might be a son, the portion sinks. *Gordon* v. *Raynes*, 3 P. W. 134.

Portion secured out of the land, and the daughter dies before the portion becomes payable, it sinks into the land. So, if a legacy be given out of land to J. S., payable at twenty one, and J. S. dies before twenty-one, the legacy sinks: *secus*, in both cases where the legacy or portion is given out of a personal estate. *Ib.*

5. Term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage; one of them dies under twenty-one, and unmarried: her portion shall not be raised for the benefit of the administratrix; otherwise, if the portion was to be raised out of a personal estate. *Poulet* v. *Poulet*, 1 Vern. 204.

6. Trust "to raise" 5,000*l.* portion, "and pay it," to such younger child as the father should appoint, for want of appointment to the younger children at twenty-one, with interest for their maintenance, etc., in the meantime, etc., etc. The only younger child died at two years old:—Held, not to be vested in him so as to be claimed by the father as his representative. *Hubert* v. *Parsons*, 2 Ves. 261.

7. The resolutions that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, are so strong that they are not to be shaken. *Prowse* v. *Abingdon*, 1 Atk. 485.

Whether charge on land be created by deed or will, whether given by way of portion for a

child, or merely as a legacy by collateral relations or others, if the party die before the day of payment, it cannot be raised. The reason is, that the Court of Equity governs itself by the rules of the common law, for then if A. covenant to pay money to B. at a future day, and B. die before the day, the money is not due to his representative. *Id.* 485.

1. A., a widower, settles land to raise 100*l.* a year for his eldest son, and 100*l.* a-piece for his younger children, and afterwards marries again, and has children by his second wife. Decreed, the children by his second wife were equally entitled with the other younger children; though portions of the younger children were by the settlement to be paid according to their seniority, yet in case of a deficiency they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father, and afterwards died. *Brathwaite* v. *Brathwaite*, 1 Vern. 334.

2. Power to father to raise for younger children, not exceeding 3,000*l.*; if no appointment, the estate charged with 3,000*l*, for the sons at twenty-one, for the daughters at twenty-one or marriage. Nothing vested in the father's lifetime, and representatives of one who attained twenty-one, and became elder, but died in father's life, not entitled to a share. *Loder* v. *Loder*, 2 Ves. 531.

3. A term is created by marriage settlement, to raise 3,000*l.* for daughters' portions, within twelve months after death of the survivor of the husband and wife; there being one daughter, the father devises the trust lands to make good his wife's jointure, and to raise 5,000*l.* for his daughter's portion: the daughter shall not have two portions of 3,000*l.*; and she dying at the age of five years, and the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall. *Brewin* v. *Brewin*, Pre. Ch. 195; 2 Vern. 439.

4. Portions provided by marriage settlement for younger children, to be paid at such time as the trustees shall think proper. One of the children dying at seventeen, before any appointment, his portion shall sink in the inheritance, but maintenance, and a sum paid in placing him out apprentice, to be allowed out of the trust estate. *Warr* v. *Warr*, Pre. Ch. 213.

5. By marriage settlement a term is created for raising 400*l.* a-piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised:—Held, that it should sink in the inheritance, and not be raised for the benefit of its representative. *Tournay* v. *Tournay*, Pre. Ch. 290.

6. Whether portion charged on land be given with or without interest by deed or by will, if the person die before it becomes payable, it shall sink into the estate. *Boycot* v. *Cotton*, 1 Atk. 555.

7. One devises 100*l.* to his daughter for her portion, charged upon a real estate, and payable at twenty-one; daughter dies before twenty-one; the portion shall sink in the land; otherwise, if no time had been limited for the payment of the portion, for in that case it goes to the executor of the daughter; no difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable. In either case it sinks in the land. *Smith* v *Smith*, 2 Vern. 92.

8 The trusts of a term were, at twelve years from a mother's death, to raise 2,500*l.* for younger children; 1,000*l.* of it for one of them, A., and the remainder for the others, to be paid to them respectively when raised pursuant to the deed. The deed was one in which the mother, being tenant for life, joined her eldest son, the remainderman, in opening the estate. A died in his mother's lifetime:—Held, the 1,000*l* was not vested and could not be raised. A charge payable at a future day is, in general, not raisable, if the party die before the day, except when the time of payment is postponed for the convenience of the estate, when it is otherwise; but this exception does not apply to children's portions, which are not generally raisable for the child's representative, if he dies before he wants a provision. The rule and cases on this subject considered. *Ruby* v. *Foot*, Beat. 581.

9. When a portion is to be raised out of land, if the person die before the day of payment, it sinks for the benefit of the heir. *Lowther* v. *Condon*, 2 Atk. 131; Barnard. 327.

A reasonable distinction may be made between a time of payment that has been derived from the circumstances of the fund and of the person. *Ib.*

If a father enter into a bond to pay 1,000*l* to his daughter after his wife's death, it would have been forfeited if the executors had refused to pay after wife's death notwithstanding she survived the daughter. When no time of payment is fixed, a legacy in general is held to be payable immediately, unless the end for which it was given ceased. *Ib.*

10. If a party die before a portion becomes payable, if out of land, it shall not be raised; but if a personal legacy, and legatee dies before the time of payment, it shall go to the executor. *Harvey* v. *Aston*, 1 Atk. 379 Forrest, 212, 217. n.

Portions charged on land do not vest till the time of payment comes; therefore in the case of a marriage with consent, and the consent is not obtained, there is no rule of law or equity which can excuse the want of it so as to claim the portion. *Id.* 561; Forrest. 212, 217. n.

11. Charge upon land payable at a future day, not vested till the time of payment. *Phipps* v. *Mulgrave* (*Lord*), 3 Ves. 614.

12. By marriage articles, A. agreed to settle lands to the use (*inter alia*) of trustees for a term of 500 years, to commence at the death of the settlor, upon trust to raise 6,000*l.* for the younger children of the marriage, to be paid and distributed amongst them in such manner and shares as the father should by deed or will appoint; and in default of appointment, share and share alike. No time was fixed for a payment. There were three daughters; one died in the lifetime of her parents, under age, intestate and unmarried. No appointment having been made:—Held, that no time being fixed for vesting, and the deceased daughter

not having occasion for her portion, it sank for the benefit of the estate. *Leslie* v. *Dungannon (Lord)*, Wall. Lyn. 263.

1. By a marriage settlement of the year 1795, reciting the intended marriage, and that the father of the lady, for the purpose of securing a provision for her, by way of maintenance, and for the purpose of providing for the issue of the marriage, had agreed to secure the sum of 4,800*l.* as her portion, in the manner therein mentioned, it was witnessed, that the father, in pursuance of that agreement, conveyed certain lands, of which he was seised in fee, to trustees for the term of ninety-nine years, upon trust to raise thereout 1,000*l.*, part of said sum of 4,800*l.*, and pay same to the intended husband for his own use, and to permit the said intended husband to receive the interest on 1,300*l.*, further part of the said 4,800*l.*, for his life; and if the intended wife should survive him, to permit her to receive the interest of the said sum of 1,300*l.* for and during her life; and, after the decease of the said intended wife and her father, to pay the principal sum of 1,300*l.*, to the said intended husband, if he should be living, and, if dead, to his executors or administrators. The further trusts of the term were declared to be, that, if there should be any child or children of the marriage, the trustees should raise the sum of 2,500*l.*, being the residue of such sum of 4,800*l.*, and pay same to the children, if more than one, in such shares and at such times as the intended husband should appoint, and, in default of appointment, to pay same in equal shares, if more than one; and if more than one, the whole to such one at his or their age or ages of twenty-one years, or, to such of them as should be daughters, at her or their age or ages of twenty-one years, or day or days of marriage. It was expressly declared, that the said intended husband should receive the interest of this sum of 2,500*l.* during his life, but that neither principal nor interest should be raised during the lifetime of the father; and the settlement contained a provision that, in case there should not be any issue of the marriage, no part of the sum of 2,500*l.* should be raised. There was only one child of the marriage, who died a few months after its birth:—Held, upon the true construction of the settlement, that the child, at the moment of its birth, took a vested interest in the sum of 2,500*l.*, and that the plaintiff, as his personal representative, was entitled to have the same raised out of the estate. *Reilly* v. *Fitzgerald*, Dr. 122; 6 Ir. Eq. R. 335.

2. Where, under a settlement, a sum of money is to be raised, out of real estates, for the portions of younger children, and some of the portions have become payable, the Court will raise the whole sum at once, although some of the children have not acquired vested interests. *Gillibrand* v. *Goold*, 5 Sim. 149; 3 L. J., N. S., Ch., 100.

3. An estate was charged with portions for younger children, "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable":—Held, that a younger child that attained twenty-one, but died in the lifetime of the tenant for life, took a vested interest. *Remnant* v. *Hood*, 30 L. J., Ch., 71; 3 L. T., N. S., 483; 2 De G. F. & J. 396. Affirming 5 Jur., N. S., 1090; 27 Beav 74.

Legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment. Upon the death of the legatee or petitioner before the time appointed for payment, they lapse or sink into the inheritance. *Ib.*

If, however, the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or petitioner, but for the convenience of the estate, the legacy or portion will, notwithstanding, vest in the legatee or portioner before the time of payment. *Ib.*

II. GIFTS TO CHILDREN CONTINGENT ON SURVIVING THEIR PARENTS.

See also V. v. *post.*

1. In General.

4. A term is limited to raise portions for daughters, if no sons, provided such daughters survive their father; a daughter dies in the life of her father: her portion shall not be raised. *Hickman* v. *Anderson*, 2 Vern. 654.

5. Term raised to secure daughters' portions; trust thereof declared that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso that if the husband should die without leaving a daughter living at his death, then the term to cease; there is no issue male by the marriage, but there is a daughter who attains twenty-one, and marries; mother dies, and daughter dies in the father's lifetime, leaving issue; her husband administers to her: he shall have no portion. *Wingrave* v. *Palgrave*, 1 P. W. 401.

6. Construction of ambiguous and incorrect settlement as vesting portions at twenty-one, against words importing condition of surviving the parents; an intention which, if clearly expressed, must prevail; but is not to be inferred as not a rational construction of an ambiguous family settlement. *Howgrave* v. *Cartier*, 3 Ves. & B. 79; Coop. 66. And see *Jones* v. *Franco*, 1 Russ. & M. 649.

7. Covenant in marriage articles, that in case the father should happen to die, having issue male, and one or more younger son or daughter, to raise portions, if but one then living 1,000*l.*, if two, 1,200*l.*, if three, 1,500*l.*, to be paid at their respective ages of twenty-one or marriage, in such proportions as the survivor of the father and mother should direct, in default of such direction, equally:—

Held, that the share of a son who attained twenty-one was vested, though he died in the father's lifetime. *Rooke* v. *Rooke*, 2 Eden 8.

1. On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail male, remainder to S. in fee, provided if there be no issue male of the marriage, and there be one or more daughters living at the husband's death, then the trustees to stand seised, subject to the intent such daughter or daughters should receive out of the rents 10,000*l.*, and 100*l.* per annum for maintenance, but no time limited for payment of the portion. The husband dies, leaving only one daughter, who lives to seventeen, but by her will disposes of the 10,000*l.*:—Decreed, this is a vested interest in the daughter, and well disposed of by her will. *Rivers* (*Earl*) v. *Derby* (*Earl*), 2 Vern. 72.

2. On a settlement before marriage, the trust of a term was, that in case husband should have no issue male, and there should be daughters, to raise, if two daughters, 25,000*l.*, to be paid at twenty-one or marriage, but not to be raised till the death of their grandfather; the father died, leaving two daughters, and then the grandfather died: the husband of one daughter claimed 12,500*l.*, with interest from the time of the marriage:—Decreed, with interest, as a vested portion in the words of the settlement. But upon portions, or interest of them, to be raised out of reversionary terms, especially upon construction or implication, the Court reluctantly interfered. *Lyon* v. *Chandos* (*Duke*), 3 Atk. 416.

3. Trust, in case husband and wife should, at death of survivor, leave any child, etc., and such child, etc., attain twenty-one, to convey to such child, if but one, and if more than one who shall attain twenty-one to convey to such children who should attain twenty-one, according to appointment of father and mother surviving; in default of appointment, equally at twenty-one, with survivorship; and if both parents die without leaving any child, etc, remainder to the father:—Held, vested in children having attained twenty-one, who died in the life of one parent, with those who survived both. *King* v. *Hake*, 9 Ves. 438.

4. Portions at twenty-one or marriage, when C. and his wife should die without issue male:—Held, a condition precedent, and not to be raised till both are dead; though one die, and the other remain tenant in tail after possibility of issue extinct. *Champney* v. *Champney*, 10 Mod. 314.

5. On marriage, lands are settled on A. for life, remainder to the first, etc., sons of the marriage in tail male, remainder to trustees for 500 years, to raise 5,000*l.* portions for daughter, payable at eighteen or marriage; remainder to A. in fee. After the marriage A. settles other lands, and a term is created for raising the like sum of 5,000*l.* for daughters on failure of issue male, payable at sixteen or marriage; A. dies, leaving a daughter his heir-at-law, who attains eighteen, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disposable by her will, but there shall be but one 5,000*l.* raised. *Thomas* v. *Kemeys*, 2 Vern. 348; 2 Freem. 207.

6. Trust of the residue of a term, with a double aspect, viz., settlement on marriage, by deed, of a leasehold estate in trust for the husband and wife for life, and after the decease of the survivor to be assigned by trustees with the rents and profits to the eldest son, "and for want of such issue of such son," to daughter; a son having been born, who died, without issue, in the life of the mother:—Held, that it did not vest in him, but was a good remainder to an only daughter, at the death of the surviving parent. *Exel* v. *Wallace*, 2 Ves. 118. Affirmed *Id.* 318.

7 Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before twenty-one years, to raise portions for daughters, etc. A son attained twenty-one, but died in father's lifetime without issue male. The portions not raisable. *Worsley* v. *Granville* (*Earl*), 2 Ves. 331.

8. Interest in partnership trade, under articles for widows of the partners for their respective lives, and after the decease of the widow to be equally divided among their respective children:—Held, not vested in children who died in life of mother, on account of nature of the subject, the primary object being to constitute a partnership, and ascertain the succession; and a provision for the family being only a secondary object through that medium. *Balmain* v. *Shore*, 9 Ves. 500.

9. One, having a daughter thirty years old, settles his estate on himself and wife, for their lives, remainder for 500 years, remainder over, and declares the trust of the term to raise after the death of him and his wife 850*l.* for his daughter, her executors and administrators. The daughter died in the lifetime of her father.—Held, her representatives were entitled. *Smith* v. *Partridge*, Ambl. 266.

10. A term is limited in remainder after the father's death, in trust if he died without issue male, and there should be one or more daughters unmarried or unprovided for at his death; the trustees were to raise 2,000*l.* for their portions, to be paid at eighteen or marriage. The mother being dead, and there being one daughter who was married, and no issue male, the Court would not decree the portion to be raised in the life of the father, it not vesting till his death. *Corbett* v. *Maydwell*, 2 Vern. 640; 3 Ch. Rep. 160. But see next case.

11. Term limited in remainder after father's death, in trust for raising portions for daughters at eighteen, or marriage; portions may be raised during life of father. *Corbett* v. *Maidwell*, 1 Salk. 159.

12. A sum of money settled on marriage to the use of the husband for life, after his death to the wife for life, and if they should both die, leaving children, to such children, vests in all the children of the marriage, and not exclusively in the children surviving both parents, such being the clear intent of the parties, though contrary to the literal expressions in the settlement. *Bradish* v. *Bradish*, 2 Ball & B. 479.

13. In a settlement of personalty, on the marriage of M. and W., it was declared that, "from and after the several deceases of M. and W., and the death of the survivor of them,

in case there should be any child or children of M. and W. which should be then living, the trustees should pay the trust funds unto such child or children, and to be paid to such child or children at his, her, or their respective age or ages of twenty-one years." Personalty was settled in trust "for all and every the child or children of M. which should be living at the time of her decease, and to be paid to them at their respective ages of twenty-one years":—Held, on the construction of each settlement, that the only child who was living at the death of the survivor took the whole. *Jeffery* v. *Jeffery*, 17 Sim 26; 13 Jur. 482.

1. Limitation in an article on marriage to A. for life, subject to annuities for the lives of B. and C. and a charge for a jointure for D., if she should survive A, and after the death of said B. and C, A. and D, then to the use of the issue, etc. The limitation to the issue is not to await the deaths of A., B, C, and D., but they are to take upon the death of A., subject to the charges for B., C., and D. *Bushell* v. *Bushell*, 1 Sch. & Lef. 95.

2. Upon the construction of a settlement it was held, that a daughter who died in the lifetime of both parents was not entitled to any portion, under the trusts of a term created for raising portions, notwithstanding she had previously attained eighteen and married. *Whatford* v. *Moore*, 3 Myl & C. 270; 6 L. J., N. S., Ch., 378. Affirming 7 Sim. 574; 5 L. J., N. S., Ch., 105.

In a case of doubt, the Court leans to that construction which will include a child attaining its age and dying before its parents, as the most convenient and most likely to have been the intention of the parties *Ib.*

3. A fund was assigned by a marriage settlement to trustees upon trust, after the death of A., to transfer it and all the interest, etc, to all and every the child or children of the marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of them, in such shares, etc., at such ages, etc., as A. by his will should appoint, and, in default of appointment, to pay the fund between them all, to sons at twenty-one, and to daughters at twenty-one or marriage, in case such ages or days should not take place till after the decease of A, but in case such should happen in his lifetime, then such payment should be postponed until after his decease. A., by will, appointed the fund to the children of the marriage, share and share alike, on their attaining twenty-one or marriage with consent, and directed that the interest should be for their support and maintenance, given in trust to his wife until the boys entered professions or attained twenty-one, and the girls attained twenty-one or married with consent:—Held, first, that the portions were, by the settlement, vested in the children before the period of payment; secondly, that the provision in the will as to maintenance was of itself sufficient to vest the portions. The rules as to the vesting of portions and legacies are the same. *Re Orme*, 1 Ir. Ch. R. 175.

4. By a marriage settlement, trustees were directed to pay the income of certain trust funds to the husband and wife for their lives, and after the death of the survivor to divide such funds between the children and issue of the marriage, to be transferred and paid unto sons at twenty-one, and to daughters at twenty-one or marriage. There were three children of the marriage. One of them attained twenty-one, and died in the lifetime of the tenants for life, leaving children and grandchildren; another attained twenty-one, and died in the lifetime of the tenants for life, without children: and the other attained twenty-one, survived the parents, and had children:—Held, that the trust funds vested in the children of the marriage as they attained twenty-one, and that the surviving child and the representatives of the deceased children were entitled to them. *Gordon* v. *Hope*, 3 De G. & Sm. 351; 18 L. J., N. S., Ch, 228; 13 Jur. 382.

5. Grant of a personal estate by a deed to trustees for a niece after the death of the grantor, in whose life niece dies, it goes to representatives of niece, not to the executor of grantor. *Peck* v. *Parrot*, 1 Ves. 236.

6. A direction to trustees, to pay a principal sum after the death of a father and mother to their issue equally, to sons at twenty-one and to daughters at twenty-one or marriage, is only a circumstance or qualification in the person receiving, and not intended to accelerate the payment or vest it in the children; for the direction of the payment is the gift, and will not vest till the time of payment comes. *Seamer* v. *Bingham*, 3 Atk. 57.

7. Settlement of money on husband and wife, etc, and in case the husband shall die, and the wife survive, he having no issue of her body, or such issue shall die in the lifetime of the wife, then the money to be paid and assigned to the wife. There was issue, a daughter, who married, attaining twenty-one, and died in the lifetime of the mother, leaving two children, who survived their grandmother:—Held, the daughter acquired a vested interest transmissible to her representatives. *Hurtley* v. *Mason*, Ambl. 621.

8. A, by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him, and, after the death of the survivor, by all the children of the marriage, equally; some of the children of the marriage died in the lifetime of A. and his wife:—Held, that under this covenant, all the children became entitled to vested interests on their coming into existence; and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate) having, by his will, given both his real and personal estate to the same persons, some of whom exclusively claimed the real estates, under the covenant, a case of election arose. *Naylor* v. *Wetherell*, 4 Sim. 114; 9 L. J., Ch., 125.

9. By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of grantor's term in trust to raise an annuity for the lives of the wife and her mother and the survivor; then reciting, that the remainder of the term might expire in the life of the wife or her children; therefore, to make a provision for her and her children by her then or any future husband, the trustees should be possessed of the said tolls for the remainder of

the term, upon trust to raise, after the deaths of the grantor and the mother of the wife, 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in Government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease, to apply the said rents and profits or interest money towards the support and maintenance of such child or children of her as should be living at her death, till the youngest should be twenty-one, and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such share and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof, to the use of all such children equally, to be divided at their respective ages of twenty-one; but if she should die without leaving any child or children, or should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls during the remainder of the term, for the use of the grantor, his executors, etc. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year, and laid out in stock the sums received and the produce. One son was the only issue; he attained twenty-one in the life of his mother, and survived her. The Court would not invest the fund in land, and held it, with the accumulations from the death of the grantor and the future payments, a vested interest in the son at twenty-one, and as personal estate belonging to his administrator. *Swann* v. *Fonnereau*, 3 Ves. 41.

1. Property was settled upon trust after death of settlor to apply the whole or part of income towards the maintenance and education of the six children of S. B. (by name), and to accumulate the residue of the income until the death of the survivor of O. B. and S. B., or until such time as the youngest of the six children, or the youngest of such of them as should be living, attained twenty-one; and then if O. B. and S. B. should then have died, or if not, immediately after the death of the survivor, to convey and assign the same to the children, or such of them as should be then living. There was no other gift to the children. The settlement contained a clause, that the share of any of the six children who alienated his share should be forfeited, and go over to the other children:—Held, that none of the children took a vested interest till after the happening of the last of the three events, namely, the attainment of twenty-one by the youngest, and the death of O. B. and S. B., and, therefore, that none of the children who died before the last of such events happened took a vested interest. *Barnett* v. *Blake*, 2 Dr. & Sm. 117; 8 Jur., N. S., 812; 31 L. J., Ch., 898; 6 L. T., N. S., 886.

Held, also, that the term "alienated" meant not only an actual alienation, but any act done for the purpose of alienating. *Ib.*

2. A fund was settled upon marriage, in case the husband should die in the lifetime of the wife and there should be issue of the marriage living at the death of the husband, for all and every the child and children of the marriage, and the issue of such child or children in case any of them should happen to be dead, leaving issue, in equal shares; the issue to be entitled only to the shares which their parents would have been entitled to if living:—Held, that, having regard to the context, the words "all and every the child and children" must be restricted to children who survived their father. *Re Thorne*, 10 W. R. 338

3. Under a trust for A. for life, "and after her death, to be divided equally between her younger children".—Held, first, that the children took vested interests at their births, and secondly, that the character of youngest child was to be determined at the period of vesting, and not that of distribution. *Adams* v *Roberts*, 25 Beav. 638.

4. In construing a marriage settlement, it is the duty of the Court to give effect to the plain meaning of the words, unless the instrument on the whole affords grounds for leaning in favour of a construction which will include all children. *Jeyes* v. *Savage*, 33 L. T., N. S., 139; 23 W. R. 764; 44 L. J., Ch., 706; 10 L. R., Ch, 555. Reversing 23 W. R. 742.

The rule in *Woodcock* v. *Dorset* (*Duke*) (3 Bro. C. C. 569) is an artificial rule, and ought not to be extended. It is founded on an implied agreement that the children of a child dying in the lifetime of his parents should be provided for. *Ib.*

When such children were provided for according to the natural meaning of the settlement:—Held, that the rule was not applicable; that the word "leaving" must be construed according to its natural meaning, and that a son who attained twenty-one, and died without issue in the lifetime of his parents, had not acquired a vested interest. *Ib.*

5. The presumption that a pre-nuptial settlement is intended to provide for children of the marriage at the time when they require a provision, is so strong that the Court will not, unless absolutely compelled by the language of the instrument, adopt a construction of such a settlement which would exclude from its benefit a child who comes of age but does not survive both parents. *Currie* v. *Larkins*, 10 Jur., N. S., 8; 9 L. T., N. S., 638. Affirmed 10 Jur., N. S., 349; 12 W. R. 515; 10 L. T., N. S., 47; 3 N R. 621; 4 De G. J. & S. 245.

2. Effect of Word "Such."

6. A sum was vested in trustees, upon trust declared by deed. The deed recited an intention to make some provision for A. and her children, and declared that the trustees should hold the fund for A. for life, and upon her death, or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A. then living,

the said stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A., and if not, immediately on her death or making any charge." And if there should be two or more such children, then the stock to be transferred amongst such children, in equal shares, at the age of twenty-one, if A. should be dead; but if not, then immediately after her decease, or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement, and accruer. There were several children; one attained twenty-one and died in the life of A.:—Held, that her representatives did not participate in the fund. A petition of appeal from the decision was dismissed with costs by Lord Cottenham on the 8th July, 1848. *Skipper* v. *King*, 12 Beav. 29; 12 Jur. 209. Affirmed 12 Jur. 570.

1. By a marriage settlement, lands were limited to trustees for a term of five hundred years, to arise after death of husband and wife, of which the trusts were, in case the husband should die leaving issue a son and other children, then, and not sooner, unless the husband should so direct, to raise, after the several deaths of the husband and wife, and the commencement of the term, portions for the younger children, payable at twenty-one, if sons, and at eighteen or marriage, if daughters, such portions to survive to the survivors or survivor; and there was a joint power in the husband and wife to substitute a younger for an elder son, which made it uncertain during their joint lives who would be entitled as younger son; and there was a clause for maintenance by the trustees after the commencement of the term, and a power of leasing was given to the husband and wife during their joint lives, and to the trustees also during the joint lives of husband and wife, and during the term, such trustees being also trustees to preserve:—Held, that a daughter who died in the lifetime of her parents, having attained the age of eighteen and married, was not entitled to a portion. *Whatford* v. *Moore*, 3 Myl. & C. 270; 6 L. J., N. S., Ch., 378. Affirming 7 Sim. 574; 5 L. J., N. S., Ch., 105.

2. By a marriage settlement, executed in 1784, certain hereditaments were vested in trustees, in trust for the husband and wife successively, for life; and on the death of the survivor to pay the rents in maintenance of "all and every the child or children until such child or children should attain twenty-one, and when and as such child or children respectively should attain twenty-one," upon trust to convey "unto such child or children" as the parents should appoint; and, in default, "to convey all the same premises unto and amongst such children equally;" and if but one such child, upon trust to convey to such only child, and his or her heirs for ever, with a gift over. By a deed executed in 1835 the surviving parent executed the appointment in favour of some only of the children:—Held, that the word "such" must be taken in the sense of "the said;" and that the power did not warrant an exclusive appointment in favour of some of the children:—Held, also, that the limitation in default of appointment gave a vested estate in fee to each child on his birth. *Strutt* v. *Braithwaite*, 5 De G. & Sm. 369; 16 Jur. 882; 21 L. J., Ch., 609.

In putting a construction on a marriage settlement, the Court always endeavours not to make the interest of the children depend on their surviving their parents. *Ib.*

3 By settlement made in contemplation of marriage between L. and A., personal estate was assigned to trustees upon trust to pay income to A. for life for her separate use; and after her death, to pay same to L. for his life; and after the death of the survivor, the trusts of the *corpus* were declared to be in favour of the children of A. by that or future marriage equally, sons at twenty-one, daughters at twenty-one or marriage, with the usual powers of maintenance during minority and of accruer. And if it should happen that there should be only one child living at the death of the survivor of L. and A., or, if there should be more than one such child, and that all should die, if sons, before attaining twenty-one, if daughters before attaining that age or marrying, then the whole fund to be paid to such only child, if a son, on attaining twenty-one, and if a daughter on attaining that age or marrying; and if there should be no such child then living, then upon trust for J. A. There was only one daughter issue of the marriage; she had attained twenty-one, and A. was dead, but L. was still living. On the question whether the interest of the daughter was vested or contingent:—Held, that it was contingent on the event of her surviving L. And *semble*, assuming that the bill had been so framed as to raise a question of mistake in the settlement, and had sought to rectify it, the Court, as there is not inconsistency in the clauses, would not have made such a decree. *Lloyd* v. *Cocker*, 19 Beav. 140; 24 L. J., Ch., 84; 1 Jur., N. S., 174.

3. Contingency running through the whole Class.

4. In marriage settlement, the father of the wife, after making a provision for her during life, covenants, that in case there shall be a child or children of the marriage living at her decease, he will pay 30,000*l.* to such child or children, on their attaining twenty-one, or, if they shall have attained that age in their mother's lifetime, at her death. In the directions that are afterwards given for the distributions of the sums in different events, among the children of the marriage and their issue, no reference is made to the contingency of their surviving the mother; and though there is an express enumeration of the cases in which the money is not to be payable, the death of a child in the mother's lifetime after having attained twenty-one is not specified as one of those cases:—Held, that the interest which a child who has attained twenty-one takes in these sums, remains contingent during the life of the mother, there not being enough in the subsequent clauses to control the plain words of the covenant. *Fitzgerald* v. *Field*, 1 Russ. 430; 4 L. J., Ch., 170.

In the same settlement the father covenants to pay upon the death of the husband 2,000*l.*

to the eldest or only son of the marriage:—Held, that this covenant is controlled by subsequent clauses, so as not to give a vested interest upon the death of the father to an only son who was then under age. *Ib.*

1. By settlement before marriage, whereby lands given to trustees for 500 years, in trust, that if husband and wife should leave one or more daughter or daughters, younger son or sons that should be living at time of decease of survivor of them, the trustees should raise, etc., 2,000*l.* for portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, and no younger son, at eighteen or marriage, and to such younger son, if but one, and no daughter, at twenty-one, with allowance for maintenance in the meantime, etc., and if there shall be more than one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage, and to such younger son or sons at twenty-one years, etc.:—Held, that the settlement did not vest any interest in the children who died before decease of surviving children. *Hotchkin* v. *Humfrey*, 2 Madd. 65.

2. A fund was settled on trust for a wife for life; and in case she should leave any issue living at her death, for the husband for life; and after his death, upon trust to divide it amongst the children of the marriage "that should be then living on their respectively attaining twenty-one." And in case there should be no child, or of their all dying in the wife's life, to pay the fund to such person as the wife should by will appoint, and in default to the executors or administrators of the husband and wife, or the survivor of them; and in case the wife should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living:—Held, that the limitations to the children remained contingent until the death of their father. *Re Woollaston*, 27 Beav. 642.

3. By a settlement trustees were directed to hold trust funds upon trust to pay the income to H. for life, and after her death, "leaving a child or children," to transfer, pay, and make over the fund unto "all and every the child or children of H., and the issue of such of the children as might be then dead" (such issue to take the parents' share), equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of H. survived her, and attained twenty-one or married, and one son of hers attained twenty-one and died without issue in her lifetime:—Held, that although the trust only took effect in case some one child survived H., the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and that the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund. *Re Orlebar*, 20 L. R., Eq., 711; 44 L. J., Ch., 661.

4. Where by a settlement portions are provided for the children of the marriage, not raisable until after the death of both parents, but with a power to the father to appoint among all the children; and the portions have actually become raisable, by reason of some of the children surviving both parents; a child, to whom the father appointed a share, who survives the father, but predeceases the mother, is entitled to the share appointed, unless the settlement, consistently throughout all its clauses, manifests an intention to the contrary. *Re Goddard*, 5 Ir. R., Eq., 14.

4. Effect of Gift Over.

5. When clauses in a settlement are conflicting, the rational presumption is, that a child attaining twenty-one takes a vested interest. *Dixon* v. *Barkshire*, 34 Beav. 531.

In a settlement, the limitation was to the children who should be living at the time of the decease of the father; this was controlled by the gift over:—Held, that a child who died in the life of her father, having attained twenty-one, was entitled to a share. *Ib.*

6. By a marriage settlement, stock was vested in trustees upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any and all of them should die under age and unmarried, in trust for certain other persons. The wife survived the husband, and at her death there was no child of the marriage living; but a son who died in her lifetime had attained twenty-one and married:—Held, that the stock vested in that son absolutely. *Torres* v. *Franco*, 1 Russ. & M. 649.

7. Money was settled upon trust, after the death of the survivor of the parents, to pay, apply, and dispose of the same unto all the sons and daughters, and the children of such as should be dead leaving issue (the children to take the share of their parents), with a gift over if there should be no children of the marriage, or being such, all sons, should die under twenty-one, and the daughters under twenty-one on marriage:—Held, that the shares vested in the children on their births, and that the representatives of those who died unmarried in their infancy, and in the life of the parents, took a share. *Re Inmor*, 28 Beav. 50.

8. By a voluntary settlement, expressed to be made in consideration of natural love and affection for settlor's son G. and daughters M. and E., property was settled in trust for settlor

for life, with remainder, as to part, in trust for G. for life, and after his decease in trust for all G.'s children who might be living at the time of his decease, as tenants in common; and if G. should have but one such child, then for such only child; the share of every such child to be vested at twenty-one, or if a daughter at twenty-one or marriage. with proviso for survivorship if more than one child of G., and any of them, being a son, should die under twenty-one, or being a daughter, under twenty-one, without having been married: and in case all such of G.'s children as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married, then over; and as to other parts of the property in trust for M. for life, and after her decease for all her children, who being sons should attain twenty-one, or being daughters should attain that age or be married, in such manner and form, and in such shares and proportions, and subject to such clauses of survivorship, etc., as before declared with respect to G.'s children; and as to a third part of the property, upon trust for E. and her children, similar to the trusts for M. and her children:—Held, that the instrument, though voluntary, and not expressed to be made in consideration of natural love and affection for the settlor's grandchildren, was within the rule in *Emperor* v. *Rolfe* (1 Ves. 208), and that having regard to the terms of the limitation over after the trusts for G.'s children, and notwithstanding the different form in which the trusts for the children of M. and E. were expressed, two children of G. who attained twenty-one, and subsequently died in his lifetime, took vested and transmissible interests equally with those of G.'s children who survived him, the rule being that, whereas in ordinary instruments an express estate thereby limited cannot be enlarged except by necessary inference, yet upon instruments of this description there is an implication of law arising upon the instrument itself, subject to any expression to the contrary that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when such portions will be wanted, namely, upon their attaining the age of twenty-one, or, in the case of daughters, upon their attaining that age or marriage; and that such portions shall then vest, whether the children do or do not survive their parents. *Swallow* v. *Binns*, 1 Kay & J. 417; 1 Jur., N. S., 843.

5. Effect of Gift Over "before Payable."

1. By a marriage settlement a term for years is created to raise 5,000*l.* portion for daughters, payable at their age of twenty-one or marriage; proviso, that if any of the daughters attain the age of twenty-one, or marry in the father's lifetime, then the portion to be paid within a year after the father's death. Also, if any of the daughters die before her portion becomes payable, or before her age of twenty-one or marriage, her share to go to the survivor. There was issue, a son and three daughters, the first of whom married, and received her portion; the second attained twenty-one, married, and died without issue, and her husband administered; the third daughter survived both her sisters. Resolved, the husband, as administrator of the second daughter, is entitled to her share of the 5,000*l.*, she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death. *Pitfield's case*, 2 P. W. 513.

2. Portions in a settlement by a term, after mother's death, for defendants, to grow due and payable at twenty-one or marriage, etc. One daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister. *Emperor* v. *Rolfe*, 1 Ves. 208.

3. In this case, a portion proceeding from a parent held vested in a deceased child, upon what was collected by the Court, as the intention of the parties, against very strong expressions to the contrary. *Woodcock* v. *Dorset* (*Duke*), 3 Bro. C. C. 569.

4. Portions to be paid or transferred at twenty-one or marriage; if in the life of parents entitled for their life, then such portions were not to be paid, etc., till the decease of such parents, with survivorship in case of death of any, before his, her, or their shares should be payable, etc.:—Held, vested at twenty-one or marriage, in life of parents. *Schenck* v. *Legh*, 9 Ves. 300.

5. Portions held vested in case of parent and child, by implication from the whole settlement against express words, and a clause of survivorship upon death of child before the portion "should become payable" was upon the authorities construed "before it should be vested." *Hope* v. *Clifden* (*Lord*), 6 Ves. 499.

6. A. settles his estate on his sister B. for life, remainder to her second and other sons in tail, etc., and gives her a power, with the consent of C., her husband, and for C. surviving B., to charge it with a sum not exceeding 12,000*l.* for their children; and if they, or the survivor or them, do not appoint the provision, then 2,000*l.* each to be raised for younger sons, and 3,000*l.* each for daughters, at their ages of twenty-one, with interest at 5 per cent. for their maintenance, to commence from the time of the appointment; and if no appointment, then from the death of the survivor of B. and C.; and if any of the younger children die before their shares become payable, the same to go to the survivor. A. dies; C. dies, leaving four younger sons and two daughters, one of which died an infant soon after her father; then B. dies, without making any appointment: the whole 14,000*l.* shall be raised, and carry interest from the death of B. *Rolt* v. *Rolt*, Forrest. 189.

7. Where portions are provided for daughters by a settlement, the father cannot, by his will, annex any condition to the payment of them, or devise them over, in case of the death of any of the daughters before their portions become payable. *Aston* v. *Aston*, 2 Vern. 452; 1 Ch. Rep. 164; Pre. Ch. 266.

8. By a marriage settlement a term was created for raising portions for daughters, in case the father should die without issue male. Such portions to be paid at twenty-one or marriage; but if the daughters should attain that age, or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before

their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained twenty-one and married, and afterwards died in her father's lifetime. The father died without issue male.—Held, nevertheless, that the daughter's representatives were entitled to her portion. *Fry* v. *Sherborne* (*Lord*), 3 Sim. 243; 8 L. J., Ch., 25.

1. Term to commence after the father's death to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of the father, with survivorship in case of the death of a child before its portion should become due and payable. The father died without making any appointment:—Held, the portions vested at twenty-one or marriage during his life. *Cholmondeley* v. *Meyrick*, 1 Eden 77; cited 3 Bro. C. C. 253. n.

2. Term in trust, after decease of father, in case he should leave a younger child, etc., to raise portions, to be paid according to appointment, and in default, etc., at twenty-one or marriage, with provision for advancement in the life of the father, by his direction; and survivorship, upon death of any child before the portion shall be payable; and if there should be no such child, or all die before the portions become payable, not to be raised:—Held, vested in an only younger child, who, having attained twenty-one, died in life of father, and no appointment having been made. *Powis* v. *Burdett*, 9 Ves. 428.

3. By settlement made previously to marriage of A. and B., certain Exchequer annuities were vested in trustees in trust for the husband for life, then to the wife for life, and after both their deaths for the children of the marriage equally, if more than one, and if but one for such only child, to be assigned over to such child or children respectively at their ages of twenty-one, happening after the death of survivor of husband and wife; but if either of the children should attain twenty-one during joint life of father and mother, or life of survivor, then his or her share was to be paid within three months after death of such survivor: but if there should be no children of the marriage, or being such, all of them should die before their share should become transferable as aforesaid, then the annuities were to go to the survivor of husband and wife. There was issue only a son, who attained twenty-one, but died in lifetime of mother, who survived husband:—Held, that the annuities became vested in son on his attaining twenty-one years, and were transmissible by him, notwithstanding he died in his mother's lifetime. *Jeffreys* v. *Reynous*, 6 Bro. P. C. 398. Affirming 2 Eden 368.

4. By a marriage settlement stock was settled, subject to life interests in the husband and wife, in trust for their children in equal shares, to be paid or payable at twenty-one or marriage, the shares of those dying, leaving issue, before their shares had become payable, to go to their issue, and in case any died without issue before their shares had become payable, then such shares to go to the surviving children of the marriage. Two of the children attained twenty-one, and died in the lifetime of the surviving parent.—Held, that payable meant vested, and that the shares of the two children so dying went to their representatives. *Mocatta* v. *Lindo*, 9 Sim. 56.

5. In construing a pre-nuptial settlement it must be considered that the intention of the parties to it was to provide for the children of the marriage at the time when those children would require provision to be made for them; and a construction which would exclude a son who attained twenty-one and afterwards died in the lifetime of his surviving parent, cannot be adopted in the absence of words absolutely compulsory. *Currie* v. *Larkins*, 4 De G. J. & S. 245.

The language of such a settlement may be controlled by its general intention. *Ib.*

By a marriage settlement made in India in 1828, on the marriage of G. and L., after a recital that a bond had been executed as a further provision for the children of the marriage, trusts were declared for the benefit of the husband and wife for their lives, and after their deaths, "for all the children of the marriage equally, to be paid or assigned to them at twenty-one or marriage, whichever should first happen; the shares to be deemed vested on the happening of those events, and to be paid within six months after the decease of the surviving parent, to such of the children who should attain twenty-one or be married, being a son or daughter; and in case any child should survive the parents, and die before attaining twenty-one or marriage, then his or her share which should have accrued should be for the benefit of the survivors in the same manner as the original shares; and if all such children, except one, should die before the shares should become vested, then, for the benefit of such one, to become a vested interest on his or her attaining twenty-one or marriage, after the decease of both parents; and in case there should be no child, or in case there should be such child or children, but they should die in the lifetime of the parents, or in the lifetime of the survivor of them, upon trust to pay the moneys to the survivor of the parents; or in case there should be such child or children, who should survive the parents, but die before the shares became vested or payable, then for the benefit of such person as the surviving parent should appoint; and in defalt, for the next-of-kin of such parent." L. died in 1836. The children of the marriage were H., who died in the lifetime of both parents; J., who attained twenty-one, and died in 1857, in the lifetime of his father; and C., who attained twenty-one, and survived both parents, and who claimed the whole of the trust funds. G. in 1841 intermarried with S., and died in 1861 intestate; and on S.'s behalf it was contended that the next-of-kin of G. were entitled to two-thirds of the funds:—Held, that the surviving trustees were entitled to prove as specialty creditors on the bond, and that the trust funds were divisible into moieties; one belonging to the legal personal representative of J., and the other to C. S. C. 10 Jur., N. S., 8; 9 L. T., N. S., 638. Affirmed 10 Jur., N. S., 349; 12 W. R. 515; 10 L. T., N. S., 47; 3 N. R. 621.

6. In a settlement of trust moneys in trust for certain persons for life, and after the decease of the survivor in trust for their chil-

dren, being sons at twenty-one and being daughters at twenty-one or marriage, "the issue of any child whose parent should die before his or her share should become payable to be entitled to the share which his or her parent would have been entitled to if living": —Held, that having regard to the fact that daughters' shares vested at their marriage when they could not have any issue, "payable" must refer to the period of distribution, and could not mean "vested." *Day* v. *Radcliffe*, 24 W. R. 961.

By a settlement reciting a royal warrant, directing 1,000*l* to be paid to trustees for the benefit of A. D. and J. D. and children of A. D., it was declared that the trustees should stand possessed of the 1,000*l*. upon trusts for investment and payment and application of the income to or for the benefit of A. D. and J. D. during their respective lives, and from and after the deceases of A. D. and J. D. upon trust to pay, divide, or transfer the 1,000*l*., and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of A. D., and the issue of such child or children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one, and to such children or child as should be daughters or a daughter at the age of twenty-one, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. A son of A. D. attained twenty-one, and died in the lifetime of A. D., leaving a child:—Held, that the child of the son so dying was entitled to the parent's share of the trust fund. S. C. 3 L. R., Ch. D., 654.

1. By a marriage settlement stock was settled upon trust for the husband and wife successively for life, and after the death of the survivor of them, on trust to assign the trust fund among their children, and the issue of such of them as should be then dead leaving issue, as the husband and wife should appoint, and in default of appointment amongst the children and the issue of any of them who should be then dead leaving issue (such issue to take only their parents' share), equally to be divided among them, to sons at twenty-one, and daughters at twenty-one or marriage; and until their respective shares should become payable, on trust to pay the income towards their maintenance; and in case any child should die without issue before his share should become due and payable, upon trust to pay and divide the share of such child among the survivors or survivor and the issue of any of the children then dead, leaving issue, equally, when and as their original share should become due and payable; and if at the death of the surviving tenant for life no such child or issue should be living, or in case any of such children and issue were then living, but all of them should die before their respective shares were payable, then on trust over for other persons. The settlement also contained a provision enabling the trustees to pay the children's shares to them before the expiration of the respective times thereinbefore limited for the payment thereof:—Held, that the words "due and payable" must bear their natural meaning, so that the share of a son who attained twenty-one and died in the life of the surviving tenant for life passed under the accruer clause. *Re Wilmott*, 38 L. J., Ch., 275; 7 L. R., Eq., 532.

2. In determining the rights of children under a marriage settlement, the Court, unless prevented by clear and distinct words, will hold that children who attained twenty-one, and died leaving their parents, took vested interests under the settlement. *Baillie* v. *Jackson*, 1 Sm. & G. 175.

The Court will lay hold of minute circumstances in favour of such construction. *Ib.*

A. fund was settled, "in case there should at the decease of A. and B. be living one or more child or children of the marriage," in trust, to be divided equally amongst all such children; the share or portion of each to be paid to sons on attaining twenty-one; to daughters at the same age or marriage. A power was also given to A. by will, "to alter or vary the proportion of each child, and to direct what should be paid to each respectively." There were nine children, all living at A.'s death; seven of them survived B., having attained twenty-one:—Held, that the children dying in B.'s lifetime had acquired vested interests, and that the fund was divisible into ninths. S. C. 1 W. R. 196; 17 Jur. 170.

3. By a voluntary settlement, expressed to be made in consideration of natural love and affection for settlor's son G. and daughters M. and E., property was settled in trust for settlor for life, with remainder, as to part, in trust for G for life, and after his decease in trust for all G.'s children which might be living at the time of his decease, as tenants in common; and if G. should have but one such child, then for such only child; the share of every such child to be vested at twenty-one, or, if a daughter, at twenty-one or marriage; with proviso for survivorship if more than one child of G., and any of them being a son should die under twenty-one, or being a daughter under twenty-one without having been married; and in case all such of G.'s children as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married, then over; and as to other parts of the property, in trust for M. for life, and after her decease for all her children, who being sons should attain twenty-one, or being daughters should attain that age or be married, in such manner and form, and in such shares and proportions, and subject to such clauses of survivorship, etc., as before declared with respect to G.'s children; and as to a third part of the property upon trusts for E. and her children, similar to the trusts of M. and her children:—Held, that the instrument, though voluntary, and not expressed to be made in consideration of natural love and affection for the settlor's grandchildren, was within the rule in *Emperor* v. *Pelfe* (1 Ves. 208); and that, having regard to the terms of the limitation over, after the trusts for G.'s children, and notwithstanding the different

form in which the trusts for the children of M. and E. were expressed, two children of G. who attained twenty-one, and subsequently died in his lifetime, took vested and transmissible interests equally with those of G.'s children who survived him: the rule being that, whereas in ordinary instruments an express estate thereby limited cannot be enlarged except by necessary inference, yet, upon instruments of this description, there is an implication of law arising upon the instrument itself, subject to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when such portions will be wanted, namely, upon their attaining the age of twenty-one, or, in the case of daughters, upon their attaining that age or marriage; and that such portions shall then vest, whether the children do or do not survive their parents. *Swallow* v. *Binns*, 1 Kay & J. 417; 1 Jur., N. S., 843.

1. Stock was, by articles of agreement, vested in trustees for several parties, in different portions, for their absolute use and benefit; provided that no payment or transfer should be made to any of them until he or she should have completed his or her twenty-fifth year, unless he or she should be previously settled in life, with the sanction and approbation of the trustees, or of the major part of them; and in case any of them should marry or act otherwise in opposition to the wishes of the trustees, it should be optional with them to deprive the party so marrying or acting of all benefit or advantage under the articles, and the portion to which such person would be otherwise entitled should go to, and be equally distributed amongst, the others; and provided that in case any of them should happen to die before the share to which he or she was entitled under the articles should have been transferred to him or her, the share of the person so dying should be distributed equally amongst the survivors, and that the trustees should apply the dividends of the fund for the maintenance and education of the parties in the several proportions to which they would be respectively entitled to the principal:—Held, that the original portions were vested, though not transferable until the respective parties attained twenty-one. *Bradon* v. *Bradon*, 16 Ir. Ch. R. 415.

Held, also, that shares accrued under the survivorship clause did not go over on the parties entitled to them dying under the age of twenty-five, but belonged to their next-of-kin. *Ib.*

Decisions under Wills.] See WILL, LX.

6. Effect of Gift Over "before becoming Entitled."

2. By a marriage settlement a fund was limited in trust after the death of the parents, to transfer and assign to all the children equally, the shares of minors to be paid, transferred, and assigned at their age of twenty-one, with maintenance in the meantime; and there was a gift over if there should be no child, or "if they should all happen to die before they became entitled to their respective shares":—Held, that the shares of the children vested at their birth, and that the shares of two of them who died in their infancy in the lifetime of their parents, passed to their personal representatives. *Jopp* v. *Wood*; *Smith* v. *Jopp*, 2 De G. J. & S. 323; 34 L. J., Ch, 625; 13 W. R. 954; 12 L. T., N. S., 689; 11 Jur., N. S., 833. Affirming 28 Beav. 53; 6 Jur., N. S., 620; 29 L. J., Ch., 406.

3. The trusts of 2,000*l.* were declared to be the interest to be retained by the settlor during his life, and after his death to be applied to the maintenance of H. and her daughter. In a subsequent part of the instrument the trusts were, "After my decease I wish the interest of the above sum to be applied to their maintenance during their joint lives; and at the decease of her mother, if the child survives, and lives till she has attained twenty-one, then the principal sum I bequeath to her; but in the event of both their deaths before the child shall have attained twenty-one, then" the principal sum to be paid to the brothers and sisters of the settlor. The daughter lived to attain twenty-one, but died in the lifetime of her mother:—Held, that the mother was entitled to the interest of the 2,000*l.* during her life; and that the daughter, upon attaining twenty-one, acquired an absolute vested interest in the principal. *Moor* v. *Abbott*, 3 Jur., N. S., 551; 26 L. J., Ch., 787.

4. By a marriage settlement funds were vested in trustees for the husband for life, and after his death for the wife for life, and after the death of the survivor, in case they should leave issue, who being a daughter or daughters should live to be married or attain twenty-one, or being a son or sons should live to attain twenty-one, upon trust to pay the funds equally amongst all such issue as and when they should attain the age of twenty-one or be married, and if there should be but one such child, upon trust to pay the same to such only child, provided that if any such issue should happen to die before he or she should become entitled to and actually receive his or her portion, leaving lawful issue surviving, such issue should be entitled to their parent's share equally:—Held, that the word "leaving" must be construed according to its natural meaning, and that the representatives of a son who attained twenty-one and died without issue in the lifetime of his parents were not entitled to share in the trust fund. *Jeyes* v. *Savage*, 33 L. T., N. S., 139; 23 W. R. 764; 44 L. J., Ch., 706; 10 L. R., Ch., 555. Reversing 23 W. R. 742.

Decisions under Wills.] See WILL, LX.

III. EFFECT OF GIFT OF INTEREST OR MAINTENANCE.

5. Trust "to raise" 5,000*l.* portion, "and pay it" to such younger child as the father should appoint, for want of appointment, to the younger children at twenty-one, with interest for their maintenance, etc., in the meantime,

etc., etc. The only younger child died at two years old:—Held, not to be vested in him so as to be claimed by the father as his representative. *Hubert* v. *Parsons*, 2 Ves. 261.

1. By marriage articles it was agreed that 6,000*l.* should be vested in trustees in trust for all and every the child and children of the marriage (other than the one son for whom a portion of 30,000*l.* was provided) the said 6,000*l.* to be paid to such child or children in such shares, at such times, and subject to such provisoes for maintenance and education, until their shares should become payable, as the intended husband should by deed or will appoint; and in default of appointment, to be paid to such child or children, and to be equally divided among them, the shares of the sons to be paid at twenty-one, and of daughters at twenty-one or marriage; and in the meantime, until their portions should become payable, to apply the interest of their shares towards their maintenance and education; and in default of any issue save an only son, in trust for the intended husband, his executors, administrators, and assigns. There was issue of the marriage, one son and two daughters, all of whom survived their parents. One of the daughters died under age and unmarried; the other attained her age of twenty-one:—Held, that the daughters took vested interests in the 6,000*l.* on being born, and that the share of the one who died under age vested in her personal representative. *Hymes* v. *Redington*, 1 J. & L. 589; 7 Ir. Eq. R. 405.

2. A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof in trust to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority, and upon his attaining the age of twenty-one years, upon trust to assign the said premises, together with the lease and accumulations of rents unto the said son, his executors, etc., for the remainder of the term:—Held, son took a vested interest in the lease, and on his death that it passed to his personal representatives. *Stephens* v. *Frost*, 2 Y. & Coll. 302; 6 L. J., N. S., Exch. Eq., 41.

3. A power to charge estates "with reasonable portions and fortunes for younger children, and for their maintenance and education," is sufficiently certain to be capable of execution. The word "reasonable" is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Therefore, an appointment of a portion to an infant, payable with interest from the death of the appointer, does not so vest the portion as to make it, on the death of the infant, transmissible to her representative; the appointment being under the implied condition that the child should attain that age at which the portion would be required for advancement in life. But the infant being entitled to a reasonable maintenance while it lived, her administrator decreed, under the head of general relief, entitled to a reasonable allowance for maintenance, though not specifically prayed by the bill. By authorising the donee to appoint maintenance and education, it implied that the portions could not be raised during infancy, for if they could, the interest of the money so raised would supply those purposes. *Edgeworth* v. *Edgeworth*, Beat. 328.

4. By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, stock was vested in trustees for the wife for life, and after her decease for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, his or her executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards his or her maintenance and education until his or her share should become invested, or he or she should previously die:—Held, that daughters who attained twenty-one were entitled to share in the fund. *Re Dannel*, 1 L. R., Ch. D., 375; 45 L. J., Ch., 105; 24 W. R. 227; 34 L. T., N. S., 308.

Semble, that daughters would not acquire a vested interest till they attained twenty-one. *Ib.*

IV. OTHER CASES.

5. Portions not to be raised for representative of child dying before he wanted it. *Teynham* (*Lord*) v. *Webb*, 2 Ves. 209.

6. Under marriage articles, 2,000*l.* part of 3,000*l.*, vested in trustees, was to be paid to such son as should attain the age of twenty-one, when and at such time as he should have attained the age of twenty-three. The eldest son attained twenty-one, but died before twenty-three:—Held, that he became absolutely entitled to the money, and the time of payment only was postponed to the age of twenty-three. *Combe* v. *Combe*, 2 Atk. 185.

7. A power in a settlement to raise a portion for a younger child, at such time as the parent should direct; he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator. The portion shall not be raised for the father. *Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 395.

8. Construction of a trust by deed, of money to accumulate until the grantor's grandchildren then living, or to be born, respectively attain twenty-one; and on attaining, etc., to pay to each, as they should respectively attain such age, their respective shares, to be ascertained by the number in being as they respectively attain twenty-one, without regard to such as might afterwards be born. No interest vested until payment; the measure of distribution is the number existing at each period: those who had received have no further claim upon the fund increased by shares falling in; therefore, one dying under twenty-one, after all the others had either received their shares or died

under twenty-one, that share is undisposed of by the deed, and passed by a bequest of "all effects whatsoever" following specified description of property. *Campbell* v. *Prescott*, 15 Ves 500.

1. By marriage settlement 1,500*l.* was provided for younger children, in such shares as the parents should appoint, in default of appointment to all the children after the death of the wife. The parents afterwards made an appointment, excluding one child; this deed vests the portions in the children born or to be born, except the one excluded. *Mayhew* v. *Middleditch*, 1 Bro. C. C. 162.

2. There are cases where the Court, though it would not raise the portion for a representative of an infant child, has allowed interest or maintenance whilst it lived. *Edgeworth* v. *Edgeworth*, Beat. 337.

In a power to appoint to children, the word "reasonable" is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Therefore, an appointment of a portion to an infant, payable with interest from the death of the appointer, does not so vest the portion as to make it, on the death of the infant, transmissible to her representative; the appointment being under the implied condition that the child should attain that age at which the portion would be required for advancement in life. But the infant being entitled to a reasonable maintenance while it lived, her administrator decreed, under the head of general relief, entitled to a reasonable allowance for maintenance, though not specifically prayed by the bill. *Id.* 328.

If such a construction can be given to an appointment as will secure the real object, the Court will not disappoint provisions for children because the parent has in part misconceived his power. On instruments providing portions, the Court has assumed a latitude of exposition which it does not on other instruments. *Id.* 334.

3. By a marriage settlement the real estate of the husband was limited to him for life, and at his death to trustees for a term of years, and subject thereto to the first and other sons of the marriage in tail male, remainder to the husband in fee. The trusts of the term were declared to be for raising portions for younger children of the marriage, "in case there should be one or more child or children of the marriage, besides an eldest or only son." There were two daughters only, and no son, issue of the marriage, and on the marriage of one of the daughters the father settled upon her and her husband, and her children, an annuity of greater value than her share of the portions under his own marriage settlement, and charged that annuity upon the estate which had been subject to that settlement. Upon the marriage of the second daughter he made a pecuniary provision for her, which was declared to be in satisfaction of her portion under the settlement; and by his will he devised the estate which had been settled to his two daughters, in the same manner as it would have come to them if he had died intestate:—Held, upon the construction of the settlement, that the portions were not raisable in the events that had happened, there being no son of the marriage. *Walcott* v. *Bloomfield*, 2 Con. & L. 577; 4 Dr. & War. 211; 6 Ir. Eq. R. 227. And see 2 Con. & L. 587.n; 4 Dr. & War. 225. n.

4. By a marriage settlement stock was settled, subject to the husband's and wife's life interests therein, upon trust for the children and issue of the marriage (except an eldest son entitled to certain settled estates), as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children (except as aforesaid) in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one, or on marriage; and it was provided that if the husband should die in his wife's lifetime, leaving an only child a son, such son should be entitled to the whole trust fund; but if the wife should survive the husband, and there should be only two children or only one child (except as aforesaid) who should attain twenty-one or marry, such two only children or one only child (except as aforesaid) should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child (except as aforesaid) were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant, and a daughter who married, and became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed, purporting to create a charge upon the settled estates, turned out to be invalid:—Held, upon the construction of the settlement, and without resting the decision upon the invalidity of the charge, that the daughter took an absolutely vested interest in the trust fund, and that it did not go to the husband's representative. *Carter* v. *Ducie*, 41 L. J., Ch., 153; 20 W. R. 228; 25 L. T., N. S., 656.

Semble, that if it had been otherwise, the invalidity of the charge would have been sufficient to displace the claim of the husband's representative. *Ib.*

5. By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees for the wife for life, and after her decease in trust for all and every the child and children of the marriage who, being a son or sons, should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, his or her executors and administrators. There followed a clause directing that the trustees should, during the minority of each of the children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of every such child for or towards his or her maintenance and education until his or her share should become vested, or he or she should previously die:—Held, that daughters who attained twenty-one were entitled to share in the fund. *Re Daniel*, 1 L. R., Ch. D., 375; 45 L. J., Ch., 105; 24 W. R. 227; 34 L. T., N. S., 308.

Semble, that daughters would not acquire a vested interest till they attained twenty one. *Ib.*

IV. Vesting of Interests in Real Estate.

See also V. *post.*

I. GIFT TO A. "AT," "WHEN," "IF," "UNTIL," HE ATTAINS TWENTY-ONE.

1. The testator directed the residue of his property to be invested in land and given to S., who was not to be of age to receive this until he attained his twenty-fifth year, and to be entailed to him and his heirs male:—Held, that S. took a vested estate tail in the land, subject to be devested if he should not attain twenty-five, and that the rents and profits were applicable to his benefit during his minority. *Snow* v. *Poulden*, 1 Keen 186.

2. The testator gave an estate to A., "to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but if sold at all, it must be sold to one of his brothers":—Held, that the estate was vested subject to be devested in case of A.'s death before he attained twenty-five, and that the restriction on alienation was inoperative. *Attwater* v. *Attwater*, 18 Beav. 330; 18 Jur. 50; 23 L. J., Ch., 692.

3. G. P., a tenant for life of real estate, with remainder for all and every, or any one or more, to the exclusion of the other or others of his children as he should by deed or will appoint, made an appointment to trustees upon trust for his son G. S. P., his heirs, executors, administrators, and assigns, and to be conveyed to him when and as he should attain the age of twenty-three years; and in case his son G. S. P. should die before he should have attained the age of twenty-one years, to the use of the second, third, and fourth, and every other son of the testator successively in tail, with remainder to his daughters in tail, with remainder to his brother in fee. And after directing the payment of two annual sums of money during the minority of his son, he directed his trustees to invest the clear residue of the rents and profits, to accumulate until G. S. P. or such other sons as aforesaid should attain the age of twenty-three, and on his or their first attaining that age then upon trust to pay over all such securities and accumulations unto G. S. P. or to such other sons, his executors, administrators, and assigns, for his and their absolute use and benefit:—Held, that the power of appointment was duly exercised; that G. S. P. took an estate in fee upon the death of the testator, liable to be devested in case of his death under twenty-one; and that the trust for accumulation was valid until G. S. P. attained the age of twenty-three. *Peard* v. *Kekewich*, 21 L. J., N. S., Ch., 456; 15 Beav. 166.

4. Devise to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son, then over. T. died leaving an eldest son a minor:—Held, that on the death of T. the eldest son took an estate in fee liable to be devested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 1 L. R., Ch. D, 410, 45 L. J, Ch., 232; 34 L. T. 82; 24 W. R. 329

5. If a father devise lands to trustees and their heirs till his son attain twenty-five years, a mortgage thereof by son when of twenty-one years is void. *Spencer* v. *Chase*, 9 Mod. 30.

6. Devise of real estate to A. for life, and after her decease to B. and C. and D. and E. (an infant), "provided she lives to attain twenty-one":—Held, that this was a condition subsequent, and the tenant for life having died during the minority of E, that she was entitled to her share of the rents until she attained twenty-one. *Simmonds* v. *Cock*, 29 Beav. 455; 7 Jur., N. S, 718; 9 W. R. 517.

7. A testator devised his real estate to his executors upon trust to pay the rents for the support of his wife and his present or future grandchildren during the life of his wife, and upon her decease upon trust to convey the property to his present or future grandchildren as they should attain the age of twenty-five, to hold the same unto his said grandchildren, their heirs and assigns, for ever, as tenants in common:—Held, that the devise was void for remoteness. *Blagrove* v. *Hancock*, 16 Sim. 371; 18 L. J., N. S., Ch., 20; 12 Jur. 1081.

8. A testator devised real estate to trustees, after life interests, to receive the rents during the minority of A., and apply them for his maintenance and education, and accumulate the residue, and to convey the property to A., his heirs and assigns, so soon as he should have attained twenty-one; and he also devised a rent-charge for the benefit of B., his heirs and assigns, declared by reference to the trusts in favour of A. The will contained a declaration, that in case the trusts should determine or become incapable of taking effect, the hereditaments should form part of the residue. B. survived the testator, and died under twenty-one:—Held, that he took an absolute estate in fee in the rent-charge. *Re Mottram*, 10 Jur., N. S., 915; 10 L. T., N. S, 866.

9. A testatrix devised real estate to trustees in trust for J. F. for life, remainder to his first and every other son in tail male, with several remainders over, and she devised the residue of her property to J. F. By a codicil, after reciting that she had, by her will, limited her estates to trustees upon trust for the life use of J. F., with remainder to his issue in tail, and divers remainders over, and that since the making of her will J. F. had died, leaving an only child, A. F., who under the will would, as she believed, take an estate tail on her death, the testatrix declared it to

be her will that the said A. F. should not become entitled to or take the estate so limited to him until he should have attained the age of twenty-three years; and she bequeathed a portion of the accumulations of the rents to J. F.'s sister, and directed that she should succeed to the estates next in remainder after the last remainder in the will:—Held, that A. F. took a vested estate at the death of the testatrix, and was entitled to the rents from that period. *Dennis* v. *Frend*, 14 Ir. Ch. R. 271.

1. Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age":—Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same rule as the realty; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately. *Jull* v. *Jacobs*, 3 L. R., Ch. D., 703; 24 W. R. 947; 35 L. T., N S., 153.

Held, also, that the remainder to the daughter's children created vested interests. *Ib.*

II. GIFT TO A. "AT," "WHEN," "IF," "UNTIL," HE ATTAINS TWENTY-ONE. EFFECT OF GIFT OVER.

2. Devise to trustees and their heirs in trust to receive the rents, etc, until A. shall attain twenty-one; and immediately after he shall attain twenty-one to convey to the use of A. for life; and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during his life, upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A under twenty-one, upon similar trust for other persons. A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last. *Stanley* v. *Stanley*, 16 Ves. 491.

3. Testator devised all his real estates to trustees in trust to convey his lands in W. to A. when and so soon as he should attain twenty-one; but in case he should die under that age, and without leaving issue, then over: and when B. should attain twenty-four, in trust to convey the rest of the real estates to him on his giving security for the annuities given by the testator and executing certain deeds, to the satisfaction of the trustees; but in case B. should die before he attained twenty-four without leaving issue, then over. A. and B. were both infants at the testator's death:—Held, that A. took a vested interest in possession in the lands in W., but that B.'s interest in the rest of the estates was contingent on his attaining twenty-four and doing the acts required, and that B. took a vested estate in the intermediate rents, the direction as to his giving security not being a condition precedent. *Ackers* v. *Phipps*, 3 Cl. & F. 665; 2 Bli. N. S. 430. Reversing on the latter point *Phipps* v. *Williams*, 5 Sim. 44; 1 L. J., N. S., Ch., 96.

4. A gift of residuary real and personal estate upon trust to sell and invest, and pay "the said property and interest arising therefrom to A. on his attaining the age of twenty-four; but in case of his not attaining that age, or leaving male issue, I give, devise, and bequeath the said properties" to other persons:—Held, that A. took an absolute vested interest in the testator's residuary estate, liable to be devested in the events mentioned in the will. *Whitter* v. *Bremridge*, 2 L. R., Eq, 736; 14 W. R. 912; 35 L. J., Ch., 807.

5 Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son for life, and in case his son should die leaving behind him no legitimate issue. then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child then living of his son should have attained twenty-five, or in default of male issue, the eldest female child then living of his son should have attained twenty-one, to convey all the estates to the eldest male child, or in default of male issue to the eldest female child, and to his or her heirs of his or her body lawfully begotten absolutely for ever. The testator then (in case his son should die during the minority of such eldest male or female child), provided for their maintenance, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then after the death of the testator's wife the estates to be conveyed to other persons. The testator's son married, and had a son born after the testator's death. The Court, holding the trust for the grandson not to be void for remoteness, and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him. *Jackson* v. *Marjoribanks*, 12 Sim. 93; 5 Jur. 885.

6. Testator devised his estate at E. to trustees upon trust to apply the rents for the maintenance and support of B. till she should attain the age of twenty-five or marry with consent, and to lay out the surplus of such rents in Government securities, that the same might accumulate for the uses and purposes of his will; and from and after the said B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life; and after her decease, upon trust for her children. The testator then gave his estate at S. to the same trustees upon trust, in case the said B. lived to attain twenty-five, or married with such consent as aforesaid, to let her receive the rents for her life; and after her decease, upon trust for her children in manner before mentioned. Provided that in case B. should marry without consent, the testator revoked all the devises and bequests in favour of her and her issue. All the residue

of his real and personal estate, and likewise his estate and premises thereinbefore devised for the benefit of B, in case she should die under twenty-five unmarried, and without issue, the testator devised and bequeathed to the trustees in trust for X., Y., and Z. B. attained twenty-five, and married with consent. Between the death of the testator and her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, and an accumulation of the rents of the S. estate:—Held, that she was entitled for her life to the income of the former accumulation, as to which the Court did not further declare the right, and absolutely entitled to the latter accumulation. *Greene* v. *Potter*, 2 Y. & Coll. C. C. 517; 7 Jur. 736.

1. A testator gave real and personal estate to H., her heirs, executors, administrators, and assigns absolutely, if she should be living at the death of his wife; but in case H. should die in the lifetime of his wife without leaving issue her surviving, then over:—Held, that H. took an absolute interest, liable to be devested only in the event of her death in the lifetime of the widow without leaving issue. *Finch* v. *Lane*, 10 L. R., Eq., 501.

2. A testator devised real estate to his widow for life, and after her death to the child or children of H., "if he leave any him surviving; but in case he leave no child or children him surviving," to the child or children of W. H. survived the widow:—Held, that the remainders to the children of H. and W. were contingent, and failed. *Price* v. *Hall*, 37 L. J., Ch., 191; 16 W. R. 642; 5 L. R., Eq, 399.

3. Devise to trustees and their heirs in trust for the plaintiff and his heirs if he should attain twenty-one; and if he should die before twenty-one, then over:—Held, that the plaintiff took a vested interest subject to be devested by his death under twenty-one. Costs, the question being one of construction, and although only relating to real estate, directed to come out of the residuary personal estate. *Hepworth* v. *Scale*, 1 Jur., N. S., 698.

See also next Subdivision.

III. GIFT TO CHILD OR CHILDREN WHO ATTAIN TWENTY-ONE, AND TO A CLASS AT TWENTY-ONE.

4. Testator devised all his real estates to trustees in trust to convey his lands in W. to A. when and so soon as he should attain twenty-one; but in case he should die under that age, and without leaving issue, then over: and when B. should attain twenty-four, in trust to convey the rest of the real estates to him on his giving security for the annuities given by the testator, and executing certain deeds to the satisfaction of the trustees; but in case B. should die before he attained twenty-one, without leaving issue, then over. A. and B. were both infants at the testator's death:—Held, that A. took a vested interest in possession in the lands in W., and that B. took a vested interest in the intermediate rents, the direction as to securing the annuities not being a condition precedent. *Ackers* v. *Phipps*, 3 Cl. & F. 665; 9 Bli., N. S., 430. Reversing on the latter point *Phipps* v. *Williams*, 5 Sim. 44; 1 L. J., N. S., Ch., 96.

5. A testator gave all his real and personal estate to trustees; and as to his lands at W., which he held in fee simple, he directed that the trustees should stand seised thereof in trust to convey the same to G. H. A. "when and as soon as he should attain his age of twenty-one years;" but in case he should die before he attained that age without leaving issue of his body, then that the said lands at W., given and devised to him, should sink into the residue of the testator's real and personal estates; and he then gave the residue to J. G. At the testator's death G. H. A. was only twelve years of age:—Held, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be devested in the event of his dying under twenty-one without leaving issue of his body. *Phipps* v. *Ackers*, 9 Cl. & F. 583; 6 Jur. 745. Affirming on this point *Phipps* v. *Williams*, 5 Sim. 44. S. C. 1 L. J., N. S., Ch., 96.

6. A devise of real estate to the use of A. for life, with remainder to the use of all and every the child or children of A. who shall attain the age of twenty-one years, and for want of such issue over, creates a tenancy for life in A., with a contingent remainder in fee to such of the children of A. as shall attain twenty-one; and on the death of A., leaving infant children, but having had no child who had then attained twenty-one, the interest of the children of A. was devested, and the limitations over were defeated. *Festing* v. *Allen*, 5 Hare 573. And see 12 M. & W. 279.

7. A testator gave real estate to trustees, their heirs and assigns, upon trust to pay the rents and profits to M. A. E., a married woman, during her life, for her separate use, and after her decease in trust for all her children by P. E., her husband, begotten or to be begotten, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or be married, share and share alike, as tenants in common, and not as joint tenants, and their heirs and assigns for ever. The testator also empowered the trustees during the life of M. A. E., and after her decease, in case she should leave any child or children living at her decease under the age of twenty-one years, then during the minority or respective minorities of such child or children to demise any part or parts of the said freehold hereditaments, etc. M. A. E. died, leaving six children, one only of whom at her death had attained twenty-one:—Held, that the legal estate vested in the trustees, and that there was an immediate equitable devise to all the children living at the death of M. A. E., subject to the contingency of their estates being devested upon their dying under the age of twenty-one years; held, also, that each child was entitled to an immediate share of the rent, and would not lose his title to such rent by dying under twenty-one. *Riley* v. *Garnett*, 19 L. J., N. S., Ch., 146; 14 Jur. 236; 3 De G. & Sm. 629.

8. A devise, after a life estate to testator's son A., in these words, "to all and every my grandchildren, the children of my said son A.,

and three daughters, B., C., and D., who shall attain the age of twenty-four years":—Held, void for remoteness, although there were no grandchildren not born in the testator's lifetime. *Newman* v. *Newman*, 10 Sim. 51; 8 L. J., N. S., Ch., 354.

1. In a devise of real estate upon trust for the daughter of the testator for her life, from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance the interest of such child's share, notwithstanding such child's share should not be then absolutely vested:—Held, that the limitation to the children of the daughter, and the limitations over, in default of such children, are void for remoteness. *Bull* v. *Pritchard*, 5 Hare 567; 16 L. J., N. S., Ch., 136; 11 Jur. 34.

2. Words of contingency in a gift have no stronger or more uncontrollable force when applied to the description of a person than when applied to the description of an event. *Browne* v. *Browne*, 3 Sm. & G. 568; 3 Jur., N. S., 728; 26 L. J., Ch, 635; 5 W. R. 777.

Devise to trustees upon trust for the testator's grandson S. for life, and after his decease in trust for all and every the child and children of S. who being a son or sons should attain the age of twenty-one, or being a daughter or daughters should live to attain that age or be married, equally to be divided between them, if more than one, and their heirs and assigns; and if there should be only one such child, then in trust for such only child, his heirs and assigns; but in case S. should die without leaving lawful issue, then upon similar trusts for others of his grandchildren and their children successively, with an ultimate trust for the testator's right heirs. The trustees were empowered, immediately after the death of the first tenant for life of the estates, to apply the rents for the maintenance of the person or persons next beneficially entitled thereto. S. died, leaving an only child, an infant, him surviving:—Held, that such child was, under the limitations in the will, devisee of an estate in fee simple, determinable in case of his dying under the age of twenty-one. *Festing* v. *Allen* (12 M. & W. 279) commented on. *Ib.*

3. Where leaseholds are bequeathed to such persons as shall be entitled "to the real estate," the gift will be contingent or vested, according as the devise of the real estate, creating a contingent remainder, fails from a rule of law not applying to personal estate. The income of leaseholds during the minority of a person entitled contingently on his attaining twenty-one falls into the residue. The income of residuary personalty in such case is accumulated for the benefit of the legatee. A devise of freeholds in remainder to all and every the children "who shall attain twenty-one" in fee, with a gift over "if there shall be no such child," creates a contingent remainder. *Festing* v. *Allen* (12 M. & W. 279) followed; and *Browne* v. *Browne* (3 Sm. & G. 568) not followed. *Holmes* v. *Prescott*, 2 N. R. 559; 1 W. R. 636.

4. A testator devised property to trustees, for the maintenance of his four children until they severally attained twenty-five, at which time he devised "unto such of his said children as should attain that age" one-fifth of the property, to hold to them and their heirs. There was a gift over to the "survivors or survivor" if any died before attaining twenty-five and left no issue, or if they should die after attaining twenty-five and should leave no lawful issue:—Held, first, that their interests did not vest until twenty-five; and, secondly, that the words "survivors or survivor" were not to be read "other or others." *Stead* v. *Platt*, 18 Beav. 50.

5. A testator devised all his freehold mills, and houses, and mines, going gear, engines, etc, to his sons S. and J for life equally, and after the decease of each of his sons, upon trust in favour of such one or more of their children as they should by deed or will appoint, and so far as no such appointment should extend, to the use of all and every the children of his sons, sons at twenty-one, daughters at twenty-one or marriage, equally, and their, his, or her heirs, executors, administrators, or assigns; and if there should be no child of such of his sons as should die leaving his brother surviving, upon the trusts declared of the original shares; and if no child, the whole to the survivor of his sons absolutely. Then followed a hotchpot clause. S. died leaving children, infants, and J. survived him, and was a bachelor:—Held, that the gift to the grandchildren was a contingent remainder and failed, there being no particular estate to support it *Rhodes* v. *Whiteheud*, 13 W. R. 100; 12 L. T., N. S., 601; 2 Dr. & Sm. 532.

6. On a devise to the use of A. for life, remainder, in default of appointment, to the use of all and every the children of A. who being sons should live to attain twenty-one, or being daughters should live to attain that age or be married, but in case A. should leave no child, who being the son should live to attain twenty-one; or being a daughter should live to attain that age, or be married, then over. *Quære*, whether the remainders were vested or contingent. *Exp. Styan*, Johns. 387.

Quære, whether the distinction between a remainder to a class if they shall attain twenty-one and one to all of a class who shall attain twenty-one can be sustained. *Ib.*

7. The rule laid down in *Festing* v. *Allen* (12 M. & W. 279), that in a devise to the children of A. "who shall attain the age of twenty-one" the words "who shall attain the age of twenty-one" are part of the description of the devisees, gives way to a contrary intention expressed in the devise. *Muskett* v. *Eaton*, 24 W. R. 52; 1 L. R., Ch. D., 435; 45 L. J., Ch., 22; 33 L. T., N. S., 716.

Therefore, where a testator devised real estate to M. for his life, and in the event of his leaving a lawful son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs; but in case he should die without leaving a son who should attain the age of twenty-one, then over:—Held, that the words, "or to be born in due time after his decease" showed that the testatrix meant the estate to vest in a son of M. at his birth, and that J., a son of M., who was seven years old at the

death of M., took a vested interest in the devised estate, subject to being devested on his death under twenty-one. *Ib.*

1. A testator devised a freehold estate to the use of his son for life, and after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue, and the heirs and assigns of such children, in equal shares. The testator had mortgaged part of the devised estate, and at his death the legal estate was outstanding in the mortgagees. The testator's son died leaving four infant children:—Held, that as to the mortgaged portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mortgagees, but as to the remaining unmortgaged portion, the remainders failed on the death of the testator's son. *Festing* v. *Allen* (12 M. & W. 279) commented on. *Astley* v. *Micklethwait*, 15 L. R., Ch. D., 59; 49 L. J., Ch., 672; 43 L. T. 58; 28 W. R. 811.

2. A testator, by a will dated in 1832, gave and devised all his freehold estates to the use of his daughters (five), whom he named, equally, as tenants in common for their several and respective lives, with remainder to trustees to preserve during the lives of the daughters respectively, and from and after the death of either of his daughters, as to the one-fifth part or share of the daughter so dying, to the use of all and every the children of such daughter, born or to be born, who being a son or sons had attained or should attain twenty-one, or being a daughter or daughters should attain that age or be married, in equal shares, and to their several heirs and assigns for ever; but if there should be no such child who being a son should attain that age, or being a daughter should attain that age or be married, as aforesaid, then to the use of the others of his four daughters for their respective lives, with remainder as to each share to such daughter's child or children. After making certain specific and pecuniary bequests, the testator, as to "all the rest, residue, and remainder" of his estate and effects, gave and bequeathed the same to the same trustees, their heirs, executors, administrators, and assigns, upon trust to lay out and invest the same or the produce, as therein mentioned, as they should think fit, and hold his residuary estate upon the same trusts as were thereinbefore declared with respect to his real estate, or as near thereto as the rules of law and equity would permit. The testator died in 1834. One of the daughters, who married in 1835, died in 1851, leaving an only child, a son, W., who did not attain twenty-one until 1860. In a suit of *Holmes* v. *Prescott* (12 W. R. 636) upon the same will it had been incidentally decided that the limitation of each daughter's share in the freehold estates to her child and children being contingent, the remainder to W. failed for want of a particular estate to support it:—Held, that the limitation over of the same share if there should be no such child, being also a contingent remainder, also failed, and that the reversion in such share, after the death of the daughter, passed under the residuary clause in the same will, and did not descend to the heir. *Percival* v. *Percival*, 2 L. R., Eq., 386.

3. A testator devised lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one, as tenants in common in fee, with remainders over; and empowered the trustees to apply the income to which any infant devisee should be presumptively entitled towards his maintenance or for his benefit during his minority. A. died leaving four children, three adult and one an infant:—Held, that the contingent remainder of the infant child of A. was equitable, and did not fail by reason of the death of A. before the remainder vested. *Berry* v. *Berry*, 7 L. R., Ch. D., 657; 47 L. J., Ch., 182; 38 L. T., N. S., 474; 26 W. R. 327.

4. A father devised to his daughter N. an estate for life, and after her decease to her child or children who, either before or after her death, should attain the age of twenty-one or die under that age leaving issue at his, her, or their death, in fee-simple as tenants in common; and in case there should be no child of N. who should attain twenty-one or die under that age leaving issue, he gave the estate to the child or children of his daughter G. who, either before or after her death, should attain twenty-one, or die under that age leaving issue living at his, her, or their death, in fee as tenants in common. N. had no child. At the death of N. two children of G. had attained the age of twenty-one. Other children attained twenty-one subsequently:—Held, that the two children were entitled to the estate. *Brackenbury* v. *Gibbons*, 2 L. R., Ch. D., 417.

5. A testatrix devised a freehold estate to her granddaughter E. during her life, and from and after her death to such of her children living at her death "as either before or after her decease" should, being males, attain twenty-one, or, being females, attain that age or marry, in fee simple as tenants in common; and if there should be no such child, then over. E. survived the testatrix, and died leaving seven children, of whom five had attained twenty-one at the time of her death, and two, a son and a daughter, were infants, the daughter being also a spinster:—Held, that the five children took vested interests liable to open to let in the two other children on their fulfilling the conditions of the will. *Brackenbury* v. *Gibbons* (2 L. R., Ch. D., 417) not followed. *Re Lechmere and Lloyd*, 18 L. R., Ch. D., 524; 45 L. T. 551.

6 Testator gave an estate to his wife Elizabeth and her assigns for her life, and after her decease unto all and every the lawful children of his son William living at the time of the decease of his wife Elizabeth or thereafter to be born, in equal shares as tenants in common:—Held, that this was an executory devise, and that the children born after the death of the tenant for life were entitled to share equally with those born before her death. *Brackenbury* v. *Gibbons* (2 L. R., Ch. D., 417) and *Re Lechmere and Lloyd* (18 L. R., Ch. D., 524) observed upon. *Miles* v. *Jarvis*, 24 L. R., Ch. D., 633; 52 L. J., Ch., 796; 49 L. T. 162.

7. A testator devised and bequeathed real and personal estate to trustees upon trust to pay the income to his wife during her life, and after her decease, if H. was then living,

to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease M. was living, and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and H. This son died in the lifetime of H. without having taken the name and arms of the testator:—Held, by Malins, V.-C., that although the limitation of the personal estate to the first son of M. who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; that he was not bound to take the name and arms of the testator until his estate came into possession, and that the real estate devolved upon his heir. But held, on appeal, that the limitation to such son of M. as should first attain the age of twenty-five years could not, as in *Riley* v. *Garnett* (3 De G. & Sm. 629), be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five. but was a limitation contingent on the son's attaining the age of twenty-five years. *Abbiss* v. *Burney*, *Re Finch*, 17 L. R., Ch. D., 211; 50 L. J., Ch., 348; 44 L. T. 267; 29 W. R. 449 Reversing 49 L. J., Ch, 710; 43 L. T. 20; 28 W. R. 903.

Held, also, that when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails if it does not vest before the determination of the particular estate does not apply, and that the limitation to such son of M. as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness. *Ib.*

Held also, that the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise. *Ib.*

IV. ESTATE TO ARISE ON A CONTINGENCY AFTER A PRIOR PARTICULAR ESTATE OR INTEREST.

1. A testator by his will, after giving certain legacies and annuities, gave unto J. the sum of 10*l.* per year for clothes until he attained twenty-one; then he ordered his executors in trust to pay him out of his property the further sum of 300*l.*; and he gave and bequeathed unto the said J. when he attained twenty-one the rents of his estates, called by the names of, etc. (naming them), and the interest of what money was placed in Government securities, during his natural life, but subject to the said annuities; and after his death to the child or children of the said J. lawfully to be begotten, if more than one equally to be divided between them, share and share alike; and in case of the death of the said J. without any child or children, then he gave and bequeathed the rents of his estates as aforesaid, and the interest of his money, between his (the testator's) brothers, etc. The estates of the testator mentioned in his will consisted of both freehold and personal estates:—Held, that J. was entitled to the rents and income from the time of the testator's death. *Tapscott* v. *Newcombe*, 6 Jur. 755.

2. A devise of two farms to the father and mother for their lives, remainder to trustees till A. and B. respectively came of age, and then to convey one farm to A., and the other to B. A. died before the time came for the conveyance. A. being to have had an estate in fee, the conveyance shall be made to his heir. *Hook* v. *Taylor*, 2 Vern. 561.

3. A testator by his will made the following devise: "It is my will that the rents and profits of my freehold estate at E. shall be applied, in the first place, towards the maintenance of J. until he shall arrive at the age of twenty-one years, and that the residue thereof shall accumulate until that event, and that, when he shall attain that age, the same be paid to him for his benefit, and that, after the expiration of the leases subsisting, the freehold shall become the absolute property of J., to hold to him, his heirs and assigns, for ever":—Held, first, that the fee of the property at E. vested in J. at the death of the testator; and, secondly, that the rents of the property between J.'s attaining his majority and the expiration of the leases belonged to J. *Bird* v. *Bird*, 11 L. J., N. S., Ch., 390; 6 Jur. 1030.

4. Residuary devise of real and personal estate to all the issue, child or children, of M. F., as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns for ever. as tenants in common:—Held, the children living at the death of tenants for life took absolute vested interests in personal as well as in real estate. *Farmer* v. *Francis*, 2 Sim. & S. 505; 4 L. J., Ch., 154.

5. Where a testator devised to trustees his "estate and interest" in farms of which he was seised, for lives renewable for ever, in trust, after paying certain annuities, etc., to permit and suffer his nephew A. to enjoy the same for his life; and from and after his decease, to permit such son of his as should attain twenty-one to enjoy said lands, and on failure of such remainder, to his nephew B. for his life, remainder to his first son as before:—Held, that a son of A.'s who attained the age of twenty-one, and died in the lifetime of his father, took the absolute interest in these premises. *Kirby* v. *O'Hea*, 2 Ir. Eq. R. 424.

6. Where the testator bequeathed the whole of his property in trust to pay the income to his wife for the support of herself and the children until the youngest should attain

twenty-one, and then to be divided into five shares, one to the wife and the others to each of his four children, and which were to vest on the youngest attaining twenty-one; and in case of either of his children dying without leaving issue, then to the children of the other daughters.—Held, to apply only to such shares as were vested, and that, as to the share of one dying under twenty-one, there was an intestacy. *Bastin* v. *Watts*, 3 Beav. 97; 7 Jur. 791.

1. By certain articles of agreement, it was provided that the interest of a fund which was vested in trustees should be paid to Lady C. for her life, and after her death the principal to go amongst the then unmarried children of herself and her husband, as the husband should by deed or will appoint; and in default of appointment, equally among the children who should be living at the death of the husband. The fund having been invested in lands, pursuant to a trust in the articles, the husband by his will appointed the lands among his sons as follows:—Ballygriffin to John, Gurtaneelig to George, Knuttery to Henry, and Gneeve to Nelson, to go to them immediately from and after the decease of Lady C., with a clause of survivorship among the brothers if any of them should die before they became respectively entitled thereto. The testator, by two subsequent deeds of appointment, irrevocably appointed Ballygriffin to John, and Knuttery (which he had by his will given to Henry) to George, and by a codicil (in which these two deeds were recited) he revoked the appointment of Knuttery to his son Henry in the will contained, and instead thereof appointed to him Gurtaneelig. Henry died after the testator, but before the death of Lady C.—Held, that the period at which the estates given by the will were to be considered as vested, was the death of Lady C., and not the death of the testator. *Charitable Donations & Bequests (Commissioners of)* v. *Cotter*, 2 Dr. & Wal. 615; 2 Ir. Eq. R. 196. Reversing as to latter point 1 Dr. & War. 498.

2. Testator gave in trust to his brother E. the remainder of his property of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother J., whom he named. "When my youngest nephew attains his age of twenty-one years, it is my will, that all my property be equally divided amongst my nephews or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E.:—Held, that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word "or" was to be construed conjunctively, and consequently that the nephews took estates tail in their shares of the testator's real property, and absolute interests in their shares of his personal property. *Parker* v. *Knight*, 15 Sim. 83; 15 L. J., N. S., Ch., 209; 10 Jur. 23.

3. A testatrix devised to trustees freehold premises in trust to receive the rents, and after paying thereout all proper outgoings and applying thereout, if they thought fit, any money towards the maintenance of S., to let the residue accumulate until S. should attain twenty-one, and then to pay such accumulations to him; but if he should die under such age without leaving issue living at his decease, then such accumulations should be for the benefit of the person to whom and in like manner and form as these premises were limited in the like event, and when S. should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees should stand seised of the premises in trust for A. in fee, and if A. should not leave any issue living at her decease, then over. S. attained twenty-one, and died without ever having had issue:—Held, that the premises vested in S. in fee on his attaining twenty-one, subject to be devested in the event of his dying without issue, which event having happened, the limitation over in favour of A. took effect. *Smith* v. *Spencer*, 6 De G. M. & G. 631; 3 W. R. 136; 3 Jur., N. S., 193. Affirming 2 Jur., N. S., 778; 4 W. R. 729. And see *Manfield* v. *Dugard*, 1 Eq., Ca. Abr., 194; Gilb Eq. Rep. 36.

4. Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son for life; and in case his son should die leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his (the testator's) widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child then living of his son should have attained twenty-five, or in default of male issue the eldest female child then living of his son should have attained twenty-one, to convey all the estates to the eldest male child, or in default of male issue to the eldest female child, and to his or her heirs of his or her body lawfully begotten, absolutely for ever. The testator then, in case his son should die during the minority of such eldest male or female child, provided for their maintenance, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then after the death of the testator's wife the estates to be conveyed to other persons. The testator's son married, and had a son born after the testator's death. The Court, holding the trust for the grandson not to be void for remoteness, and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him. *Jackson* v. *Marjoribanks*, 12 Sim. 93; 5 Jur. 885.

5. The doctrine laid down in *Leake* v. *Robinson* (2 Meriv. 363) as to remoteness applies to real as well as to personal estate. *Walker* v. *Mower*, 16 Beav. 365.

Devise and bequest of real and personal estate to trustees for A. for life, and afterwards "to convey and assure" equally between all A.'s children on their respectively attaining twenty-one, with a gift over on A.'s death without "leaving any child." There was one child who survived A., and died an infant:—

Held, first, that such child did not take a vested interest; and, second, that the gift over did not take effect. *Ib.*

1. Freehold and leasehold estates were devised upon trust, after certain trusts that failed, to receive the rents and pay them for the benefit of the testator's daughter's son R., and all other sons she should leave, until he and they should attain the age of twenty-five years; and on attaining that age, in trust for the heirs, executors, administrators, and assigns of the said R., and all other such sons as the daughter should leave who should attain the age of twenty-five years; but if the daughter should leave no sons, or they should die without attaining that age, then in trust for other objects:—Held, that the gift to R. and the other sons of the testator's daughter was well vested in them, though liable to be devested in case of death under the age of twenty-five. *James* v. *Wynford (Lord)*, 1 Sm. & G. 40; 17 Jur. 17; 22 L. J., Ch., 450; 1 W. R. 61.

Observations on *Porter* v. *Fox* (6 Sim. 485), how far it is consistent with *Leake* v. *Robinson* (2 Meriv. 203). *Ib.*

Other freehold and leasehold estates were devised upon trust to receive the rents and pay them to the testator's daughter for life, and after her decease to apply the rents, or so much thereof as should be necessary, for the maintenance of the daughter's son R., and all other sons she should leave, until they should attain twenty-five; and on their attaining that age, in trust for R. and such other sons for life, as tenants in common; and after their deceases in trust for the eldest son of R. and the eldest of all and every of the sons of the testator's daughter and their heirs male in tail as should survive her, with trusts over in default of issue:—Held, that the eldest son of R. and the sons of the daughter other than R. were presently entitled as tenants in tail male in remainder as to the freehold estates, and that, the freehold and leasehold lands being given together, the estate in the freehold being vested in tail, the estate in the leasehold must vest absolutely in the first tenant in tail. *Ib.*

Semble, a gift by will to an individual named and known to the testator does not fail because there are words superadded which include a class to take with him, as to which class the gift must wholly fail, because as to some of them it might be too remote; *secus*, where an individual is named as one of a class. *Ib.*

V. ESTATE TO ARISE ON DETERMINATION OF PRIOR ESTATE BY MARRIAGE, BANKRUPCTY, ETC.

2. Where a will contains a gift of an estate for life or until marriage followed by a gift over in terms depending on marriage only, the gift over will be construed to take effect on the determination of the previous estate, whether by death or marriage. And there is no difference in this respect whether the first estate is limited to a widow or to any other persons. *Walpole* v. *Laslett*, 1 N. R. 180.

If the gift over be in favour of a class to be ascertained on the determination of the previous estate by marriage, the class will, nevertheless, be ascertained at the time when the previous estate determines either way. *Ib.*

A testator bequeathed the residue of his real and personal estate to trustees for his widow until death or second marriage, and upon her decease or second marriage to his unmarried daughters so long as they should remain unmarried, and "when and so soon as all his daughters should be married," a gift over "to all and every his sons and daughters as should be living when the last of his daughters should have intermarried, and the issue of such of them as should be then dead leaving any." The testator left three unmarried daughters, all of whom died unmarried, the survivor in 1861:—Held, that the four children of the testator's deceased son, living at the death of the surviving daughter, were entitled to the residue. S. C. 7 L. T., N. S., 526.

3. A testator gave the produce of his real estate to his daughter E. for life so long as she should remain single; but in case she should marry, then he gave one-half of the income to his daughter E. and one half to his daughter M. (a married woman with children); and after the death of M., he gave one-half of the trust moneys to her children and the other half to the children of E.; and if M. should die without leaving children, then the whole for E.'s children; and if E. should die without children, the whole to M.'s children; and if both should die without children, then over. E. never married:—Held, that upon her death the children of M. took the whole corpus and income, subject only to be devested if M. should die without having any children. *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; 1 N. R. 10; 8 Jur., N. S., 1120; 11 W. R. 76; 7 L. T., N. S., 496.

4. A testator gave property to trustees, on trust for his son for his life, until he should become bankrupt or insolvent, or compound with his creditors, and after any such events, over. There were powers to lease during the son's life, and general powers of sale:—Held, that the limitations over were not contingent on the happening of bankruptcy, insolvency, or compounding only, but took effect on the death of the son. *Etches* v. *Etches*, 3 Drew. 441.

5. Bequest to A. during widowhood, and immediately after her death or second marriage, whichever event should first happen, to trustees to sell and divide between several persons named, or such of them as should be living at the death of A. A. married again:—Held, that the property thereupon became immediately distributable. *Bainbridge* v. *Cream*, 16 Beav. 25.

6. A. devised his house, etc., to his wife for life, upon this express condition only, that if she should marry again, then his will and meaning was, that his house, etc., was to go forthwith to his eldest son and his issue; and if all his issue male should die, etc., remainder over. Lord Hardwicke held, that it was not a vested remainder in the son, but a contingent limitation, to take effect only if the wife of the testator should marry again. It was contended to be a devise to the wife during her widowhood, in which case the devise over would have been vested to take effect either on the marriage or death. But Lord Hardwicke thought that, upon the whole

will, the devise over was contingent, and to take effect only on the widow's marrying again. *Sheffield* v. *Orrery* (*Lord*), 3 Atk 284.

1. A. devised his land to his wife if she did not marry; and if she did, then his eldest son should enter presently, and hold the land to him and the heirs male of his body, remainder to his other sons in tail male. The wife did not marry; yet decreed that the son took an estate tail by the will, though he should not enter till the marriage or decease of the wife. *Lawford* v. *Cheeke*, 3 Lev. 125.

2. Devise of land to A. in trust for E. for life, with a proviso that if E should marry, then the testatrix devised the land to W.:—Held, that upon E.'s death without having married the gift to W. took effect. *Meeds* v. *Wood*, 18 Beav. 215.

3. Where there is a devise or bequest to a woman for life or until she marries again, followed by a gift over upon her marriage, the gift over takes effect upon the determination of her estate by death. *Underhill* v. *Roden*, 24 W. R. 574; 2 L. R., Ch. D., 494; 45 L. J., Ch., 266; 34 L. T., N. S., 227.

A husband directed the rents of his real estate to be paid to his wife for the maintenance of herself and her children until his eldest son attained twenty-five or until she should marry again, whichever should first happen, and when his children attained twenty-five he directed the rents of the residue of his estate, after raising certain sums, to be paid to his wife if she should then be unmarried, but in case she should marry again he directed that the trustee should pay the residue of his estate, subject to an annuity to the wife, to his children. The widow died during the infancy of the children without having married again:—Held, that, apart from other indications in the will leading to the same conclusion, the general rule applied, and the gift over took effect upon the death of the widow. *Ib.*

VI. INTERESTS ARISING UNDER DEEDS

4. If the time at which a remainder in a deed is to vest is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favour of vesting estates; but that presumption may be rebutted or controlled by intention collected from the recital of any other part of the deed. *Cholmondeley* (*Marquis*) v. *Clinton*, 2 Jac. & Walk. 1, 81; 2 Meriv. 173. Affirmed 4 Bligh 1.

A., in a conveyance to uses reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of S. R., his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R., and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settles them to the use of herself for life, remainder to heirs of his body: for default for such issue as he should appoint, and for default of appointment, to use of right heirs of S. R., with power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R., at the expiration of the estate previously limited. *Ib.*

VII. OTHER CASES.

5. A testator gave freehold and leasehold property in trust for his widow for life, with remainder to his niece for life; and on her decease, for all and every the child and children of the niece, and for their respective heirs, executors, and administrators, as tenants in common, the children to become beneficially interested on the death of their parent:—Held, that the children of the niece took vested interests on their respective births. *M'Lachlan* v. *Taitt*, 2 De G. F. & J. 449; 6 Jur., N. S., 1269; 9 W. R. 152; 3 L. T., N. S., 492. Affirming 28 Beav. 407.

6. A. devised all his freehold estates in three several parishes to trustees, to hold to them, their heirs and assigns, for ever upon trust to receive the rents till C., his daughter, came of age, with a provision for her maintenance, and to account for and pay the surplus rents upon her coming of age; from that period "as to his said estates" to the use of the trustees, their heirs and assigns, upon trust during the life of C. to preserve contingent remainders, C. and her assigns to receive the rents nevertheless during her life; after her death to the use of all and every the children of C., share and share alike, as tenants in common; in case C. should die under twenty-one, and without issue, the trustees were to account with and pay the balance of the trust account unto and to the use of such person as should by the will be next in remainder, and entitled to the "aforesaid estates and hereditaments" after the death of C.; in case C. should die before she attained twenty-one, or surviving should die without lawful issue, then as to the aforesaid estates to the use of F. in tail male with remainders over in default of such issue. C. attained twenty-one, married, and had six children. E., one of the children, contracted to sell her undivided sixth share in the estates, expectant upon the death of C.:—Held, that there was a remainder in fee to the children of C., which vested at their birth, and that E. could make a good title to her share, which she had contracted to sell. *Hawker* v. *Saunders*, 9 W. R. 332.

7. A testator devised an estate to his daughter for life, and after her decease to all and every the children of the body of his daughter lawfully begotten (in case she should leave more than one child), their heirs and assigns, for ever, as tenants in common; but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die without leaving any issue of her body, then he devised the estate to all such children of his body as he should leave or have living at the decease of his daughter, in fee. The testator's daughter had two children, both of whom died during her life:—Held, that the two children of the testator's daughter took absolute and devisable estates in remainder under the will, and their devisees were consequently entitled. *Re Tookey's Trust, Re Bucks Railway Co.*, 21 L. J., N. S., Ch., 402.

1. A testator being seised in fee of Whiteacre and Blackacre, charged both with an annuity of 500*l.* for his wife for her life, and devised to trustees two annuities of 200*l.*, one to issue out of Whiteacre, the other out of both estates, for the separate use of his daughters respectively, and limited those two annuities to his son F. in remainder for his life, with a condition of forfeiture on alienating them; and devised Blackacre, subject to the annuities charged upon it, to the trustees upon trust to receive the rents until his grandson J. should attain twenty-one, and to invest the same in stock "for the purposes of the will," and subject thereto, upon trust for J. in tail male. The testator devised Whiteacre to the trustees in trust to permit F. to receive thereout an annuity of 100*l.* for the life of his mother, and after her death an annuity of 200*l.* for his life, with a condition of forfeiture on alienation. The testator next directed that the rents of Whiteacre should be invested in stock for the purposes of his will; and that Whiteacre should be held upon further trust upon the death of his wife and daughters, and subject to the annuities charged thereon, to permit F. to receive the rents during his life, with a condition of forfeiture on alienation; and from and after his death or forfeiture to his first and other sons in tail male, and in default of such issue, then to permit and suffer J. to receive the rents during his life, with remainder over. Out of the funds to be accumulated as above mentioned by the trustees, the testator directed them to pay and assist in paying the annuities given to his wife, daughters, and F., should those annuities be in arrear for four months, and out of the next moneys which should come to their (the trustees') possession to replace the sums so advanced. The testator charged several legacies also upon the accumulated fund. The testator died, F. having died afterwards without issue, and leaving the other annuitants, viz., his mother and sisters, surviving him:—Held, that the estate for life in remainder in Whiteacre limited to J. did not vest in possession upon the death of F., and would not so vest in the lifetime of any of the annuitants, viz. his mother and sisters, surviving him. *Fitzpatrick* v. *Knaresborough*, 13 Ir Eq. R. 338.

See also IX. 1. and XIV. *post.*

V. Meaning of the Word "Vest" when used by Settlor.

I. WHEN CONSTRUED INDEFEASIBLE OR PAYABLE.

2. A devise of real estate to the four sons of the testator as tenants in common, and a bequest of residuary personal estate in trust for the same four sons, in like manner to be vested in them, as to one moiety, as they should respectively attain twenty-one years of age, and, as to the other moiety, when the youngest should attain that age; and in case any son should die before the respective moieties of his share should become vested, then the unvested share which should belong to the son so dying, and also his accrued share, to go to the others of the testator's sons as tenants in common, and to become vested at the times aforesaid; and in case all his sons should die under twenty-one, then to the testator's right heirs. And the testator appointed his executors guardians of his sons, and empowered such guardians to receive the rents and profits of the respective shares of his sons in the said real estate during their minorities for their maintenance, education, and advancement:—Held, that the sons took an immediate and vested interest in their respective shares in the real and personal estate, but liable to be divested by their death, before the time at which the testator declared they should respectively be vested, payable, or transferable. *Poole* v. *Bott*, 11 Hare 33; 17 Jur. 688; 22 L. J., Ch., 1042; 1 W. R. 276; 1 Eq. Rep. 21.

The will contained a proviso, that in case any one of the testator's sons should marry or illegally cohabit with certain of their cousins, then and in every case, as well the original as every accruing share or shares of the said son or sons so intermarrying or illegally cohabiting as aforesaid, should go over and be in trust for all and every the person or persons who, under the trusts and directions of the will, would have been entitled thereto in case the son or sons so intermarrying or illegally cohabiting as aforesaid had died under the age of twenty-one years; and he declared that it should not be lawful for his trustees to pay to his sons the amount thereby bequeathed, or to permit them to enter upon the possession of the lands thereby devised until they should have respectively given and executed to his trustees a bond, in the penal sum of 20,000*l.*, that they respectively would not intermarry or illegally cohabit with their said cousins:—Held, that the direction with regard to the bonds would not be enforced by the Court, and the trustees were directed to transfer the residuary shares of the sons, without requiring them to enter into such bonds. *Ib.*

3. M., by her will, in pursuance of a power, appointed 1,000*l.*, charged on real estate, to trustees, upon trust to invest the same and to pay the dividends thereof to her daughter A. for life; and from and after the decease of A. to pay, apply, and dispose of the capital and interest unto, between, or amongst all and every the child and children of A. in equal

shares, and if but one the whole to that one child, to be a vested interest or vested interests, on their respectively attaining the age of thirty years; and if any child or children of A. should die under the age of thirty without lawful issue, the share or shares of such child or children, original or accruing, should go to the survivor or survivors of them:—Held, that the word "vested" was used in the sense of "not subject to be divested" or "indefeasible," so that the share of each child who attained thirty was no longer to be defeasible by the executory bequest, held, also, that the original bequest to the children gave them a present vested interest, and that the executory bequest on the death of any under thirty without issue was void for remoteness. *Taylor* v. *Frobisher*, 5 De G. & Sm. 191; 21 L. J., N. S., Ch., 605; 16 Jur. 283.

1. A testator, after giving life interests to R. and her husband, gave the principal fund to their children in equal shares, the shares of daughters "to be considered a vested interest" at twenty-one, the shares of sons at twenty-five, with provisoes of survivorship and accruer, and a gift over in case of the death of all the children without having attained a vested interest:—Held, on an examination of the whole will, that "vested" meant "indefeasible"; and that the shares should be vested in the legatees on the death of the testator, subject to be divested on their not attaining the specified ages; and that, in the case of sons, the gift over was void for remoteness. *Re Baxter*, 10 Jur., N. S., 845; 10 L. T., N. S., 487; 4 N. R. 131.

2. Testator bequeathed his residue in trust for his mother for life, remainder in trust for the children of his two sisters in equal shares as tenants in common, and to be vested interests in the sons at twenty-one, and in the daughters at that age or on marriage; and if any of them should die under age, or as to the daughters unmarried, then as to the original shares belonging to the children so dying, and the shares to which they might become entitled under the now-stating trust, in trust for the others of them, in equal shares, their executors, etc.; and in case no child should live to attain a vested interest in the trust funds, then in trust for the testator's next of kin. The testator then empowered the trustees (but, during the life of his mother, with her consent) to apply the whole or any part of the principal trust moneys to which the children of his sisters should be entitled under the trusts thereinbefore contained, for their advancement, notwithstanding they should be under age, or as to daughters unmarried; and he directed that in case, at the death of his mother, any child who, under the trusts thereinbefore contained, might be entitled to any vested or presumptive share or shares of the trust moneys should, if a son, be under age, or if a daughter under age and unmarried, the trustees should pay the interest of their shares to testator's sisters for the maintenance of their children. The testator's mother died a few months after him. His sisters had several children, some of whom were born after the death of his mother:—Held, that the mother's death was the period at which the shares vested (subject, however, to be divested), and consequently that the after-born children were not entitled to participate in the funds. *Berkeley* v. *Swinburne*, 16 Sim. 275; 17 L. J., N. S., Ch., 416; 12 Jur. 571. And see S. C. 6 Sim. 613; 3 L. J., N. S., Ch., 165.

3. A testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth share, to pay the income to her great-nephew H. for life, and at his decease to pay the share unto and among all and every the children and child of H., if more than one, equally; as to the other four-fifths, upon like trusts for the benefit of the testatrix's great-nieces and nephews, R., P., T., and A., and their children respectively. In the event of the death of any one or more of them, H., R., P., T., and A., without leaving issue, she directed that the share or shares of him, her, or them so dying should be in trust for the survivor or survivors of them, and the income and capital be paid and divided in the same manner as was directed as to the original shares. She then directed that none of the shares should be so paid to or become vested interests in any of the children of H., R., P., T., and A., until he, she, and they attained the age of twenty-five respectively; and that in the meantime it should be lawful for the trustees to pay any part of the income from "such shares respectively towards the maintenance and education of such children respectively." The will then contained a proviso (which was void for remoteness) that if any of the children of H., R., P., T., and A. should die before attaining twenty-five, the shares or share of him, her, or them so dying should accrue to the survivors and survivor. The testatrix then declared that, in case of the death of any other of the children "before such accruing or surviving shares shall become vested as aforesaid," every such accruing or surviving share should again be subject to the same condition of accruer; provided, nevertheless, that, in case any of such child or children should have left issue, such issue should take such share in the trust funds as his, her, or their deceased parent or parents would have had if living; and such share or shares to be paid to such issue at such age or time as thereinbefore was directed with respect to the payment of their parents' original shares:—Held, that the word "vested" must be construed as meaning "indefeasible"; and that the remainders to the children of H., R., P., T., and A., vested in such of the said children as were alive at the death of the testatrix, or were born afterwards. *Re Edmondson*, 5 L. R., Eq., 389; 16 W. R. 899.

4. A testator directed the trustees of his will to hold a fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years and of a daughter or daughters at that age or marriage":—Held, that the shares of the children were on the death of the testator vested in interest though subject to be divested. *Armytage* v. *Wilkinson*, 3 L. R., App. Cas., 355; 47 L. J., P. C., 31; 38 L. T., N. S., 185; 26 W. R. 559.

The word "vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute and indefeasible. *Ib.*

1. A testatrix bequeathed the residue of her personal estate to trustees to invest it and pay the income to her three daughters, and the survivors, so long as they should continue unmarried, with similar directions on their deaths or marriage to go over for the benefit of the other five daughters. She also provided that in case the last survivor of her daughters should die without having been married, then immediately after her decease the residue should be "in trust for all my daughters who should have been married, in equal shares and proportions; but in case any one or more of my last-mentioned daughters shall be then dead," as well the original as any other share or shares of her so dying, should be in trust for the children or child of such daughter or each of such daughters respectively in equal shares, if more than one, to be vested at twenty-one. A child of one of the married daughters attained twenty-one, and died unmarried:—Held, that her share went over for the benefit of the other daughters of the testatrix. *Re Kearsley*, 21 L. T., N. S., 294.

A declaration in a will that shares of legatees shall be vested interests immediately upon the execution of the will does not prevent a lapse on death before testator. *Browne* v. *Hope*, 41 L. J., Ch., 475; 14 L. R., Eq., 343; 20 W. R. 667; 27 L T., N. S., 688. And see *Re Featherstone's Trusts*, 22 L. R., Ch., D., 111; 47 L. T. 538; 31 W. R. 39; 52 L. J., Ch., 75.

II. WHEN CONSTRUED LITERALLY. IN GENERAL.

2. Testator, after making a provision for the maintenance of his children, gives "all the rest, residue, and remainder of his real and personal estate" to his son T., "to be a vested interest on his attaining the age of twenty-one," and "if he shall happen to die before" then to his daughter E., with remainders over. The rents and profits are to accumulate until T. attains the age of twenty-one, or dies under that age. *Glanvill* v. *Glanvill*, 2 Meriv. 38.

3. A testator devised certain freehold premises to his wife during widowhood, remainder to his nephew R. B. R. for life, and, after his decease, unto and equally between all and every the children of his said nephew R. B. R., their heirs and assigns, as tenants in common; but in case there should be no child of his nephew R. B. R. living at the time of the decease or marrying again of the testator's wife, then over: and he devised the residue of his real estate to certain other persons in fee; and, by a codicil of even date, he directed as follows, "that neither the said R. B. R., nor any or either of his issue, shall, by virtue of this my will, take, or be considered as entitled to, a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years;" with benefit of survivorship in case of the death of any one or more of such children under such age. R. B. R., during the life of the testator's widow, attained the age of twenty-one, and, upon her decease, took possession of the devised premises; and, at his death, left several children, all under the age of twenty-one:—Held, that the devises to the children were contingent, and, therefore, in the event failed; and that the heir-at-law was entitled to the devised estate. *Russel* v. *Buchanan*, 7 Sim 628; 5 L. J., N. S., Ch., 122. And see 2 Cr. & M. 561; 3 L. J., N. S., Exch., 194; 4 Tyrw. 384.

4. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn; a subsequent direction that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and, therefore, upon the death of the first tenant for life, under twenty-five, the accumulation belonged to his personal representative. *Montgomerie* v. *Woodley*, 5 Ves. 522.

5. Bequest in trust for all the children (then unborn) of A., to be vested at twenty-five for sons, and at that age or marriage for daughters, with a subsequent direction that, if only one child, the whole should be paid to that child at twenty-five, or marriage with consent, if a daughter:—Held, that the vesting, and not the payment only, was postponed till twenty-five or marriage, and that the bequest was void for remoteness. *Griffith* v. *Blunt*, 4 Beav. 248; 10 L. J., N. S., Ch., 372.

6. Where a testator, after giving certain sums in certain shares among the six children of A., naming them, to be vested and payable at twenty-five, with certain provisions for their maintenance until then, afterwards gives another sum of 6,000*l.*, subject to certain life interests, to all the children then born or hereafter to be born, to be vested and payable at twenty-five, and with the like trust for maintenance, and subject to the like provisions and conditions, as the legacies before given to the children then born and named:—Held, that the legacy of 6,000*l.* was void for remoteness as to all the children, both those then born and also the unborn. *Comport* v. *Austen*, 12 Sim. 218.

7. Devise upon trust for mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall be then paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled, in the event of the portion not having become vested in her lifetime; an inquiry was directed as to the time when the debts were, or might have been, paid. *Bernard* v. *Mountague*, 2 Meriv. 422. See 11 Ves. 508. n.

8. Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, and a gift over to the issue of any dying under twenty-five:—Held, too remote. *Rowland* v. *Tawney*, 26 Beav. 57.

9. A gift, by will, of real and personal estate to trustees, upon trust, to pay half the income to E. for life, and after her death to her child or children equally; the shares of sons to be vested in them on attaining twenty-five, and of daughters on attaining that age or day of marriage, which should first happen; and in the meantime to be applied for their

maintenance, with survivorship in case of the death of any child before twenty-five or marriage respectively, with a similar gift to S. and her children of the other money, and a gift over in case of the death of either E. or S. without leaving issue, or leaving such and they should all die under twenty-five:—Held, that the limitations to the children of E. and S. were void for remoteness. *Pickford* v. *Brown*, 2 Kay & J. 426; 2 Jur., N. S., 781; 25 L. J., Ch., 702; 4 W. R. 473.

Held, also, that the direction for maintenance was altogether void. *Ib.*

1. Bequest to A. for life, and afterwards to her children equally "to be vested" on such as should attain twenty-five, and "to be payable" as soon as might be after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to B. if no child should attain twenty-five:—Held, first, that the gift to the children was too remote; and, secondly, on A.'s death, without having been married, that the gift to B. could not take effect as an alternative limitation to a person *in esse* at the date of the will. *Re Thatcher*, 26 Beav. 365.

2. W. gave one-third of the residue of his personal estate to invest, and pay so much of the interest as might be necessary for the maintenance of his two granddaughters, and to accumulate the surplus until the younger of them should attain the age of twenty-one; and after that event, upon trust to pay and divide the principal moneys equally between them, share and share alike; and he declared that each of his granddaughters should have a vested interest on her attaining twenty-one or marriage; and if either of his grandchildren should happen to depart this life before she should have attained a vested interest, then he gave her share to the survivor. There was no gift over:—Held, that neither of the grandchildren took a vested interest until they attained twenty-one or married; and that therefore, in the events which had happened, viz., the death of both of them under twenty-one without being married, the interests of both—*i.e.*, of the grandchild who died first, and of the survivor—formed part of the testator's undisposed-of personal estate. *Wakefield* v. *Dyott*, 4 Jur., N. S., 1098; 7 W. R. 31.

3. A testator devised his real estate to trustees in fee for T. for life, with remainder to the trustees to preserve contingent remainders, with remainder to the first and other sons of T. in tail male with other remainders over, with a proviso that the real estate should not vest in any person thereby made tenant for life or in tail until he should have attained twenty-five, and the rents and profits were in the meantime to form part of the personal estate:—Held, that the direction in reference to vesting amounted to a limitation void for remoteness, and that the direction was not modified by a provision for maintenance in the meanwhile. *Washington* v. *Penrice*, 16 W. R. 836; 18 L. T., N. S., 597.

4. A testator gave his residuary real and personal estate to his daughter for life, and afterwards he directed his trustees to pay, transfer, and divide his residuary estate between his children, and to (by substitution) the issue of such as should have died in his lifetime leaving issue living at his decease. He subsequently authorised his trustees, in their discretion, if they should think fit, to pay the male issue their shares at any time between attaining twenty-one and thirty, with power of maintenance and advancement in the meanwhile; but he directed that the shares of female issue should be vested at twenty-one:—Held, that the shares of the issue vested on the death of the daughter. *Barnet* v. *Barnet*, 29 Beav. 239.

5. A testator devised and bequeathed certain freehold and leasehold property upon trust, *inter alia*, to pay two annuities to J. A., to whom he also bequeathed a legacy of 1,000*l.*, payable out of his personal estate, and by a subsequent clause in his will the testator directed that the bequest by annuity and legacy for J. A. should not become payable or vest in him until he should have attained the age of twenty-one years, nor then, unless he should have conducted himself to the satisfaction of the trustees of the will, who were empowered in the meantime to pay and advance such part of the provision so made for J. A., either out of the annuities or principal of the legacy, for his maintenance, education, and advancement, as they might think fit, and the testator directed that J. A. should be brought up a Protestant; and that, in the event of misconduct on his part, or of his not continuing a Protestant, the annuities and legacy, or such portion thereof as should remain undisposed of and unappropriated, and save such portion thereof as should be necessary for his actual support, should go over upon certain charitable trusts therein mentioned. The testator also directed that J. A. should not have any power to dispose of or incumber the said bequests or legacies until he should have attained twenty-five and have become otherwise entitled to them as aforesaid. J. A. survived the testator, and attained twenty-one, but died under twenty-five years of age:—Held, upon the construction of the will, that the word "vest" must be interpreted in its primary meaning, and could not be construed as referring merely to the time of payment; and that the gifts of the legacy and of the annuities, even so far as they were payable out of personal estate, were contingent on J. A.'s attaining twenty-five. *Creeth* v. *Wilson*, 9 L. R., Ir., 216.

6. A father left to his trustees 6,000*l.*, on trust, as to one moiety, for his daughter J., for life, and as to the other, for his daughter A., for life, and after the decease of each of them leaving lawful issue or other lineal descendants her or them surviving, to pay, assign, and transfer the principal trust moneys . . . of her or them so dying unto her or their child or children, or other lineal descendants respectively, to be equally divided between them, if more than one, share and share alike, such child or children or other lineal descendants to take *per stirpes* and not *per capita*, such principal trust moneys to be paid to them respectively, when and as they respectively should attain the age of twenty-one, with a provision for maintenance in the meantime, "but nevertheless the shares of the child or children of and in the principal trust moneys shall be absolute vested interests in him, her, or them, immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their

executors or administrators respectively." Then followed a gift over, in case of either J. or A. dying without issue or lineal descendants, of her share to the survivor for life, with remainders to the children or other lineal descendants of such survivor, with various remainders over in the event of both J. and A. dying without leaving issue or other lineal descendants. A. had seven children, three of whom died in her lifetime:—Held, that the interests of the children did not vest till the death of the tenant for life, and that, accordingly, the fund was divisible into fourths, and not into sevenths. *Selby* v. *Whittaker*, 26 W. R. 117; 6 L. R., Ch. D., 239; 37 L. T., N. S., 514; 47 L. J., Ch., 121.

III. WHEN CONSTRUED LITERALLY. (SETTLEMENT LIMITATIONS.)

1. Trust funds are settled, subject to life interests, in the husband and wife, as portions for the children of the marriage, to be vested interests in them at twenty-five if sons, or at twenty-five or marriage if daughters; and to be payable at the same times if after the death of tenants for life; and if not, then immediately on the death of tenants for life. Survivorship between the children in case of their death before twenty-five, or twenty-five or marriage respectively. Maintenance to be given out of the annual income of shares before they should become payable:—Held, that the shares did not vest till twenty-five, and the gift therefore too remote. *Re Morse's Settlement*, 4 W. R. 148; 25 L. J., Ch., 192; 2 Jur., N. S., 6; 21 Beav. 174.

2. An express direction in a settlement that shares should vest in the members of a class at their ages of twenty-four years:—Held, to be not controlled by other expressions, *e.g.*, by a provision for maintenance out of the income of "the expectant or presumptive share" of each. *Re Blakemore's Settlement*, 20 Beav. 214.

Limitations of a term to trustees, upon trust to raise portions for the children of A. surviving A. and B., "to vest in and to be paid and payable to" them at their ages of twenty-four, with maintenance, etc., meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their share should become vested:—Held, void for remoteness. *Ib.*

3. By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one. There were five children, of whom four attained twenty-one, and the fifth died an infant:—Held, that the whole fund vested in the four children who attained twenty-one. *Re Colley*, 1 L. R., Eq., 496; 14 W. R. 528.

IV. "VEST" AND "PAYABLE" USED INTERCHANGEABLY.

4. Upon a devise of lands in trust to pay annuities to testator's widow and eldest son, the surplus to accumulate until the death of the survivor, to form part of his personal estate, and subject thereto in trust for his first and other sons in strict tail, remainder over, with like limitations to his daughters, etc., with a direction that no one of the parties to whom the estates were so limited should come into possession so long as any precedent limitations should remain in contingency. His personal estate he directed to be transferred equally between his grandchildren, except an elder son, or as any should become such, their shares to vest at twenty-one, or marriage of daughters, but not to become payable until the death of the surviving annuitants, but in the meantime the interest of such grandchildren's presumptive share to be applied for their maintenance, including the eldest, the surplus to accumulate and be divisible and payable with their respective shares when become vested and transmissible:—Held, first, that the eldest did not take a vested interest in the personal estate, but was entitled to maintenance before and after attaining twenty-one: secondly, that the other grandchildren took vested interests, although liable to be partially divested by the birth of others, and that the latter were also entitled to maintenance. *Ellis* v. *Maxwell*, 3 Beav. 587; 10 L. J., N. S., Ch., 266.

5. A testatrix, in exercise of a power, directed and appointed that her two trustees should pay, assign, or transfer a sum of 500*l.* unto A. B. upon trust for his daughter, to be vested in her on attaining twenty-one years or day of marriage, which should first happen; and she directed the interest and dividends of the said sum to accumulate for her benefit, and to be paid to her, with the principal thereof, at the time before mentioned. The daughter of A. B. died under twenty-one and unmarried:—Held, that the representatives of the daughter took neither principal nor accumulations, and that the fund would go as if no appointment had been made. *Re Thruston's Estate*, 17 Sim. 21; 18 L. J., N. S., Ch., 437.

6. A testatrix gave a legacy of 4,000*l.*, payable at the decease of A. to a class of persons, to be equally divided amongst them, share and share alike, the shares to be vested interests on majority or marriage, and the income, in the event of A.'s death in the meantime, to be paid towards the maintenance and education of such persons. There was no gift over. Two of the class survived A., and died under twenty-one:—Held, that the word "vested" meant "vested in possession," and that the shares of the deceased minors passed to their legal personal representatives. *Simpson* v. *Peach*, 16 L. R., Eq., 208; 42 L. J., Ch., 816; 21 W. R. 728; 28 L. T., N. S., 731.

7. A husband gave the residue of a mixed fund (after a life interest to his wife) among the children of his three brothers who should be living at the death of his wife or his own death, which events should happen last, to be paid and vested in them at twenty-one, or if females on marriage. One of the nieces survived the testator and his wife, but died under twenty-one, unmarried:—Held, that she took a vested interest. *Re Parr*, 41 L. J., Ch., 170.

8. Where there was first a distinct gift of a legacy, and then a direction that it should be paid within six months, and a general declaration that all legacies should be vested only when payable, and the legatee died within the six months:—Held, that the legacy had vested. *Lucas* v. *Carline*, 2 Beav. 367.

1. H. gave his residuary, real, and personal estate to trustees, upon trust for conversion, and to invest and accumulate until his youngest grandchild attained twenty-one, or until such time as, if living, he would have attained twenty-one, and then to divide amongst his four grandchildren therein named equally, share and share alike, and their respective executors, administrators, and assigns. And in case any one or more of them should attain twenty-one and afterwards die previously to the time of distribution, his or their share or shares to be vested, but the actual payment to be postponed to the time above mentioned. There was no gift over, nor provision for maintenance out of the shares. One of the grandchildren died a minor:—Held, that his share did not vest, and was undisposed of by the will. *Re Horsfall*, 25 L. T., N. S., 197.

V. GIFTS TO CHILDREN SURVIVING THEIR PARENTS, WITH DIRECTION AS TO VESTING.

2. Bequests to A. for life, with remainder to her children living at her death, and their issue, the issue to take the share of a deceased parent, followed by a declaration that the children should take vested and transferable interests at twenty-one, or leaving lawful issue at the time of his decease before that age. A child attained twenty-one, and died in the life of A., without having had any issue —Held, that her representatives took no share. *Re Payne*, 25 Beav. 556.

3. A testator gave a moiety of residue unto and amongst all the brothers and sisters of his wife that should be living at her death, and he declared that the bequest to them, "who were then nine in number, should be deemed vested interests in them":—Held, that only two of them who survived the testator's wife were entitled. *Draycott* v. *Wood*, 5 W. R. 158.

4. A testator gave his residuary personalty to a niece for life, and directed his trustees after her death to pay and divide it unto and amongst all and every the children of his niece who should be living at the time of her decease, if more than one, equally; and if only one, then wholly to such only child, "the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one, but not to be transferred until after the decease of my niece," with maintenance clauses:—Held, that the representatives of children of the niece who attained twenty-one, but died in her lifetime took no share, for that the words "but not to be transferred until after the decease of my niece" were not contradictory to the previous expression confining the class to children who survived the niece, and being in any view of the case surplusage, could not be held to modify the definition of the class. *Williams* v. *Haythorne*, *Williams* v. *Williams*, 6 L. R., Ch., 782.

5. Gift to "all and every the child and children of the testator's daughter who should be living at the time of her decease," to be paid to and become vested in "such child or children," in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage; but if such times for payment should happen in the lifetime of the testator's daughter and her husband, or the survivor, then after the decease of such survivor; but nevertheless the shares of "all and every such child or children" to be vested and transmissible on their attaining twenty-one or marriage, although such respective times should happen before the decease of the survivor of his said daughter and her husband:—Held, that a child who attained twenty-one and died in the lifetime of its mother took a vested interest. *Dalton* v. *Hill*, 10 W. R. 396; 6 L. T., N. S., 446.

6. A testator bequeathed residuary personal estate for A. for life, with remainder to the children of A. who should be living at her death, and who, being sons, should attain twenty-one, or, being daughters, attain that age or marry. By a subsequent proviso he declared that the children of A. who attained, or should attain, twenty-one, or die before that age, leaving issue, or, if a female, should have married under that age, should be deemed to have attained a vested interest:—Held, that the proviso introduced a new gift, and having regard also to other provisions in the will, that children of A., who attained twenty-one, but predeceased her, were entitled to share. *Williams* v. *Russell*, 10 Jur., N. S., 168.

7. Bequest of 4,000*l.* to A. for life, and afterwards if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one; and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share," and a gift over, if the daughter should "have" no child who should arrive at twenty-one:—Held, that a daughter of A. who attained twenty-one, and married, but died in the life of A., took no share. *Sheffield* v. *Kennett*, 27 Beav. 207; 4 De G. & J. 593.

8. B. gives property to trustees to pay the income to his wife for life, she maintaining the children living at his death; but if she should marry again, on trust until all the children attained twenty-one or his wife's death, one-third to her and two-thirds to her or other persons, at the trustees' discretion, for maintaining the children; and when they attained twenty-one, in case his wife should be then living, then to pay the income of half to his wife, whether *coverte* or *sole*, without power of anticipation; and as to the other moiety, in trust for the children then living or dead leaving issue, equally; the share of males to be vested at twenty-one, and females at twenty-one or marriage; and if all the children or issue living at the wife's death should die before the vesting of their shares, then in trust for the survivors equally, to be vested in their issue as provided for the children themselves. Upon the question what was the period of division:—Held, that all the children

living when the youngest attained twenty-one took. *Semble*, where there is a clear gift a subsequent explanatory clause as to time inaccurately worded shall not render it nugatory. *Bickford* v. *Chalker*, 2 W. R. 502; 2 Drew. 327.

1. The rule that the Court will lean to a construction which gives portions to all of a class of children who may live to require them, is not confined to settlements, but extends also to wills. The rule will be applied so as to modify express words of gift, though the instrument contains no necessary implication to that effect. *Jackson* v. *Dover*, 2 Hem. & M. 209; 1 N. R. 136; 10 Jur., N. S., 630; 12 W. R. 855; 10 L. T., N. S., 489.

Gift of residue upon trust for testatrix's adopted daughter A. for life, then upon trust to pay to all the children of A. living at her decease equally, at twenty-one or marriage, unless such day of payment should happen in the lifetime of A., and then the payment to be postponed till the death of A, but to be a vested interest in each of the children at twenty-one or marriage:—Held, that a son who attained twenty-one, and died in A.'s lifetime, was entitled to share. *Ib.*

VI. Words of Contingency. Whether Extending to a Series of Limitations.

See also III. II. 3 *ante.*

— *In Gifts substituting Children for their Parents.* See WILL, LVIII. VII.

2. A., seised in fee, has a son B., and a sister C., etc, and devises his lands to his son in tail general; and if his son B. should die without issue, and his wife should survive him, then the wife to have the premises for life, remainder to C. in fee; B., the son, dies without issue, but testator's wife dies before him: C. is not entitled to the remainder in fee, because the contingency is annexed to all the devise over. *Davis* v. *Norton*, 2 P. W. 390.

3. Testator devised his real estates to trustees upon trust that his daughter M. should until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.* And that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*, but, in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of M., under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister S., provided that, if M. should marry with the consent of the trustees, the estate should be in trust for her and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. M. married with the consent of the trustees and died without issue:—Held, that the remainder to S. was not conditional, depending on M.'s marriage with consent; consequently, that, notwithstanding M.'s marriage with consent, the remainder to S. took effect. *Toldervy* v. *Colt*, 1 Y. & Coll. 240. Reversed on appeal 1 Y. & Coll. 621; 5 L. J., N. S., Exch. Eq., 25. And see S. C. at law, 1 Mees. & Welsb. 25; 1 Tyr. & Gr. 324.

4. Construction of gift over in case a daughter should die under twenty-five or marry without consent. Contingency extended to all the trusts of a legacy. *Thompson* v. *Teulon*, 1 W. R. 12, 97; 9 Hare (App) 49; 22 L. J., Ch., 11, 243.

5. Bequest of residue equally between A. and B. (the wife of C.); and if C. survive B. for life, and afterwards to their four children:—Held, that the children took only in the event of C. surviving B. *Cattley* v. *Vincent*, 15 Beav 198.

6. A testator bequeathed to his daughter an annuity of 100*l.*, while she remained single, but on her marriage, and on some adequate provision made, and which he directed to be made by settlement for her life, and to the use of her issue, he bequeathed to and for her use 2,500*l*, and in default of such issue, he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married, but no settlement was made, and the annuity continued to be paid to her. She had an only child, who died in her lifetime under age:—Held, that the gift over did not take effect, and that her personal representative was entitled to the 2,500*l.* *Findon* v. *Findon*, 1 De G. & J. 380; 26 L. J., Ch., 561; 24 Beav. 83; 5 W. R 485, 794.

7. A testator, by will, made in 1832, bequeathed a moiety of the dividends arising from stock standing in his name in the reduced 3*l.* 10*s.* per cents. to his niece, G., for life, and after her death the principal to her children, as she should appoint; and as to the other moiety, he bequeathed the same upon trust to pay the dividends to his niece O. for life, or until she "shall intermarry with any person who shall be her first cousin kindred. In the event of her marriage with a first cousin, he gave her, in lieu of such bequest," the dividends of a smaller sum of stock, for life; and, subject thereto, he gave the principal to G, "subject to the same trusts as are before expressed concerning her own moiety of the reduced 3*l.* 10*s.* per cents." O. never married her cousin, and died without issue:—Held, that the moiety to which O. was entitled for her life fell into, and formed part of, the residue of the testator's estate. *Gray* v. *Golding*, 6 Jur., N. S., 474; 8 W. R. 371.

8. Testator gave his real and personal property to trustees, their heirs, etc., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease, share and share alike, for their lives; "and in case any of my said children, being daughters, shall marry, and shall happen to depart this life in the lifetime of her or their husband or husbands, I direct that the share or shares of her or them so dying shall go to her or their respective husband or husbands for his or their life or lives, and from and after his or their decease then to be equally divided amongst all and every the child and children of my said daughter and daughters then living, and in default of any such child or children then I direct such share or shares shall go and be divided equally to and amongst all and every my said children who shall be then living."

The testator left a son and seven daughters; one of the daughters died unmarried:—Held, that the gift over of the shares applied only to the shares of daughters marrying, and that the share of the daughter who died a spinster was undisposed of after death. *Lett* v. *Randall*, 10 Sim. 112.

1. Testator appoints executors in trust to pay the interest of 1,000*l.* to his son, for life, then to his son's children, and if he left none, or they should die unmarried, and under age, bequeaths a moiety of the principal unto G. W. and his wife, or their children and representatives.—Held, that the estate, which passed on the death of the testator under the second disposition, was consonant to that limited under the first, not absolute or vested, but remained in contingency till the event of the son dying, or his issue failing, etc., determined to whom it belonged, the parents, if then living, being entitled, if not, in the next place, their children; or, finally, their representatives. *Fenoulet* v. *Passavant*, 2 Ken Ch. 109.

2. A testator bequeathed the interest of his property in the funds to his wife for life or widowhood, and the capital at her death in equal shares unto and among the children of his brothers, J. and E., and of his late brother S., as should be living at the death or second marriage of his wife. By a codicil he declared it to be his wish that H. M. M. (a niece) might have her share equally with his brothers' E. and S.'s children:—Held, that H. M. M. took her share absolutely, and not contingently upon her surviving the tenant for life. *Biggs* v. *Gibbs*, 5 De G. & Sm. 744.

3. J. devised his real estate to his son M., for life, and after his death, if he leaves any issue male, to other persons, and to one of those other persons he gave a legacy of 500*l.* at twenty-one; M. died without issue, legatee also died:—Held, that the legacy was not contingent on his becoming entitled to real estate. *Baynes* v. *Bertie*, 5 Bro. P. C. 62.

4. Power of appointment in tenant for life, subject to condition of her remaining sole and unmarried, which condition was qualified by proviso that a marriage with consent of A., B., and C., should not determine that power:—Held, a condition subsequent, and becoming impossible by death of A., B., C., marriage of tenant for life after their death, without their consent, did not determine the power. *Aislabie* v. *Rice*, 3 Madd. 256.

5. J. devised all his lands, etc., to his daughter, B., for life, remainder to trustees to preserve, etc., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over, and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin, C., should attain the age of twenty-one; and in case of the death of C., under twenty-one without issue, then to D. for life, remainder to his first, etc., son in tail, remainder to E. for life, remainder to his first, etc., son in tail, remainder over. Lord H. inclined to confine the contingency in the will of J., of B.'s dying without issue of her body living at her death, to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Lethieullier* v. *Tracy*, 3 Atk. 775; Ambl. 204. And see 2 Ken. Ch. 40.

6. By a will, real and personal estate were devised and bequeathed to trustees, upon trust for the testator's wife for her life, and after her decease in trust for his daughter, M. U., and all his other children who should be living at his decease, their respective heirs, executors, administrators, and assigns, as tenants in common, but he declared that no division should be made while any child should be under the age of twenty-two years; and as to M. U.'s share, subject to the proviso thereinafter contained; that proviso was, that in case M. U. should survive his (the testator's) wife, the said trustees should stand possessed of her share, upon trust for her separate use for life, and after her decease for her children; and in case M. U. should have no children, her share should go to the others of the testator's children, in the same manner as their original shares. The testator then provided for the shares of the other children going over, in the event of their dying under twenty-one without leaving issue. M. U. survived the testator, but died in the lifetime of his widow, and never had a child. All the testator's children attained twenty-one:—Held, that M. U.'s share went over to the testator's other children, and did not belong to her administratrix as part of her estate. *Doutty* v. *Laver*, 14 Jur. 188.

7. Wife having absolute power of appointment over 5,000*l.*, appointed it in favour of her daughter, but in a certain event directed it to be divided between her son and her daughter, desiring that her husband should have the free use of the interest of the 5,000*l.* till his death:—Held, that the husband took a life interest in the 5,000*l.* in any event. *Darby* v. *Darby*, 18 Beav. 412.

8. A testator gave the produce of his real estate to his daughter E. for life, so long as she should remain single; but in case she should marry, then he gave one-half of the income to his daughter E., and one-half to his daughter M. (a married woman with children); and after the death of M., he gave one-half of the trust moneys to her children, and the other half to the children of E.; and if M. should die without leaving children, then the whole for E.'s children; and if E. should die without children, the whole to M.'s children; and if both should die without children, then over. Eliza never married:—Held, that upon her death, the children of M. took the whole corpus and income, subject only to be divested if M. should die without having any children. *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; 8 Jur., N. S., 1120; 11 W. R. 76; 7 L. T., N. S., 496.

9. A testatrix bequeathed the interest of long annuities to her sisters, and in case of one or both of their deaths before hers, gave "the whole of interest in long annuities" to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half the capital." Likewise the testatrix bequeathed to a son of her brother the other half:—Held, on the construction of the whole will, that the bequests to the niece and nephew were not contingent upon the sisters'

deaths in the testatrix's lifetime. *Boosey* v. *Gardener*, 5 De G. M. & G. 122.

1. A testator bequeathed his leasehold estates to trustees, out of the rents to pay an annuity to his daughter, and he proceeded: "And I direct, that if my son Henry, now absent, shall within five years make his claim to my trustees, he shall be entitled to and receive one moiety of my leasehold estate, subject however, together with the other moiety thereof, in favour of my son William, to the annuity and trust before mentioned":—Held, that William was entitled to a moiety of the leasehold, subject to the annuity, and that the gift to him was not contingent on Henry's claiming. *Partridge* v. *Foster*, 35 Beav. 545.

2. A testator devised two estates at S. and H. to the use of trustees and their heirs upon trust for R. and the heirs of his body; but in case A. should die under twenty-one and without issue, H. should be in trust for A. and the heirs of her body; but in case A. should die under twenty-one and without issue, H. should be on the trusts thereinafter declared of S.; and if R. should die under twenty-one and without issue, H. should be upon certain trusts for the testator's son and daughter-in-law during their lives; and subject to the trusts thereinbefore declared, the said estate should be in trust for D. and R. A. attained twenty-one, but died without issue;—Held, that the trust for D. took effect as to S. but not as to H. *Pearson* v. *Rutter*, 1 W. R. 421; 1 Eq. Rep. 352; 3 De G. M. & G. 398. And see *Sheffield* v *Coventry (Earl)*, 2 De G. M. & G. 551.

3. H. gives all his personalty to trustees upon trust, as to all the yearly interest arising therefrom, to his wife, "for her and my son's support, etc," until twenty-one, and if he died under twenty-one, then the whole interest in bank stock to his wife for life, and after her death to S. for her separate use. The son died under twenty-one:—Held, that there was an intestacy; that the wife took one-third, the other two-thirds to the son, and that S. took nothing. *Fitz-Henry* v. *Bonner*, 2 W. R. 30; 2 Drew. 36; 2 Eq. Rep. 454.

4. A testator devised an estate to his son until he attained twenty-one, and to the testator's widow for life, in case his son died under twenty-one. This was followed by a gift of the produce of the estate to his nephews, which commenced with the word "likewise":—Held, upon the context, that the gift to the nephews was governed by the same contingency as that to the widow; and his son having attained twenty-one, that the gift to the nephews failed. *Paylor* v. *Pegg*, 24 Beav. 105.

5. A contingency affecting a gift by will to a parent is not to be extended to a gift to his issue, which is an independent bequest; and the Court will construe such a gift as vested if the words will at all permit of that construction. *Re Applebee*, 21 W. R. 290; 28 L. T., N. S., 102.

A father gave property to his two daughters in equal moieties for their respective lives, with benefit of survivorship, remainder over to the respective children of such daughters, and the issue of deceased children as the daughters should appoint, and failing appointment among such children and issue equally, or (if only one child of either) the entire moiety to go to that one child "at twenty-one years." Failing issue by either daughter (the event which happened), the whole was given over to the children and issue of the other daughter without mention of twenty-one years, as their mother should appoint, and failing appointment amongst such children and issue equally, or (if only one child of such surviving daughter) the entire moiety to go to that one child "at twenty-one years":—Held, that the variances in the descriptions of the legatees must be read in their strict and natural sense, and that, therefore, the attainment of the age of twenty-one was not to be imported into the second gift where it was not expressed. *Ib.*

6. Survivorship held to apply not only to the original, but to the substituted class. *Atkinson* v. *Bartrum*, 28 Beav. 219; 9 W. R. 885.

VII. Estates or Interests Limited in Clear Terms of Contingency. Events do not Happen.

See also XIV. II. *post.*

I. IN GENERAL.

7. A contingent legacy failed, the event which happened not being provided for, and no necessary implication in favour of the legatee. *Parsons* v. *Parsons*, 5 Ves. 579.

8. A legacy upon an express contingency which never happened failed, notwithstanding the apparent intention in favour of the legatee. *Holmes* v. *Cradock*, 3 Ves. 317.

9. A testator devised one moiety of his property to his wife during widowhood, and the other moiety upon certain limitations for the benefit of his son and his issue, with the like devise to the son and his issue as to the widow's moiety in the event of her death or marriage in her son's lifetime, and directed that if the son should die during the widowhood of his mother without leaving lawful issue, then that his share should go to the widow for life; and "in case of the marriage or death of his present wife, his said son being dead and leaving no lawful issue," he gave the whole to J. B. The son survived the mother, and then died without issue:—Held, that the contingency was too clearly confined to the marriage or death of the widow, after the death of the son without issue, to allow of the gift over taking effect, and the heir-at-law of testator was entitled. *Dicken* v. *Clarke*, 2 Y. & Coll. 572.

10. A., the father, and B., the eldest son, re-settle an estate, to the use of A. for life as to part, then to trustees for two hundred years, to raise 1,100*l.* to be paid to the second son within six years after A.'s death, or as soon after as the same could be raised, and in the meantime interest from A.'s death, for and

towards his maintenance, remainder to B., the eldest, etc.; C. died indebted, and two years after him A. died, from whom a good estate came to B.: the creditors cannot have this portion raised, the contingency upon which it was payable never happening. *Bradley* v. *Powell*, Forrest. 193.

1. Bequest in trust for the wife and children of H. during his life; and from and after the decease of H., in trust to pay it to his children then living, reserving one-fifth for his wife for her life, which, immediately on her death, was to be divided amongst H 's children generally:—Held, that the reservation of the one-fifth for the wife and children was contingent on the wife surviving H., and she having predeceased him, that it did not take effect. *Patch* v. *Sparkes*, 30 Beav. 415; 8 Jur., N. S., 297; 10 W. R 239.

2. Testator bequeathed a sum in trust for his daughter (a single woman) for her separate use, independently of any husband she might have, and after death in trust for her children, and, if no children, then if she should survive any husband she might have, for her absolutely, but if her husband should survive her then as she should appoint, and in default of appointment for her next of kin. The daughter died unmarried:—Held, that she only took a life interest, the apparent intention being to give the corpus only in the event of her marrying. *Lenox* v. *Lenox*, 10 Sim. 400; 9 L. J., N. S., Ch., 83; 4 Jur. 5.

3. Bequest of money to trustees on trust to invest in public funds, and pay dividends to A. until marriage, and then to transfer stock to her husband; in case she should die unmarried, then as she should appoint by will, and in default of appointment to her executors and administrators. *Semble*, she is not entitled to have fund transferred while unmarried. *Wilson* v. *Mount*, 2 Sim. & S. 493.

4. A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman:—Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity. *Bartleman* v. *Murchison*, 2 Russ. & M. 136; 9 L. J., Ch., 60.

5. A testator bequeathed his residue to trustees in trust for J. F. for life, and after her death for her children; but in case J. F. should survive her mother and die without having had lawful issue, then in trust for the brothers and sisters of J. F. But in case J. F. should die in the lifetime of her mother without lawful issue, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and after her decease he gave the principal so to be retained to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue. J. F. died without issue in her mother's lifetime:—Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of, and the testator's next of kin entitled to it. *Clarke* v. *Butler*, 13 Sim. 401.

6. Term raised to secure daughters' portions; trust thereof declared that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso that if the husband should die without leaving a daughter living at his death, then the term to cease; there is no issue male by the marriage, but there is a daughter who attains twenty-one, and marries; mother dies, and daughter dies in the father's lifetime, leaving issue; her husband administers to her: he shall have no portion. *Wingrave* v. *Palgrave*, 1 P. W. 401.

7. Devise of houses to executors in trust to receive the rents for the support of testator's children until they should respectively attain twenty-one or marry, and from and after which to A., B., and C., or such of them as shall be then living:—Held, that the devise to A., B., and C. did not take effect till after all the children attained twenty-one or married. *Quære*, whether there was an intestacy as to the surplus rents beyond maintenance, etc. *Farran* v. *Smith*, 11 Ir. Eq. R. 254.

8. Bequest of a moiety of a residue to A. for life, if she shall attain twenty-four, or marry under twenty-four with consent, remainder to her children. Similar bequest of the other moiety in favour of B. and her children. And in case either of them should die under twenty-four, and without having been married with consent, the survivor attaining twenty-four, or marrying with consent, to take the other's moiety, for life, remainder to her children. But if both A. and B. shall die under twenty-four, and without having been married with consent, and shall die without issue, the whole estate to go to the testator's three sisters. It was held, that in the event that had happened of A. attaining twenty-four, and dying unmarried, there was no disposal by the will of the first moiety. *Losh* v. *Townley*, Coop. *temp.* Brough. 372.

9. Testator bequeathed a sum of stock to his wife, and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should die in her lifetime, leaving a child or children, such child or children who should be living at the time of the wife's death should be substituted in the place of such of his sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife; the third died a bachelor:—Held, that one-third of the stock fell into the residue. *Hustler* v. *Tillbrook*, 9 Sim. 368.

II. LIMITATION OVER. WHETHER IT FAILS WHERE EVENT HAS NOT HAPPENED.

10. Legacy in trust to pay the interest to the separate use of A. for life, and after her decease as to the capital for her child; and if no child, to pay the interest to her husband during his life, and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other

persons; though the husband having died during his wife's life never became entitled to the interest, the limitation over was established, as distinguished from the case of express condition. *Pearsall* v. *Simpson*, 15 Ves. 29. See *Pyle* v. *Pyle*, 6 Ves. 779.

1. A testator, after giving various life estates in his real and personal property, directed that, if M. H. should, after the death of J. and certain other first tenants for life, die before N. H., the last tenant for life, leaving issue male, then his trustees should convey one moiety of his real estate to trustees, to the use of the first and other sons of M. H. successively, in tail male, with remainder to N. H. for life, with remainder to his sons in tail male; and he directed one moiety of his personal estate to be invested in the purchase of real estate to be settled in the same uses. The testator then gave corresponding directions with regard to the other moiety, in the event of N. H. dying before M. H. And in case M. H. and N. H. should both die without issue male, then the testator directed his trustees to convey his real estate to such persons as would be his right heirs at the death of the survivor of M. H. and N. H., and to transfer his personal estate to such persons as would be his next of kin. M. H. died without issue in the lifetime of J., etc. On J.'s death, N. H. claimed an absolute interest in the personal estate, and suffered a recovery of the real estate, and afterwards died without issue:—Held, that the words "after the deaths of J., etc.," did not import contingency, but were only words of reference that N. H. became entitled on the death of J. to both moieties, and that he took the personal estate absolutely, and an estate tail in the real estate. *Franks* v. *Price*, 3 Beav. 182; 9 L. J., N. S., Ch., 333. And see S. C. at law 5 Bing. N. S. 37; 6 Scott 710.

2. A testator left by will his lands to his brother C. for life, and in default to his brother F. for life, and in default of issue living at his death to M. and his heirs for ever; but, in case C. should die leaving issue, such issue were to take estates to them and their heirs as tenants in common, and in case F. should come into possesion of the estates, and should die leaving issue, such issue were to take life estates in like manner as the estates to the issue of C.:—Held, that the issue of F. took under the will, although F. died in the lifetime of C., and consequently never came into possession of the estate. *Edgeworth* v. *Edgeworth*, 15 W. R. 213; 4 L. R., H. L., 35.

3. A testatrix bequeathed a leasehold house and personal estate to trustees, to sell, and convert, and invest in consols, and stand possessed of the proceeds on certain trusts; and as to the residue of the consols as to one moiety, and of the dividends, to pay the same dividends as and when received, to her daughter E., for her separate use, without power of anticipation, for her life, and after her decease, as to that moiety, and dividends and accumulations, until it shall be payable and distributable, to pay the same to the children of E., who should survive her, sons at twenty-one, and daughters at twenty-one or marriage; with benefit of accruer and survivorship; with a gift in precisely similar terms to her daughter M. and her children of the other moiety. And in case at the decease of either of her daughters there should be no child or children who should have lived to attain a vested interest, then that moiety and the dividends and accumulations should be held in trust for the other of her daughters and her children as before given. And if before the death of the survivor of her daughters there should be no child or children of either of her daughters who should have lived to attain a vested interest, then the entirety of the two moieties and the dividends and accumulations to her nephews and nieces absolutely. E. having died, but in her mother's lifetime, the testatrix, by a codicil, referred to that fact, declaring that the moiety, the gift of which had so lapsed, should go to her surviving daughter in the same manner as it would have gone to E had she lived, and there was a gift to the only child of the deceased daughter for maintenance. The surviving daughter died, leaving six children, and the trustees paid the fund into court:—Held, that the event had not happened under which the nephews and nieces would take by virtue of the gift over; that the interest of the grandchildren was not vested, but their shares must be directed to accumulate until they attained twenty-one. *Bull* v. *Jones*, 10 W. R. 820; 31 L. J., Ch., 858.

4. A testatrix devised and bequeathed her real and personal estate to trustees, upon trust to pay the income to M. W. for her life, and then to M. W.'s mother for her life (in case she survived M. W., and M. W. left no issue surviving); and after the decease of M. W., and also after the decease of her mother, in case the gift to the mother should take effect, upon further trust to sell the real estate. The testatrix then directed the sale moneys to form part of her residuary personal estate; and in the event of M. W. dying leaving no issue (which event happened), she gave one moiety of her residuary personal estate, from and after the decease of the survivor of M. W. and M. W.'s mother, unto and among the child and children then living of A. A., and the issue then living of any child or children of the said A. A. dying in the lifetime of the said M. W., and to their respective executors, administrators, and assigns, share and share alike, the issue of any such deceased child or children of the said A. A. taking only the share or shares that their respective parent or parents would have taken if living at the death of M. W. And the testatrix declared, that if any one or more of the children of the said A. A. should die without issue in the lifetime of M. W., then she gave the share or shares of him, her, or them so dying unto and among the child and children of M. H. who should be living at the death of M. W., and to their respective executors administrators, and assigns, equally to be divided between them, share and share alike. The testatrix died in 1825; M. W. died a spinster in 1830; M. W.'s mother died in 1850. A. A. had seven children, of whom the said M. H was one. Five of them had died without issue before the date of the will. M. H. was dead at the date of the will, but left children, all living except one, H. C., who survived M. W., and died in the lifetime of M. W.'s mother, leaving two children, who survived M. W.'s mother:—Held, *inter alia*, that the children of H. C. took no interest under the will, as they did not fulfil the condition of being issue of a

child of A. A. dying in the lifetime of M. W. *Coulthurst* v. *Carter*, 21 L. J., N. S., Ch., 555; 16 Jur. 532; 15 Beav. 421.

1. Testator gave real and personal estate upon trust to sell and convert, and as to the proceeds in trust for the benefit of such children as his two nephews and niece should leave at the time of their respective deaths; "and in case either of my said nephews and niece shall happen to die without leaving any child or children, then I direct that such third part shall go and be paid to the children or child of the other or others leaving children or a child in equal proportions, if more than one; and in case all of them my said nephews and niece shall happen to die without leaving any issue, then I direct that the whole of the residue of my estate shall go and be paid to the three children of P. in equal shares," and to the issue of such as might be dead, such issue taking *per stirpes*, and not *per capita*:—Held, except the nephews and nieces had all died without leaving any issue. *Pride* v. *Fooks*, 4 Jur., N. S., 678; 1 L. T., N. S., 292; 3 De G. & J. 252; 5 Jur., N. S., 158; 28 L. J., Ch., 81.

2. A bequest after a life interest to S., to testator's twelve nephews and nieces, with a gift over in case any of them should depart this life before the period of distribution, leaving issue, and such issue die before twenty-one, to the survivors, does not imply a gift to the survivor, except in the exact event specified by the testator. *Taylor* v. *Sparrow*, 14 W. R. 124.

A testator gave his property, subject to a life estate, to his nephews and nieces, with a gift over in the event of the death of any of them leaving issue before the distribution of his estate. One of the nephews died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. S. C. 12 Jur., N. S., 593; 14 W. R. 881.

3. A testator gave certain property to all his children who should be living at a certain time after his death; and added a proviso that in case of the death of any child before that time, without leaving issue, then the share which such child would have taken if living at that time should go to A. One of the testator's children, living at the date of his will, predeceased him, leaving issue who survived the testator:—Held, that A. took no interest in the property under the proviso. *Groome* v. *Dell*, 3 N. R. 26.

4. Testator gave certain fee farm rents and stock in the funds to trustees upon trust to pay the annual produce and dividends to his two nieces, M. and N., for their lives, and the life of the survivor, and after the decease of the survivor of them unmarried, to convey or transfer the rents and the stock to the children of B.; with a proviso, however, that if his nieces, or either of them, should marry, the trustees should have power to settle the share of the party marrying for her benefit, and that of her husband and children; and that in the event of a marriage, and children of the marriage who should attain twenty-one, but not otherwise, the limitations over in favour of B.'s children should be void; and the testator gave the residue of his property to M. and N. absolutely. M. and N. both married, but had no children, and their settlements provided that in the event of their having no children the persons interested under the will should take:—Held, that the children of B. were entitled. *Doyne* v. *Cartwright*, 1 Colly. 482.

5. A testator gave real and personal property to trustees for his son John for life, and after his death for his children in equal shares; but if his son John should die under twenty-one without leaving lawful issue living at his decease, he directed the property to be in trust for his other children in equal shares. And after further gifts he gave the residue of his property for his four sons, Matthew, Thomas, John, and Christopher; but in case no child of his should live to attain twenty-one, or if none of them should leave lawful issue at his or her death, or respective deaths, then he gave the residue to other persons. In 1863 he died, leaving one daughter, Jane, and the four sons named in his will surviving. All the testator's children attained twenty-one. John, who attained twenty-one in 1864, died without issue in 1868:—Held, that the property of which trusts were declared in favour of John and his children did not on John's death pass under the gift over to the other children of the testator, but fell into the residue; and that under the residuary gift the three surviving sons and the representative of the deceased son took indefeasible interests. *Imray* v. *Imeson*, 26 L. T., N. S., 93.

6. A testatrix bequeathed one moiety of the residue of her personal estate to her daughter H., for her separate use during the joint lives of her and her husband, and if she survived him to her absolutely; if not, to such of her children at her decease as should attain twenty-one, with a bequest over if there were no such children to another daughter, M., for her separate use and her children; and she bequeathed the other money to M. for her separate use during the joint lives of her and her husband, and after her decease to such of her children living at her decease as should attain twenty-one; and if there were no such children of M., to H. and her children in like manner as the first moiety; with a proviso that if H. died in her husband's lifetime and should not have a child living at her decease who should attain twenty-one, the second moiety was to go over to H.'s executors and administrators, and that in like manner the first mentioned moiety, in the event in which it was limited over, should, if M. had not a child living at her death, who should attain twenty-one, go over to M.'s executors and administrators: by a codicil the executrix gave 1,500*l.*, if M. died without leaving any child who attained twenty-one, to H. and her children, in the same manner as was in the will directed touching the first-mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1,500*l.* together with all the residue of her personal estate to A.; both the daughters died without issue, but H. survived her husband:—Held, nevertheless, that A. was entitled to the residue. *Hopkins* v. *Howle*, 3 Russ. 304. Affirming 1 Sim. & S. 337; 1 L. J., Ch., 155.

7. Where there is in a will a limitation over, which, though expressed in the form of a contingent limitation, is in fact merely dependent upon a condition essential to the deter-

mination of the interest previously limited, the Court is at liberty to hold, that notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interest so previously limited. But, in order that this rule of construction may be applied, the condition, upon which the limitation over is made dependent, must involve no incident but what is essential to the determination of the interests previously limited. *Maddison* v. *Chapman*, 4 Kay & J. 709. Affirmed 5 Jur., N. S., 277; 28 L. J., Ch., 450.

A testator directed that when his youngest child attained twenty-one, his property should be divided into three shares, one for his wife, one for his daughter A., and one for his daughter M.; and that if either of the daughters should die before division, and leaving no surviving issue, her share should be given to her surviving sister; but if either of them should die leaving issue, her share should be divided among her surviving children. He directed the income to be applied to the support of his wife, and the support and education of the children, "during their minority, or the minorities of either of them," and that each daughter should have 10*l.* pocket money "during the minority, or until division of the property." By a codicil he made a gift over, "should both children die in their minority and leave no issue." One daughter attained twenty-one, and died unmarried; the other afterwards died a minor, and unmarried:—Held, that the words "in their minority," could not be construed as meaning "before the period of distribution," or "while either of them is a minor," and that the gift over had failed. S. C. 3 De G. & J. 536.

III. GIFT OVER ON TWO DIFFERENT EVENTS.

1. Devise of lands to be sold in aid of personal estate, "and after death of my wife, the estates not sold, and the personal estate not applied, to be subject as after-mentioned; the rents and produce to be carried on in accumulation of 3 per cent. as aforesaid during her life, and also for five years after her death, and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and any lawful issue of his body, to them for life, as tenants in common, then to their issue in moieties; if only issue of one, to that issue; if but one, to that one, with power of settlement; my wife to receive such provision as aforesaid, neat and clear, and the residue only to be subject to the devise over, to take place after her death, to her son, his heirs, etc.; and if she should have any other issue, to them, their heirs, etc., on failure of issue of his sons and grandson." The devise over is attached to the single event of both sons being dead with issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect: but the son is not entitled to the estate absolutely, on account of the contingent interest in his issue. *Graves* v. *Bainbridge*, 1 Ves. J. 562.

2. A. gave to his two children a leasehold house, the rents to be equally divided between them, and at their death to go to their children, "but if either one of them should die without children, that share to go to the other." Both died without children:—Held, that each took a moiety of the house absolutely, the consideration being, that the gift over was to take effect if either one died without children; but both having done so, the event contemplated by the condition had not happened; consequently, the gift over did not take effect, *Drennan* v. *Andrew*, 30 L. J., Ch., 384; 9 W. R. 430; 4 L. T, N. S, 133.

A testator gave to his wife a house during her life, and at her death to go to his two children, the rent to be equally divided between the two, and at their death to go to their children; but in case that either one of them should die without children, that share to go to the other. Both the children survived the wife, and died without children:—Held, that on the death of the child who died first, the other became entitled to the entire house. S. C. 36 L. J, Ch., 1; 15 L. T., N. S., 259.

3. A testator possessed of real and personal estate, and also devisee of Whiteacre for life, with remainder to his children, gave one-fourth of his residuary real and personal estate to a married daughter for life, with remainder to her children. The testator then directed his said daughter to sell her share of Whiteacre to his eldest son, at a fixed price, and in case she should refuse to do so, he gave her share of his residuary real and personal estate over to his eldest son. The testator further directed his said daughter to settle certain real property, and also the purchase moneys of Whiteacre, upon certain trusts, and in case she should refuse to make such settlement, he gave the property given to her by the will, over to his other children. On the death of the testator the daughter not only declined to sell her share of Whiteacre, but also at the same time declined to settle the property above mentioned:—Held, that as the testator had not provided for the simultaneous breach of both conditions, the gift to his daughter and her children took effect as if no clauses of forfeiture had been contained in the will. *Ormerod* v. *Riley*, 12 Jur., N. S., 112; 15 L. T., N. S., 571.

VIII. Divesting of Vested Interests and Effect where Events do not Happen or Contingent Clauses Fail.

See also XIV. III. *post.*

4. Bequest to A. for life, and after her decease to B. and C., in equal moieties, and in case of the decease of either in the life of A., the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison* v. *Foreman*, 5 Ves. 207.

A clear vested interest not divested, the express contingency upon which it was to be divested not having happened. *Ib.*

5. Bequest to A. for life, and then to be equally divided between her three children,

or such as shall be living at her death. Children took vested interests and transmissible to representatives, subject to be divested only in favour of those who should be living at the prescribed period. *Sturgess* v. *Pearson*, 4 Madd. 411. See 6 Madd. 250.

1. Testator bequeathed a sum of money in terms which by themselves were sufficient to carry the absolute interest, to his daughter in the event of her attaining twenty-one, and, in the event of her dying under that age, then over. He then directed that, should his daughter live to marry, her interest in the money was to be enjoyed by her during life, with remainder to her children. She attained twenty-one, and then married:—Held, that she was entitled to the money absolutely, the contingency provided for by the latter clause being a marriage under twenty-one. The statement in a will of the date of a legatee's birth is *primâ facie* taken to be correct. *Vulliamy* v. *Huskisson*, 3 Y. & Coll. 80; 2 Jur. 656.

2. Under a bequest of the interest of a fund to a person for life, "and after his death to divide the said sum, and any interest that may be due thereon at his death, among all his children equally, and if he leave but one child then to give the whole sum to such one child," the children take a vested interest in their respective shares, as tenants in common, liable to be divested as to children dying in the father's lifetime, in favour of a single child surviving him, should such an event happen. *Kimberly* v. *Tew*, 2 Con. & L. 366; 4 Dr. & War. 139; 5 Ir. Eq. R. 389.

3. Testatrix gave an annuity of 50*l.* to her son-in-law for his life, provided he remained unmarried, but if he should marry the annuity to cease; and, after his death or second marriage. she gave 1,000*l.* to be equally divided between her brother and sisters; and, if they should not all be then living, she gave the share of him, her, or them so dying to be equally divided between them her surviving brother and sisters. The testatrix's brother and sisters all died in her son-in-law's lifetime, and he died unmarried:—Held, that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. *Peters* v. *Dipple*, 12 Sim. 101.

4. Legacy, on condition to be void in case the legatee should succeed in event of the death of A., without issue of her body; payment decreed in the life of A., and without security. *Fawkes* v. *Gray*, 18 Ves. 131.

5. A testatrix directed her residuary estate to be divided equally between her two granddaughters on the youngest attaining twenty-one. She added, if they both marry a relation of D, then the residue is to be divided between my nephews and nieces. The granddaughters having attained twenty-one and being still unmarried, the Court declined deciding the validity of the gift over, but held that they were entitled to payment, subject to any future question. *Hurd* v. *Pinckey*, 34 Beav. 273.

6. Although no time is specified for payment of a legacy given as a portion, subject to a contingency, provision to go over if legatee die before twenty-one, raises a necessary implication, that it is payable at twenty-one. Legacies to A. and B., and "in case the said A. and B., or either of them, shall become entitled to the said lands (real estate settled in remainder, on the event of C. dying without issue), my intention is, that she or they so becoming entitled shall not have, possess, or enjoy any part of my property; but in case A. and B. shall not become entitled to the settled estate, I leave each of them 300*l.*," with other provisions in the event of dying before twenty-one or marriage with consent, that the legacies should go over. A. having attained twenty-one and married with consent:—Held, that her legacy became absolutely vested not liable to be divested, notwithstanding the devolution of the settled estate by the subsequent happening of the event. *Colhoun* v. *Thompson*, 2 Moll. 281.

7. Bequest of a sum of stock to trustees, upon trust to pay the interest, dividends, and annual produce thereof to the testator's daughter M., the wife of G. W., for her own sole and separate use, free from the control of her husband; and after the decease of the said G. W., in case the testator's daughter M. should be then living, and without issue, upon trust to pay and transfer the said sum of stock, and the interest, dividends, and annual produce thereof, unto the testator's said daughter M., to and for her own use and benefit; and in case M. should die in the lifetime of her husband G. W., leaving a child or children, then upon trust to transfer and pay the said sum of stock, and the interest, dividends, and annual produce thereof, to, between, and among all and every such child or children equally, and if but one, then the whole to such one. The testator's daughter M. died in the lifetime of her husband G. W., without issue.—Held, that G. W., as personal representative of his deceased wife M., was entitled to the sum of stock, and the dividends thereof. *Whipple* v. *Martyn*, 14 Jur. 361.

8. Under a direction, that, after the decease of A., a fund "should be transferred to A. B and C. D., or the survivor or survivors":—Held, that A. B., who survived C. D., but died in A's lifetime, was entitled to the whole. *Antrobus* v. *Hodgson*, 16 Sim. 450; 18 L. J., N. S., Ch., 93.

9. Where the testator directed his trustees to apply the interest arising from his residuary estate for the maintenance of all his children, and the surplus to accumulate until the youngest should attain twenty-one, and then the capital to be divided into as many shares as there should be children then living, one to be allotted to each, and the issue of such as should be then dead to take their parents' shares, the shares of sons to be payable at twenty-one, and of daughters to remain in the hands of his trustees, upon trust to pay the interest for their lives for their separate use, and on the decease of such daughter leaving issue on the youngest attaining twenty-one:—Held, that a daughter living at the time when the youngest child attained twenty-one who died single, took an absolute interest in a share of the residue, the gift which was absolute in the first instance not being affected by the direction as to settling the share of the daughters having issue. *Hulme* v. *Hulme*, 9 Sim. 644.

10. Bequest to H. S. for life, and after her decease to the testator's four brothers and sister, "or such of them as should be then

living," equally. And in case any of them should be then dead, then he bequeathed the deceased child's share to the children, "to be paid at the time before mentioned." The brothers and sister all died in the lifetime of H. S., one (A. B.) having had no children:—Held, that the representatives of A. B. were entitled to his share, and that all the children took, whether living at the death of H. S. or not. *Masters* v. *Scales*, 13 Beav. 60.

1. Bequest of residuary estate upon trust for testator's wife during her widowhood, and after her decease or second marriage, in trust for all and every his child and children who should be living at his decease as tenants in common, to become vested in them respectively after the decease or second marriage of his wife, when and as they should severally attain twenty-one, with interest on their respective shares for maintenance and education in the meantime, and with equal benefit of survivorship in case of the death of any of them under age and without issue, with gift over in case of the death of any of the testator's children in his lifetime, or during the widowhood of his wife, leaving issue, who should survive the decease or second marriage of testator's wife, to such issue of their parent's share. And the testator empowered his wife to advance to all or any of his children such sums as she might think advisable for their advancement in life, and to take their promissory note or receipt for the same; and declared that such advances should be received by his children, and accounted for to his executors as part of their share of the estate, to which they would be entitled at the decease or second marriage of his wife, such advances not to exceed one-half of what they would at the time of such advances be considered as likely to be entitled to at the death or second marriage of testator's wife:—Held, that having regard to the proviso for advancement, and to the circumstance that any other decision would have resulted in intestacy as to the share in question, that one of five children of the testator who attained twenty-one and died leaving issue, which died during the widowhood of the testator's wife, took a vested interest in one-fifth of the estate, which passed on his death to his personal representatives. *Walker* v. *Simpson*, 1 Kay & J. 713; 1 Jur., N. S., 675.

2. Testatrix bequeathed the residue of her funded property in trust for her niece for life, and after her death to be equally divided amongst all her children, whether sons or daughters, share and share alike; in case it should happen that there was but one child at the niece's death, then to go to that one only child, and in case of failure of issue to go as the niece should appoint by her will. The niece had eleven children, three of whom died in her lifetime:—Held, that all the children took vested interests, and, as more than one survived their mother, there was no divesting the interests. *Templeman* v. *Warrington*, 13 Sim. 267.

3. Gift of personal property to trustees to be settled on marriages of testator's daughters for their separate use, and on their deaths upon trust for their children, with limitation over in case of either daughter dying without marriage or issue her surviving. The shares of the children of each daughter are vested, subject to be divested by all dying before their mother, and there being one alive at her death, the representatives of the two who died before her were held entitled to their share. *Bromhead* v. *Hunt*, 2 Jac. & Walk. 459.

4. A testator gave a fund to trustees upon trust to pay the income to A. during his life, and after the decease of A. leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of A., equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and if daughters at that age or marriage, with benefit of survivorship; and in case there should be no child or children of A. at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. A. had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father. *Cornech* v. *Wadman*, 7 L. R., Eq., 80.

5. A testator gave life estates in some personal property to his sisters, Mary and Harriet, in succession, and, after their deaths, equally to his two brothers, Robert and John, to do as they pleased with; but in case his sisters, Mary and Harriet, should survive Robert and John, after their deaths, to go to A. and W. Robert died first, Mary second, John third, and Harriet last:—Held, that the contingency had not happened, and that the representatives of the brothers whose interest had not divested, were absolutely entitled. *Terrell* v. *Cooke*, 5 L. J., N. S, Ch., 68. And see *Re Minor's Trust*, 28 Beav. 50.

6. Bequest to testator's wife for life, and after her death to be divided between his brothers and sisters in equal shares; but in case of the death of any in lifetime of wife, the shares of him, etc., to be divided between his children:—Held, vested subject to be divested only by death in life of widow leaving children. *Smither* v. *Willock*, 9 Ves. 233.

7. Testator bequeathed 1,500*l.* stock to trustees in trust for his daughter for life, and after her decease for her children, but, if she should have no children, then he directed his executors to stand possessed of the fund in trust to pay or transfer the same equally unto and between his three nephews, A., B., and C., and his niece, and the survivors or survivor of them, share and share alike. The nephews and niece survived the testator and died in the lifetime of the daughter, who died without ever having a child:—Held, that the representatives of the nephews and niece were entitled in equal shares. *Wagstaff* v. *Crosby*, 2 Colly. 746.

8. Bequest to A. for life, and after her decease to become the property of B., "or, in case of her decease, to be equally divided between her children living." B. died in the testator's lifetime, and her only child survived her, but died in the life of A.:—Held, that the word "living" referred to the antecedent,

viz., the death of B., and that such only child took a vested interest, and that her legal personal representatives were entitled to the legacy. *Hodgson* v. *Smithson*, 21 Beav. 354; 2 Jur., N. S., 315; 4 W. R. 427. Affirmed 2 Jur., N. S., 1199; 26 L. J., Ch., 110; 5 W. R. 3.

1. When a legacy is given, subject to be defeated by a subsequent event, the legatee has an absolute interest till the event happens; and if the event become impossible, the legacy becomes absolute. *Lowther* v. *Cavendish*, (*Lord*), Ambl. 358; 3 Bro. P. C. 186.

2. A. devised 600*l.* apiece to his two daughters, and the residue of his personal estate to his son, and, if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and one sister brought a bill against the executors and the other sister, to have her own 600*l.* and one-half of her brother's personal estate, which was decreed, upon her giving security to pay back her own 600*l.* in case she died during her minority. *Pate* v. *Hatton*, 1 Ch. Ca. 199.

3. Testator gives his personal estate to trustees, upon trust, to pay the interest to his daughter E. S. for her life, and after her decease to pay and divide the principal among the children of his said daughter and the issue of a deceased child as she should appoint, and in default of appointment to go to, and be equally divided among them, and if but one, then to such only child; the portions of sons to be paid at the respective ages of twenty-one, and of daughters at their respective ages of twenty-one or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given as to vest immediately in the children of E. S., though liable to be divested by all dying under twenty-one without issue. The share of a child so dying was therefore held to pass to its representatives. *Skey* v. *Barnes*, 3 Meriv. 335.

A devise over upon a contingency, does not of itself prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass. *Id.* 340.

4. Bequest of 1,000*l.* to the children of J. W., to be paid to them or the survivors or survivor of them after the decease of the testator's wife (who was to have the interest for her life), share and share alike; and also 1,000*l.* to a trustee after decease of testator's said wife, in trust to permit R. W. after the decease of testator's said wife, to receive the interest thereof for his life; and if the said R. W. should die, leaving issue, to divide the 1,000*l.* among such issue, etc.; and if the said R. W. should die without such issue, the 1,000*l.* to go to and among the children of the said J. W. in the same manner as the 1,000*l.* so bequeathed to them as aforesaid. R. W. survived testator's widow, and died without issue. Only two of the children of J. W. survived the testator's widow, but all of them died during the lifetime of R. W.:—Held, that the two children of J. W. who survived the testator's widow, took, as to the second legacy, vested interests transmissible to their representatives. *Luby* v. *Hamilton*, 1 Ir. Eq. R. 305.

5. Bequest to A. for life, and, after his decease, to his eldest son; but in case A. should "die under age without issue," over:—Held, that the word "and" was not to be read "or," and that A.'s son, in his father's lifetime, took a vested interest not subject to be divested. *Malcolm* v. *Malcolm*, 21 Beav. 225.

6. The Court may supply words in a will, where the context shows, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy. *Hope* v. *Potter*, 3 Kay & J. 206; 5 W. R. 389.

So where there is a gift by will, and then a gift over, not commensurate with the original gift, the Court will curtail the general words of the gift over, by supplying words of reference; as where the first gift is to A.'s children and the gift over is in default of issue of A. The Court will read the gift over as though it were in default of "such" issue. *Ib.*

But where there was a devise of a particular property to the testator's daughter, A., her heirs and assigns, and if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently, a devise of other real estate to trustees in fee, in trust for A., for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of A., as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case A. should die without leaving any child or children, or leaving such child or children, all should die under twenty-one," over:—Held, that the Court could not, after "such children of A.," supply the words, "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such," as relating to all the children of A., as they had been mentioned in the previous limitation. *Ib.*

7. Where the testator gave a sum to a daughter, in the event of her marrying (which happened) absolutely; and in a subsequent clause, after recommending that his sons should, in the event of their dying without issue, not dispose of the estates respectively devised to them, to the prejudice of their brothers; the testator then proceeded, "And as to my daughters, I trust that they would, in the event of their marrying, have their fortunes so settled that, in case of dying without issue, then, on the decease of their husbands and themselves, their fortunes to revert to their surviving brothers, share and share alike," the daughter died without issue, in the lifetime of her two brothers, and both the latter in the lifetime of the daughter's husband:—Held, that the period when the legacy of the daughter was intended, by the testator, "to revert to the surviving brothers" was when the enjoyment of it by the daughter and her family, whose issue should fail, ceased, *i.e.*, not before the death of the survivor of the daughter and her husband, at which time, the brothers being dead, and the period had not arrived, nor ever could, the gift became absolute in the daughter, and passed to her representatives. *Eaton* v. *Barker*, 2 Colly. 124; 9 Jur. 822.

1. Testator gave all his real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might leave at his decease; but if he died without leaving issue, then he gave all his property in equal proportions to his brothers and sister, Thomas, Anthony, John, and Jane; and if any of them should die without leaving issue he gave such share or shares to the survivors or survivor of them; but if issue he gave such share to their children. The testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of his widow, leaving one child and several grandchildren, the issue of a deceased child. Thomas survived the widow, and died leaving children. Then Anthony died a bachelor:—Held, that the share intended for John belonged absolutely to Thomas, Anthony, and Jane; that Jane's share belonged to her child, Thomas's to his children, and Anthony's to his real and personal representatives. *Benn* v. *Dixon*, 16 Sim. 21; 11 Jur. 812.

2. Bequest to A. for life, and afterwards to B.; but if he should be then dead, to C. and D. in equal shares, or the whole to the survivor of them. B. died in life of tenant for life, as did also C. and D.:—Held, that gift to C. and D. was a vested interest as tenants in common subject to be divested, if one only should survive tenant for life. *Browne* v. *Kenyon* (*Lord*), 3 Madd. 410.

3. Bequest of residue to A. for life, and after the death of A. and B. to G. B. and H. B., to be equally divided between them, share and share alike, or to the survivor or survivors of them. G. B. and H. B. both died in the lifetime of the surviving tenant for life:—Held, that their representatives were respectively entitled to a moiety of the residue on the death of the surviving tenant for life. *Belk* v. *Slack*, 1 Keen 238.

4. Devise of real estate to three daughters for life, and after their decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughter, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren:—Held, that the survivorship had reference to the death of the last tenant for life, and not to a survivorship between the grandchildren; that the divesting clause never took effect, and that on the decease of the survivor of the three daughters, the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns* v. *Household*, 21 Beav. 29.

5. A legacy given absolutely will not be divested if the event on which it is given over does not strictly happen. *Page* v. *May*, 27 L. J., Ch., 242; 24 Beav. 323; 3 Jur., N. S., 1047.

After the cesser of a life estate, "a gift to three persons equally, or in case of the death of each or either of them, to be divided between the survivors or survivor, or their representatives":—Held, on the death of the three before the tenant for life, that their legal personal representatives were entitled to the fund. *Ib.*

6. A. bequeathed a legacy upon trust for his widow for life, and after her death for A. and B., in equal shares, "and in case of the death of either of them in the lifetime of my wife, then upon trust to pay the whole of the trust fund unto the survivor of them, A. and B., his executors, administrators, or assigns." A. died in the lifetime of the widow:—Held, that upon his death B. acquired an indefeasible vested interest in the whole fund. *White* v. *Baker*, 2 De G. F. & J. 55; 6 Jur., N. S., 591; 29 L. J., Ch., 577; 8 W. R. 533. Reversing 8 W. R. 267; 6 Jur., N. S., 209. And see *Re Clark's Trusts*, 9 L. R., Eq., 378; 18 W. R. 446; 22 L. T. 151.

7. A testator directed that a legacy of 1,500*l.* should be set apart for the benefit of his daughter A. for life, and after her death the principal and capital to go and be divided amongst her children; "and in case she should have no child or children," then the same to go to and for the benefit of his son C. and his children in like manner. He made a similar bequest in favour of his son C., and directed that "in case both his son and daughter should die without leaving any issue him or her surviving," then the 1,500*l.* should go and be divided among his next of kin, and the remaining 1,500*l.* amongst the next of kin of his wife. A. married B., by whom she had one child only, who died in her lifetime. A. died, leaving B. and C. surviving her:—Held, that the child of A. took a vested interest in the legacy of 1,500*l.*, which was not cut down by the subsequent bequest over, and that B. was entitled to the capital as the legal personal representative of his daughter. *Whyte* v. *Collins*, 3 L. T., N. S., 263; 6 Jur., N. S., 1281.

8. A testator bequeathed trust funds and moneys "in trust for all the children, to be equally divided amongst them, their respective executors, administrators, and assigns, of my brother H. M. W., of my nephew A. W. D., of my sister H. C. D., and of my niece M. B., of Jamaica, and my nephew G. D. himself (if he shall be then living, but not otherwise, G. D. taking a share with all such children), and the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived testator. There was enough in the case to enable the Court to presume that the testator was aware of the state of H. M. W.'s family:—Held, that G. D. took two shares under it; the one vested; the other vested, subject to be divested. *Milne* v. *Wood*, 42 L. J., Ch., 545.

9. Gift to A. for life, with remainder in case A. died unmarried (as happened) between B. and C., "or such of them as should be then living," and the lawful children of such of them as should be then dead, "for the share of the father or mother deceased only." B. and C. died in the lifetime of the tenant for life. B. had issue, C. had none:—Held, that C.'s interest was not vested, and that his representatives were not entitled. *Willis* v. *Plaskett*, 4 Beav. 208; 5 Jur. 572.

10. Bequest to executors in trust, to sell, etc., and apply so much of interest, etc., for maintenance, etc., of testator's five children, and the surplus to accumulate to pay each child at twenty-one 2,500*l.*, and if there should be any surplus after such payments, to pay and divide it amongst the five children, or such of them as should be living when the youngest attained twenty-one; and in case

any of them died under twenty-one having issue, his share should go to the children; with benefit of survivorship amongst the five children, in case of one dying without issue:—Held, that one dying after twenty-one, and before youngest had attained twenty-one (though with issue), took no vested interest in the surplus. *Howes* v. *Herring*, M'Clel. & Y. 295.

1. A testator gave to his son for life, and if his son should die without leaving lawful issue living at his death, then for "all and every his brothers and sisters, and the issue of such as should be then dead, such issue taking only the share their parents would have been entitled to if living":—Held, that a brother surviving the testator, but foredeceasing before the tenant for life, took a vested interest, and his representatives were entitled. *Etches* v. *Etches*, 3 Drew. 447; 4 W. R. 487.

Held, also, as to a sister who survived the testator, but died before the tenant for life, leaving a child, who also died before the tenant for life, the representatives of that child were entitled. *Ib.*

2. Gift of a legacy upon trust for A., a son of the testator, for life, remainder to any wife he might marry, for life, remainder to his children absolutely, with a gift over, "in case he should die unmarried and without issue, to B., C., and D., or such of them as should be living at his decease absolutely." A. died a widower, and without having had any children. B., C., and D. all died in A.'s lifetime:—Held, that the interests of B., C., and D., though depending on a contingency, were transmissible, and that their representatives were entitled to their shares. *Re Sanders*, 1 L. R., Eq., 675; 12 Jur., N. S., 351; 14 W. R. 576.

3. A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. and B. for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively, if living (A. and B. excepted), would have been entitled to:—Held, that the shares of such as had died without leaving children belonged to their representatives. *Re Bennett*, 3 Kay & J. 280. And see *Strother* v. *Dutton*, 1 De G. & J. 675.

4. A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue; and in default of such of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by their mother's side, and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators, and assigns for ever as tenants in common, and not as joint tenants:—Held, first, that the gift to the cousins was not too remote. Secondly, that it was not a gift to a class to be ascertained at a future period, but that the first cousins *ex parte materna* living at the testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution. Thirdly, that the shares of the first cousins who died before the period of distribution leaving no issue were not divested, but went to their real and personal representatives. Fourthly, that the share to a first cousin who died before the period of distribution leaving children went to those children. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 17 Jur. 267; 22 L. J., Ch., 665.

5. A testator gave all his real and personal estate to his two sons and daughter in equal shares absolutely, and if his daughter should die without leaving issue, he gave the property bequeathed to her to the survivors or survivor of his said sons:—Held, that the survival of the sons was part of the contingency raising the gift over; and therefore, the sons having predeceased the daughter, the latter's estate became indefeasible, although she died without leaving issue. *Jones* v. *Davies*, 28 W. R. 455.

6. A husband bequeathed 600*l.* (after the death of his wife) to his two daughters A. and B. in equal shares; and if either of them should die in the lifetime of his wife, to such of her children as should attain twenty-one; "but if there be one such child" then upon the trusts of the other moiety:—Held, that the gift over was good, though A. died in her mother's lifetime unmarried. *Moore* v. *Beagley*, 33 L. T., N. S., 198.

7. M. D. devised certain estates to his nephew, Sir J. E., Bart., for life, after Sir J. E.'s decease to his second son and his heirs male, and so on, with a proviso, that if the baronetcy should come to or descend to the second son of Sir J. E., the estates should go over to the next in succession. P. J., the father of Lady E., by a will made subsequently to that of M. D., devised his estates to his daughter Lady E., for life, then to her eldest son for life, and his heirs, and for default, etc., to the second son of Lady E. for life, and to his heirs ("in case he shall not become, or shall not continue, seised of the real estates of M. D. by virtue of his will"), and to the third and every other son of Lady E., subject to the like condition, "provided always, that if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid, then and in either of those cases, I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs, etc.," with cross-remainders amongst them; "and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." At the time of the death of Lady E. there were two sons and several daughters living; both sons afterwards died without issue:—Held, that the daughters of Lady E. did not take any estate under the limitations of the will of P. J., for that the words "living at her death" applied to both branches of the

proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. *Eden* v. *Wilson*, 4 H. L. Ca. 257.

Period of Defeasibility in Gifts over in General.] See WILL.

IX. Contingent Remainders.

I. GENERAL PRINCIPLES.

1. That a remainder is contingent, when uncertain whether it would take effect or not, is by no means the true legal definition of it; for if an estate be limited to A. for life, remainder to B., and the heirs of his body, this is a vested remainder, notwithstanding B. may die without heirs of his body before the death of A., and the remainder may never take effect in possession. All contingent remainders may be reduced to two heads: first, where a remainder is limited to a person not in being, and who never may exist; and, secondly, where a remainder depends upon a contingency collateral to the continuance of the preceding estate. *Smith* v. *Packhurst*, 3 Atk. 138; 2 Stra. 1105.

If an estate be limited to A. for life, remainder to B., and the heirs of his body, this is a vested remainder, notwithstanding B. may die without heirs of his body in the lifetime of A., and the remainder may never take effect in possession. *Ib.*

2. It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. *Carwardine* v. *Carwardine*, 1 Eden 28.

A limitation in a settlement "to trustees, to the use of the settlor for life, remainder to B., his intended wife, for life (except as thereafter excepted), remainder to the heirs of the body of A., begotten on B., remainder to A. and his heirs, with a proviso that if A. should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the same trustees should stand seised of one moiety, from and after the decease of A., to the use of such child":—Held, a contingent remainder, and not a springing use, and therefore barred by a fine levied by A. and B. *Ib.*

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Id.* 34.

No instance where equity has considered an estate as not executed, at the same time that law would have considered it as executed. Limitation to trustees to stand seised and receive rents and profits to the use of A. is an estate executed in A. *Id.* 36.

3. Every contingent remainder, even of a real estate, depends upon the event, whether good or void. *Gower* v. *Grosvenor*, 5 Madd. 341.

If estate is given to A., remainder to right heirs of B., and A. dies before B., it is void by the event. *Ib.*

Where after estate tail there is a limitation over, which does not depend on a contingency, limitation is void, nor can subsequent event make it better or worse. *Ib.*

Limitation of personal chattels to go as heirloom with real estate; chattels shall follow that estate into a contingent remainder falling in. *Id.* 337.

If in will there are two contingencies, and one good, and that falls out, the devise over will be good, though the other contingency be bad; for the bad subsequent contingency, where he makes two, could never have touched the limitation over upon trust. *Id.* 342.

4. Devise after limitation in strict settlement, in default of such issue, then to the devisors, not the heir-at-law, is a limitation of the reversion, not a contingent remainder to the heir at the time of failure of issue as a purchaser. *O'Keefe* v. *Jones*, 13 Ves. 412.

5. Devise of land to A. for sixty years, if he so long live, and, from and after the death of A., to his eldest son B. in tail. Whether this be a vested or contingent remainder, *quære*. *Beverley* v. *Beverley*, 2 Vern. 131.

6. A., by his will, ordered all his personal estate to be sold for the payment of his debts and legacies; and in case it should prove insufficient, he devised his real estate to his executors, for the purpose of making good the deficiency. He then devised his real estate, after such time as his debts and legacies should be paid by the rents and profits thereof, to E. for life; and in case E. should have any issue male, then to such issue male and his heirs for ever. And after the decease of E., in case he left no issue male, then after such time as the testator's debts and legacies were fully paid, he devised part of his said real estate to J. in fee, and the residue to N. in fee. E. entered into possession, and kept down the interest of the debts; but afterwards suffered a common recovery of the whole estate, and declared the uses thereof to himself in fee:—Held, that an estate for life was vested in E. at the time of the recovery, notwithstanding the debts were not paid, and that he could make a good tenant to the *præcipe*:—Held, also, that the remainders limited to J. and N. were contingent remainders, and well barred by this recovery. *Barnardiston* v. *Carter*, 3 Bro. P. C. 64; 1 P. W. 509.

7. Devise of freehold and copyhold, surrendered to the use of the will, to trustees and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes, then on the marriage, or attaining twenty-one, of his granddaughter, to convey to her for life, remainder to trustees, etc.; remainder to her first and other sons in tail male, remainder to her

daughters in tail general, remainder to such persons for such estates, and subject to such charges and conditions as he should by any deed or instrument, with two or more witnesses, appoint. The next day, by deed-poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estates farther, he directed his trustees, immediately after the death of his granddaughter, and failure of her issue, to convey all his real estate to the first and other sons of his sons in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The granddaughter died without issue; the son died without issue, leaving one trustee surviving. The last limitation is a contingent remainder to the heir of the surviving trustee. *Habergham* v. *Vincent*, 2 Ves. J. 204; 4 Bro. C. C. 353.

1. Contingent remainders may be supported after an executory devise, though there are no trustees inserted. *Hopkins* v. *Hopkins*, 1 Ves. 269.

2. Where a remainder in tail is vested, subsequent contingent remainders are not regarded. *Winnington* v. *Foley*, 1 P. W. 537.

3. To support a contingent remainder in a freehold there must be a tenant of the *præcipe*, yet not so of a copyhold, for there no *præcipe* can be brought, being parcel of the manor only, and the freehold in the lord. *Lovell* v. *Lovell*, 3 Atk. 12.

4. A dormant surrender of a copyhold (that is, a surrender to A., on condition to perform the will of the surrenderor) will vest an estate in the dormant surrenderor, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for the purpose. *Gale* v. *Gale*, 2 Cox 136.

5. Remoteness does not affect the validity of contingent remainder. *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed 2 H. L. Ca. 186; 12 Jur. 927.

6. Where there is a gift to a person for life, with remainder to children not *in esse*, with a gift in default to the parent, no remainder is vested in the parent until after the contingency is determined. *Crofts* v. *Middleton*, 1 Jur., N. S., 1133; 1 Kay & S. 1173; 2 Kay & J. 194. And see S. C. 2 Jur., N. S., 528; 25 L. J., Ch., 513; 8 De G. M. & G. 192.

A testator devised land to A., spinster, for life, and after her decease to her children equally in fee; and in case there should not be any child of A., or if any, and all such children should die under twenty-one, and without leaving issue, then he devised the land to the heirs and assigns of A.:—Held, that this was a limitation of an estate for life, with a contingent remainder in fee.

7. Though a gift over may, as to one alternative, operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. *Evens* v. *Challis*, 7 H. L. Ca. 531; 29 L. J., Ch., 121; 7 W. R. 622; 5 Jur., N. S., 825.

The invalidity of one alternative will not necessarily defeat the other. *Ib.*

Devise to E. for life, "and from and after decease to such child or children as she may have, if a son or sons, who shall live to attain the age of twenty-three, and if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, etc.," and in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case E. has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. "And also, in case E.'s children shall die under" the ages mentioned, "or if she has none," then to J., A., and S. for life, and afterwards to their sons and daughters, on attaining the above ages respectively. There were similar devises to J., A., and S., but in the devises to J. and S. nothing was said as to total absence of issue; in that to A., the words used were, "and farther, in case A. shall die without issue." E. first, and A. afterwards, died without ever having had a child:—Held, that, on the death of A., the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of A.) determined the contingency on which the remainder was to take effect, had occurred. *Ib.*

Held also, that though the gift over, on the death of E.'s sons, under twenty-three, was void for remoteness, the gift over on her death, without having had issue, was not thereby affected. *Ib.*

A. died without ever having had issue:—Held, that though in the devise to her the not having issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain twenty-three or twenty-one, and therefore, on her death without ever having had issue, the gift over took effect. *Ib.*

8. A. has a contingent remainder in fee, and conveys it to B. as a security. The contingent remainder is afterwards barred by A.'s mother, who acquires the fee, and by her will devises her real estates to trustees, upon trust to sell, and invest the money, and pay two-thirds of the dividends to or for the benefit of A., for his life, with a similar trust as to two-thirds of the rents of the estates not sold:—Held, that the interest of A. is bound by the security given to B. *Brown* v. *Blount*, 9 L. J., Ch., 74.

See also IV. III. *ante.*

II ESTATE OF TRUSTEES TO PRESERVE.

9. A. devised to the use of trustees and their heirs in trust for B. for life; remainder to his first and other sons in tail; remainder to the future sons of C., successively for life; remainder over. B. died without issue in testator's lifetime; the contingent limitations were taken as executory devises, because no child was then born to C.; afterwards a child was born to C., and died; and a subsequent remainderman claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed, as it had been decreed that, upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that

executory devise; but it was held, that the inheritance in the trustees was sufficient to support the intermediate contingent remainders till they should come *in esse*, although no particular estate to support, etc., was inserted, and that the estate should not vest in possession whilst any of the preceding limitations might come *in esse*. *Hopkins* v. *Hopkins*, 1 Atk. 580; 1 Ves. 268; Ca. *temp*. Talb. 44. And see *Habergham* v. *Vincent*, 4 Bro. C. C. 390, where Lord Loughborough has stated this case from a corrected copy. See also *Bamfield* v. *Popham*, 1 P. W. 56; 1 Ves. 26, where Lord Trevor said it had been resolved that a *cestui que trust* for life could not destroy the contingent remainders to his first and other sons.

The legal estate in trustees will support contingent remainders of a trust declared by a will, where no conveyance is directed. S. C. 1 Atk. 594.

Though contingent remainders by law must vest, during or at the instant the particular estate determines, yet it does not hold in the case of trusts; the ground the law goes upon is, that a freehold cannot be in abeyance, because there must be a tenant of the freehold to perform services and answer all writs concerning the realty; but this objection is obviated in the case of an equitable estate, because the trustee is the tenant of the freehold to perform those services, and if there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested. *Id*. 589, 590.

The legal estate in trustees will preserve contingent remainders of a trust declared by will, where no conveyance is directed. *Id*. 594.

The resulting trust of a freehold to support contingent remainders of a trust may connect with the limitation in tail, though not created together with it. *Id*. 595.

In a limitation to preserve contingent remainders, it is not material to restrain it to the life of the tenant for life, provided it be restrained to the life of a person in being. *Id*. 596.

1. Devise of freehold and copyhold surrendered to use of will to trustees and survivor and his heirs, in trust to pay debts and legacies, an annuity to testator's son, and for other purposes; then, on marriage, or attaining twenty-one of his granddaughter, to convey to her for life; remainder to trustees, etc.; remainder to her first and other sons in tail male; remainder to her daughters in tail general; remainder to such persons, for such estates, and subject to such charges and conditions as he should by any deed or instrument, with two or more witnesses, appoint. Next day by deed-poll with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate, further, he directed his trustees, immediately after death of his granddaughter, and failure of her issue, to convey all his real estate to first and other sons of his son in tail male, then to his daughters in tail general, then to right heirs of survivor of his trustees, his heirs and assigns for ever. No conveyance was made. Granddaughter died without issue; son died without issue, leaving one trustee surviving. Under will alone trustees have a mere legal estate, and all equitable interest, beyond express dispositions, would result to son as heir; but deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to heir of surviving trustee; and a conveyance was directed with an insertion of trustees to support that remainder as to copyhold: rents and profits of copyhold, during life of trustee, and all freehold, to go to heir of testator. *Habergham* v. *Vincent*, 2 Ves. J. 204; 4 Bro. C. C. 353.

2. A remainder in fee by settlement to trustees, limited to the life of the tenant for life, though not so expressed, the object of the trust terminating with that life, and a remainder following to the same trustees upon the death of the tenant for life, for a term of years; a subsequent remainder, therefore, to the heirs of the body of the tenant for life, held a legal estate, uniting with the legal estate for life, and vesting an estate tail, according to the rule in Shelley's case, not an equitable estate capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89.

3. A testator devised an estate to his wife for life, and upon the determination of that estate by forfeiture or otherwise to a trustee to preserve contingent remainders, nevertheless upon trust for his wife for life, and after her death he gave, devised, and bequeathed the rents to his two daughters in equal parts for life; and in case of the death of either without leaving issue, then to the survivor; but if either daughter should leave issue, such issue to be entitled to the mother's share; and on the death of both daughters he devised one moiety to the issue of each daughter, or the whole to the issue of one if the other should die without issue:—Held, that the legal estate was in the trustee until the death of both daughters. *Saunders* v. *Eppe*, 9 W. R. 69; 3 L. T., N. S., 291.

4. Lands were limited to W. B. for life, remainder to trustees and their heirs to preserve, etc., remainder to R. for life, with remainder to the same trustees for 500 years to raise portions:—Held, regard being had to the intention apparent on the face of the whole deed, that, although the estate was limited to the trustees and their heirs, yet they only took an estate *pur autre vie* so as to give effect to the 500 years' term. *Beaumont* v. *Salisbury* (*Marquis*), 19 Beav. 198; 24 L. J., Ch., 94; 1 Jur., N. S., 458; 3 Eq. Rep. 369.

5. Under a settlement and recovery lands were limited to the use of A. for life, and after his decease to the use of B. and his heirs, during the life of A., to support contingent remainders, remainder to the use of C. for life, remainder to the same B. and his heirs during the life of C. to support contingent remainders, remainder to the first and other sons of C. in tail male, remainder to the use of D. for life, and if she should marry, and her husband should survive her, to her husband for his life, and after the determination of those estates to the said B. and his heirs (without saying during the life of D.) to support and preserve contingent remainders; remainder to the first and other sons or D. in tail male, remainder to the use of C. for her life, and if she should marry, and her husband should survive her, to her husband for his life; and after the deter-

mination of those estates to the said E. and his heirs (without saying during the life of E.) to support contingent remainders; remainder to the first and other sons of E. in tail male:—Held, that under the limitations to B. and his heirs, after the limitations of estates for life to D. and E., the trustee took the fee, and that E. took only an equitable estate. *Colmore* v. *Tyndall*, 2 Y. & J. 605.

It is not a sufficient ground for restraining an estate limited by a deed to a trustee and his heirs to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Ib.*

1. Under a voluntary settlement lands were limited unto J. and N. and their heirs, to the use of such persons as J. L. and A. should jointly appoint; and in default of appointment to the use of J. L. for life, and after his death to the use of A. for life, remainder to the use of J. and N. and their heirs, to support contingent remainders, and from and after the death of the survivor of J. L. and A. to the use of W. L. during the term of one hundred years for certain purposes, and subject thereto to the use of T. L., son of J. L., for life, remainder to the use of J. and N. and heirs, to support contingent remainders; and after the death of T. L. to the use of his first and other sons in tail male, with remainders over:—Held, that under the limitation to J. and N. and their heirs they took the legal fee, and that this estate could not be cut down to an estate *pur autre vie*:—Held, also, that a settlement and a recovery suffered by T. L. in consideration of his marriage and after he came into possession as tenant for life were ineffectual to bar the limitations under the previous voluntary settlement. *Lewis* v. *Rees*, 5 W. R. 96; 26 L. J., Ch., 101; 3 Jur., N. S., 12; 3 Kay & J. 132.

2. *Semble*, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Rochfort* v. *Fitzmaurice*, 2 Dr. & War. 1. S. C. *nom. Rochford* v. *Fitzmaurice*, 1 Con. & L. 158; 4 Ir. Eq. R. 375.

3. Devise to trustees and their heirs to preserve contingent remainders:—Held, to pass an estate during the life of the tenant for life only, and not in fee. *Haddelsey* v. *Adams*, 22 Beav. 266; 2 Jur., N. S., 724; 25 L. J., Ch., 826.

Devise to trustees and their heirs, in trust for A. and his wife for their lives, and after the death of the survivor to the testator's four granddaughters, as tenants in common during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder to the testator in fee:—Held, that the granddaughters took for life as tenants in common, with survivorship to the survivors and survivor of them; and that after the death of the last survivor their issue took several inheritances in tail. *Ib.*

Held, also, that the limitation to trustees and their heirs to support contingent remainders was not in fee, so as to make the subsequent remainders equitable, and prevent the coalescing of the remainder to the issue with the life estate to the parent, and therefore that the four granddaughters took estates tail. *Ib.*

4. A testator devised all his manors "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve" (this devise in trust was repeated whenever necessary), "for the son or sons, daughter or daughters, the males taking first of my said son till they attain the age of twenty-one years, or the days of their marriage, and no farther; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses" He empowered his son to give "any part, or even the whole, of these estates" to any or either of his sons, but not to his daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson I leave and bequeath my landed property, estates," etc. "I will, therefore, that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, etc., "the estates being equally divided between them or their heirs;" and he gave the "estates and property to them through the said trustees," etc., whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate:—Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. *Watkins* v. *Frederick*, 11 H. L. Ca. 358.

5. A testator, by his will made in 1838, directed his debts to be paid. And he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust and for the intents and purposes thereinafter mentioned, viz., upon trust during the minority of his daughter D. to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without the power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue, children or child, of the daughter who should live to attain the age of twenty-one, in equal shares if more than one, and to their respective heirs and assigns, with remainders over. And, after making other specific devises and bequests, the testator devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely, for his own use and benefit. The daughter D. survived the testator,

and she afterwards married and had three children, but she died before any of them had attained twenty-one:—Held, that by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee-simple in the specifically devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency. *Festing* v. *Allen* (12 M. & W. 279) distinguished. *Creaton* v. *Creaton* (3 Sm. & G. 386) followed. *Marshall* v. *Gingell*, 21 L. R., Ch. D., 790; 51 L. J., Ch., 818; 47 L. T. 859; 31 W. R. 63.

1. Where a will creates a succession of legal limitations of real estate in strict settlement, the Court will not hold the legal estate to be in the trustees merely to prevent a contingent remainder from failing for want of an estate of freehold to support it. *Cunliffe* v. *Brancker*, 35 L. T., N. S., 578; 3 L. R., Ch. D., 393; 46 L. J., Ch., 128.

A testator devised real estate to two trustees, their heirs and assigns, to the uses and upon the trusts thereinafter declared, that is to say, to the use of the trustees, their executors, administrators, and assigns for the term of 120 years after his decease, if his niece should so long live, and subject thereto to the use of the niece's husband for life, with remainder to the use of the trustees and their heirs during the husband's life, upon trust to preserve contingent remainders, with remainder to the use of all the children of his niece who should be living at the decease of the survivor of her husband and herself, and the issue of such of them as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common, with divers remainders over. The niece survived her husband:—Held, that the contingent remainder to the children failed for want of an estate of freehold to support it; for the Court could not, in order to preserve the contingent remainder to the children of S. C. from destruction, hold that R. P. and T. A. took a legal estate in fee, the testator having clearly expressed his intention that they should be mere conduit pipes to feed the uses. *Ib.*

2. T. was the daughter and heiress-at-law of L., and tenant for life in possession of the K. estates under his will. Subject to such life estate, and to limitations which had ceased, the estates stood limited as follows:—To E. for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and younger sons of E. in tail; with remainder to M. for life; with remainders over. The will contained a proviso to the effect, that if E. became entitled to the T. estates, the limitation of the K. estates in his favour should cease, determine, and be absolutely void, as if he were dead, and the K. estates should go over to the person next entitled in remainder under the will. In 1857 E. became entitled to the T. estates, having at that time one son only. T., the tenant for life, died in 1858, leaving M. her residuary devisee and legatee. In 1859 E. had a second son born:—Held, that the trustees to preserve contingent remainders were "the persons next entitled in remainder;" but that M. was entitled to the rents of the K. estates from the death of T. to the birth of E.'s second son, and that such second son was entitled to them from that period. *Turton* v. *Lambarde*, *Lambarde* v. *Turton*, *Turton* v. *Turton*, 6 Jur., N. S., 233; 29 L. J., Ch., 361; 8 W. R. 355.

III. DESTRUCTION OF.

1. *In General*, 7449.
2. *Liability of Trustees*, 7449.

1. In General.

3. If a contingent remainder is destroyed by a legal conveyance, and that conveyance is obtained in fraud, equity will relieve against it. *Englefield* v. *Englefield*, 1 Vern. 443.

4. How far it shall not be in the power of trustees to destroy contingent remainders. *Mansel* v. *Mansel*, 2 Barn. K. B. 187.

5. Where tenant for life under will, with remainders in tail, is also made trustee to preserve remainders over, he is not guilty of breach of trust by joining with remainderman in tail to destroy remainders over. *Osbrey* v. *Bury*, 1 Ball & B. 58.

6. How far a contingent remainder shall be said to be barred or not. *Hooker* v. *Hooker*, 2 Barn. K. B. 200.

7. Estates *pur autre vie* were devised to A. for life, with an ultimate limitation to A., subject to some intervening contingent limitations to other persons:—Held, that A. could not destroy the intermediate contingent interests. *Pickersgill* v. *Grey*, 30 Beav. 352.

Freeholds, copyholds, and leaseholds for lives were devised in 1838 to A. for life, with divers contingent remainders over, with an ultimate remainder to the testator's right heirs. There were no trustees to support the contingent remainders. A., who was the heir-at-law of the testator, executed a release, by which he purported to re-settle the estates discharged from the contingent limitations created by the testator:—Held, first, that as to the freeholds, there being no trustees to preserve, the contingent remainders therein were destroyed. S. C. 8 Jur., N. S., 632; 31 L. J., Ch., 394; 10 W. R. 207; 5 L. T., N. S., 706.

Held, secondly, that the contingent remainders in the copyholds were not destroyed, as they were supported by the estate of the lord of the manor. *Ib.*

Held, thirdly, that the contingent remainders in the leaseholds for lives were not destroyed, as the possible estate, as special occupant, of the heir or executor of the tenant for life was not large enough to merge the prior life estate of the tenant for life. *Ib.*

By Fine and Recovery.] See FINES AND RECOVERIES, IV. 7.

2. Liability of Trustees.

8. Trustees in a will to support contingent remainders, joining with tenant for life in

destroying them, are guilty of breach of trust, and purchaser, with notice of trust, is liable to make good the estate. *Gorges* v. *Pye*, 7 Bro. P. C. 221; Pre. Ch. 308; 1 P. W. 128.

1. Trustees for supporting contingent remainders joining to destroy them guilty of a breach of trust; and no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only. *Mansell* v. *Mansell*, 2 P. W. 678; Ca. *temp.* Talb. 252.

2. Trustee to preserve contingent remainders, joining in a recovery with the remainderman in tail, having attained twenty-one:—Held, no breach of trust, and no objection to a specific performance. *Biscoe* v. *Perkins*, 1 Ves. & B. 485.

Trustees to preserve contingent remainders, honorary trustees; not to be compelled to join in destroying them. *Id.* 492.

3. Trustees to preserve contingent remainders, joining in a recovery:—Held, with reference to the circumstances and occasion, no breach of trust. *Moody* v. *Walters*, 16 Ves. 283.

Generally trustees joining to destroy the contingent remainders, before the tenant in tail is of age, is a breach of trust. *Ib.*

4. Trustees to preserve, etc., are not to permit the tenant for life or years, by destruction of that estate, to bring forward a remainder to himself or another, for the purpose of cutting timber. *Stansfield* v. *Habergham*, 10 Ves. 278.

5. Where tenant for life under will, with remainder in tail, is also made trustee to preserve remainders over, he is not guilty of breach of trust by joining with remainderman in tail, to destroy remainders over. *Osbey* v. *Bury*, 1 Ball & B. 58.

6. A settlement was made by a third person to the use of the husband for ninety-nine years; remainder to trustees during his life, etc.; remainder to the wife for life; remainder to the first, etc., sons of the marriage; remainder to the heirs of the body of the husband; remainder to the right heirs of the husband: there was no issue of the marriage, and the trustee joined in cutting off remainders, yet the Court refused to punish them at the suit of a remote remainderman. *Tipping* v. *Piggot*, Gilb. Exch. Rep. 34.

7. If a trustee joins with a *cestui que trust* in any conveyance to bar the entail, it is no breach of trust, for it is no more than what he may be compelled to do, though the trustee himself might have barred such entail without his joining, and that not only by fine or recovery, but also by feoffment, bargain or sale, devise or surrender (if no custom to the contrary in the latter case). See *Goodrick* v. *Brown*, 1 Ch. Ca. 49; *Washborn* v. *Downs*, 1 Ch. Ca. 213; *Digby* (*Lord*) v. *Langworth*, 1 Ch. Ca. 68; *North* v. *Champernoon*, 2 Ch. Ca. 64, 78.

8. If trustees to preserve contingent remainders join in sale to one without notice, the purchaser will be safe; *contrà*, if he have notice. *Willoughby* v. *Willoughby*, Ambl. 284.

IV. RIGHTS OF TRUSTEES.

9. Trustees to preserve, etc., may bring title to stay waste by tenant for life. *Perrot* v. *Perrot*, 3 Atk. 95.

V. ORDER ON TRUSTEES TO CONVEY.

10. Trustee to preserve contingent remainders in a voluntary settlement decreed to join in a sale for payment of debts. *Bassett* v. *Clapham*, 1 P. W. 358.

11. Trustees in a marriage settlement, for preserving contingent remainders (there being no issue), are decreed to join in a sale, the settlement being only of an equity of redemption, and the wife consenting to the sale. *Platt* v. *Sprigg*, 2 Vern. 303.

12. Whether a trustee for preserving contingent remainders shall be decreed to join in a sale, to pay debts, when there is no probability of issue. *Davies* v. *Weld*, 1 Vern. 181.

13. Where Court has at instance of eldest son ordered trustees to join in destroying contingent remainders, it has sometimes imposed conditions on the son as a provision for a sister. *Frewin* v. *Charleton*, 1 Eq. Abr. 386.

14. In a marriage settlement husband made tenant for ninety-nine years, if he so long lived; remainder to trustees during the life of the husband, etc.; remainder to the first, etc., sons by the marriage in tail male; remainder to the first, etc., sons of any other wife; remainder over. A son is born, and of age, the wife dead, and there are no other sons by the second marriage: the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. *Winnington* v. *Foley*, 1 P. W. 536.

15. On marriage lands are settled to A. for ninety-nine years, if he so long live; remainder to B. and his heirs, during the life of A., to support contingent remainders; remainder to the first, etc., sons of A. A. has two sons, C. and D. A., the father, having mortgaged the premises, he and his son C. covenant to suffer a recovery, and to procure B., the trustee, to join. B., the trustee, by answer, submits to the Court; the Court will not compel the trustee to join, unless D., the second son of the marriage, will consent. *Townsend* v. *Lawton*, 2 P. W. 379; Sel. Ch. Ca. 71.

16. The Court will not compel trustees to join in a sale which will not only destroy contingent remainders, but all the uses in a marriage settlement; for they are guilty of a breach of trust in joining to destroy contingent remainders, whether the settlement be voluntary, for a valuable consideration, or by will. *Symance* v. *Tattam*, 1 Atk. 614.

17. The Court will not compel a trustee for preserving contingent remainders to join in a recovery, unless to continue the estate, or under very particular circumstances. *Bernard* v. *Large*, 1 Bro. C. C. 534.

18. A., tenant (of a settled estate) for ninety-nine years, if he should so long live; remainder to trustees to preserve, etc.; remainder to his first and other sons; remainder over to A. and B. His sons, being indebted, assigned this settled estate in trust to their creditors, and agreed to suffer a recovery. The creditors filed a bill against A. and B. and against the trustee to preserve, etc., to compel him to join in the recovery. *Per curiam*, the Court will

effectuate the intention of a testator as far as possible, to preserve the limitations he has made, where the uses are executory; and as there is no similar case, in which the Court has decreed the trustees to join, it ought not to be done here. Bill dismissed. *Woodhouse* v. *Hoskins*, 3 Atk. 22.

X. Cross Executory Limitations in Personal Estate.

1. Vesting of a legacy postponed to time of payment, and a limitation over in the nature of a cross remainder implied from the general intention. *Mackell* v. *Winter*, 3 Ves. 236, 536.

2. One, having a wife and three daughters, devises 900*l.* to his three daughters equally, payable at their respective ages of twenty-one or marriage, and, if all die before their legacies were payable, then the whole to the mother. If two of the daughters die before their shares become due, the surviving daughter is entitled to the whole. *Scott* v. *Bargeman*, 2 P. W. 68.

3. Bequest to the child or children of the testator's two daughters in terms creating a tenancy in common, viz., equally to be divided, etc., to be paid at twenty-one or marriage of daughters, with survivorship upon the death of any before his or their shares become payable; the accrued share to be equally divided, and to be payable, etc., as the original shares; the issue of any dying in the lifetime of the two daughters to stand in the place of the parent, and a limitation over in case his daughters die without issue, or, having had issue, such issue should die in the lifetime of his daughters. The event of a death of a child above twenty-one not being within the survivorship expressed, his interest vested in his representative, subject to the ultimate contingent limitation. *Bayard* v. *Smith*, 14 Ves. 470.

4. Testator gave an annuity, to which he was entitled for the life of E., to his daughter L. for life, and, after her death, to her children; but if she should not have any who should survive E., then to such persons as should then be entitled to the testator's personal estate. He then disposed of all his estate amongst his sons and daughters, giving the shares of his sons to them absolutely, and the shares of the daughters to trustees for them, for their respective lives, and, after their deaths respectively, to apply the interest of the shares of his daughters respectively for the maintenance of their respective children until they attained twenty-one, and then to divide the principal amongst such children respectively as should attain that age. But if all such children of his daughters respectively, or both of them, should die under twenty-one, then upon trust to pay the said trust money to such persons as should then be entitled to his personal estate. A., one of the testator's daughters, died, leaving children who attained twenty-one; then L., the only other daughter, died without issue:—Held, that the cross limitations were not to be implied between the children of the daughters, and that the persons who were to take under the gift over were not sufficiently described, and, therefore, that the annuity and L.'s share of the residue must go as in case of an intestacy. *Turner* v. *Frederick*, 5 Sim. 466; 2 L. J., N. S., Ch., 2.

5. Bequest of 500*l.* to A., and in case of her death, either before or after the testator, to devolve to her child or children, or in the event of their being also dead at her decease to B. There were three children, one of whom only survived:—Held, that he was entitled to the whole fund. *Currie* v. *Gould*, 4 Beav. 117; 10 L. J., N. S., Ch., 304.

6. Devise of copyholds to A. for life, remainder to the eldest or only son of A. and the legal and customary heirs respectively of such eldest or only son for ever; provided that if A. leave no son or issue of a son living or *in ventre sa mere* at his death, then the testator gave the land to the daughters or only daughter of A., as tenants in common, and their respective legal and customary heirs for ever; provided that if A. having neither son nor daughter nor issue of a son or daughter living or *in ventre sa mere* at his death, then over. A. had a son and daughters, but left no son or issue of a son living at his death:—Held, that all the daughters, and not those only who were living at A.'s death, took, as tenants in common in fee, so that those who died in A.'s lifetime had descendible contingent interests. *Rider* v. *Wood*, 1 Kay & J. 644; 24 L. J., Ch., 737; 3 Eq. Rep. 1064.

Held, also, that the devise to the daughters was not a gift to a class, to be ascertained at the death of the tenant for life, within the principle of *Currie* v. *Gould* (4 Beav. 119). *Ib.*

7. Testatrix bequeathed the residue of her funded property in trust for her niece for life, and after her death to be equally divided amongst all her children, whether sons or daughters, share and share alike; in case it should happen that there was but one child at the niece's death, then to go to that one only child, and in case of failure of issue to go as the niece should appoint by her will. The niece had eleven children, three of whom died in her lifetime:—Held, that all the children took vested interest, and, as more than one survived their mother, there was no devesting of interests. *Templeman* v. *Warrington*, 13 Sim. 267.

8. Testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and after the decease of any of them, the capital of his share to be sold and the proceeds to be divided amongst his children; and in default of such issue then to go and be divided amongst the children of A., and in case all A.'s issue should be dead, then to be divided amongst the children of B. A. had four children. Three of them died, and then one of the testator's nephews died without issue:—Held, that the three deceased children, as well as the surviving child of A., took vested and transmissible interests in the deceased nephew's share of the stock. *Cohen* v. *Waley*, 15 Sim. 318; 10 Jur. 767.

9. A testator directed his trustees to accumulate the rents and profits of his real and personal estate until the period of distribution named in his will; and he directed them to stand seised and possessed of his real estate, and of the moneys to arise from any part of

it which should be sold, and of his personal estate, and of the accumulations thereof, all which were, for the purpose of distribution, to be considered as personal estate, upon trust to divide the same into two equal parts, and distribute one of such parts among the children of F., and the other among the children of C. The will contained a single clause of survivorship and accruer, applicable to all the children, with a gift over in default of any of such children attaining a vested interest under the provisions of the will. F., who was a female fifty-eight years of age, and one of the objects of the gift over, having no children and never having been married, prayed for a distribution of the trust fund.—Held, that there were no cross limitations and no absolute conversion; that the heir of the testator took the produce of his real estate, and his next-of-kin the produce of his personal estate; and a distribution of the fund was directed. *Edwards* v. *Tuck*, 23 Beav. 268.

1. A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons, on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interest in the personalty; and that cross remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell*, 25 Beav. 551.

2. A testator gave a residue upon trust to pay the produce thereof between his grandchildren A. and B., during their respective lives, in equal shares, and after the death of A. and B. to transfer the capital unto and amongst the children of A. and B. in equal shares, and if there should be no children living at their decease then upon trust for his personal representatives. A. died, leaving children, in the lifetime of B.:—Held, that B. was entitled to the whole for life. *Pearce* v. *Edmeades*, 3 Y. & Coll. 246; 8 L. J., N. S., Exch. Eq., 61; 3 Jur. 245.

3. Bequest of personal estate, after the death of the tenant for life, in trust to pay equally between A. and B. But if "neither" should be then living, to C. A. died in the lifetime of the testatrix. B. survived the tenant for life, and claimed the whole, either as surviving joint tenant or under a gift to her by implication. The Court rejected such claim, and held, that the moiety intended for A. had lapsed, and belonged to the next-of-kin of the testatrix. *Baxter* v. *Losh*, 14 Beav. 612; 21 L. J., N. S., Ch., 55. And see *Skey* v. *Barnes*, 3 Meriv. 334.

4. Gift of personal property to trustees to be settled on marriages of testator's daughters for their separate use, and on their deaths upon trust for their children, with limitation over in case of either daughter dying without marriage or issue her surviving. The shares of the children of each daughter are vested, subject to be devested by all dying before their mother, and there being one alive at her death, the representatives of the two who died before her were held entitled to their share. *Bromhead* v. *Hunt*, 2 Jac. & Walk. 459.

5. Although the operation of a bequest of a residue by a father to his two children, to be equally divided between them, and if they should die without issue, or before twenty-one, to go over, would be to give vested legacies to be devested only on the deaths of both children under twenty-one, and without issue; and the representative of one of the children dying under twenty-one, and without issue, would be entitled till the happening of that event; yet the intention that the surviving child should take the whole, sufficiently appearing on the will, controls the effect of the bequest to the deceased child, and the survivor held to be entitled to the residue, subject to the event on which the whole was given over. *Beauman* v. *Stock*, 2 Ball & B. 406.

6 A testator gave real and personal estate to trustees, to pay the income of a fifth part to a daughter for life, and after her death to all her children equally, with similar trusts in favour of the testator's four other children and their children, with a proviso, that if any of the children should die without leaving any child living at his death, the part of such child should be held in trust for all the other children for their lives, and the issue of any of them that should be dead, as before directed; and when all his children should have died, the whole property was to be in trust for all the children of the testator's children *per capita*:—Held, that the income of the share of a child dying, and leaving a child who also died before the death of the testator's last surviving child, was undisposed of between the two last-mentioned deaths, and that the case was not one in which cross remainders were implied. *Rabbeth* v. *Squire*, 4 De G & J. 406; 19 Beav. 70, 77; 24 L. J., Ch., 203; 19 Jur. 218; 28 L. J., Ch., 565.

7. A father gave his residuary personal estate upon trust to pay the income equally between his three daughters F., E., and C. during their lives; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. C. died leaving issue, and afterwards F. died without leaving issue:—Held, that cross limitations were to be implied between the daughters and their families, and that the issue of each daughter was, for all purposes, to be ascertained at her own death; and that, therefore, one moiety of F.'s share was payable to the issue of C. living at C.'s death, and the other moiety went by way of accretion to E.'s original share. *Re Ridge*, 7 L. R., Ch., 665; 41 L. J., Ch., 787; 20 W. R. 878; 27 L. T., N. S., 141.

8. C. directed that his residuary real and personal estate should be sold and converted, and that his trustees should hold four-sixths of the proceeds for three reputed daughters and a lawful daughter (naming them) of his brother during their lives, and after their deaths for their children respectively, as they should respectively appoint, and in default of appointment, for the children of the four daughters, in equal shares, with cross executory trusts as between the children of the same parent as regards the shares of male

children dying under twenty-one and female children dying under twenty-one and unmarried, with an ulterior trust in case the four daughters should all die without leaving any child or children, or, leaving such, if such children should all happen to die under twenty-one, and without having been married. One of the four legatees died without having been married.—Held, that as to her share, cross limitations must be implied between the other three legatees and their children, corresponding with the limitations contained in the will of the original shares. *Re Clark*, 32 L. J., Ch., 525; 11 W. R. 871; 8 L. T., N. S., 571; 2 N. R. 386.

Held, also, that no such cross limitations could be implied as to the share of any daughter after once a child of that daughter had attained a vested interest, even though the daughter might subsequently die without leaving a child, the proper function of the cross limitations being not to divest any estate once vested, but merely to supply the gap left by the testator. *Ib.*

1. A will contained a trust of real and personal property during the lives of five children and the survivor to divide the income into five parts, and pay one-fifth to each, if living, or if dead to their respective children or issue, the latter taking equally between themselves in classes the one-fifth share which the parent, if living, would have taken. And if any one of the five children died without leaving children or issue, or if such issue failed during the period, the share of such children or issue to belong to the others of the testator's children and their issue in the same way as original shares. This clause to apply to accruing as well as original shares, and upon the death of the last surviving child the capital to testator's grandchildren in classes, *per stirpes*. One child died leaving children. One of the grandchildren died, leaving one child, Lucia, who died unmarried before the period had expired:—Held, upon a special case to determine what became of Lucia's share of income, that she took only a life interest, and that on her death her share went equally among her uncles and aunts and their issue, *per stirpes*, cross limitations being implied to effect this. *Re Hudson, Hudson* v. *Hudson*, 20 L. R., Ch. D., 406; 51 L. J., Ch., 455; 46 L. T. 93; 30 W. R. 487.

Rules deducible from the authorities:—1. Cross executory limitations in the case of personal estate, like cross remainders of real estate, are only implied to fill up a hiatus in the limitations which seems from the context to have been unintentional. 2. They cannot be implied, as cross remainders could not, to divest an interest given in the will. 3. The existence of other cross limitations between different persons does not prevent the implication. 4. But where such express cross limitations are in favour of the persons to whom the implied cross remainders would convey the property, that circumstance is of weight in determining the intention. *Ib.*

Implication of Gift to Survivors.] See WILL I. VII.

XI. Cross Remainders in Real Estate.

I. IMPLICATION OF IN WILLS.

2. Question as to cross remainders in will. *Eastland* v. *Reynolds*, Dick. 317.

3. A. devised lands to his wife for life, and then to his son and daughter, to be equally divided between them and the respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross remainder, which can only be raised by an implication absolutely necessary, which is not here the case, for the words "several of the respective" effectually disjoin the title. *Davenport* v. *Oldis*, 1 Atk. 579.

Cross remainders have never been adjudged to arise merely upon these words, "in default of such issue." S. C. 1 Atk. 580.

4. Devise to first and other sons, and in default to daughters as tenants in common, and in default of such issue over, raises cross remainders between the daughters. *Wright* v. *Englefield*, Ambl. 468: 2 Eden 239.

5. Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there were a failure of issue of all the devisees, there the devisees take cross remainders. Where estates tail are given to two persons only as tenants in common, there cross remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively. *Livesey* v. *Harding*, 1 Russ. & M. 636; Taml. 460.

6. In order to raise an implication of cross remainders, there must be a devise to two or more persons as tenants in common in tail. *Re Sharp*, 2 N. R. 54. S. C. *sub. nom. Re Tharp's Estate*, 2 N. R. 253; 33 L. J., Ch., 59; 11 W. R. 763; 8 L. T., N. S., 558. And see *Woodhouse* v. *Herrick*, 1 Kay & J. 352; 3 W. R. 303; 3 Eq. Rep. 817; 24 L. J., Ch., 649.

7. Devise to trustees and their heirs in trust to receive and pay over rents and profits to A., a feme covert, for life for her separate use; and after her decease to convey to her daughters as tenants in common in tail, remainder over. A. takes an equitable estate for life, and may, by lease and re-lease, make a tenant to the *præcipe* for an equitable recovery; each daughter takes a vested estate when she comes *in esse*, subject to be devested as the number increases; the conveyance in execution of the trust need not wait the death of A. Personal estate not exempted from the debts, etc., by a charge upon the real. Cross remainders implied. *Burnaby* v. *Griffin*, 3 Ves. 266.

8. Devise by very general and extensive words, restrained upon the apparent intention. Devise to the first and other sons in tail male, and for want of such issue to the daughter and daughters, her and their heirs, as tenants in common, and for want of such

issue to three nieces, and their several and respective heirs for ever as tenants in common, and for want of such issue to the testator's right heirs. As to the estate of the niece, the prior limitations having failed, and the implication of cross remainders, *quære*. *Green* v. *Stephens*, 12 Ves. 419. See further 17 Ves. 64.

1. Under a devise in trust to settle on the devisor's children in equal shares and proportions undivided, for and during their respective lives, with remainder to their issue, severally and respectively in tail general, with cross remainders over, there being two daughters, cross remainders implied not only among the several children of each, but also as between the two families. *Horne* v. *Barton*, 19 Ves. 298; Coop. 257.

Implication of cross remainders under a direction in default of such issue to go over. *Ib.*

2. Testator devised freehold fee-simple estates in possession to all and every the child and children of his daughter, S., for life; and after the deccase of such child and children, to the lawful issue of such child or children, to hold to such issue, his, her, and their heirs as tenants in common, and in default of such issue over. S. had nine children, four in testator's life and five after:—Held, that the nine took under the devise as tenants in tail with cross remainders. *Mogg* v. *Mogg*, 1 Meriv. 654.

3. Lands held in fee-simple were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life, remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common; in case of two survivors, with remainder in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters, as tenants in common in tail; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters to go to the use of the daughters of the survivors or survivor as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion;—Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and, therefore, not void for remoteness; and also, that the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross remainder. *Cole* v. *Sewell*, 2 H. L. Ca. 186; 12 Jur. 927. And see S. C. 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66.

4. Devise in trust for the testator's daughters M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross remainders in tail. *Stanhouse* v. *Gaskell*, 17 Jur. 157.

5. Devise and bequest of freehold and leasehold estates to trustees upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law and equity would permit, the testator's six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, and, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children, and of the survivor, should take the share of him or her so dying of the said rents and profits, and that upon the death of all his said other children, as to the leasehold estates, the same to go and belong to the issue of his said other children for their respective lives in equal shares, with benefit of survivorship, and, as to the freehold estates, the issue of his said children to take the rents, profits, and proceeds thereof for their respective lives in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and, if any of such issue of his said children should die leaving issue, the child and children of him or her so dying during the lives of such issue of his said children, and of the survivor of them, should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go and belong to the child and children of such issue absolutely as tenants in common; and as to the said freehold estates, in case the issue of his said children, or any of them, should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and, if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original and accrued shares of such child or children, whose children should so fail, to the use of the remaining and other and others of the said children, and the heirs of the body or bodies of such remaining and other children, and, if more than one, equally as tenants in common; and in default of such issue of the issue of his said children, to the use of the right heirs of the testator. The six younger children of the testator survived him. Some of them had children at the time of his death, and some had children born after his death:—Held, that the six younger children of the testator took life interests in both the freehold and leasehold estates, with remainder as to the freeholds to the children of such younger children as tenants in common in tail, with cross remainders between and among them, and the ultimate remainder to the testator's right heirs: and, *semble*, that the same children of such younger children (after the decease of the last survivor of their respective parents,

the tenants for life) take absolute interests in the leaseholds. *Williams* v. *Teale*, 6 Hare 239.

1. Testator empowered his trustees to purchase freehold land to the amount of 1,500*l.* for the use of T. during his life, and then to be divided among his issue, if any:—Held, that T. was entitled for life, with remainder to his children as tenants in common in tail, with cross remainders between them in tail, and reversion to T. in fee. *Hadwen* v. *Hadwen*, 23 Beav. 551.

2. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and, after the decease, and respective deceases, of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint-tenants; that, inasmuch as the children of the afterborn child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près*, or approximation by giving an estate tail to the afterborn child of A.; that the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the afterborn child would alone be altered; that cross remainders were to be implied between the children of A., and, therefore, that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross remainders among them. *Vanderplank* v. *King*, 3 Hare 1; 12 L. J., N. S., Ch., 497; 7 Jur. 548.

3. Testator devised all his manors, messuages, lands, etc., to trustees in trust for A. for his life, with remainders to his first and other sons in tail male, and, for want of such issue, he devised all the same manors, etc., to his daughters and granddaughters respectively during their lives, and after their decease to the heirs male of their bodies, to take as tenants in common, and on failure of such issue he devised the remainder of his whole estate to his own right heirs. The devise will create cross remainders amongst the daughters and granddaughters. *Staunton* v. *Peck*, 2 Cox 8.

4. Devise to A., B., and C., etc., share and share alike, for their lives, remainder to their respective children for their lives, and so to be continued from issue to issue for life; but if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and for default of any issue then over:—Held, that A., B., C., etc., take estate tail with cross remainders. *Mortimer* v. *West*, 2 Sim. 274.

The case of *Humberston* v. *Humberston* (1 P. W. 332) is not applicable as in this case, the trust is not executory, but the devisees take by direct devise to themselves. *Id.* 282.

5. Devise in trust for A. for life, with remainder in trust for B., C., and D., and the survivor for their lives, and for the issue of them respectively for their lives, for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue, and a direction that the before stated entails B., C., and D., and their respective issues were to be equally divided amongst the daughters as well as the sons of them and their issue:—Held, that B., C., and D. took equitable estates in remainder for their lives and the life of the survivor, with cross remainders between them, and that on the death of the survivor all the children of B., C., and D. took equitable estates as tenants in common in tail with cross remainders between them in tail. The doctrine of *cy près* established by *Humberston* v. *Humberston* (1 P. W. 332) is applicable to such a devise, and not merely to a will of an executory character. *Parfitt* v. *Hember*, 4 L. R., Eq., 443.

6. Testator devised an estate to A. for life, remainder to trustees to preserve, etc., remainder to all the children of A., as tenants in common, and not as joint tenants, and for want of such issue, to B. for life, remainder to trustees to preserve, etc., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue to C. in fee:—Held, that the children of A. took estates for life, with cross remainders between them for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross remainders between them for life, with remainder to C. in fee. *Ashley* v. *Ashley*, 6 Sim. 358; 3 L. J., N. S., Ch., 16.

7. Devise of estates to testator's son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship, to and amongst their issue respectively, as tenants in common; but such issue, being sons, not to have vested interests until twenty-one, or daughters until twenty-one or marriage, with powers to trustees to advance, etc., to the extent of one-half the presumptive share of each child; and in case his son or daughters, or either of them, should die without leaving lawful issue, or with lawful issue, and such issue being a son should not attain twenty-one, or a daughter not attain twenty-one nor be married, then the share of the party so dying to be for the benefit of the

survivors and their issue, in same manner as their original shares".—Held (confirming the certificate of the Court of Exchequer), that the son and daughters took estates for lives as tenants in common, with contingent remainders in their shares to their respective children, by purchase, as tenants in common in tail, with cross remainders in tail between such children in each respective share, with cross remainders over in the whole of each of such shares respectively (on failure of all the children of any one son or daughter and their issue), to the survivor or survivors of the testator's son or daughters, for life, remainder in tail general to the children of such surviving son or daughters respectively, in like manner as in the original share given to such son or daughters respectively; and that the son and daughters and their children respectively took corresponding interests in the leaseholds devised by way of executory bequest after the death of the testator's widow. *Cursham* v. *Newland*, 2 Beav. 143 n. And see S. C. at law, 2 Bing. N. S. 51; 2 Scott 105; 4 Mees. & Welsb. 101.

1. A testator devised particular estates to the use of his daughter E. for life, remainder to her children, remainder to John, the elder son of another daughter, F., for life; then to John's children; then to George, second son of F., for life; then to George's children; remainder to A., F., F. and E., the other children (daughters) of his daughter F., in equal shares; remainder to trustees to preserve, and remainder in equal shares to the children of his four granddaughters, and the heirs of their bodies, such children taking the mother's share as tenants in common in tail; remainder to the survivor of such children; in default of issue of granddaughters, over. He devised his residuary estates, in the same manner, to his daughter F., and then to John and George, as before; and then, "in default of such issue, to A., F., F. and E., for their lives, in equal shares; remainder to trustees to preserve the contingent remainders hereinafter limited: remainder in four equal shares to the children of my granddaughters, and the heirs of his, her, or their body, such children taking their mother's share as tenants in common in tail, remainder to the survivors or survivor, and the issue of the bodies in tail; in default of issue of my granddaughters," over:—Held, that the granddaughters, and not their children, took estates tail with cross remainders between them; and that, consequently, all the granddaughters but one having died without issue, and that one having left a son and a daughter, the son was entitled to an estate in fee-simple in seven-eighth parts of the estate, and the daughter to the remaining eighth part. *Atkinson* v. *Hobby*, 10 H. L. Ca. 313; 9 Jur., N. S., 503; 32 L. J., Ch., 735; 11 W. R. 544; 8 L. T., N. S., 583. Affirming S. C. *nom. Atkinson* v. *Barton*, 31 Beav. 272; 9 W. R. 885; 5 L. T., N. S., 330. Reversing 8 Jur., N. S., 902; 31 L. J., Ch., 410; 10 W. R. 281; 5 L. T., N. S., 812.

2. The Court will not imply cross remainders in a devise, for the purpose of passing accrued shares in a certain event, where the testator has expressly stated what shall be done with the original shares in the same event. *Dutton* v. *Conway*, 12 W. R. 222; 33 Beav. 272; 10 Jur., N. S., 28; 33 L. J., Ch., 241; 9 L. T., N. S., 630; 3 N. R. 234.

3. When cross remainders between persons are expressly limited by a will to effect in a given event, the Court will not imply cross remainders between the same persons, in a different event. A gift of real and personal estate to trustees, upon trust as to one-fifth for each of the testator's five children for life, and after his or her decease, for his or her children, which he or she should leave at his or her decease; and if he or she should leave none, in trust for the other children for life, and after the death of all the children, in trusts, as to the corpus, for all the grandchildren of the testator *per capita*. One child died, leaving a child who died before the last of the testator's children:—Held, such child took an estate for his own life only, that that one-fifth was undisposed of until the death of the surviving child, and that cross remainders were not, in the event which had happened, to be implied. *Rabbeth* v. *Squire*, 19 Beav. 77; 1 Jur., N. S., 218; 24 L. J., Ch., 203; 4 De G. & J. 406; 28 L. J., Ch., 565.

4. A testator gave a moiety of his estate to the children of R. and the other moiety to the children of B. The will contained a single clause of survivorship and accruer applicable to all the children, and not in terms distributive, with a gift over if there should be no children of A. and B., "or of either of them," or being such, all such children should die without having attained a vested interest:—Held, that there were no cross remainders between the two classes of children, and that on the death of A. without having been married, the children of B. would not take the first moiety. *Edwards* v. *Tuck*, 23 Beav. 268.

5. Whether cross remainders are to be implied or not is a question of construction; and wherever there are limitations in tail male, "and in default of such issue," a gift over, the presumption is, that that means in default of all such issue male. *Taaffe* v. *Conmee*, 8 Jur., N. S., 919; 6 L. T., N. S., 666; 10 H. L. Ca. 64.

A testator, by will, in 1823, after bequeathing real estate to his nephew D. for life, with remainder to his first and other sons in tail male, proceeded as follows: "And for default of such issue male in D., then to the use of my nieces, and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants, without impeachment of waste; and from and after their decease to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their bodies, successively, in equal proportions, the elder of such sons of each of my nieces, and the heirs male of their bodies, being always preferred and to take before the younger and the heirs male of their bodies; and for default of such issue male, then to the daughters of my nieces; and for default of such issue, male or female, to the use of my own right heirs for ever." The nephew died without issue. One niece died leaving a daughter, the others having sons:—Held, that the three nieces were entitled as tenants in common for life, with remainder to the survivors and survivor of them, with remainder to the eldest sons of the three nieces as tenants in common in tail male. The daughter of the

niece could take no estate until the prior limitations to the sons of the other nieces were exhausted. *Ib.*

1. A testator, by will, in 1826, gave real and personal estate to trustees in fee, in trust for his four nieces, M., B., S., and J., for their respective lives, as tenants in common, and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died, and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and to be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died a spinster. S. was a spinster and over sixty:—Held, first, that the equitable fee was given to the children of the nieces. *Maden* v. *Taylor* 45 L. J., Ch., 569.

Held, secondly, that seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Ib.*

By codicil of same date the testator devised freehold estate on trust for M., B., S., and J., for their respective lives, as tenants in common, and on death of all or any of them, then as to the part of her or them so dying, in trust for all and every the child and children of them respectively, and the heirs of their bodies; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies; and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for his heirs. B. died, having had four children, three of whom died infants and unmarried. J. died, having had three children, one of whom died an infant and unmarried. Then M. died, a spinster. S. was a spinster, and over sixty:—Held, first, the cross remainders in tail were to be implied between the children of the tenants for life. *Ib.*

Held, secondly, that "survivor" was not to be read "other," but that S. took M.'s share. *Ib.*

Held, thirdly, that S., being past the age of child-bearing, was entitled to her own one-fourth share in tail under the gift over to the survivors and survivor of them. *Ib.*

2. A decree declared A. and B. to be entitled for their lives as tenants in common, with cross remainders between them. Upon the death of A., which took place more than five years after the decree, one of the parties entitled in remainder applied for leave to appeal against the declaration as to cross remainders:—Held, that as the proper time for deciding whether there were cross remainders had not arrived when the decree was made, leave to appeal ought to be granted. *Walmsley* v. *Foxhall*, 1 De G. J. & Sm. 451.

II. IMPLICATION OF IN ARTICLES, SETTLEMENTS, OR EXECUTORY TRUSTS.

3. Articles on marriage, for settling land to be bought with money, on all the children of the marriage and their respective issues, and for default of such children and their issue, over:—Held, there should be cross remainders by implication. *Twisden* v. *Locke*, Ambl. 663.

4. Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross remainders, as to the original shares. *Edwards* v. *Alliston*, 4 Russ. 78; 6 L. J., Ch., 30.

5. Leaseholds for life were settled by a deed on the parents for life, with remainder to the children of the wife equally and the heirs of their bodies, and if but one child then to such child and the heirs of his body, and in default of such issue to the heirs of the wife:—Held, that there were no cross remainders between the children, and that on the death of a child without issue and without having made any disposition, his share went to the heir of the wife. *Bainton* v. *Bainton*, 34 Beav. 563.

6. Marriage articles carried into execution, by limiting estates in strict settlement to A. and B. respectively, with cross remainders between B. and the issue of A., with power to A. to appoint both estates among his children. The will of A. referring to the estate, but not to the power, declared a good execution of the power, to the extent of limiting estates tail to the children; the excess reformed to effectuate the general intention of the articles. *Dillon* v. *Dillon*, 1 Ball & B. 77.

7. Testatrix by her will gave 500*l.* to each of her two nieces to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made. And by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die without issue—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross remainders between them. *Holloway* v. *Collier*, 1 W. R. 266.

8. By marriage articles a father covenanted to convey an estate to trustees for the benefit of his son T. during his life, with remainder for the use and benefit of the issue of T. by M., his intended wife, their heirs and assigns for ever. The husband and wife both died, leaving a son and two daughters:—Held, that the settlement ought to be framed so as to give an estate tail to the son, with remainder to the daughters as tenants in common in tail, with cross remainders between them. *Phillips* v. *James*, 3 De G. J. & S. 72; 11 Jur., N. S., 660; 13 W. R. 934; 12 L. T., N. S., 685. Affirming 2 Dr. & Sm. 404; 12 L. T., N. S., 200; 13 W. R. 543.

9. Devise to trustees, as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants, this not a joint estate, but to be construed as near as it may be; so that the conveyance must be at

twenty-one respectively, with cross remainders. *Marryat* v. *Townly*, 1 Ves. 102.

1. Testator devised his estates to trustees, in trust to settle and convey the same to the use of or in trust for G. R. (who had then no issue) for life, without impeachment of waste, with remainder to his issue in tail male in strict settlement:—Held, that the words "in tail male" were descriptive, not of the issue, but of the interest that they were to have; and that the estates ought to be settled on G. R. for life, without impeachment, etc., with remainders to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male. *Trevor* v. *Trevor*, 1 H. L. Ca. 239. Affirming 13 Sim. 108; 11 L. J., N. S., Ch., 417; 6 Jur. 863.

2. A testator directed his trustees to purchase lands in certain counties, to be settled, on the death of the eldest son of S. without issue (which happened), to the use of every son of S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. *Surtees* v. *Surtees*, 12 L. R., Eq., 400; 25 L. T., N. S., 288; 19 W. R. 1043.

XII. Shifting Clauses.

See also YOUNGER CHILDREN, III.

I. *Construction and Operation of*, 7458.
II. *Right to Intermediate Income*, 7464.
III. *Name and Arms Clause.* See CONDITION, IX.

I. CONSTRUCTION AND OPERATION OF.

3. Shifting clauses, which take away an estate from the owner, are construed strictly. *Walmesley* v. *Gerard*, 29 Beav. 321; 7 Jur., N. S., 1041; 30 L. J., Ch., 435.

A testator devised an estate to his eldest nephew and his issue, subject to a shifting clause requiring them, under pain of forfeiture, in case they should also become seised, "under any now existing or future will or settlement or other assurance (except actual purchase for money)," to a Lincolnshire estate, to convey it to the younger nephews and their issue male. At the date of the will, and at his death, the eldest nephew was seised in fee of the Lincolnshire estate, which had descended to him as heir of his father:—Held, first, that he was not bound by the shifting clause; but the nephew having, after the testator's death, by deed conveyed the estate to the uses to which it should be conveyed as a compliance with the will. Held, secondly, after his decease, that the deed was as operative as if he had been compellable, under pain of forfeiture, to execute it. *Ib.*

Devise of an estate (Cansfield) to nephews and their first and other sons, in succession, and afterwards to nieces, with a shifting clause requiring any nephew, seised of the Cansfield estate, becoming also seised of the Lincolnshire estate, to settle the latter on the next in age of the nephews and his heirs male, "under the like limitations and restrictions" as were contained in the will as to the Cansfield estates:—Held, that the nieces were not objects of the shifting clause. *Ib.*

4. Proviso in a will that, in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to the use of the next person in remainder, valid; and the oldest son of the tenant in possession is the next person in remainder. *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215.

5. Proviso that if any of the tenants for life, in a devise and executory trust to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void and not take effect; and the person next in remainder, under the said limitations or directions, thereupon become entitled to the possession. The first tenant in tail is entitled under the proviso, notwithstanding the descent of the other estate upon his father for life. *Stanley* v. *Stanley*, 16 Ves. 491.

6. By letters patent the barony of Buckhurst was conferred on Elizabeth for life, with successive remainders to her second and other sons and the heirs male of their respective bodies. The patent contained a proviso that if her second son or any other person taking under the letters patent should succeed to the earldom of Dorset, the succession to the dignity of Buckhurst should devolve upon the son of Elizabeth or the heir who should be next entitled to succeed to the barony, if the person so succeeding to the earldom was dead without issue male. Lands having been devised by a testatrix to trustees and their heirs, upon trust to convey, settle, and assure the same "in a course of entail to correspond as nearly as may be with the limitations of" the barony of Buckhurst, "and the provisoes affecting the same contained in the letters patent," a settlement was executed, in which was inserted a clause providing that, if the second son of Elizabeth (who had then by her death become Baron Buckhurst) or any other person taking under the limitations therein contained should succeed to the earldom, the succession to the lands thereby settled should devolve upon the son of Elizabeth or the heir who would be next entitled to succeed to the barony, if the person so succeeding to the earldom was dead without issue male. The second son of Elizabeth afterwards succeeded to the earldom. He had issue male:—Held, that upon the second son succeeding to the earldom, the third son became entitled in possession to the settled estates. *Cope* v. *De la Warr* (*Earl*), 8 L. R., Ch., 982; 42 L. J., Ch., 870; 22 W. R. 8; 29 L. T., N. S., 565. Affirming 29 L. T., N. S., 24.

7. A testator directed a settlement of his real estate to be made on A. for life, with remainder to his children in strict settlement

with remainder to B. for life, with remainders over. Such settlement was to contain a name and arms clause, under which, if not complied with, the estate was to shift from the person failing to comply to the next remainderman *in esse*, but without prejudice to prior contingent estates. It was also to contain a clause providing that, in an event which happened, the estate should go, etc., to such uses, etc., as the same would have gone unto, etc., if the limitation in A.'s favour had not been inserted. A. had no children:—Held, that the settlement being executory, and the whole will being inconsistent with the testator's intending to die intestate as to any part of his property, B. was entitled to enjoy the estate during his life, or until a child should be born to A., to the exclusion of the testator's heir-at-law. *D'Eyncourt* v. *Gregory*, 3 N. R. 628; 10 Jur., N. S., 484; 12 W. R. 679; 10 L. T., N. S., 317; 34 Beav. 36.

1. Estate A. stood limited to E. T. for life, remainder to his first and other sons successively in tail. He had two sons, E. and R., and a daughter, Mrs. L. A testator, who knew these circumstances, devised the L. estate to M. for life, remainder to E. T. for life; remainder to R. for life; remainder to trustees, to preserve remainders to his first and other sons successively in tail; remainder to E. for life; remainder to trustees, to preserve contingent remainders in the usual form; remainder to his second, third, and other sons successively in tail male; remainder to Mrs. L. for life; with divers remainders over. The will contained a proviso, that if any person thereby made tenant for life or in tail should become seised of the A. estate, the limitations made by the will in his, her, or their favour should determine as if he, she, or they were dead, and the estate should go over to the person next entitled in remainder. R. died unmarried almost immediately after the testator. Afterwards, E. T. died, and E. thereupon came into possession of the A. estate. M. next died, and at her death E. had only one son, but afterwards had a second son, R. B. T. M. was the heiress-at-law of the testator, and left a will giving all her property, real and personal, to Mrs. L.:—Held, that although, having regard to the way in which the A. estate was settled, the shifting clause, if it applied to E., made it impossible for him in any event to retain any interest in the L. estate, except by means of an alienation of the A. estate in his father's lifetime; this, though aided to some extent by expressions in other parts of the will, was not a sufficient reason for holding the shifting clause not to apply to him. *Turton* v. *Lambarde*, and *Lambarde* v. *Turton*, and *Turton* v. *Turton*, 1 De G. F. & J. 495; 6 Jur., N. S., 233; 29 L. J., Ch., 361; 8 W. R. 355.

Held, also, that on the determination of the life estate of E. under the shifting clause, the estate did not go over to the next person beneficially entitled, but to the trustees to preserve. *Ib.*

Held, also, that the trust in favour of E. was determined as well as his legal life estate, and that the trustees held the rents accrued after the birth of R. B. T. in trust for him. *Ib.*

Held, also, that the rents accrued between the determination of E.'s interest and the birth of R. B. T. were held in trust for Mrs. L. *Ib.*

The beneficial interest in the estate of the trustees to preserve followed the limitations of the will, and upon the determination of E.'s beneficial interest there was no resulting trust for the heiress, and Mrs. L. was entitled to the last-mentioned rents directly, and not through the heiress. *Per* Turner, L. J. *Ib.*

2. A testator devised the K. estates to T. for life, with remainder over (which remainders failed), with remainder to E. H. T. for life, with remainder to trustees to preserve; with remainder to the second and younger sons of E. H. T. in tail; with remainder to M. T. L. for life, with remainders over; with a shifting clause, as to the K. estates, in case any tenant for life or in tail thereof should become seised of the T. estates. E. H. T. was the eldest son of T., and became seised of the T. estates on the death of his father. E. H. T. had only one son:—Held, nevertheless, that the shifting clause took effect; that the K. estates vested in trustees to preserve; and that during E. H. T.'s life, until he had a second son, the rents and profits were undisposed of. *Lambarde* v. *Peach*, 4 Drew. 553; 5 Jur., N. S., 480; 28 L. J., Ch., 569.

3. The testator bequeathed his residuary estate upon trust for his son for life, and after his decease for the children of his said son, and he directed that in case his said son should at any time thereafter come into the actual possession of an estate entailed upon him, the testator, and his issue by his late uncle, R. D. of B., then and in such case the provision which he had thereinbefore made for his said son, and all and every the trusts thereof, should cease, determine, and be void, and the trustees should thenceforth stand possessed of the said trust moneys for the benefit of his other children exclusive of his said son. R. D. of B., the late uncle of the testator, had settled three estates to uses, which included, after several estates for life and in tail, a limitation in remainder to his nephew, the testator, for his life, with remainder to trustees upon trust to preserve contingent remainders, with remainder to the first and other son and sons of the body of his said nephew severally and successively in tail male, with divers remainders over: before the date of the will, a tenant in tail, who had the then first expectant estate tail, joined with the first tenant for life in a recovery, whereby such tenant in tail had acquired the fee as to one of the three estates, but whether that fact was known to the testator did not appear; after the death of the testator, the same tenant in tail came into possession of the property and suffered recoveries, whereby the entail as to the two remaining estates was barred, and he then devised the three estates to the son of the testator in fee, subject to certain charges, under which devise the said son afterwards entered into possession of the same three estates:—Held, that the possession thus acquired was not an actual possession of the estate entailed upon the testator and his issue within the meaning of the will. *Taylor* v. *Harewood* (*Earl*), 3 Hare 372; 13 L. J., N. S., Ch., 345; 8 Jur. 419.

4. W. G., by his will, dated in 1775, devised his estates to his nephew for life, with re-

mainders to his first and other sons in tail male. P. G., the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure, and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will, dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male, provided that if the lands devised by W. G. to T. G. in tail male should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof, then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons; then T. G. died:—Held, that as W. G.'s estates came to T. G.'s second son unincumbered with the term, S. F.'s estates did not go over under the shifting clause. *Fazakerly* v. *Ford*, 4 Sim. 390.

1. By indenture of settlement, two estates, A. and B., were limited to the father for life, and subject thereto the estate A. was limited to the first and other sons in tail male, and the estate B. was limited to the second and other sons in like manner; and it was provided that if the second son should become an eldest son, and as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A., the limitations of the estate B. should cease and determine as if such second son were dead without issue; the second son, by the death of his elder brother, became the eldest son, and joined his father in suffering a recovery of the estate A., the uses of which were declared to the joint appointment of the father and son, and subject thereto to the old uses; in exercise of this power, the father and son by a mortgage in fee of the estate A. raised a sum of money, which was paid to the father and son:—Held, that on the death of the father, the estate B. shifted from the second son under the terms of the proviso contained in the settlement. Held, also, that the recovery suffered by the father and son did not by itself prevent the operation of the proviso, and that the mortgage had not that effect, but that, notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement. Held, also, that the party entitled to the estate A. might, previously to the happening of the event mentioned in the proviso, have so exercised his rights over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement. *Harrison* v. *Round*, 2 De G. M. & G. 190; 1 W. R. 26; 22 L. J., Ch., 322; 17 Jur. 563.

The decisions in the cases of *Fazakerly* v. *Ford* (4 Sim. 390), and *Taylor* v. *Harewood (Earl)* (3 Hare 372), approved of. *Ib.*

During the life of the father, a portion of the estate A. was sold, and the proceeds applied to the purchase of the land tax of both estates:—Held, that on the estate B. shifting under the provisions of the settlement, the second son had no claim against that estate for the amount expended in the purchase of the land tax of that estate. *Ib.*

When an estate is once fairly taken out of the settlement containing a shifting clause, the shifting clause is at an end, and it matters not whether the estate comes back or not. *Ib.*

2. A testator, who was at the date of his will entitled in remainder, upon an event which afterwards happened, to the G. estates as tenant for life, with remainder to his first and other sons in tail male, remainder to his brother for life, remainder to that brother's first and other sons in tail male, remainder to the testator's first and other daughters in tail male, with remainders over, devised the C. estates, of which the testator was seised in fee, to his eldest son for life, with remainder to his first and other sons in tail male; with similar limitations in favour of the testator's second and third sons, and their issue male; remainder to the testator's unborn sons successively in tail male; remainder to the first and other sons of the testator's eldest son in tail general; with similar limitations in favour of the first and other sons of the second and third sons of the testator; remainder to the first and other daughters of the testator's first, second, and other sons successively in tail male; with remainder to the first and other daughters of the testator's first, second, and third sons successively in tail general; with remainder to the unborn sons of the testator in tail general; with remainder to the testator's eldest daughter for life; with remainder over. The testator then provided, by a shifting clause, that the C. estates should not be held by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue, should come into possession of the G. estates; but as often as the G. estates should come to the possession of any of his said sons or daughters or any of their issue, that then the person next in remainder, according to the limitations of his will, after the person or persons who should so come into the possession of the G. estates, should be entitled and come into possession of the C. estates, in such manner as the person or persons so becoming possessed of the estates had died, or was then dead, without issue:—Held, that the word issue must be limited to such issue as might take or inherit under the limitations of the G. estates; and that the effect of the shifting clause was merely to accelerate the next remainder, leaving the remainders over unaffected; and, consequently, that the respondent, though in possession of the G. estates, was not precluded from taking the C. estates. *Jellicoe* v. *Gardiner*, 11 H. L. Ca. 323; 11 Jur., N. S., 249; 34 L. J., C. P., 282; 13 W. R. 528; 13 L. T., N. S., 127; 5 N. R. 465. Affirming S. C. *nom. Gardiner* v. *Jellicoe*, 15 C. B., N. S., 170; 10 Jur., N. S., 363; 33 L. J., C. P., 128.

3. General construction of shifting clause. See *Micklethwait* v. *Micklethwait*, 5 Jur., N. S., 437; 29 L. J., C. P., 75; 7 W. R. 451. Affirming 4 C. B., N. S., 790; 5 Jur., N. S., 41; 28 L. J., C. P., 121; 7 W. R. 117.

4. A testator settled estates in P. upon T. C. and his issue male, and provided that if T. C. or his issue male should become entitled

in possession to the estates settled on the marriage of C. in the county of S., the trust in favour of T. C. and his issue male should cease for the benefit of those next in remainder. C. became under his marriage settlement tenant for life of the S. estates, with remainder to his first and other sons in tail male After the death of the testator he joined with his eldest son in destroying the entail, and thereupon some portions of the S. estates were sold, and certain charges were imposed upon the residue, which was re-settled. Under the re-settlement, T. C. became substantially entitled to the residue of the S. estates:—Held, first, that the shifting clause must be construed to operate only in the event of T. C. becoming entitled under the marriage settlement of C. *Meyrick* v. *Mathias*, *Meyrick* v. *Laws*, 43 L. J., Ch, 521; 9 L. R., Ch., 237; 30 L. T., N. S., 77; 22 W. R. 341.

Held, secondly, that in any event the shifting clause could not operate, as the identity of the S. estates had been destroyed in point of quantity and value. *Ib.*

1. B., by will, made in 1765, devised his lands to trustees, to the use of his brother C. for life; remainder to the use of his nephew J., the eldest son of C., for life; remainder to the use of the first son of the body of J. lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, and all and every other son and sons of the body of J. successively, in tail male; and for default of such issue, corresponding series of limitations to C. and T., the second and third sons of his brother C.; and for default of such issue, to the use of all and every the daughter and daughters of his brother C. lawfully to be begotten, her and their heirs for ever, to take as tenants in common, if more than one, and not as joint tenants; and for default of such issue, corresponding limitations to the daughter or daughters of his nephews J., C., and T.; and for default of such issue, to the use of the testator's sister, in fee: "provided, that if at any time thereafter all or any of the daughters of his brother C. or his nephews should enter into religion, and become professed nuns, thereupon the uses before limited to such daughters as should so enter into religion should cease and determine, and that the person next in reversion to take, according to the afore-mentioned limitation, should enter into and enjoy the lands, as if the persons so entering into religion had been then dead without issue":—Held, that by the shifting clause the testator declared that the previous successive estates to the daughters were to be remainders in tail. *Biddulph* v. *Lees*, 5 Jur., N. S., 818; 28 L. J., Ch., 211; 7 W. R. 309; 32 L. T. 392.

2. A testator provided that in case R., or any son of his body, should succeed to a certain family estate, the trusts declared by his will of his estates at S. and H., for the benefit of R., and such son so succeeding, should cease, and the estates should be in trust for the person and persons next entitled to the same. R. became tenant for life, and his son tenant in tail in remainder, of the family estate, and of the estates at S. and H.:—Held, that the father alone had succeeded, and that, by the effect of the shifting clause, the estate of W., the son, was accelerated, and he was entitled to S. and H., as tenant in tail in possession. *Bagot* v. *Leyge*, 10 Jur., N. S., 994; 12 W. R. 1097; 10 L. T., N. S, 898; 34 L. J., Ch, 156; 4 N. R. 492.

3. C., by will, in 1841, bequeathed all his stock in the 3*l.* per cent. Consols to trustees, in trust to pay the dividends of one-eighth part to every one of his eight nephews and nieces named in his will, for life, and upon other trusts after the death of every one of these eight persons. The dispositions made to females, and for female children, were for their separate benefits; and he declared that if and when any of such nephews and nieces should be in the receipt of or entitled to a permanent income of 1,000*l.* per annum or upwards, then the interest under his will of such nephew or niece should cease, and the share of such stock he or she would otherwise be entitled to should be held upon other trusts. To prevent any dispute as to any of his nephews or nieces being in the receipt of or becoming entitled to such permanent income of 1,000*l.* per annum, the decision of the trustees of his will was to be final and conclusive, and the nephews and nieces were not to impeach such decision; and he directed that the interest of which any person claiming under his will might be deprived by any such decision should not be revived by any future diminution of their income. C. died in 1846. In 1856 one of the eight persons named in the will became entitled to a share of personal estate, amounting to 51,000*l.* and upwards; but on her marriage with L., in 1827, they covenanted that all the real and personal estate and property which the wife might become interested in or entitled to, by descent, bequest, or in any other manner, in her own right, during the coverture, should be assigned to trustees in trust for the husband and his assigns for his life, with remainder for the wife and her assigns for her life, with remainder for the benefit of their children. The question raised was, whether Mrs. L. had become possessed of or entitled to such a permanent income of 1,000*l.* a year as was within the meaning of the provision in the will:—Held, that she had not incurred any forfeiture of her interest under the will, but was entitled to the receipt of the income of one-eighth of the accruing share out of the testator's estate. *Curzon* v. *Curzon*, 5 Jur., N. S., 907; 1 Giff. 248.

4. J. M., a testator, devised certain estates to trustees, upon trust for P. M. for life, without impeachment of waste; and after his decease, for the first son of P. M. for life; and after his decease for the first son of such first son, and the heirs male of his body; and in default of such issue, for all and every other the son and sons of P. M., severally and successively, according to seniority of age, for the like interests and limitations as before directed respecting the first son and his issue; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life; and after his decease, for T. G. M., the eldest son of T. M., for life; and after his decease, for the first son of T. G. M., and the heirs male of his body; and in default of issue of the body of T. G. M., for all and

every other the son and sons of T. M., for the like estates and interests, severally and successively; and in failure of all such issue of T. M., upon trust for him, his heirs and assigns for ever. P. M. never had a child. T. M. died in the lifetime of the testator.—Held (affirming 14 Jur. 1083), first, that P. M. took an estate for life only in the estates, with a remainder over to his first unborn son for life; and that all the remainders over to P. M.'s issue were void. Secondly, that the gift over to T. G. M. and his issue, "in default of issue of the body of P. M., or in case of his not leaving any at his decease," was valid, that clause creating a contingency distinct from the previous limitations. *Monypenny* v *Dering*, 17 Jur. 467; 22 L. J., Ch., 313; 2 De G. M. & G. 145.

The doctrine of *cy près*, as applied to the construction of a will, cannot be used to carry an estate to a class or a part of a class of persons for whom the testator never intended to provide, and contrary to the express limitations. *Ib.*

In construing wills, effect may in certain cases be given to the general intent at the expense of a particular intent, but this is not to be done without an actual necessity. *Ib.*

Where an estate is so limited to A. as would generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant, and to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of the testator. *Ib.*

The cases of *Pitt* v. *Jackson* (2 Bro. C. C. 51) and *Nicholl* v. *Nicholl* (2 W. Black, 1159), observed on. *Ib.*

Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause unless it will accord with previous valid limitations. *Ib.*

A gift over made in words comprising only one event will not be construed as made on two events, although in point of fact it may consist very reasonably of two branches, unless it is so expressed by the testator. *Ib.*

J. M. provided by his said will that if P. M. or T. M. or any of their issue should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust for the next person entitled thereto, under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator, by a codicil, declared that his trustees should stand seised of the devised estates, upon trust for his wife for life, and then upon the trusts declared by his will, subject to the declaration therein contained, with reference to the Jodrell estate. On the death of the widow P. M. came into possession of the Maytham Hall estate, being at that time entitled to a life estate in remainder in the Jodrell estate, the tenant for life of that estate being then living:—Held, first, that there was not such an interest in P. M. as fell within the intention of the shifting clause, and that it did not in that event come into operation; held, secondly, on P. M. afterwards coming into possession of the Jodrell estate on the death of the tenant for life, that then the Maytham Hall estate went over, and became vested in the trustees of J. M.'s will; held, thirdly, on the construction of the clause generally, that its operation was not confined to one shifting, but that it operated *toties quoties* as regarded the parties named in it. *Ib.*

Remarks as to whether a shifting clause in a devise took effect, where the estate, subsequently coming to the devisee, did not come to him according to the devolution in the contemplation of the testator. *Ib.*

The Jodrell estate was limited under the will of E. J., to the use of M. J. for life, with remainder to the use of the sons and daughters of M. J. successively in tail, with remainder to the use of S. M. for life, with remainder to her sons and daughters in tail, with remainder to P. M., son of J. M., for life, with remainders to his sons and daughters in tail, with remainder to T. M., another son of the said T. M., for life, with remainder to his sons and daughters in tail, with divers remainders over. The will contained a proviso, that if P. M. and T. M. or either of them, their, or either of their issue, or any other son or sons of the said J. M., or his or their issue, should become entitled to an estate of freehold or inheritance, in possession of or in the Maytham Hall estate, belonging to R. M., so as to be in the possession or in the actual receipt of the rents and profits thereof, then and in that case the estate devised by her will should shift from the person so becoming entitled in manner therein mentioned. At the date of the will R. M. was entitled to the Maytham Hall estate, partly in fee and partly as tenant in tail. The Maytham Hall estate was subsequently disentailed and devised, and so came to the son of T. M. (who was then entitled in possession to the Jodrell estate) by limitation as a purchaser, and not by inheritance, or under the original limitations, existing at the date of the testator's will:—Held, that this did not prevent the shifting clause from taking effect. S. C. 15 Jur. 1050.

In construing will effect may in certain cases be given to the general intent at the expense of a particular interest, but this is not to be done without an actual necessity. *Ib.*

Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son, and the heirs male of his body, and, in default of such issue, for every other son of P. M. successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. M., and the heirs male of his body; and, in default of issue of the body of the said T. G. M., for every other son of T. M. successively, for the like estates and interests; and, on failure of all such issue of the body of T. M., upon trust for him, his heirs and assigns, for ever; provided that if P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand

seised of the devised premises, upon trust for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator, by a codicil, declared that his trustees should stand seised of the devised estates, upon trust for his wife for her life, and, from and after her decease, upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—Held, that P. M. took an estate for her life only; that T. G. M. took an estate for life in remainder after the life-estate of P. M., contingent on P M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate; that the eldest son of T. G. M. took a contingent remainder in tail after the determination of the life-estate of his father. S. C. 7 Hare 568; 14 Jur. 1083.

1. Certain hereditaments were settled to the use of the settlor in tail male; remainder to J. L. for life; remainders to the eldest son of J. L. in tail male; remainders to the younger sons of J. L. in tail male; remainder to L. C. for life; remainders over; subject to a proviso, "that in case the said J. L, or any issue male of his body, should become entitled to the possession of the family estates of L., then and in every such case the uses declared of the said hereditaments to or for the benefit of him or them who should so become entitled to the possession of the family estates of J. L., and to and for the benefit of the issue male of such person or persons so becoming entitled, should cease, determine, and be absolutely null and void; and then and in every such case all and singular the said hereditaments and premises should immediately thereupon from time to time divest out of the person or persons so becoming entitled, and should go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." J. L. became possessed of the family estates of L., in the lifetime of the settlor, who afterwards died without issue. At the time of his death, there were living J. L., his eldest son (who afterwards became possessed of the family estates), his second son H. L., and L. C. The Court had little doubt about the matter, but sent a case to the Court of Exchequer, by whom it was held, that L. C. took an estate for life; and it was so decreed. *Morrice* v. *Langham*, 11 Sim. 260; 10 L. J., N. S., Ch., 38; 6 Jur. 334. And see S. C. at law, 8 Mees. & Welsb. 196; 10 L. J., N. S., Exch., 289; 11 Cl. & F. 667. See also S. C. *nom. Sandford* v. *Morrice*, 11 Cl. & F. 667.

2. A testator directed two estates to be purchased (A. and B.). The estate A. was to be settled on the sons of his daughter (except Lord K. the eldest), and their issue, and in default on K. for life, with remainder to his first and other sons in tail, with remainder to his issue in tail general, with remainders over to daughters of the daughter. Estate B. was to be settled on Lord K. for life, with remainder to his first and other sons in tail, and afterwards to the same uses as the estate A. There was a shifting clause determining the estate of Lord K. and his first and other sons in estate B., in case he or his issue male became entitled to estate A. K. having become entitled to estate A.:—Held, that his first life estate alone in estate B. had ceased, but that his second life estate therein, expectant on the failure of younger sons of the daughter, was still subsisting. *Kenlis* (*Lord*) v. *Bective* (*Earl*), 34 Beav. 387.

3. A lady devised freehold estates to trustees for her sister E. for life, with remainder in strict settlement to her sons, excluding the second, and with powers of jointuring and charging portions. By letters patent, subsequent to the will, a barony was created and limited to E. for life, with remainder to her second son R. and the heirs male of his body, and in default of such issue to the third and younger sons of E. and the heirs male of their bodies respectively and successively. The patent contained a shifting clause, by which if any person taking thereunder should succeed to the earldom of D., and there should then or thereafter be a younger son or heir male of a younger son of E, then the succession to the barony was to devolve upon the son of E. or the heir who would be next entitled to succeed thereto if the person succeeding to the earldom of D. was dead without issue. By a subsequent codicil, the testatrix devised her estates to trustees on trust, to settle the same in a course of entail corresponding as nearly as might be with the limitations of the barony, and the provisoes affecting the same contained in the patent, and with all such powers, provisoes, declarations, and agreements as the trustees should think proper or their counsel advise. The House of Lords after E.'s death declared that the estates ought to be limited in strict settlement, to the second son for life, with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of E. and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale* (*Viscount*) v. *West*, 40 L. J., Ch., 795; 12 L. R., Eq., 280.

4. A testator devised his freehold estates in Worcestershire to his third son, and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trust as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth

son, who thereupon entered into possession of the Worcestershire estates:—Held, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Miles* v. *Harford*, 12 L. R., Ch. D., 691; 41 L. T. 378.

II. RIGHT TO INTERMEDIATE INCOME.

1. A testator devised real estate to trustees, to convey and settle the same to the use of A. for life; remainder to the use of the children of A. in strict settlement; remainder to the use of B. for life, with remainders over. The testator directed that the settlement should contain a name and arms clause; and in case of refusal, the estate of the person refusing was to cease, and was to go over to the person next entitled in remainder under the limitations, as if the person so refusing, being tenant for life, were dead, or tenant in tail were dead without issue, but without prejudice nevertheless to prior contingent estates. The settlement was also to contain a shifting clause, directing, in the events which happened, namely, that if A. should succeed to certain other estates, he should re-settle them; and in default, that the settled estates should go to such uses, as if the limitations in A.'s favour had not been inserted. A. had no children, and made default in re-settling the other estate:—Held, that the trust was executory; that the whole will was inconsistent with the intention of the testator to die intestate as to any portion of his estate; and that B. was entitled to receive the rents for his life, or until A. should have issue, to the exclusion of the heir-at-law. *D'Eyncourt* v. *Gregory*, 10 Jur., N. S., 484; 12 W. R. 679; 10 L. T., N. S., 317; 3 N. R. 628; 34 Beav. 36.

2. T. was the daughter and heiress-at-law of L., and tenant for life in possession of the K. estates under his will. Subject to such life estate, and to limitations which had ceased, the estates stood limited as follows:—To E. for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and younger sons of E. in tail; with remainder to M. for life; with remainders over. The will contained a proviso to the effect, that if E. became entitled to the T. estates, the limitation of the K. estates in his favour should cease, determine, and be absolutely void, as if he were dead, and the K. estates should go over to the person next entitled in remainder under the will. In 1857, E. became entitled to the T. estates, having at that time one son only. T., the tenant for life, died in 1858, leaving M. her residuary devisee and legatee. In 1859, E. had a second son born:—Held, that the trustees to preserve contingent remainders were the "persons next entitled in remainder;" but that M. was entitled to the rents of the K. estates from the death of T. to the birth of E.'s second son, and that such second son was entitled to them from that period. *Turton* v. *Lambarde*, *Lambarde* v. *Turton*, *Turton* v. *Turton*, 6 Jur., N. S., 233; 29 L. J., Ch., 361; 8 W. R. 355; 1 De G. F. & J. 495.

3. A testator devised the K. estates to T. for life, with remainder over (which remainders failed), with remainder to E. H. T. for life, with remainder to trustees to preserve; with remainder to the second and younger sons of E. H. T. in tail; with remainder to M. T. L. for life, with remainders over; with a shifting clause, as to the K. estates, in case any tenant for life or in tail thereof should become seised of the T. estates. E. H. T. was the eldest son of T., and became seised of the T. estates on the death of his father. E. H. T. had only one son:—Held, nevertheless, that the shifting clause took effect; that the K. estates vested in trustees to preserve; and that during E. H. T.'s life, until he had a second son, the rents and profits were undisposed of. *Lambarde* v. *Peach*, 4 Drew. 553; 5 Jur., N. S., 480; 28 L. J., Ch., 369. And see *Stanley* v. *Stanley*, 16 Ves. 491.

XIII. Remainders and Gifts over of Personal Property.

I. *Gift of Chattels by way of Remainder. In General*, 7464.
II. *Chattels Quæ Consumuntur Usu*, 7465.
III. *Absolute Interests given to Persons in Succession*, 7466.
IV. *Limitation of Terms.* See TERMS.
V. *Gift over of Undisposed-of Interests.* See WILL, XLVII.
VI. *Limitation of Heirlooms.* See SETTLEMENT, XVI.

I. GIFT OF CHATTELS BY WAY OF REMAINDER. IN GENERAL.

4. Personals cannot be limited; and bill to have bonds executed tending thereto, according to directions of will, was dismissed. *Williams* v. *Williams*, 1 Eq. Abr. 307.

5. Whether a remainder may be limited on a *donatio mortis causâ*, *quære*. *Hambrooke* v. *Simmons*, 4 Russ. 25.

6. Devise of chattels for life, with remainder over, good; but if of small value, and the case requires, it may be otherwise. *Cooper* v. *Williams*, Pre. Ch. 71.

7. A. devises household goods to his wife for life, and afterwards to his son. The Court allowed this a good devise over, and to be the same as if the devise had been only of the use of the goods to the wife for life. *Hyde* v. *Parrat*, 1 P. W. 1; 2 Vern. 331.

8. Devise of a personal thing to one for life, remainder to another; the remainder is good; it being the same as if the use of a thing was devised to one for life, the remainder over. *Clarges* v. *Albemarle*, 2 Vern. 245; Nel. Ch. Rep. 174.

9. A., seised in fee by deed and fine, conveys the lands to the use of trustees for seventy years, if A. so long live, remainder to trustees for 3,000 years, and, after the death of A., then to his son B. Whether the remainder to B. is good, *quære*. *Penhay* v. *Hurrell*, 2 Vern. 373; 2 Freem. 258.

10. A testator bequeathed all his "estate and effects, goods, chattels, houses, lands, moneys," to his wife for her sole separate use and benefit; and further gave, willed,

and directed that at her decease "whatever remains of" his estate and effects should go to other parties, who were enumerated and described. The widow only received and spent a small sum of money, and enjoyed the remainder in specie, and died:—Held, that such of the parties enumerated and described as were living at the death of the widow were entitled to the property. *Constable* v. *Bull*, 18 L. J., N. S., Ch., 302; 13 Jur. 619.

II. CHATTELS QUÆ CONSUMUNTUR USU.

1. A specific bequest for life of things *quæ ipso usu consumuntur*, is a gift of the property, and there can be no limitation over, after a life interest in such articles; but if included in a residuary bequest for life they must be sold, and the interest enjoyed by the tenant for life. *Randall* v. *Russell*, 3 Meriv. 194. And see *Hardman* v. *Johnson*, *id.* 347. *Bryant* v. *Easterson*, 5 Jur., N. S., 166.

Where the use and the property can have no separate existence, the old rule must prevail, viz., that a gift for life carries the absolute interest. *Ib.*

In this case where the gift was of a leasehold farm, and the stock and crop thereon, an inquiry was directed to ascertain of what the stock consisted. *Ib.*

2. A testator bequeaths consumable articles to A. for life, with a limitation over by way of remainder to B.; as the gift to A. is absolute, the limitation to B. cannot take effect, even though A. die in the testator's lifetime. *Andrew* v. *Andrew*, 1 Colly. 690.

Testator, after devising his real estate to his natural son, T. A., bequeathed as follows: "I give and bequeath unto my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of 250*l.* per annum, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay and farming utensils and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either event, then to go to T. A.; but should she marry, then my will and mind is, that my executors shall pay her 100*l.* per annum for her own use during her natural life, out of the rents and profits of my said estate." The sister married in the testator's lifetime:—Held, that the consumable articles did not go to T. A., but fell into the residue. *Ib.*

3. Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur*, and therefore a gift of them for life does not confer on the legatee for life the absolute interest in them. *Groves* v. *Wright*, 2 Kay & J. 347; 2 Jur., N. S., 277.

4. A. bequeathed his stock-in-trade, etc., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book-debts or capital which he at his death might have employed therein":—Held, that the widow and son were entitled to the book-debts or capital absolutely. *Terry* v. *Terry*, 12 W. R. 66; 9 L. T., N. S., 469; 33 Beav. 232.

By will a testator gave all his farming stock and other property to trustees, directing that they should permit his wife to have the full use, benefit, and enjoyment thereof during her life, and at her decease directed that his trustees should get in and convert the same and divide the proceeds. The testator died in 1827, being then tenant from year to year of a farm of sixty acres. The widow entered, and with the assistance of her son J. carried on the farm with success, and from time to time took in additional parcels of land, until, in 1849, they had 240 acres in hand. The farming stock was, in 1827, of very small value, probate having been taken out under 200*l.* The widow died in 1853, when the farming stock was estimated at near 1,500*l.* J. had for the latter years managed entirely in his own name, and taken the last lease in 1849 in his own sole name:—Held, first, that such a gift of farming stock to the widow for her sole use and enjoyment during her life, although it was continually perishing and renewed, did not give the whole subject matter to her as being of things *quæ ipso usu consumuntur*. *Ib.*

Held, secondly, that J. had managed solely as the bailiff of the widow, and was not entitled to the stock in his own right. *Ib.*

Held, thirdly, that in such a case an inquiry would be directed as to how much of the farming stock property would belong to the land formerly held by the testator; and so much was declared to belong to his estate; and the residue of the farming stock, viz., so much as properly belonged to the additional land, was declared to form part of the widow's estate. *Ib.*

Allowance and indemnity to J. as bailiff. *Ib.*

5. Man's wearing apparel given, with other articles, to wife for life, remainder over:—Held, that the wearing apparel did not vest absolutely in her as things *quæ ipso usu consumuntur*. *Re Hall's Will*, 1 Jur., N. S., 974.

6. A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, and everything he died possessed of, to his wife for life; and he bequeathed the whole of his effects that might be remaining after her death to his daughter:—Held, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest. *Phillips* v. *Beal*, 32 Beav. 25.

7. A husband gave to his widow his personal estate, including his farming implements and stock, live and dead, for her life, and declared that she should not be liable to account for any diminution or depreciation in the farming implements and stock; and after her decease he gave the residue of his personal estate to his children:—Held, that the widow took an absolute interest in the farming implements and stock. *Breton* v. *Mockett*, 9 L. R., Ch. D., 95; 47 L. J., Ch., 754; 26 W. R. 850.

8. A gift for life of a business and stock in trade confers only a life interest in such part of the stock in trade as consists of consumable articles. *Cockayne* v. *Harrison*, 13 L. R., Eq., 432; 20 W. R. 504; 26 L. T., N. S., 385.

Secus, when the gift is of consumable articles, without any reference to trade or business. *Ib.*

1. Devise upon trusts to permit M. to have the use and enjoyment of house and premises free of ground rent, and also all household furniture, carriages, horses, goods, wines, linen, etc., in or about the house for life or widowhood:—Held, that M. was confined to the personal use and enjoyment of the house and furniture and effects, but that he was entitled to the wines and other consumable articles absolutely. *Clive* v. *Clive*, 2 Eq. Rep. 913; 1 Kay 600; 23 L. J., Ch., 981.

III. ABSOLUTE INTERESTS GIVEN TO PERSONS IN SUCCESSION.

2. A testator left all his personal estate, subject to legacies, and all his houses, gardens, parks, and woods, and all his landed estates, to his wife for her life, and afterwards all his personal and landed estates to his sister for her life, and then to the eldest son G. B., afterwards to G. B.'s second, third, or any later sons he might have by the testator's niece, A., and then to the eldest son and other sons successively of the Earl of B., by the testator's niece C.; but all these to be subject to outpayments and legacies by the will given; and if they and the conditions of his will were not complied with exactly, he left all the advantages of it to the next person in succession, subject to the legacies and so on, unless they were discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the non-payment of which he declared repeatedly, and in various forms of expression, that the persons taking his personal estate should be subject to the penalties in the will. G. B. had several sons, all living at the death of the testator:—Held, that the eldest son of G. B. took the personal estate absolutely, subject to the prior life estates and to the legacies and annuities given by the will and codicils. *Hoare* v. *Byng*, 10 Cl. & F. 508; 8 Jur. 563. Affirming S. C. *nom. Byng* v. *Strafford* (*Lord*), 5 Beav. 558; 12 L. J., N. S., Ch., 169; 7 Jur. 98.

3. Under a gift by A. to his wife of 10,000*l*., "afterwards to go to the understated residuary legatee E.":—Held, that the legacy of 10,000*l*. was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *Percy* v. *Percy*, *Percy*, *Re*, 24 L. R., Ch. D., 616; 49 L. T. 554.

XIV. Executory Devises and Bequests.

I. IN GENERAL.

4. Executory devise is in its nature equitable, and becomes legal estate only by application of the Statute of Uses, which executes every species of interest that a court of equity would before and that has been extended to cases not in contemplation of the statute. *Perry* v. *Phelips*, 1 Ves. J. 255.

Devise of personal estate, and of rent and profits of real, in trust, to accumulate and to be laid out in land to be conveyed with the real to the youngest, or only son of the trustee, at twenty-one:—Held, a vested interest by executory devise in an only surviving son, and not to wait till the death of the father, but liable to be divested by birth of another son. The trustee survived his son several years, and received the rents and profits till his death, but never laid them out in land as directed; those accrued after the son made his will:—Held, to be an equitable interest in land, and therefore to pass by it. *Id.* 231.

5. A devise to A. and B. and their heirs, in default of issue male and female of the testator's own body, is, at the testator's death, a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz., at the death of the testator without issue. *French* v. *Caddell*, 3 Bro. P. C. 257.

6. It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. *Carwardine* v. *Carwardine*, 1 Eden 28.

A limitation in a settlement "to trustees, to the use of the settlor for life, remainder to B., his intended wife, for life (except as thereafter excepted), remainder to the heirs of the body of A., begotten on B., remainder to A. and his heirs, with a proviso that if A. should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the same trustees should stand seised of one moiety, from and after the decease of A., to the use of such child:—Held, a contingent remainder, and not a springing use, and therefore barred by a fine levied by A. and B. *Ib.*

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Id.* 44.

No instance where Equity has considered an estate as not executed, at the same time that law would have considered it as executed. Limitation to trustees to stand seised and receive rents and profits to the use of A. is an estate executed in A. *Id.* 36.

7. A testator devised and bequeathed real and personal estate to trustees upon trust to

pay the income to his wife during her life, and after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease M. was living, and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and H. This son died in the lifetime of H. without having taken the name and arms of the testator:—Held, that the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise. *Abbiss* v. *Burney*, *Re Finch*, 17 L. R., Ch. D., 211; 50 L. J., Ch., 348; 44 L. T. 267; 29 W. R. 449. Reversing 49 L. J., Ch., 710; 43 L. T. 20; 28 W. R. 903.

1. Though a gift over may, as to one alternative, operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. *Doe* d. *Evers* v *Challis*, 7 H. L. Ca. 531; 29 L. J., Ch., 121; 5 Jur., N. S., 825; 7 W. R. 622.

The invalidity of one alternative will not necessarily defeat the other. *Ib*

Devise to E. for life, "and from and after her decease to such child or children as she may have, if a son or sons, who shall live to attain the age of twenty-three, and if a daughter or daughters who shall live to attain the age of twenty-one, as tenants in common," etc., and in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case E. has only one son to attain twenty-three or a daughter to attain twenty-one, to such son or daughter. "And also, in case E.'s children shall die under" the ages mentioned, "or if she has none," then to J. A. and S. for life, and afterwards to their sons and daughters, on attaining the above ages respectively. There were similar devises to J. A. and S., but in the devises to J. and S. nothing was said as to total absence of issue; in that to A., the words used were "and farther, in case A. shall die without issue." E. first, and A. afterwards, died without ever having had a child:—Held, that on the death of A. the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of A.) determined the contingency on which the remainder was to take effect, had occurred. *Ib.*

2. Devise to A. and B. and their heirs, to sell and dispose at their discretion of all the testator's right in S., belonging to the manor of M., and all his right in M., if an Act should pass for inclosing the same within twenty years, to pay the proceeds to the several persons therein mentioned. An enclosure Act passed within the twenty years, and various allotments were made in respect of the testator's estates:—Held, that the devise was in the nature of an executory devise to take effect on the passing of the Act. And the decree declared the parties claiming under the devise to be entitled to one-fourth part of the moneys produced from the sale of allotments in S., in respect of the testator's messuage and lands in S., and to the whole of the moneys produced by the sale of the allotments in respect of the land in M. *Gardner* v. *Lyddon*, 3 Y. & J. 389.

3. A. devises his freehold, copyhold, and leasehold, and all his real and personal estate not before devised, to three trustees, their heirs, etc., in trust to pay his son B. an annuity; and if he should have any child or children, the residue of the rents, during B.'s life, for the education and benefit of such child or children; and after B.'s decease, a moiety of the trust estate to such child and children as he shall leave, their heirs, etc., the other moiety to the child and children of his grandson C., and every other child and children of his daughter S, their heirs, etc. And if B. die without issue, the first moiety to C., and other child and children of S., and their heirs, etc.; and directs an annual payment to such wife as B. shall marry. The testator died; B. married, and had issue a son and daughter, and died; afterwards C. married, and had issue a daughter and died; the limitation to the daughter of C. is well supported by the estate in the trustees; or, if not, is good as an executory devise, and the profits, etc., shall go to the children of B. *Chapman* v. *Blisset*, Forrest. 145.

4. Proviso in a will that, in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to the use of the next person in remainder, valid; and the eldest son of the tenant in possession is the next person in remainder. *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215.

5. A residuary estate was given to three brothers and a nephew, for their lives as tenants in common, and after their decease, then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children, dying under twenty-one without issue, should go to the survivors, and that the share of such child as died under twenty-one, leaving issue, should go to the children of such child; but that in case one child only of the brothers and nephew should attain twenty-one or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence* v. *Handford*, 4 Jur., N. S., 987; 27 L. J., Ch., 767.

6. A. devises his real estate to B., his brother, for life, then to trustees to preserve, etc., remainder to first and other sons in tail, with power to make jointure; and if his said brother had no son, or if he had and such son died without issue male, then to C., and his first, etc., sons in like manner, and willed that his plate, jewels, etc., should go to the heirs male of his family successively, as his real estate is settled, as much as they could by law. B. having no son, limitation to C. held

good by way of executory devise. *Gower* v. *Grosvenor*, 9 Mod. 249.

1. Gift to testator's brother, without any restriction as to his children, to whom he shall leave, before or after his death, such part of the testator's inheritance as their conduct may deserve; but if at the death of his brother there should be no children, then to A.: this is an executory devise, which, if it took place, would defeat the interest of the children of the brother. *Lieutand* v. *Agassiz*, 2 Bro. C. C. 615.

2. W. H., by will, gave 550*l.* to his daughters, and then devises his land in trust for a term of ninety-nine years, with a power to raise a less term, upon trust that if his wife should, within four years, pay off the 550*l.*, then the lands to go to her for life, and after her death to W. H., his son, and his heirs, male and female, and for want of such issue to him and his heirs for ever. Declared that this is a conditional limitation in the wife, taking place as an executory devise; that the freehold descended to the son, as heir-at-law to the testator, till the four years elapsed, or his wife had performed the condition, as part of the inheritance undisposed of; and that, by this devise, the son had a good estate tail of inheritance expectant on the termination of the term of ninety-nine years. *Hayward* v. *Stillingfleet*, 1 Atk. 422.

3. A father devised houses to his four sons, share and share alike, with a proviso against division or alienation without their respective consent, and in case of no such distribution being made certain executory gifts over were made:—Held, that the executory devise was void. *Shaw* v. *Ford*, 47 L. J., Ch., 531; 7 L. R., Ch. D., 669; 26 W. R. 235; 37 L. T., N. S., 749.

An executory devise, which would defeat or abridge an estate in fee, and alter the course of devolution, and can only take effect at the moment of devolution, is void. *Ib.*

An executory devise, which would defeat an estate, and would take effect on the exercise of a right incident to that estate, is void. *Ib.*

A father devised thirteen houses to his four sons, share and share alike, to hold subject to certain conditions. First, it was his will that none of the houses be disposed of, either by division, assignment, transfer, or sale, without the written consent of each and every of his four sons, their heirs, assigns, or representatives. Secondly, it was his will that, until the before-mentioned distribution of the property was made, the rents should come into one common fund and be divided equally among his four sons. Furthermore, it was his will that, if there should be no lawful distribution of the property during the life or lives of his four sons, it should then devolve to the children of his four sons. And, in case any of them should die without issue, then it was his further will that the share of the rents possessed by them or him should devolve to the widow or widows of such deceased son or sons, to be by them received during their widowhood, and afterwards it should devolve to the survivor or survivors of his other sons, that is to say, to his grandchildren and to their heirs and assigns, to be divided equally among them:—Held, that the four sons took the houses as tenants in common in fee, and that the executory devise over to the children was void. *Ib.*

4. Feme covenants to stand seised to the use of herself in tail, remainder to such uses as she, by writing under her hand, should appoint, for want of such appointment, to the use of the plaintiff, her kinsman, in fee. Whether this remainder to such uses as she should appoint is not a void remainder, being on a covenant to stand seised. *Warwick* v. *Gerrard*, 2 Vern. 7.

Executory Devise. Power of Tenant for Life to defeat.] 5. Leaseholds for lives were devised to A. and his heirs, and, in case A died without issue, to B.:—Held, in analogy to a fee simple, that A. could not by dealing with the property defeat the executory interest of B. *Re Barber's Settled Estates*, 18 L. R., Ch. D., 624; 50 L. J., Ch., 769; 45 L. T. 433; 28 W. R. 909.

II. FAILURE OF PRIOR GIFT. EFFECT ON EXECUTORY OR SUBSTITUTED GIFT.

6. A. devised a term for years to his wife for life, and after her death to the child she was then *enceinte* with, but, if such child died before twenty-one, then he devised one-third part of the said term to his wife, whom he made executrix. The wife not being *enceinte* at the time of the devise:—Held, first, that the devise to her was good, though the contingency never happened; secondly, that she should have the undisposed surplus of the personal estate, and not to go in a course of administration. *Jones* v. *Westcomb*, Pre. Ch. 316.

7. Construction of a residuary clause, after a bequest to the testatrix's younger children, "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one and unmarried, to another family; not a condition. Residuary bequest is therefore established in the event of the testatrix's death, having never had a child. *Murray* v. *Jones*, 2 Ves. & B. 313.

8. Testator, after directing that freehold property should be given to the inhabitants of B. to found an hospital, and that his executors should call a meeting of the inhabitants to appoint a committee and trustees, appointed W. one of the trustees, leaving the inhabitants to choose as many more as they pleased; but in the event of the inhabitants not appointing a committee or not being willing to carry out the scheme, the property was absolutely to belong to W. The testator also directed "the said trustee or trustees" to be residuary legatees of the will:—Held, that the gift for the purposes of the hospital being wholly void under 9 Geo. 2, c. 36, the gift over to W. took effect; the ulterior limitation having been accelerated and not defeated by the failure of the preceding gift. *Warren* v. *Rudall, Hall* v. *Warren*, 6 W. R. 847; 4 Jur., N. S., 653; 28 L. J., Ch., 70. Affirmed 7 Jur., N. S., 1089; 10 W. R. 66; 5 L. T., N. S., 190; 9 H. L. Ca. 420.

9. As a general rule, when a bequest is to take effect after the failure of a prior gift, the total failure of the latter does not prevent the ulterior bequest taking effect. *Tennant* v.

Heathfield, 21 Beav. 255; 2 Jur., N. S., 33; 25 L. J., Ch., 197.

Distinction between a series of limitations all dependent on the same contingency and successive limitations, each intended to take effect upon the failure of all those prior to it, *Ib.*

Gift to A. for life, and after her death to her children, and in case of their death before the vesting of their shares in trust for her next-of-kin; the daughter never had any children:—Held, that her next-of-kin were nevertheless entitled. *Ib.*

1. A legacy was given in trust for P., who was then unmarried, and who never married, for life, for her separate use, without power of anticipation, with remainder to her children; and in case there should be no child who should attain a vested interest, in trust for P. absolutely, "if she should survive her husband, but if she should die in his lifetime" as she should by will appoint, and in default in trust for her next-of-kin, as if she had died intestate and unmarried:—Held, that P. was absolutely entitled to the legacy, although the event of her dying unmarried was not in terms provided for. *Brock* v. *Bradley*, 10 Jur., N. S., 815; 12 W. R. 1136; 11 L. T., N. S., 16; 4 N. R. 529; 33 Beav. 670.

2. By a marriage settlement, property belonging to the intended wife was conveyed to trustees, upon trust (after the death of the husband and wife) for the children of the marriage. It was declared that the children should convey the property to A., B., and C. There never was any issue of the marriage:—Held, that although the language of the deed only provided for death of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593; 6 Jur., N. S., 1325; 9 W. R. 11; 3 L. T., N. S., 265.

3. Limitation over after a limitation, which never took effect, established; not operating as a condition precedent. *Meadows* v. *Parry*, 1 Ves. & B. 124.

4. Testator gave his estate to trustees, to apply the profits for the use of the child with which his wife was then pregnant, during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was stillborn. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death, his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster* v. *Cook*, 3 Bro. C. C. 347.

5. Bequest of pecuniary legacy to A. for life, with remainder to B., his wife, for life, remainder to such children of A. as should be living at the death of the survivors of A. and B., to be paid at twenty-one; with survivorship in case of the death of any such children under twenty-one, with a gift over to C. after the death of A. and B. if all such children should die under that age. A. had two children, who both attained twenty-one, but died in his lifetime, leaving issue:—Held, that the gift over to C. took effect. *Wilson* v. *Mount*, 2 Beav. 397; Jur. 262.

6. A testator, by his will, gave his residuary estate upon trust for his wife for life, providing she should survive him twelve months and remain unmarried, and he gave to his wife power to dispose by will of one half of the estate, and gave the other half after her decease to his sister J., or, in case of her predecease, to other persons; and he directed that, in case of his wife dying within twelve months from his own decease, his whole estate should go to his said sister, with a gift over as before in case of her predecease, and he made a similar provision with respect to one-half of the estate in the event of his wife omitting to make a will. The testator's wife died in his lifetime, and his sister J. survived him:—Held, that the contingencies against which the testator guarded, and which the Court, in construing the will, was bound to regard, were the event of his wife not being alive at the expiration of twelve months from his own decease, and the event of there being no testamentary disposition by her, and that, in the events which had happened, the gift over in favour of the testator's sister took effect. *Davies* v. *Davies*, 47 L. T. 40; 30 W. R. 918.

7. A testator, after giving a life interest to his wife, bequeathed certain stock to his four sons, A., B., C., and D., provided D. should be of sound mind at the time of the decease of his wife But in case he should be insane at that period, then he directed that the stock should be divisible between his sons A., B., and C. D. died insane in the lifetime of the testator's wife—Held, that D. did not take any vested interest in such stock, and his share was divisible in thirds, and payable to three other sons *Re Chappell*, 10 W. R. 573; 6 L. T., N. S, 613

8. A testator devised specific shares in an estate to several persons, nominatim, to hold the same as tenants in common, and not as joint tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his other share was to go to the survivors:—Held, that the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on the happening of two events; that the word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given, and made the gift over void. *Greated* v. *Greated*, 5 Jur., N. S., 454; 28 L. J., Ch., 756; 26 Beav. 621.

9. A testator gave one-fifth of the interest of a fund in the following proportions: namely, one-fifth to M., and two-fifths each to C. and J.; if M. should die without issue, which event did happen, her fifth was to go between C. and J. for their lives, if living at M.'s decease, or, if only one, to him; if C. should leave issue, they should be entitled to the principal moneys the interest whereof was given to C. for life; but if he should die without issue in the lifetime of J., all benefit of the bequest to C. should go to J.; and if J. should die without having succeeded to, and been in actual possession of, the family estate, for a certain time, leaving issue other than an only son, such issue should be entitled to all the principal moneys the interest whereof J. might be entitled to as aforesaid. Then followed a gift over of all benefit intended for J., in case he should die in the lifetime of C., either without issue, or without issue other

than an only son, or having been in possession of the estate for a certain time. If both C. and J. should die without issue, to be entitled as aforesaid to the bequest, the whole property should go as the survivor should think fit. J., having survived M., died in the lifetime of C., leaving a daughter, and without having been in possession of the estate; and then C. died without issue:—Held, that the daughter of J. was entitled to the whole fund. *Newburgh (Earl)* v. *Eyre*, 4 Russ. 451; 6 L. J., Ch., 153.

1. A. made a will by which, under a power of appointment reserved to her in her father's will, she bequeathed her property to her husband; "and in case my husband shall die in my lifetime," to W. The husband made a will in the same terms. The husband and wife were by the same wave swept off the deck of a vessel in a storm at sea, and were drowned. No evidence was given to prove that one survived the other:—Held, that W. could not claim under either will, and that the property went over to those who by the father's will were to take in default of appointment by the daughter. *Wing* v. *Angrave*, 8 H. L. Ca. 183; 30 L. J., Ch., 65. S. C *sub. nom. Underwood* v. *Wing*, 19 Beav. 459; 1 Jur, N. S., 159; 24 L. J., Ch., 293; 4 De G. M. & G. 633; 3 W. R. 228; 3 Eq. Rep. 794.

The union of the two titles of W. did not affect the case, for he could not succeed in one because he did not succeed under the other, but was bound to establish his claim clearly under one or the other. *Ib.*

Gift over if A. dies under twenty-one, etc., who dies over age, etc., in life of testator. Prior gift fails by lapse.] 2. Devise to A. and her heirs, but, if she dies under twenty-one and unmarried, to B. and her heirs. A. dies in the life of the testator under twenty-one and without issue, but having been married: the heir is entitled. *Williams* v. *Chitty*, 3 Ves. 546.

3. First, a devise to A. at twenty-one, and if she die under twenty-one to her children, or if she die under twenty-one and no children then over. A. survived twenty-one and had children, and then died in the lifetime of the testatrix; decided at law, that A.'s children could not take, the above being a condition precedent, contrary to the opinion of Lord Thurlow, Ch. *Doe* v. *Brabant*, 3 Bro. C. C. 393. And see *Calthorpe* v. *Gough*, 3 Bro. C. C. 395.n.

4. Bequest to a son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he shall die before he accomplishes his apprenticeship, then, and in such case, to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship in the testator's life. *Humberstone* v. *Stanton*, 1 Ves. & B. 385.

6. A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son William until he attained twenty-one, "and when and so soon as" he should attain twenty-one, she devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, or if none, then to the defendant. The son did attain twenty-one, and died without issue in the lifetime of the testatrix. There being no heir or next-of-kin of the testatrix:—Held, that the trustee was entitled to hold the real estate beneficially. *Cox* v. *Parker*, 22 Beav. 168; 2 Jur., N. S, 842; 25 L. J., Ch., 873.

6. Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller* v. *Faure*, 1 Ves. 85.

7. A testator, after bequeathing a sum of long annuities to his wife for life, gave the capital after her death to A., if he shall be living at her decease, and if not, to A.'s son; A. outlives the wife, but both he and the wife die in the testator's lifetime:—Held, that the legacy to A. lapsed, and that the gift to his son did not take effect. *Williams* v. *Jones*, 1 Russ. 517.

8. Devise on condition that the land should go over to another if devisee did not give a release in three months after testator's death; devisee dying in the testator's lifetime, the devisee over shall take instead of heir-at-law; this being a conditional limitation, and not a strict condition. *Avelyn* v. *Ward*, 1 Ves. 420.

9. Testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her grandchildren, if she should survive her mother, and attain twenty-one; then in trust for such other child or children of the testatrix's said daughter as should be living at their mother's death, to be paid to them after her death, as they attained twenty-one; and if all such other children of the testatrix's said daughter, should die before attaining twenty-one, then in trust for L. M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive his mother; afterwards the daughter died:—Held, that the bequest over to L. M. took effect. *Mackinnon* v. *Sewell*, 5 Sim. 78. S. C. 2 Myl. & K. 202; Coop. *temp.* Brough. 224; 3 L J., N. S., Ch., 161.

10. Testator bequeathed a sum of stock to A. and B., for their lives, and on their deaths to their children then living, who should attain twenty-one, with a gift over to the survivor of A. and B., in case the children of either of them should die under twenty-one. A. died, leaving a child who had attained twenty-one. B. afterwards died without having had a child:—Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. *Aiton* v. *Brooks*, 7 Sim. 204.

11. Bequest of stock in trust for three persons nominatim, in equal shares, to be transferred to them when they shall attain twenty-one. But if any of them shall depart this life under the age of twenty-one and unmarried, then his share, original and accruing, to go to the survivors. And if all of them shall die under twenty-one and unmarried, then the stock to sink into the residue. One of the three died some months prior to the making of the will:—Held, that the survivors were entitled to the share which the testator attempted to bequeath to the deceased. *Re Sheppard's Trust*, 1 Kay & J. 269.

12. A father, by his will, which recited and was intended to carry into effect articles made on the marriage of his daughter, devised real property to trustees to the use of the husband for life, or until bankruptcy or insolvency,

and after bankruptcy or insolvency to the use of trustees during the joint lives of husband and wife to pay the rents and profits to the wife for her separate use, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a power of appointment, to the children of the marriage in fee as tenants in common, with benefit of survivorship, and if only one child, then to that one; and in case every child born or to be born should die under the age of twenty-one, and without leaving lawful issue born or to be born in due time afterwards, then to the use of the heirs and assigns of the wife as if she had continued sole and unmarried. There was one child living at the date of the will. All the children died in the lifetime of the testator, one having attained the age of twenty-one. The husband became insolvent, and afterwards joined with the wife in a conveyance to such uses as she should by deed or will appoint. She appointed by will to S.:—Held, that a child having attained the age of twenty-one, the ultimate limitation never took effect, that the case was one of lapse, and that the heir-at-law was therefore entitled to the property. *Brookman* v *Smith*, 7 L. R., Exch., 271; 41 L. J., Exch., 114; 26 L. T. 974; 20 W. R. 906. And see *Tarbuck* v. *Tarbuck*, 4 L. J., N. S., Ch., 129.

See also VII. *ante.*

III. FAILURE OF EXECUTORY GIFT OVER. EFFECT ON PRIOR GIFT.

1. A testator gave real and personal estate to his daughter A., and to two other persons, upon trust, to permit A. to receive the rents and interest for life, for her separate use, and after her decease, in trust, to convey to her heirs, executors, etc.; but, in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children:—Held, that A. took an absolute equitable estate, with an executory gift over, to D. and his children; and D. having died in the lifetime of A., leaving no children:—Held, that A. was absolutely entitled to the property. *Jackson* v. *Noble*, 2 Keen 590; 7 L. J., N. S., Ch., 133; 2 Jur. 251.

2. A testator devised lands in fee, but declared that if the devisee died under twenty-one, and without issue, then the lands should go to a charity. The gift to the charity being void:—Held, that the devise in fee was defeated; held, on the authority of *Doe* v. *Eyre* (5 C. B. 746), that the gift to A. was divested by the charitable gift over, although that gift was for all other purposes void. *Robinson* v. *Wood*, 6 W. R. 728; 4 Jur., N. S., 625; 27 L. J., Ch., 726; 1 L. T., N. S., 311.

A testator devised his real estates to trustees, their heirs and assigns, upon trust, to apply the rents for the maintenance of his daughter till twenty-one, and then to convey the estates to his daughter, her heirs and assigns; and in case his daughter should die under twenty-one, then upon trust for the absolute use and benefit of such issue as tenants in common, but if she should die under twenty-one without issue, then upon trust to sell the property and pay the proceeds to a charity. The daughter died under twenty-one without issue, and the gift over being void under the Statute of Mortmain:—Held, that the original devise to the testator's daughter, assuming that she took an absolute estate in fee simple, was divested by the subsequent gift over, although that gift had failed, and that the trustees of the will became entitled to the estate. *Ib.*

3. A testator gave his whole property to his wife upon condition that she should pay 130*l.* to his mother during her life, and after the death of his wife to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again and died, leaving her husband surviving her:—Held, upon her death, and the events which had happened, the testator's property was undisposed of, and that the next-of-kin, and not the second husband in right of his wife, were entitled to it. *Joslin* v. *Hammond*, 3 Myl. & K. 110; 3 L. J., N. S., Ch., 148.

4. Testator gave the interest and produce of the residue to his two sisters for their lives, and after their decease the principal to be paid to their children, share and share alike; but whichever died before the other, then the share to be paid to her children in equal proportion; but if she should have no children, then the interest and produce to be paid to the survivor for her life, as aforesaid: one sister died without having children; the survivor is entitled to the interest for life, and the principal is vested in all her children. *Taylor* v. *Langford*, 3 Ves. 117.

5. *Semble*, the *dictum* in *Forth* v. *Chapman* (1 P. W. 666), and the doctrine in *Doe* v. *Cooke* (7 East 269), that when there appears to be an intention on the face of a will to give the whole of a term of years away from an executor, a bequest of it, though only for a day, is a gift of the whole term, in case the limitations over are void, cannot be sustained. *Kerr* or *Ker* v. *Dungannon* (*Lord*), 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.

6. A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. *O'Mahoney* v. *Burdett*, 7 L. R., H. L., 388; 23 W. R. 361; 31 L. T., N. S., 705. And see 10 Ir. Ch. R. 14.

A gift to X. for life, with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children. *Ib.*

There is no rule of construction arising from possible delay in the vesting of a gift, which controls the natural meaning of the terms of the bequest. *Ib.*

Gift of 1,000*l.* consols to A. for her life, after her death to her daughter B., "if B. should die unmarried or without children the consols I here will to revert to C." The will then appointed D. residuary legatee. Both A. and

C. died in the lifetime of the testatrix. On her death B. entered into possession, and married, but after some years died without ever having a child —Held, that on the death of B. without children the gift over to the residuary legatee took effect, and that it was not affected by the death of C. in the lifetime of the testatrix. The gift to C. failed by lapse, and the residuary legatee became entitled to take all that C., if living at the death of the testatrix, could have taken. *Ib.*

The words "I here will to revert to C." indicated a benefit intended for C. by means of an executory limitation over, after enjoyment by a previous taker, and not an alternate gift to take effect, if at all, before the period of enjoyment had commenced. *Ib.*

1. Specified freeholds and leaseholds were given by will to trustees upon trust to permit the rents to be received by H. for life, and after his death to convey to his children on their attaining twenty-one, with a proviso that if H. charged or incumbered the property, the gift to him should be absolutely forfeited, and that in such case the gift in favour of his children should at once take effect, and be acted upon by the trustees as thereinbefore directed. H., by a memorandum in writing, in 1869, charged his life estate in favour of W. W. shortly afterwards, on hearing of the clause of forfeiture, and before he had taken any benefit under the charge, repudiated the security, and obtained another security from H. In 1874 the trustee of the will, by leave of the Court in an administration suit, filed a bill against persons who were in possession of the property under a title derived from a lessee of H., to make them account for the rents. H. had no children:—Held, that the memorandum of charge produced a forfeiture of the life interest of H., although W. had never claimed any benefit thereunder, and had afterwards disclaimed it, and although H. had no children, so that there were no persons to take under the gift over. *Hurst* v. *Hurst*, 21 L. R., Ch. D, 278; 51 L. J., Ch., 729; 46 L. T. 899; 31 W. R. 327. Affirming 51 L. J., Ch., 417.

2. When legacy is given subject to be defeated by a subsequent event, the legatee has an absolute interest till the event happens; and if the event becomes impossible, the legacy becomes absolute. *Lowther* v. *Cavendish* (*Lord*), Ambl. 358; 3 Bro. P. C. 186.

3. Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, and after her death, to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:—Held, that the wife was absolutely entitled. *Crozier* v. *Crozier*, 15 L. R., Eq., 282; 21 W. R. 393.

4. A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son W. and daughter M. share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid, to the children of J. and M. The heir-at-law claimed the corpus as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—Held, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue—that when the gift over of any share was void for remoteness the original gift remained unaffected—and that the heir-at-law had no title. *Re Goodier*, *Goodier* v. *Johnson*, 18 L. R., Ch. D., 441; 45 L. T. 515; 51 L. J., Ch., 369; 30 W. R. 449.

See also VIII. *ante.*

IV. GIFT OVER AFTER A FEE SIMPLE.

5. T. devised all his real and personal estate to his wife for life; remainder to his son and his heirs for ever; and if he should die without any heir, then to plaintiff. A., by will, devised the whole to plaintiff, but he neither levied a fine nor suffered a recovery. This is a fee mounted upon a fee, and a void devise both at law and equity. *Tilbury* v. *Barbut*, 3 Atk. 617.

V. GIFT OVER OF AN ESTATE PUR AUTRE VIE.

6. A., having an estate for three lives, settles it to the use of himself in tail, remainder to B.: the remainder is void, or if good, it might be barred by deed, surrender, or other conveyance. *Baker* v. *Bayley*, 2 Vern. 225.

7. Leaseholds for lives were devised to A. and his heirs, and, in case A. died without issue, to B.:—Held, in analogy to a fee simple, that A. could not by dealing with the property defeat the executory interest of B. *Re Barber's Settled Estates*, 18 L. R., Ch. D., 624; 50 L. J., Ch., 769; 45 L. T. 433; 29 W. R. 909.

XV. Assignment of.

— *When Devisable.* See WILL, XXXIV.
— *Assignments of Contracts to Purchase.* See VENDOR AND PURCHASER, II.

— *Sale of Reversions.* See VENDOR AND PURCHASER.
— *Reversions passing by Will.* See WILL, XXXIX. IV.—XLI. III.

See also EQUITABLE ASSIGNMENT — HEIRS EXPECTANTS AND REVERSIONERS.

1. A possibility of a term is assignable in equity for a good consideration. *Theobalds* v. *Duffoy*, 9 Mod. 102.

2. A possibility cannot be assigned, but it may be released. *Thomas* v. *Freeman*, 2 Vern. 563.

3. It is now well known that a possibility may be both assigned and released. *Jewson* v. *Moulson*, 2 Atk. 417.

4. Possibility assignable in equity for valuable consideration in the second degree, and operates by way of agreement, and will be made good, like the case of defective execution of a power, or devise of copyhold without surrender. *Wright* v. *Wright*, 1 Ves. 411.

5. A. granted an annuity to B, and covenanted to charge it upon all such property as, in the event of C. dying before him, he might become possessed of at C.'s death, either by will or otherwise. A. afterwards became bankrupt, and obtained his certificate, and then C. died, having bequeathed an annuity in trust for A.:—Held, that B. was entitled to a decree specifically charging his annuity bequeathed in trust for A. An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. *Lyde* v. *Mynn*, 4 Sim. 505. Affirmed 1 Myl. & K. 683; Coop. *temp.* Brough. 123.

6. A remainder of a term is an assignable interest; as if J. G., being possessed of a term of 2,000 years, devised the estate to his wife for fifty, if she should so long live, and after her decease, to his son for fifty years, if, etc., and after her decease, to his two grandchildren for the remainder of the term. One of the grandchildren assigns his interest in the life of the father or grandmother. *Per curiam.* This is an assignable interest, and a moiety passed by the assignment so decreed. *Kingslader* v. *Courtney*, 2 Freem 238. *Semble* S. C. *Kimpland* v. *Courtney*, *id.* 250.

7. If a father devise lands to trustees and their heirs till his son attain twenty-five years, a mortgage thereof by son when twenty-one is void. *Spencer* v. *Chase*, 9 Mod. 30.

8. Expectancy of an heir, either presumptive or apparent, not an interest, or possibility capable of being made the subject of the contract. *Carleton* v. *Leighton*, 3 Meriv. 667.

9. Devise of use of personals to A. for life, and afterwards to B., though B. dies first, transmissible. *Exel* v. *Wallace*, 2 Ves. 119. Affirmed *id.* 318.

10. The contract for the present demise, by a person out of possession, not enforced in equity. *Bayly* v. *Tyrrell*, 2 Ball. & B. 358.

11. A person out of possession cannot convey anything to a stranger; he can only give a release to one in possession. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 65.

12. An equitable interest under a contract of purchases may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract Such sub-contracts are not within the doctrine of champerty and maintenance. *Wood* v. *Griffith*, 1 Swan. 56.

13. H. sold to T. all the machinery on T.'s mill and premises. The deed, registered as a bill of sale, after reciting the purchase, witnessed that T. assigned to a trustee all the machinery specified in a schedule on trust, if T. paid to H. 5,000*l.* on demand for T. absolutely; but, in default of such payment, then to sell and apply the proceeds. The deed also provided that all the machinery which, during the continuance of the security, should be fixed or placed on the mill and premises, in addition to or substitution for the present machinery, should be subject to the same trusts. T. remained in possession, working the mill, and from time to time sold part of the machinery, and purchased new, of which he gave notice to H. Afterwards H. demanded payment of the 5,000*l.* which was not paid. An execution creditor of T. issued a *fi. fa.*, and the sheriff seized the added or substituted machinery:—Held, that the added and substituted machinery became, as soon as it was put in the mill. subject to the deed; and H. was equitable owner, and had priority over the execution creditor, without the formality of taking actual possession. *Holroyd* v. *Marshall*, 11 W. R. 171; 7 L. T., N. S., 172; 10 H. L. Ca. 191; 32 L. J., Ch., 193; 9 Jur., N. S., 213. Affirming 6 Jur., N. S., 931; 29 L. J., Ch., 655.

At law non-existing property to be acquired at a future time is not assignable; in equity it is so. *Ib.*

At law, although a power is given in a deed of assignment, to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, the moment the property comes into existence, the agreement operates upon it. *Ib.*

14 *Quære*, whether a transfer by deed of a contingent remainder, before the passing of the 7 & 8 Vict. c. 76 (which made contingent remainders assignable at law), would not, though made without valuable consideration, be held good in equity, as an equitable assignment. *Crofts* v. *Middleton*, 2 Jur., N. S., 528; 25 L. J., Ch., 513; 8 De G. M. & G. 192. Reversing 2 Kay & J. 194; 1 Jur., N. S., 1173.

Assuming that between the passing of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 76, and of the 7 & 8 Vict., c. 76, a man or feme sole could not by any means effectually dispose at law of a contingent remainder in fee by act *inter vivos*, except by estoppel by means of a false recital, still, upon the true construction of the former act, a married woman could convey such an estate by deed acknowledged. *Ib.*

Supposing such a deed could not operate so as to pass the legal estate, still, if made for a valuable consideration, it would be good to confer an equitable title by way of contract; for the Fines and Recoveries Act gives a married woman power, with the concurrence of her husband, to contract by acknowledged deed, so as to bind her real estate, though not herself personally. *Ib.*

The Court will not enforce a deed, although made for valuable consideration, purporting to convey a contingent interest in land which could not be conveyed at law. *Ib.*

Observations on fraud consisting of suppression, and on positive misrepresentation. *Ib.*

1. Although it is a rule of law that a reversion will pass by general words, unless a different intention is distinctly shown in other parts of the instrument, yet such an intention may be gathered by implication from the form of the deed. *Mullineux* v *Ellison*, 8 L. T., N. S., 236

2. A testatrix gave the interest of the residue to her brother during his life, and after his death she gave the residue to her executors in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime; of those four persons two died during the life of the brother:—Held, that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all other the estate and effects, of or to which she was then possessed or entitled, to trustees upon trust for her creditors; this assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope* v. *Whitcombe*, 3 Russ. 124; 6 L. J., Ch., 53.

VESTING ORDERS.

See TRUSTEE ACTS, I. and II.

VESTRY.

See ECCLESIASTICAL PERSONS AND PROPERTY, IX.—LOCAL GOVERNMENT, VIII.—PARISH—POOR-LAW.

VEXATION.

— *Restraining Vexatious Proceedings.* See INJUNCTION, II. XI.

See also PRACTICE (APPEAL)—PRACTICE (COSTS).

VICE-CHANCELLOR.

See JURISDICTION, II.—PRACTICE.

VILLAGE.

3. Teddington in Middlesex is a village and not a town. *Blackmore* v. *London & South Western Railway Co.*, 38 L. J., Ch., 19; 19 L. T., N. S., 4; 16 W. R. 1105.

VISITOR.

See CHARITY, III.

VIVÂ VOCE EXAMINATION.

See PRACTICE (EVIDENCE).

VOLUNTARY CONVEYANCES OR SETTLEMENTS.

— *Validity in Bankruptcy, and when an Act of Bankruptcy.* See BANKRUPTCY, VIII. ii.

— *Fraudulent within the Statutes of Elizabeth.* See FRAUDULENT CONVEYANCES.

— *Voluntary Settlements.* See SETTLEMENT, XVII.

— *Voluntary Trusts.* See TRUSTS.

VOLUNTEER.

— *Military.* See ARMY AND NAVY.

— *Under Settlements.* See FRAUDULENT CONVEYANCES—SETTLEMENT, XVII.

VOTE AND VOTING.

See BANKRUPTCY, XVI. ii. and iii.—COMPANY, VI. 1. 2.

WAGER.

— *Differences on the Stock Exchange.* See BANKRUPTCY, XXIV. XXXIV.; STOCK EXCHANGE, I.

See also GAMING AND WAGERING.

WAGES.

— *Preferential Claim for.* See BANKRUPTCY, XXV. VI.

See also COMPANY, XVII. XVIII. viii—MASTER AND SERVANT—SHIPPING, IX. VI.—X.

WAITING CLERK.

See PRACTICE (OFFICERS OF COURT).

WAIVER AND ACQUIESCENCE.

— *In Practice.* See PRACTICE AND PLEADING.
— *In Bankruptcy Proceedings.* See BANKRUPTCY.
— *Breaches of Trusts.* See TRUSTS, XXIV. IX.
— *Objections to Title.* See VENDOR AND PURCHASER, XI. VII.
— *Forfeiture.* See LANDLORD AND TENANT, IX. II. 2.—VENDOR AND PURCHASER
— *Ratification of Fraudulent Transactions.* See FRAUD, I IV.
— *In Mode of Keeping Accounts.* See ACCOUNT, II. 1—BANKER, IV. 1.
— *Waiver of Time. When Essence of Contract.* See VENDOR AND PURCHASER, X. IV.
— *Right to Injunction. When Barred by.* See INJUNCTION, I. V.—COPYRIGHT, XII IV — LIGHT AND AIR, V. VII. 3—NUISANCE, III. 6—PATENT, VII. XII. 5—TRADE MARK, IV. VI. 3.
— *Waiver or Discharge of Lien.* See LIEN, II.—SOLICITOR, XIV. III.—XV. I. 11—VENDOR AND PURCHASER, XIV. V. 3—XIV. VI.

See also ABANDONMENT — CONFIRMATION —ESTOPPEL — LACHES — LIMITATIONS, STATUTE OF AND LAPSE OF TIME—RELEASE, and other SPECIFIC TITLES.

I. GENERAL PRINCIPLES, AND KNOWLEDGE OF PERSON ACQUIESCING.

1. Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognisant of his rights, and, being so, neglects to enforce them. *Vyvyan* v. *Vyvyan*, 30 Beav. 65.

2. Where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. *Strange* v. *Fooks*, 4 Giff. 408.

3. Acquiescence without full and sufficient knowledge and understanding of the circumstances of the case, in respect of which such acquiescence is alleged to be a bar, cannot be of any avail. *Prideaux* v. *Lonsdale*, 32 L. J., Ch., 317.

4. Silence as to a legal right, when the facts are known to both parties, will not be an acquiescence in equity to bind the silent party. *Crofts* v *Middleton*, 1 Jur., N. S, 1133.

5. Acquiescence by one of several co-plaintiffs in the act complained of precludes the interference of the Court upon an interlocutory application as much as upon decree; and the rule is the same although some of the co-plaintiffs are infants. *Marker* v. *Marker*, 9 Hare 15; 20 L J., N. S., Ch., 246; 15 Jur. 663.

Parties cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. *Ib.*

6 There can be no acquiescence in acts in which the party is ignorant that he has a right to dispute. *Cholmondeley* v. *Clinton*, 2 Meriv. 362.

7. Distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer. In the former case, acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever. *Gordon* v. *Cheltenham Railway Co.*, 5 Beav. 229.

8. No act will amount to a confirmation of an impeachable transaction unless the party has become aware of the fraud, and is also aware that his act will have the effect of confirming it. *Murray* v. *Palmer*, 2 Sch. & L. 486.

9. A party is not bound by acquiescence when ignorant of his rights. *Exp. Chambers*, 2 Mont. & A. 476.

10. Acquiescence imports full knowledge, and a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights, and of all the material facts and circumstances of the case. *Life Association of Scotland* v. *Siddall*, *Cooper* v. *Greene*, 7 Jur., N. S., 785; 4 L. T, N. S, 311.

11. A., a solicitor, was entrusted by a client with money to be lent on mortgage. He appropriated the money to his own use, and afterwards being pressed by B. his client, obtained from another client, C., fraudulently, and without consideration, mortgages of equitable estates belonging to C. which he handed over to B. A soon after became bankrupt, and nearly three years afterwards C. discovered, for the first time, the nature of the transaction between A. and B., whereupon he filed a bill against the latter to be relieved from the mortgages:—Held (affirming the decision of the Master of the Rolls, and reversing that of Lord Chancellor Campbell), that he was entitled to the relief sought, and that his claim had not been barred by acquiescence or confirmation whilst he was ignorant of the facts constituting his equity. *Wall* v. *Cockerell*, 1 N. R. 486; 11 W. R. 442; 8 L. T., N. S, 1.

12. Acquiescence in what has been done will not be a bar to relief when the person alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed. *Beauchamp (Earl)* v. *Winn*, 6 L. R., H. L., 223.

13. *Semble*, that mere submission to a wrongful act, which has been completed without the knowledge or assent of the person whose right is infringed, cannot, without some conduct amounting to accord and satisfaction, or a

release under seal being shown, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances. *De Bussche* v. *Alt*, 38 L. T., N. S., 370; 8 L. R., Ch. D., 286; 17 L. J., Ch, 386.

1. Creditors having, subsequently to the appointment, signed resolutions authorising the assignees to do certain acts as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature. *Exp. Nash, Re Wyatt*, 1 Dea & Ch. 445.

2. A waiver must be an intentional act with knowledge. *Darnley (Earl)* v. *London, Chatham, & Dover Railway Co.*, 15 W. R. 817; 16 L. T., N. S., 217; 36 L. J, Ch., 404; 2 L. R., H. L., 43.

3. A party by acquiescing may raise such difficulties as to prevent the Court from interfering to remove temporary bars. To charge a party with acquiescence he must be affected with knowledge of the facts acquiesced in. *Blennerhasset* v. *Day*, 2 Ball & B. 137.

Where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief *Id.* 118.

A party acquiescing and receiving money under a misapprehension of his rights, not bound by it as in case of a contract for a disputed title or the compromise of a litigated right. *Id.* 128.

Upon a bill by a lessee evicted for non-payment of rent seventeen years before, though imputing fraud, unsupported in proof, but praying for liberty to try validity of the eviction at law by the removal of temporary bar, a mortgage of the tenant's interest, vested in the landlord:—Held, that he was entitled to such relief, there being no equitable circumstances to bar him of that right, he having acquiesced in ignorance of his rights, and the defendant having by the concealment of a fact obtained a legal advantage, which consistent with good conscience should not be allowed to protect his title on such a trial. S. C. 2 Ball & B. 104.

4. Where there was no acquiescence with knowledge of rights, a lapse of ten years was held not to affect the rights of a client seeking to set aside a purchase by his solicitor. *Austin* v. *Chambers*, 6 Cl. & F. 1.

5. Upon one of the sections of a railway, deposited with the clerk of the peace, and referred to by an Act (afterwards passed) authorising the formation of the line, there was a note to the effect that a particular road, therein delineated, was to be stopped up, and another, therein also delineated, was to be a substituted road for it:—Held, that the public and the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction, upwards of four years afterwards, on the company's proceeding to stop up the road. *Att.-Gen.* v. *Great Northern Railway Co.*, 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.

6. A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained, in consideration of a friend of the bankrupt paying a sum to the creditors. After this the assignees discovered that other property to a large extent had been concealed by the bankrupt, and they presented a petition to discharge the annulling order, as having been obtained by fraud, and before this petition had been heard filed a bill to restrain the bankrupt from getting in the concealed property. The petition was ultimately dismissed by the Lord Chancellor, on the ground that the assignees having, when they consented to the annulling order, been aware of previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt having made a full disclosure of his property:—Held, that the proceedings in the cause ought to be stayed without costs. *Elsey* v. *Adams*, 2 De G. J. & S. 147; 10 Jur., N. S., 459; 10 L. T., N. S, 492.

7. Major E. died in India in September 1810, having left his property between M. and H., and having appointed L. testamentary guardian. In December 1810, J., being indebted to Major E, executed a bond for securing payment of the debt, and delivered it to the agent of Major E. L. died in January 1870, and in July 1871, M, with her husband, filed a bill against L.'s representatives, alleging that L. had neglected, by registration of the bond or otherwise, to realise J.'s debt for the benefit of Major E.'s representatives, by which neglect the debt became irrecoverable in 1831, owing to J.'s insolvency. M. and her husband first knew of the bond in 1833, but were unwilling to interrupt the friendly relations between themselves and L., and so declined taking proceedings during L.'s lifetime:—Held, without reference to other objections, that the plaintiffs had, by their own acquiescence, disentitled themselves to any relief in the matter. *Sleeman* v. *Wilson*, 20 W. R. 109.

8 In 1841 sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances that the transaction could not be sustained if complained of in due time. One sister died in 1852, and the other in 1857, and the brother died in 1860. In the following year a bill was filed by the representative of the sisters to set aside the transaction:—Held, that the plaintiff wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead, and which transaction they all understood at the time. *Mackintosh* v. *Stuart*, 36 Beav. 21.

9. An intending lessee cannot throw any responsibility upon the solicitor of the lessor, though no other party be present at the time, by a simple appeal to the effect that "he was sure the solicitor would not let him do anything wrong." *Haberdashers' Co* v. *Isaac*, 3 Jur., N. S., 611.

10. A shareholder who had acquiesced in the recommencement of the works afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—Held, that the purchaser was bound by the acquiescence of his vendor. *Effooks* v. *South-Western Railway Co.*, 1 Sm. & G. 142; 17 Jur. 365.

11. The doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. The acquiescence which will deprive

a man of his legal rights must amount to fraud. The following are necessary elements to constitute fraud of this description:—(1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended money or done some act on the faith of his mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief of his rights; (5) the defendant must have encouraged the plaintiff in the expenditure of money, or in the other acts which he has done either directly or by abstaining from asserting his legal rights. *Willmott* v. *Barber*, per Fry, J., 15 L. R., Ch. D., 105; 49 L. J., Ch., 792; 43 L. T. 95; 28 W. R. 911.

II. BY PARTICULAR PERSONS.

Infant.] 1. Infancy of defendant no excuse for plaintiff's delay. *Jones* v. *Turberville*, 2 Ves. J. 11; 4 Bro. C. C. 115.

2. A petition to annul an adjudication in bankruptcy on the ground of the infancy of the bankrupt, but which was not presented until after the expiration of the time limited for that purpose by the 233rd section of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict., c. 106), dismissed as out of time, the Lord Chancellor holding that the case of an infant was no exception from the provisions of that section. *Re West*, 3 De G. M. & G. 198; 22 L. J, Bky, 71.

3. An encroachment of a water-course was made in the infancy of the ancestor, who acquiesced for twenty-one years after he became of age. The Court would not afterwards notice his complaint. *Guernsey* (*Lord*) v. *Rodbridges*, Gilb. Eq. Rep. 3.

4. An infant cannot avail himself of his infancy to excuse the non-assertion of his right under an executory agreement made with his ancestor where the immediate performance of his part of the contract is essential to the interest of the other contracting party. *Griffin* v. *Griffin*, 1 Sch & Lef. 352.

5. Where a building lease was granted during the minority of infants, with a covenant that they, when of age, should confirm it, and the infants accepted rent for ten continuous years after coming of age, decreed, that the lease should be established. *Smith* v. *Low*, 1 Atk. 489.

If a person of age grant a lease, having no title in premises, and the lands afterwards descend to him, the lease shall enure by way of estoppel; otherwise if he had been an infant. *Ib.*

6. Expenditure on an estate claimed with plaintiff's knowledge, but chiefly in his minority, held no defence. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

Married Woman.] 7. *Quære*, whether a married woman who is entitled to the interest of a fund to her separate use, without restraint upon anticipation, can be bound by acquiescence in an improper investment of the fund. *Davies* v. *Hodgson*, 4 Jur., N. S., 252.

8. On the marriage of a female infant, property then in reversion was settled under the court to her separate use for life, remainder to her children. Part of the property fell into possession during the life of the first husband, and the other part during the life of a second. She married again, her third husband having notice of the settlement. He afterwards filed a bill against the trustees of the funds for an account, and to obtain possession in right of his wife:—Held, that the wife not having repudiated the settlement upon her first discoverture, must be considered as having adopted it, it being for her benefit to do so, and that it was binding on the husband who had notice of it, and his bill was dismissed with costs. *Ashton* v. *M'Dougall*, 5 Beav. 56; 11 L. J., N. S., Ch., 344; 6 Jur. 447.

See also HUSBAND AND WIFE, XI. v. and IX., and other DIVISIONS.

Company or Corporation.] 9. Where an incorporated company stands by and permits expensive works to be executed at the spot where its premises are situated and its operations carried on, the effect, for all purposes of knowledge and acquiescence, will be the same as in the case of an individual. *Laird* v. *Birkenhead Railway Co.*, Johns. 500; 6 Jur., N. S., 140; 29 L. J., Ch., 218.

10. Where a company has stood by and seen works performed, it will be held to have assented to them, as much as if the company had been an individual. *Hill* v. *South Staffordshire Railway Co.*, 11 Jur., N. S., 192; 12 L. T., N. S., 63.

11. A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. *Kerr* v. *Preston* (*Corporation*), 6 L. R., Ch. D., 463; 46 L. J., Ch., 409; 25 W. R. 264.

III. OBJECTIONS TO JURISDICTION OF PARTICULAR COURTS.

12. No appearance or answer will give a jurisdiction to a limited court. *Green* v. *Rutherforth*, 1 Ves. 471. *Penn* v. *Baltimore*, 1 Ves. 446.

13. Filing a cross bill prevents any objection to the jurisdiction. *Burgess* v. *Wheate*, 1 Eden 190; 1 W. Bla. 121.

14. Prohibition lies not to an inferior court after the defendant has pleaded there, for by pleading the defendant submits to the jurisdiction. But at the suit of the King prohibition lies, though the defendant has pleaded; but if a prohibition has been granted, the Court will grant a supersedeas if there is an affidavit that the cause arose within the jurisdiction. *Anon.*, 1 Vern. 301.

15. The bankrupt deposited with A. the title-deeds of premises which he had previously mortgaged to R. & Co. After the bankruptcy it was agreed between R. & Co., A., and the assignees, that the assignees should sell the premises, and apply the proceeds in payment of R. & Co.; and A., upon a petition by the solicitor of the bankrupt, claiming a lien by deposit of the title-deeds of the premises prior to A.:—Held, that there was no jurisdiction in bankruptcy, to determine the priority of lien between A. and the petitioner; and

that A. was not precluded from objecting to the jurisdiction by filing affidavits as to the merits. *Exp. Allison*, 1 G. & J. 210.

1. If, in an ecclesiastical court, a party is cited as resident within the jurisdiction, and appears and pleads without objection, he cannot afterwards put that fact in issue. And in such case an intervener is not at liberty to raise an objection to the jurisdiction on that ground. *Chichester* v. *Donegal*, 6 Madd. 275.

2. A creditor, resting upon a common law lien, without proving under the commission, previously to the Bankruptcy Court Act, appeared as a respondent, in opposition to a petition before the Vice-Chancellor, who ordered that the matter should be referred to the commissioners, to ascertain the rights of the several parties, and that the creditor should have his costs. The creditor attended the inquiry before the commissioners, but did not draw up the order of the Vice-Chancellor:—Held, that this was not enough to bring him within the jurisdiction of the Court:—Held, also, that filing an affidavit is not a waiver of any objection to the jurisdiction. *Exp. Reid, Re Mills*, 1 Dea. & Ch. 250.

3. The subject of the suit was a mine in America, in which the plaintiff and the defendants, P. and B. (all Americans), were interested. Various negotiations and contracts were made and entered into between the parties, under or by virtue of which an English company was formed here to work the mine. P. came over to this country to superintend the English company, but B. remained throughout in America. Disputes arose, and a suit was instituted here to restrain P. from selling certain shares of the English company; for an account; and for other relief. P. did not object to the jurisdiction. An order was made in the suit to serve process upon B. in America, which was done:—Held, upon a motion by B. to discharge such order, that as it did not appear that P. was B.'s agent, his not objecting to the jurisdiction did not operate as a waiver by B. of any objection which he (B.) might have to it, or of his rights as an American citizen to be sued in respect of an American contract, in the courts of his own country alone. *Davis* v. *Park*, 42 L. J., Ch., 204; 21 W. R. 136. Affirmed 42 L. J., Ch., 673; 21 W. R. 301; 28 L. T., N. S., 295.

IV. OF STATUTE.

4. A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *Goldsmid* v. *Great Eastern Railway Co.*, 25 L. R., Ch. D., 511; 53 L. J., Ch., 371; 49 L. T. 717; 32 W. R. 341; 47 L. T. 727.

V. PERMITTING EXPENDITURE OR OUTLAY ON BUILDINGS OR WORKS.

5. The relief in respect of expenditure, under an erroneous opinion of title, or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge or permission of the other party, requires a case of bad faith clearly made out. In this instance it failed for want of evidence. *Dann* v. *Spurrier*, 7 Ves. 231.

6. Injunction against draining, preparatory to opening a coal mine, with prejudice to a canal, before establishing a right at law, refused, upon laches of two years' permitting expenditure. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515.

7. If owner stands by and suffers a stranger to build on his land without notice of title, stranger shall have the land, but there must be no title or colour of title in the stranger to build. *Att.-Gen.* v. *Balliol College*, 9 Mod. 411. See also 1 Anstr. 185; 2 Atk. 83; Gilb. Eq. Rep. 85.

8. Remainderman lying by, and suffering the tenant to lay out money without giving him notice of his intention to impeach his title, a ground of relief against the remainderman. *Shannon* v. *Bradstreet*, 2 Sch. & Lef. 73.

After lying by for a length of time, remainderman shall not turn round to the tenant to seek compensation against the assets of tenant for life. *Ib.*

9. To have a work, erected at great expense, whether private or public, removed by this court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complainant to law. *Jones* v. *Royal Canal Co.*, 2 Moll. 319.

10. Where an agent had permitted his principal to expend money on an estate, which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for mesne profits. Where an action for trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law, there being no right of set-off in such an action. *Cawdor* (*Lord*) v. *Lewis*, 1 Y. & Coll. 427.

11. The Court, in exercising the increased powers conferred on it by modern legislation in respect of legal rights, will have regard to the principles upon which it formerly acted, and will not therefore entertain a suit where a party has had ample opportunity of trying his right at law, and no action had been brought. *Swaine* v. *Great Northern Railway Co.*, 9 Jur., N. S., 1196.

Where a party had lain by and allowed expenditure to be incurred, and a trade, which might be a nuisance in point of law, to be established, and carried on for a considerable period, without asking for the interference of the Court or bringing an action:—Held, that he was precluded by acquiescence from obtaining relief in equity, though the trade had been gradually increasing. *Ib.*

12. Plaintiff had a lease of certain mills, which was nearly expired. A., the lessor, on his marriage, settled these mills on himself for life, then to the first and other sons of his marriage in tail male; remainder to his own right heirs. Plaintiff afterwards took a new lease from A., the father, for thirty years, and expended 2,800*l.* in rebuilding the mills. Defendant, the eldest son of A., during these improvements, told his father he had no right

to make such a lease, but he never made plaintiff acquainted with the settlement; on the contrary, wrote to him to desire he would keep one of the mills in repair. A. died, and his son recovered against the plaintiff at law, who brought his bill to be quieted in his possession during the lease, which was decreed, by reason that the son, knowing the imperfection of his father's lease, suffered the plaintiff to rebuild. *Hanning* v. *Ferrers*, Gilb. Eq. Rep. 85.

1. If a man is conscious of a defect in his title, and, with that conviction on his mind, will expend money in improvements, he is not entitled in equity to avail himself of them; but if a person entitled to an estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such an expenditure without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of it, the jurisdiction of the Court of Equity will attach upon him on the ground of fraud. *Kenney* v. *Brown*, 3 Ridgw. P. C. 518, 519.

2. Where a company has stood by, and seen works performed, it will be held to have assented to them, as much as if it had been an individual. *Hill* v. *South Staffordshire Railway Co.*, 11 Jur., N. S., 192; 12 L. T., N. S., 63.

3. The equitable rule as to the effect of a person's lying by, and allowing another to spend money on his property, does not apply where the money is expended with knowledge of the real estate of the title. *Rennie* v. *Young*, 2 De G. & J. 136.

4. In 1794 an Act of Parliament was passed empowering a company to make and maintain a canal, and the Act provided that "it should be lawful for owners of lands within the distance of twenty yards from the canal to take water from the canal for the sole purpose of condensing the steam used in working any engine, but for no other purpose." The defendants were the owners of two mills, one of which was begun in the year 1829, and during the erection of it an application was made by the then owner to the company to be allowed to lay down pipes from the canal to his engine house, to convey water for steam and injection. No condition was made by the company that the use of the water should be confined to condensing purposes; and the owner, with the knowledge of the company, and under the superintendence of their engineer, laid down pipes for both the above purposes. After a lapse of several years an action was brought by the company against the owners of the mill for getting water for other than condensing purposes; and they obtained a verdict, with damages, and then filed a bill for a perpetual injunction:—Held, that the company were precluded by the acquiescence from disputing the right of the owners of the mill to obtain water for both the above purposes; but an injunction was granted to restrain the defendants from using the water to make sow or size, and for cleaning the boilers. *Rochdale Canal Co.* v. *King*, 17 Jur. 1001; 22 L. J., Ch., 604.

The other mill was built in 1841, and the notice then given to the company was for liberty to lay a pipe for injecting water only, and was made after the millowner had received notice that the company would insist on adhering to their Act of Parliament:—Held, that there was no acquiescence on the part of the company as to this mill; and an injunction, restraining the defendants from using the canal water for any other purpose than that of condensing steam, was granted. *Ib.*

5. Specific performance decreed of parol agreement as to land, made as a family compromise of doubtful rights, where there had been part performance by possession and improvements, and acquiescence near nineteen years; a third person being permitted to act on his conception of right not questioned at the time by defendant, who cannot object that he had acquiesced under expectations from that third person, which were in part disappointed. *Stockley* v. *Stockley*, 1 Ves. & B. 23. See also *Stapleton* v. *Stapleton*, 1 Atk. 2.

6. Expenditure on an estate claimed with plaintiff's knowledge, but chiefly in his minority:—Held, no defence. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

7. Where a man, conusant of his right, suffers another to build on his ground without setting up a right till afterwards, the Court will oblige the owner to permit the person building to enjoy it quietly. *East India Co.* v. *Vincent*, 2 Atk. 83.

8. Where a tenant under a void lease makes great improvements, with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease. *Semble.* *Hardcastle* v. *Shafto*, 1 Anstr. 185.

9. Whether a corporation consisting of numerous governers would be bound by the acquiescence of some, standing by, permitting expenditure, etc., *quære*. *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188.

10. If a stranger builds upon the land of A., supposing it to be his own, and A. remains wilfully passive, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which he is building belongs to A., then A. may assert his legal rights, and take the benefit of the expenditure. And a tenant building on his landlord's land, in the absence of such special circumstances, acquires no right against him at the expiration of the tenancy. *Ramsden* v. *Dyson*, 1 L. R., H. L., 129; 12 Jur., N. S., 506; 14 W. R. 926. Reversing S. C. *sub nom. Thornton* v. *Ramsden*, 4 Giff. 519; 10 Jur., N. S., 839; 12 W. R. 850; 10 L. T., N. S., 481.

If a tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error.—*Semble*, that equity will interfere to compel the grant of a lease. *Ib.*

By a practice which prevailed for many years upon the estates of which the late Sir J. R. was tenant in fee, persons desirous of building took land either with or without a lease. If without a lease, the land was held at a low ground rent, upon a tenure locally known as "tenant right." Persons holding by this tenure were for many years treated by Sir J. R. as having transmissible interests, and his agents encouraged the belief, that as long as tenants paid their ground rents they would not be disturbed. When a lease was granted,

it was usually, though not uniformly, at a ground rent of double the amount of the lower rent, and for a term of sixty years, renewable every twenty or forty years, upon payment of a fine. In 1837 D., for building purposes, took a piece of land from the agent of Sir J. R at the lower rate of ground rent, without any stipulation as to the terms of his holding, and, as he alleged, upon the assurance that he would never be disturbed. Upon this land he expended 1,800*l.* in building. In 1845 (Sir J. R. having died) D. took a further piece of ground, at the same rate of ground rent, from the trustees of Sir J W. R. (the successor of Sir J. R.), then a minor, having applied to them in writing according to a printed form supplied by them, whereby he undertook to hold as tenant at will. Upon this piece of land he also built. In 1861 Sir. J. W. R., having attained his majority, commenced an ejectment against D. to recover possession of both pieces of land, and D. thereupon filed his bill for the purpose of obtaining a declaration that he was entitled to a lease or to compensation:—Held, that D. was not entitled to relief, inasmuch as the evidence failed to show that he built in the belief that he had the right to hold for ever, on the tenant-right system, and to call for lease when minded to do so, or that Sir J. R. knew he was building in that belief; and inasmuch as the representations made by Sir J. R.'s agents merely amounted to an assurance that there was no intention to disturb the tenants, and that they might rely upon the honour of the R. family:—Held, also, that the fact that the amount of the rent remained to be settled between the lessor and lessee, and the want of reciprocity in the supposed right, would have disentitled D. from calling for a lease. *Ib.*

Held, also, that Sir J. R. would not have been bound by statements made by his agents *dehors* the contract, unless he had authorised such statements, or knew that they had been made and acted on. *Ib.*

1. A railway company had constructed its line so as to leave the passage for a private road two intervals of nine feet three inches each. The interval required by the Railway Clauses Act, for a similar right of way, was twelve feet. The plaintiff's right of way was not disputed; but he had lain by and allowed the railway works to proceed, and the damage accruing to the plaintiff in consequence was of small amount:—Held, that he, having delayed the assertion of his legal right, and the damage slight, the Court would not grant an injunction to restrain the infringement on the legal right. *Wintle* v. *Bristol & South Wales Union Railway Co.*, 10 W. R. 210; 6 L. T., N. S., 20.

2. A railway company, having constructed a tunnel, proceeded to dispose of the ground under which the tunnel ran, and contracted on the 5th June to sell a portion to B., subject to the condition that he was to erect no buildings nor make any excavations, etc., but according to a specification approved in writing by the principal engineer. B. entered immediately, and sent in plans in August for the resident engineer, for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. thereupon proceeded till the 26th October, when the conveyance was completed, and the company's solicitor, finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, and told him he must procure it. The principal engineer then for the first time saw the plans of the proposed buildings, and immediately condemned them as dangerous to the tunnel, and therefore, of course, also dangerous to the proposed houses. B. insisting on proceeding, the company caused an information to be filed to restrain him, on the ground of danger to the public. A counter information was thereupon filed against the company to restrain them from running their trains, on the same ground of danger to the public. The fact of danger to the public by the continuation of B.'s plans was fully made out. An injunction had been obtained on the first information, and refused on the second:—Held, at the hearing, first, that the approval of the company's resident engineer was not binding on the company; and, secondly, that the defendant B. having been allowed to continue his works from August to the 26th October was, under the circumstances, not such an acquiescence on the part of the company as to exempt B. from being restrained from further prosecuting his building. *Att.-Gen.* v. *Briggs*, 1 Jur., N. S., 1084.

3. A railway company made excavations upon their own lands, the purpose of which was the partial diversion of the stream of water of a navigable river; and the works so prosecuted necessarily occasioned the obstruction of a private road. The plaintiffs, who were the owners of a fulling mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the Act. The plaintiffs, who had a right of way over the private road, also alleged that the company were interfering with the road without the performance of the conditions imposed by the railway Act, as preliminary to interfering with the road:—Held, that although the company were working on their own land, the plaintiffs must be held to have had notice of the intended works of the company; and had by an acquiescence for eighteen months, during which the company had expended a large sum of money on the works, precluded themselves from asking for the interposition of this Court by injunction. *Semble*, the plaintiffs, although interested, by the situation of their property or the nature of their business, in preserving open the navigation of the river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the railway Acts protecting the Calder navigation from injury by the railway works. *Illingworth* v. *Manchester & Leeds Railway Co.*, 2 Rail. Ca. 187.

4. In 1794 an Act authorised the making of a public canal through lands of which A. was the owner and B. his lessee, and upon payment of the compensation the land was to vest in the company. An arrangement was made in respect of compensation with B., but not with A. The canal was made "with the full consent and approbation of and in accordance with the wishes of A.," whose name was mentioned in the Act, and it was enjoyed until

the expiration of the lease in 1844. The representatives of A. then recovered at law the land taken for the canal:—Held, in equity, that A., having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794:—Held, secondly, that persons who had bought A.'s property, with notice into the conditions of sale as to the canal, were equally bound by the same equity —Held, thirdly, that this Court might itself determine the amount of compensation. *Beaufort (Duke)* v. *Patrick*, 17 Beav. 60; 17 Jur. 682; 22 L. J., Ch., 489; 1 Eq. Rep 41.

1. If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, neither the owner of the land, nor any person claiming under him, can dispute the right of the builder to use the land. *Mold* v. *Wheatcroft*, 27 Beav. 510.

2. Where a landlord stands by and sees a tenant lay out money on the faith of a promised lease, this, though not strictly part of performance, may raise an equity analogous to that which is raised when one stands by and sees his neighbour spending money on his land. *Semble*. *Munn* v. *Fabian*, 11 Jur., N. S., 861.

3. A defendant on the 28th March called on the plaintiff, who occupied a house adjoining his, and informed her that he was going to erect a photographic studio on a building at the rear of his premises, and that plans had been prepared. The plaintiff, under a misunderstanding as to the spot where the studio was to be erected, made no objection and did not ask to see the plans. On the 8th April the workmen commenced operations. The actual erection of the studio began on the 16th, and the first complaint was made verbally on the 24th, by which day considerable progress had been made in the building. On the 28th a formal written complaint was made, and on the 5th May the plaintiff filed a bill for an injunction and damages, alleging obstruction of air and light. The bill was dismissed with costs by the Vice-Chancellor, on the ground of delay and acquiescence:—Held, that although there had been sufficient acquiescence to justify the Court in refusing an injunction on interlocutory application, there had not been such acquiescence as to justify the dismissal of the bill on that ground. *Johnson* v. *Wyatt*, 2 De G. J. & S. 18; 9 Jur., N. S., 1333; 33 L. J., Ch., 394; 12 W. R. 234.

Held, also, that the case was one in which the Court ought to exercise the jurisdiction given to it by the 21 & 22 Vict., c. 27, and determine whether the plaintiff was entitled to any and to what damages. *Ib.*

4. The plaintiff, a shipbuilder, being desirous of having a private communication with a railway company, entered into negotiations with them for the construction of a tunnel at his own expense, and the directors expressed their assent generally to the project. The plaintiff then, with the acquiescence of the company, and the approval of their engineer, executed the necessary works, and the communication was used by the plaintiff, and tolls received by the company for two years and a half; but no formal agreement was ever executed, the parties being unable to agree upon all the terms. At the end of that time the company gave notice to the plaintiff that every agreement between them, if any ever existed, was at an end, and proceeded immediately to stop up the communication. Upon a bill filed for an injunction:—Held, that the company was as much bound by acquiescence as an individual would be, notwithstanding the want of a formal contract; and that, after all that had taken place, the plaintiff had acquired a right of user which the company had no power to terminate. *Laird* v. *Birkenhead Railway Co*, 1 Johns. 500; 29 L. J., Ch., 218; 1 L. T., N. S, 159.

5. The defendant being the owner of a canal of which the plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the plaintiffs remained good customers of the canal they should be allowed to use the superfluous water of the canal for the purposes of copperworks, of which they were occupiers under an agreement for a lease with the defendant. The use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiff's works:—Held, that such an understanding did not form the foundation of an equitable right. *Secus*, if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary. *Clavering's Case* (5 Ves. 690) considered. *Bankart* v. *Tennant*, 10 L. R., Eq., 131; 39 L. J., Ch., 809; 23 L. T., N. S., 137.

6. The owner of land separated from the sea by a high-road and waste land belonging to a corporation proposed to construct at his own expense a terrace walk between his own land and the high-road, upon the corporation agreeing to grant him a lease of all the waste lands between his own property and the sea for three hundred years, at a nominal rent, to reimburse him for his outlay. In 1860 the corporation passed resolutions accepting the proposal and providing for the stumping out of boundaries by a committee to be appointed. The owner objected to the boundaries proposed by the committee, but took possession of such land as he considered necessary, and constructed the terrace. In 1865 the corporation gave him notice to quit, and in 1869 served him with a summons in ejectment, whereupon a suit was instituted for specific performance:—Held, that he was entitled to a lease of the lands of which he had taken possession, the Court considering the corporation bound by its acquiescence. *Crook* v. *Seaford (Corporation)*, 18 W. R. 1147; 10 L. R., Eq., 678. Affirmed 25 L. T., N. S., 1; 19 W. R. 938; 6 L. R., Ch., 551.

7. A. made a lease of lands, with a condition against assigning or sub-letting without the consent of A., under his hand and seal, on breach of which the lease was to be void. The lessee made an agreement for a lease of a part of the lands, with the consent of A., by letter, not under seal. B. afterwards purchased A.'s reversion, subject to the agreement. C., the lessee's administratrix, applied to B. for permission to make a lease, in pursuance of the agreement to E., to whom the interest under it had been assigned. B. advised and encouraged C. to make the lease, stood by

while a large sum was expended by E. on the lands, and witnessed the execution of the lease, knowing it to be a lease of the lands from C. to E. B. knew of the clause against sub-letting, but did not know that the consent of A. was not valid in law, not being under seal, and swore that he had no intention, at the time, of taking advantage of a forfeiture. B. afterwards brought an ejectment for the forfeiture:—Held, that the Court had power to relieve the tenant, notwithstanding the condition in the lease against assigning or sub-letting. *Burke* v. *Prior*, 15 Ir. Ch. R. 106.

1. A number of persons were partners in working a mine held under a lease for years, which expired on the 29th September 1846. The concern was managed exclusively by some of the partners, and the partnership was at will. In July 1846 the managing partners gave notice of dissolution to the others, and in August agreed with the landlord for a new lease to themselves. In September 1846 they gave the other partners notice of their intention to sell the stock-in-trade, and to apply to the landlord for a new lease to themselves exclusively. On the 11th December 1846 a new lease, in pursuance of the agreement entered into in August, was granted to the managing partners, who thenceforth carried on the concern at their own risk, and made large profits, without having any occasion to bring in fresh capital. The partners who were excluded never in any way assented to these proceedings, but, on the contrary, continually insisted on their right to a share in the benefits of the new lease; they, however, took no legal proceedings to enforce their right till 1855, when a bill was filed:—Held, that the plaintiffs, having, with the full knowledge of their rights, which were founded solely on constructive and not on express trust, allowed the managing partners to carry on a mining concern at their own risk so long without taking any steps to assert those rights by legal proceedings, could not be permitted effectually to assert them now. *Clegg* v. *Edmondson*, 3 Jur., N. S., 299; 26 L. J., Ch., 273; 8 De G. M. & G. 787.

Held, also, that the continual assertion by the plaintiffs of their rights, without taking any steps to enforce them, had no effect in removing the bar arising from lapse of time. *Ib.*

Held, also, that the fact that the mine had been uniformly profitable did not alter the case, for that this could not be known beforehand; and the plaintiffs, having abstained so long from making themselves liable to the risks, could not now claim to share the profits. *Ib.*

2. The doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. The acquiescence which will deprive a man of his legal rights must amount to fraud. The following are necessary elements to constitute fraud of this description:—(1) the plaintiff must have made a mistake as to his legal rights; (2) he must have expended money or done some act on the faith of his mistaken belief; (3) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) the defendant must know of the plaintiff's mistaken belief of his rights; (5) the defendant must have encouraged the plaintiff in the expenditure of money, or in the other acts which he has done either directly or by abstaining from asserting his legal rights. *Willmott* v. *Barber*, per Fry, J., 15 L. R., Ch. D., 105; 49 L. J., Ch., 792; 43 L. T. 95; 28 W. R. 911.

See also INJUNCTION, I. v.—LANDS CLAUSES ACT, XII. iii.—LIGHT AND AIR, V. vii. 3.

Effect of Part Performance on Contracts Relating to Land] See LANDLORD AND TENANT, I. v.—SPECIFIC PERFORMANCE, VI.

VI. PERMITTING THE SETTLEMENT OR DISPOSITION OF PROPERTY.

3. A., on marriage with M., settled a jointure on her, with the approbation of B., his father, who witnessed the deed. A. died, leaving a large personal estate, and made M. executrix. Afterwards B. discovered that A. was only tenant for life, with remainder to himself in fee, and he recovered at law. *Per curiam*, it is plain that the father thought the son had the fee, and that he knew of the settlement; considering, therefore, the near relation of father and son, the widow shall not be compelled to resort to the son's covenant, and compel the jointure to be made good out of his personal estate. *Teasdale* v. *Teasdale*, Sel. Ch. Ca. 59.

4. A. made an absolute conveyance of lands to B. and his heirs, in consideration of 1,500*l.*, which was at that time the full value; but, on the next day, B. executed a defeasance, declaring that, if A. or his heirs should, within sixteen years, pay B. the 1,500*l.*, the conveyance should be void. B entered and enjoyed the lands, and, about three years afterwards, made a settlement thereof upon his marriage, and to which settlement A. was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion that B. was the sole and absolute owner of the lands. After B.'s death, A. set up the defeasance, and filed a bill to redeem, to which the son and heir of B. pleaded the purchase-deeds and marriage settlement of his father:—Held, that the intent of the conveyance being to enable B. to obtain a marriage settlement and a considerable portion, such intention was fraudulent, and therefore a perpetual injunction was awarded against A., to stop all further proceedings under the defeasance. *Webber* v. *Farmer*, 4 Bro. P. C. 170.

5. One, by articles previous to his marriage, covenants, in consideration of 3,500*l.* portion, and of his intended wife's conveying her lands to him and his heirs when she came of age, to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage the husband settles his lands mentioned in the articles, and recites the settlement to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife (to bar her dower), and their issue; but never requires her to convey her lands to him. The wife is a party to and executes this settlement. After the husband's death she enters on the settled lands. This settlement is a waiver by the husband of the proposed conveyance by the wife, and she shall hold as

well her own estate as also the lands settled. *Lucy* v. *Moore*, 4 Bro. P. C. 343.

1. Feme covert without husband's joining, but in his presence, surrenders her copyhold to use of her will or appointment, and devises it. *Quære*, whether good. *Taylor* v. *Phillips*, 1 Ves. 229.

2. The wife does not acquiesce in assignments, or waive the right to claim against them, by forbearing to impeach them till the death of the tenant for life. *Honner* v. *Morton*, 3 Russ. 65. S. P. *Watson* v. *Dennis*, *id.* 90.

3. A., in consideration of marriage, and of 500*l.* portion which he is to have with his wife by settlement, empowers his wife to dispose of 200*l.* by her will; they live together fifteen years; the wife gives the 200*l.* away by her will. The husband, at this distance of time, not admitted to say he had not 500*l.* with his wife, but shall pay the money. *North* v. *Ansell*, 2 P. W. 618.

4. Bill for a strict settlement after long acquiescence by plaintiff's ancestors, and when impossible to bar the remainder, dismissed. *Parker* v. *Philips*, 1 Ves. 530.

5. A settlement made under the direction of the Court ought to provide for the children as well as for the mother; but where that has been omitted, and the order acquiesced in for a long time, it will not be supplied. *Johnson* v. *Johnson*, 1 Jac. & Walk. 479.

6. A release and conveyance by a legatee and devisee to the trustee and executor was held to be confirmed by acquiescence for six years before, and many intermediate acts of recognition, though the transaction would otherwise have been set aside. *Montmorency* v. *Devereux*, West 64; 7 Cl. & F. 188; 2 Dr. & Wal. 410. Affirming 1 Dr. & Wal. 119.

7. A person entitled to real estate by voluntary conveyance settled it in strict settlement. After the decease of the settlor, his heir-at-law, who was also tenant for life under the settlement, upon his marriage, by indenture reciting the voluntary settlement, conveyed all his interest in the lands upon trust to secure a provision for his wife. *Quære*, can he afterwards insist that the voluntary settlement was void because the settlor was in a state of mental imbecility when he executed it. *Roddy* v. *Williams*, 3 J. & L. 1.

8. Construction of a clause in a marriage settlement. A court of equity will not direct payments made under a mistaken construction of doubtful clause in a settlement to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 76.

9. Specific performance decreed of parol agreement as to land, made as a family compromise of doubtful rights, where there had been part performance by possession, and improvements, and acquiescence near nineteen years, a third person being permitted to act on his conception of the rights, not questioned at the time by defendant, who had acquiesced under expectations from that third person, which were in part disappointed. *Stockley* v. *Stockley*, 1 Ves. & B. 23. See also *Stapilton* v. *Stapilton*, 1 Atk. 2.

10. The B. company, possessing springs of water of their own, covenanted, upon selling to the A. company a portion of those springs, to take from the A. company the entire supply of water they might require for certain specified purposes, and that they would not supply any of the places (their own premises forming part of the district) which the A. company was authorised to supply by Act of Parliament The B. company afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream:—Held, that a delay of twelve years in making the complaint did not amount to acquiescence, or to an abandonment of the plaintiffs' rights. *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Railway Co.*, 12 L. T., N. S., 366.

11. A. having a claim on property which he knew was the subject of a reference between C. and D, suffered the award to be made without bringing forward his claim:—Held, that he was bound by the award. *Govett* v. *Richmond*, 7 Sim. 1.

12. If tithes claimed by vicar are supposed to be payable to rector, and he makes no claim, but stands by and allows the vicar to take them, he is bound as between him and vicar by the effect of such laches. *Manby* v. *Lodge*, 9 Price 231.

13. If an executor, in pursuance of the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise. *Ray* v. *Ray* (G. Coop. 264) distinguished. *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 L. R., Ch. D., 93; 50 L. J., Ch., 834; 45 L. T. 183. Affirming 50 L. J., Ch., 654; 44 L. T. 796; 29 W. R. 733.

14. A voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death. *Hughes* v. *Seanor*, 18 W. R. 1122.

A mortgage effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld. *Ib.*

15. An agreement between a merchant and a shipowner for a partnership in a particular voyage of a ship belonging to the latter was carried into effect by two instruments—one a charter-party, by which one half of the freight, at a certain sum per ton per month, was made payable by the merchant to the shipowner, by monthly instalments during the voyage, and the rest on the return of the ship; the other a memorandum of agreement, which provided that the parties should be liable for the

expenses, and interested in the profits of the voyage in equal moieties. While the ship was at sea, the shipowner deposited the charter-party with his bankers, as a security for a balance then due on his account, with an order endorsed thereon, addressed to the merchant, to pay the freight, thereafter to become due, to the bankers. Notice of the deposit and endorsement was, some time afterwards, given to the merchant, who accordingly paid the subsequent instalments, as they fell due, to the bankers, without informing them of the agreement; but, upon the return of the ship, the shipowner having, in the meantime, become bankrupt, and the voyage having turned out a losing one, the merchant refused to make any further payment, on the ground that, by virtue of the agreement, which was then for the first time brought to the knowledge of the bankers, he was liable only for half the freight made payable by the charter-party:—Held, however, that although the bankers claimed only as assignees of a chose in action, the merchant having enabled the shipowner, by means of the charter-party, to hold himself out as entitled to the whole freight; and having neglected to undeceive the bankers on that point as soon as he found that they had taken a security upon the faith of such apparent title, he was precluded from afterwards asserting any equity inconsistent with that title; and the decree below, restraining an action brought by the bankers for the whole balance of the freight due under the charter-party, was accordingly reversed. *Mangles* v. *Dixon*, 1 Macn. & G. 437; 1 H. & Tw. 542; 19 L. J., N. S., Ch., 240.

1. The plaintiff in the suit having been advised that his daughter, then an infant, was entitled in fee to two fourth parts of certain freehold estates then vested in trustees, subject only to a question whether he, the plaintiff, was or was not entitled to the rents thereof for his life, as tenant by the curtesy of England, instituted, in 1826, a suit, to which he was not a party, but in which he was named and acted as next friend of his infant daughter, and in 1830 obtained a decree in such suit, inconsistent with any title in himself as tenant by the curtesy, declaring his daughter to have become entitled at the death of her mother "to two-fourths of the estates in fee, and to the rents and profits thereof," and directing a partition, and an allotment of two-fourths of the estates to the daughter. In 1833 the father, still acting as next friend of his daughter in the suit, obtained an order of the Court approving of a deed of partition, containing a conveyance by the trustees of two-fourths of the estates in question to the daughter in fee, and declaring that the father, his executors, etc., should have the use of the same for ten years, if the daughter should so long live, and remain an infant and unmarried; and from and after the happening of either of those events, to the daughter in fee; and provided that the rents received by the father should be applied, at the discretion of the father, towards the maintenance of the daughter. This the father accordingly did until the daughter attained her majority in 1843; after which, until her marriage in 1847, without her father's consent, he duly accounted to her for the rents of the estates. After the marriage the daughter and her husband brought ejectment against the father, who thereupon, in 1852, obtained the common injunction, claiming by the same bill to be entitled as tenant by the curtesy to the rents of the estates in question, on the ground that his title was not concluded by the suit commenced in 1826, to which he was not a party, but which he alleged had been instituted and conducted by him as next friend of his daughter, in ignorance of his own right to curtesy:—Held, dismissing, with costs, an appeal from the decision of Sir J. Stuart, V.-C., declaring the plaintiff not entitled to curtesy, that the proceedings and conduct of the plaintiff from the commencement of the suit of 1826 were tantamount to a waiver, as against his daughter and her husband, of his right to curtesy out of the estates in question; and, moreover, that the representations shown in evidence to have been made by him to his daughter were such as that the marriage must be considered as having been contracted by her upon the faith of the correctness of those representations, and the plaintiff considered as liable to have that faith treated as the legitimate consequence of such representations. *Stone* v. *Godfrey*, 18 Jur. 524; 23 L. J., Ch., 769; 5 De G. M. & G. 76; 2 W R. 118; 2 Eq. Rep. 866.

VII. PROCEEDINGS BEFORE ARBITRATORS.

2. If the assignees of a bankrupt attend meetings under a reference to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Dod* v. *Herring*, 1 Russ. & M 153.

3. After a submission of all matters in difference, and an award made by an umpire, a release given, and an acquiescence of nine years, the award shall not be set aside, or the matters unravelled, upon a suggestion that the umpire had particular matters only under his consideration. *Jones* v. *Bennett*, 1 Bro. P. C. 528.

4. The parties to an award and arbitration met on the business, and one of the parties was present only part of the time. On the following day the party had an interview alone with the arbitrator on the business of the award, without the personal knowledge or assent of the other party. After this the arbitrator made his award. The Court of Chancery refused to set aside the award, holding that, under the circumstances appearing in the evidence, the party absent at the interview between the other and the arbitrator must be taken to have acquiesced in it. *Hamilton* v. *Bankin*, 19 L. J., N. S., Ch., 307; 15 Jur. 70.

5. If the terms of an agreement are to be ascertained by an award, being so ascertained it shall be specifically performed, if anything is to be done *in specie*, conveyance, etc.; not, if the acts done towards executing it by an award are not valid at law, as to the time, manner, or other circumstances, unless there has been acquiescence, notwithstanding the variation of circumstances of part performance. *Blundell* v. *Brettarch*, 17 Ves. 241.

6. By a submission to arbitration between patentees, all matters in difference between them relating to gutta-percha were referred

to the decision of an arbitrator, who was empowered to set aside deeds which had been executed by the parties, if he thought fit, and to order assignments to be executed for vesting in trustees all patents and applications for patents relating to gutta-percha taken out or made, or to be taken out by the parties, or any of them. By the award the arbitrator, "if and so far as he had power and jurisdiction," set aside altogether deeds which he specified, but if he had not "power or jurisdiction to set the same, or any or either of them, aside," or to award any other matter in that his award contained, he declared that the rest of his award was yet to stand. He also decided upon the rights of the parties under the deeds executed by them, and not thereby set aside, and directed that neither of the parties should grant any licence of or work any of the patents, save under a licence from the trustees to be appointed under the award, which required the parties to nominate trustees within fourteen days, and to signify their election to take licences within two calendar months from the date of the award. The award also directed that the parties should covenant with one another that they and their licencees should assign to the trustees any assignable interest which they might respectively have in any patents relating to gutta-percha The submission was made a rule of a common law court. In a suit in equity for a specific performance of the award:—Held, that although one party had to some extent acted on the award, by nominating trustees and signifying an election to take licences, there had not been such an acquiescence in the award as to justify the Court in enforcing a specific performance of it against him on that ground, no one appearing to have been misled by his acts. *Nickells* v. *Hancock*, 7 De G. M. & G. 300.

1. A. having a claim on property which he knew was subject to a reference between C. and D., suffered the award to be made without bringing forward his claim:—Held, that he was bound by the award. *Govett* v. *Richmond*, 7 Sim. 1.

2. A plaintiff disputed an award of valuers for the price of growing crops, on the ground that it was made upon a wrong principle. On settlement he took the sum awarded, and signed a receipt for it, writing the words, "under protest," at the top. He afterwards waited nine months, and then filed a bill in equity:—Held, that he was precluded by delay and what amounted to acquiescence from disputing the valuation. *Parrot* v. *Shellard*, 16 W. R. 928.

3. Pending a reference, the umpire held a communication with the agents of one of the parties: this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded, and the award having been subsequently made:—Held, that it was too late for either of the parties after the award was made to object to it on the ground of such communication between the umpire and the agents of one of them. *Mills* v. *Bowyers Society*, 3 Kay & J. 66.

4. Award enforced, although made after the prescribed time, where both parties had, without objection, allowed the arbitrators to proceed after that time. *Hawkesworth* v. *Brammall*, 5 Myl. & C. 281.

5. By an agreement between W., who claimed to prove against a bankrupt's estate, and his assignees, it was agreed that his right to prove as the holder of a bill of exchange which the bankrupt had accepted should be referred. The submission to arbitration was made without the leave of the Court The arbitrator decided that W. had no right to prove as holder of the bill. W. applied to be admitted to prove, notwithstanding the award:—Held, that having acted under the submission, he was precluded from objecting to its informality, and was bound by the award. *Exp. and Re Wyld*, 7 Jur, N. S., 294; 30 L. J., Bky., 10; 9 W. R. 421; 3 L. T., N. S., 794.

6 The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, and, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners, under the *bonâ fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass and damages by the adjoining owner was referred to arbitration. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, and did not object to it. The arbitrator found that a trespass had been committed, and assessed the damages at 6,000*l*. The co-partners refusing to contribute, the managing partner brought an action against them, claiming a declaration that the 6,000*l*. damages was a partnership debt, and that defendants were bound to contribute ratably to it:—Held, that the co-partners had acquiesced in the arbitration, and were bound by the award, which was equivalent to a verdict by a jury and the judgment of the Court thereon. *Thomas* v. *Atherton*, 10 L. R., Ch. D., 185; 48 L. J., Ch., 370; 40 L. T. 77.

7. A. B., having acted as agent for a purchaser, and, as such, made an offer to the vendor of a price for a certain piece of land, was afterwards appointed arbitrator on behalf of the purchaser, and the vendor then appointed an arbitrator to act with him in settling the price to be paid for the land:—Held, on a motion by the vendor to set aside the award, that he had waived any objection to the purchaser's arbitrator. *Re Elliot, and Re South Devon Railway Co.*, 2 De G. & Sm. 17; 12 Jur. 445.

8. Objection to appointment of arbitrator waived by attending him. *Harcourt* v. *Ramsbottom*, 1 Jac. & Walk. 511.

9. Where there has been an agreement between two parties giving power to a third to make, within a certain time, an award on a matter in difference between them, if the award is not made within the specified time, but one of the parties, not knowing that fact, takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time contained in the agreement. *Darnley* (*Earl*) v. *London, Chatham, & Dover Railway Co.*, 2 L. R., H. L., 43; 36 L. J., Ch., 404; 15 W. R. 817; 16 L. T., N. S., 217.

VIII. MATTERS OF CONTRACT.

10. Treaty and negotiations for a variation of

the terms of a contract will not amount to a waiver, unless the circumstances show that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson* v. *Page*, 3 Russ. 114.

1. Though a parol waiver of a written contract amounting to a complete abandonment, and clearly proved, would bar a specific performance, or even parol variations so acted upon that the original agreement could no longer be enforced without injury to one party, variations verbally agreed upon are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining the same. In this case the variations were all for the advantage of the defendant by gratuitous covenants of the plaintiff. *Price* v. *Dyer*, 17 Ves. 356.

2. Where a party rests satisfied with an agreement, and for some time treats it as fair, it is most material to ascertain the time he first impeaches it; for although he may be entitled to relief if applied for in due time, by his delay he may lose it. *Moroney* v. *O'Dea*, 1 Ball & B. 118.

3. A written agreement can only be waived by written waiver, it seems; but strong proof of parol waiver would at least be required. *Buckhouse* v. *Crossby*, 2 Eq. Abr. 33. But see *Inge* v. *Lippingwell*, Dick. 469.

4. The lord of a manor entered into an agreement with his copyhold tenants for inclosing part of a common, and, to effectuate this agreement, the tenants consented to the inclosure, and released their right of common in the ground to be inclosed; and the lord, on the other hand, released each particular tenant from all quit-rent and other services. The inclosure, by various accidents, was prevented from taking effect, and therefore the tenants continued to enjoy their right of common, pay their quit-rents, and do suit and service at the lord's courts, as before:—Held, that this agreement was mutually waived. *Lanesborough* v. *Ockshott*, 1 Bro. P. C. 151.

5. Vendor being in possession for upwards of fifty years, and purchaser having done acts inconsistent with notion of his being the owner, specific performance of agreement to sell refused, as amounting to waiver. *Rosse* (*Earl*) v. *Sterling*, 4 Dow 442.

6. By the terms of the articles of the agreement usually entered into between the postmaster-general and the persons supplying horses for mail coaches, the postmaster-general cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves. A bill for an account by a substituted party, of whose nomination the postmaster-general had given no notice to one of the defendants, an original contracting party, who was entitled to the option of performing the duty himself, was therefore dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that, although no notice had been given by the postmaster-general, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Loregrove* v. *Nelson*, 3 Myl. & K. 1.

7. The waiver of a contract is itself a contract, and must be acquiesced in by both parties, and, when relied on against a tenant, must be established by clear and unequivocal evidence. *Carolan* v. *Brabazon*, 3 J. & L. 200; 9 Ir, Eq. R. 124.

A. wrote to C.: "I have told Mrs. C. that it is my intention to let and lease to you that field which J. M. held under me, and that the rent thereof is to be at 2*l*. 10*s*. per acre for your life and Mrs. C.'s, which will be stated in the lease, with the understanding that you are to be accountable for the payment of the tithe rent charge, poor rate charge, cess, etc." The law agent of A., upon the instructions of C., and without the authority of A., afterwards prepared a lease which was executed by C., whereby the lands were purported to be demised for the lives of C., his wife, and a third person, or twenty-one years, whichever should last the longest, at a rent which was the aggregate of the rent mentioned in the letter, and the tithe rent charge. This reserved rent was for some time received by A., who afterwards refused to execute that or any other lease. A. was decreed specifically to execute a lease to C. for his own life and that of his wife, at the rent mentioned in the unexecuted lease; and the costs of the suit were given against A. because of his misconduct. *Ib.*

8. Bill alleging fraud as to quantity and quality of goods sold not discovered till they were exported to America, and that they were in consequence sold at a loss, and that plaintiff, being threatened with action, paid the original price according to contract, under a protest that he would seek relief in equity, and praying an account and payment in respect of the loss and commission to America:—Demurrer allowed. *Kemp* v. *Pryor*, 7 Ves. 237.

9. Effect of acquiescence by a railway company as to the payment of interest on purchase money, pending the investigation of title. *Exp. Hardwicke* (*Earl*), 1 De G. M. & G. 297.

10. A. agreed to lend B. 600*l*. navy stock; he sold the stock for 522*l*., which was paid to B.: a bond was drawn to repay "the sum of 522*l*. (being the produce of 600*l*. navy 5 per cents., or such other sum as would replace the stock) with lawful interest." B., on discharging the bond, refused to replace stock; A. received the money and gave up the bond:—Held, that, after having received the money, he could not come into equity for relief. *Barnham* v. *Munn*, 1 Taml. 86.

11. Master of vessel in South Sea whale fishery agrees on behalf of owners that each of crew shall have a specific share of profits of voyage; before return of vessel owner sells a quarter of cargo. The custom of trade is for cooper to estimate quantity of oil; this was done, and plaintiff settled accordingly:—Held, that owners had no right to sell part of cargo; but the plaintiff having settled, could not then come for relief to equity. *Cockle* v. *Whiting*, 1 Taml. 55.

12. A. and B. entered into a contract, and, a dispute having arisen, B. commenced an action in respect of a portion of the contract. A. filed a bill for a specific performance, and moved

to restrain the action:—Held, that B. could not, after having commenced an action on the contract, set up in equity the defence of an alleged previous waiver of it. A valid contract cannot be waived unless both parties assent, at the same time, to the proposal to put an end to it. *Whittaker* v. *Fox*, 14 W. R. 192; 13 L. T., N. S., 588.

1. A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. *Darnley (Earl)* v. *London, Chatham, & Dover Railway Co.*, 2 L R. H L, 43; 36 L. J., Ch., 404; 15 W. R. 817; 16 L. T, N. S., 217.

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding. *Ib.*

A railway company agreed to make such accommodation works as A. should notify within one month after possession should have been given to the company. A. and the company's engineer met and discussed the necessary works, and a memorandum was made specifying certain works. Certain discussions as to these works were protracted beyond the month. Two months after the one month had expired A. made his award. The award provided for a cattle arch which had not been previously mentioned. The solicitors of the company, not being fully informed as to the exact date of the award, took it up, and paid the arbitrator's charges:—Held, that the condition as to time was not waived as to such works as had not been previously mentioned, for a waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement, in substitution of a written contract, to show that both parties understood the terms of the substituted agreement. *Ib.*

2. When the subject of a contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest:—Held, that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character. *Lamare* v. *Dixon*, 43 L. J., Ch., 203; 6 L. R., H. L., 414.

When a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the plaintiff had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the nonfulfilment of the alleged promises. *Ib.*

A. was the owner of some land, on which he was about to erect buildings. B. wished to have cellars there for wine vaults. A. promised that they should be made dry, but would not introduce that promise into the written agreement. B., however, confiding in the promise, signed the agreement, by which he undertook to accept from A. a lease of the vaults for a certain term, and at a certain rent. B. was to pay down 100*l.*, and was to pay another 100*l.* on the execution of the lease. B. paid the first 100*l.*, and for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest; and finally, after more than two years' actual occupation of the cellars, refused to sign the lease, on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of 100*l.*, but removed his stock of wines to another place. On a bill for specific performance, the Court granted a decree against B, but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by B. in the course of the long correspondence between the parties, but neglected by A., should not be done:—Held, that the decree in this form was erroneous. *Ib.*

Held, also, that the taking possession of the vaults, and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent B. from setting up as a defence the non-performance of the promise which had been the inducement to the contract. *Ib.*

Held, also, that as there had been delay on both sides, though the plaintiff's bill ought to be dismissed, it must be dismissed without costs. *Ib.*

3. A. having 500*l.* given him by his uncle in case he should survive the testator's wife, sells it for 100*l.*, to be paid by 5*l.* per annum; but that if the testator's wife should die before A., and the legacy become due, in such case the rest of the money to be paid within a year next. A. does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain; he shall be bound thereby. *Cole* v. *Gibbons*, 3 P. W. 290.

4. Discussion of the principles on which a contract made by one on behalf of the other, without express authority in writing, and of the principles on which a binding assent to a contract is to be presumed from silence, acquiescence, or circumstances of conduct. *Bigg* v. *Strong*, 3 Sm. & G. 592; 4 Jur., N. S., 983. Affirmed 4 Jur., N. S, 983.

There being two proprietors of an estate, where one of them, without any express authority from the other, agrees to sell the whole on behalf of both, and without express authority, signed a contract for sale on behalf of both, and the other never expressly assents or signs the contract; but, after knowledge of the contract, does not, within a reasonable time, disavow it or express absolute dissent, a presumption of his assent arises, which is strengthened in proportion to the length of time during which he lies by; and unless the presumption is rebutted by circumstances of evidence sufficiently strong, he will be held bound. In such a case, it is conclusive circumstance (unless explained by evidence) that

he, with knowledge of the contract, tacitly and knowingly enjoys a benefit from the contract to which, but for the contract, he would not be entitled. *Ib.*

1. A. was the administrator of an estate, to one-third of which each of his brothers, C. and D., was entitled. In 1883 A. wrote to B and C., offering, in order to prevent the necessity of accounts and the probability of dispute, to pay each 1,000*l.*, his share B. accepted the offer, and C. wrote to say that whatever B. determined "would meet with his approbation." A. and B. acted on the contract as complete, and C. never repudiated it, or asked for any accounts or explanations. Upon the death of B., seventeen years afterwards, C. insisted that there was no contract binding on him, and he claimed one-third of the estate —Held, that C. had acquiesced, and was bound by the contract. *Cood* v. *Cood*, 33 Beav. 314; 9 Jur., N. S., 1335; 33 L. J., Ch., 273.

See also ABANDONMENT, I.—LANDLORD AND TENANT, I. II.—SPECIFIC PERFORMANCE, XI.—VENDOR AND PURCHASER.

IX. BREACHES OF COVENANT.

2. Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused, the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court. *Roper* v. *Williams*, T. & R. 18.

A landlord who relaxes, in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Ib.*

3. The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant to be used as schools. *Kemp* v. *Sober*, 1 Sim., N. S., 517; 20 L. J., N. S., Ch., 602; 15 Jur. 458.

4. Remedy by injunction to restrain an action on breach of covenant to repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the defendant. *Hannam* v. *South London Waterworks Co.*, 2 Meriv. 65.

5. Covenant not to assign without licence once dispensed with, the condition is gone, both in law and equity; but the principle questionable, and not to be extended, for instance, to a mere act where the licence is to be in writing. *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191.

6. Proviso in a lease for re-entry upon assignment by the lessee, his executors, administrators, or assigns, without licence, ceases by assignment with licence, though to a particular individual. *Brummell* v. *Macpherson*, 14 Ves. 173.

7. A. granted a lease for twenty-one years to B., with a proviso determining the lease, and giving A. a right of re-entry, on non-performance of any of the covenants in the lease, and A. covenanted that at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years. B. paid all his rent, and continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A., in his answer, set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused. *Thompson* v. *Guyon*, 5 Sim. 65.

8. No relief against covenant to repair in a given time, though no request by landlord; and though tenant was suffered to continue in possession merely without rent, etc., and though specified time in lease was inserted by mistake, as alleged by plaintiff, the quantum of damage is no criterion. *Bracebridge* v. *Buckley*, 2 Price 200.

9. A letter written by the landlord's attorney after the eviction, offering to account with the tenant for rent received since the *habere*, a waiver of landlord's right to insist on the forfeiture. *Sheridan* v. *Casserly*, Beat. 249.

10. To permit a tenant to remain in possession and expend his money in building, with the knowledge of the landlord, after an eviction for non-payment of rent, is a waiver of the forfeiture under the ejectment statutes. Acceptance of rent with notice of forfeiture is a waiver thereof at law. *Hume* v. *Kent*, 1 Ball & B. 554, 561.

11. A term for years, conditioned to be void upon non-performance of certain acts, becomes void without entry, and there can be no waiver. *Freeman* v. *Boyle*, 2 Ridgw. P. C. 79.

But where the condition is annexed to a freehold (in which case an entry is necessary in order to take advantage of the breach), there may be a waiver after the breach and before entry; for until an entry be made the entry is not complete. S. C. Vern. & Scriv. 414.

12. A person in embarrassed circumstances entered into a composition with his creditors, agreeing to pay them 1,500*l.* by instalments of 500*l.* One of the terms of the deed carrying this composition into effect was, that the debtor should insure his life in 1,500*l.*, and, on failing to do so, that the deed should be void. The debtor, after paying 500*l.*, part of the 1,500*l.*, effected the insurance in 1,000*l.* only. One of the creditors who had signed the deed, taking advantage of this breach of covenant, brought an action against the debtor. The Court, on a bill filed by the debtor, looking at the facts of the case, and giving effect to a positive statement contained in the bill, supported against the answer by the evidence of a single witness:—Held, that the creditor had waived his right to take advantage of the alleged breach of covenant, and granted a perpetual injunction accordingly. *Watts* v. *Hyde*, 17 L. J., N. S., Ch., 409; 12 Jur. 661.

13. A building agreement between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement,

might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to and become the property of the landowner "as and for liquidated damages":—*Semble*, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture. The decision in *Doe* v. *Brindley* (12 Moo. P. C. 37) questioned. Under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure is made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement. *Exp. Newitt, Re Garrud*, 16 L. R., Ch. D., 522; 51 L. J., Ch., 381; 44 L. T. 5; 29 W. R. 344.

1. A. was the purchaser in fee of a house and premises, part of an estate formerly the property of the plaintiffs, of which all the purchasers of such parts as were sold (including A.) were under a covenant not to use the house and premises so purchased, or any part, as a public-house or a beer-shop. A. built a shop at the back of his premises, and on the 11th February, without the consent, but without interference on the part of the plaintiffs, opened it as a beer-shop. In June he leased the beer-shop to B., who carried on the same business with the consent of A., but equally without the consent of the plaintiffs, who, on the 8th July, served B. with notice to desist. It also appeared that a purchaser of another house on the same estate had, also without consent, but without interference on the part of the plaintiffs, opened a beer-shop at the back of his premises. A bill for an injunction was filed on the 1st August:—Held, that the conduct of the plaintiffs did not amount to such a degree of acquiescence and waiver as to preclude them from the right of enforcing the covenant. *Mitchell* v. *Steward*, 1 L. R., Eq, 541; 35 L. J., Ch., 393; 14 W. R. 453.

The Court will grant an injunction to restrain a breach of a covenant, although the covenantee has allowed the breach to go on for a few months, if such breach has been of a gradual and not conspicuous character. S. C. 14 L. T., N. S., 134

Where a lessee, who has entered into a restrictive covenant as to user of premises, under-lets to a person who, with his sanction, commits a breach of the covenant, he may properly be made a party to a suit for an injunction, and is liable for the costs. *Ib.*

2. Acquiescence in a trivial breach of covenant does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards* v. *Revitt*, 7 L. R., Ch. D., 224; 37 L. T., N. S., 632; 47 L. J., Ch., 472; 26 W. R. 166.

When the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant. *Ib.*

3. Acquiescence in the violation of a covenant to a certain extent:—Held, a sufficient objection to an interlocutory application for an injunction against a greater violation of it. *Child* v. *Douglas*, 5 De G. M. & G. 739; 1 Kay 575; 2 Jur, N. S., 350; 2 W. R. 461, 701.

Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful:—Held, that the burden of proof was on the plaintiff to show that the balance of convenience was in favour of granting the injunction. *Ib.*

4. Acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. *Western* v. *M'Dermot*, 35 L. J., Ch., 190; 12 Jur., N. S., 366. Affirmed 36 L. J., Ch., 76.

5. Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle within two years an estate on the heirs male of the marriage, bill for a specific performance, by decreeing a strict settlement, dismissed; and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the Court would not have interfered. *Howarth* v. *Deem*, 1 Eden 351.

See also VENDOR AND PURCHASER, XVIII. VI.

X. DEBTOR AND CREDITOR.

6. If, in a creditors' suit, plaintiff does not call for contribution, according to decree, before creditors are admitted to prove, he waives all claim to contribution. *Shortley* v. *Selby*, 5 Madd. 447.

7. No rule of convenience fixing any period within which a creditor of a banking-house, not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner. *Devaynes* v. *Noble*, 1 Meriv. 569.

8 Specialty security not waived by a promissory note taken for the balance of the account of interest. *Curtis* v. *Rush*, 2 Ves. & B. 416.

9. Acknowledgment by conusor of judgment in reply to inquiry by intended assignee, that the sum secured by the judgment is justly due to the conusee, shuts out the equitable defence which the conusor may have had against the conusee, subject, however, to inquiry as to the *bona fides* of the transaction. *Hickson* v. *Aylward*, 3 Moll. 1.

10. Where, from construction of will, executor, who was residuary legatee, had power to release debtor of testator, and he waived the debt by writing, but did not formally release, executor of executor might, it seems, withhold annuity given in consideration of whole debt being paid. *Hemming* v. *Gurrey*, 2 Sim. & S. 311.

11. A party against whom a commission of bankruptcy had been maliciously obtained, and to whom, after superseding the commission, the Lord Chancellor had assigned the

petitioning creditor's bond, having afterwards brought an action on the case against the petitioning creditor, and a rule of court having been made by consent, referring the matters in dispute, except the bond assigned, to the award of an arbitrator, and an award having been made with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of a right of action on the bond, and, to restrain that right, the agreement of the parties must be unequivocal. *Holmes* v. *Wainwright*, 1 Swan. 20.

1. Where bond creditors acquiesce in sale of lands, charged by will of debtor with their debts, and for sixteen years receive interest regularly, they shall not disturb purchaser. *Elliot* v. *Merriman*, 2 Atk. 41; Barnard 78.

2. The creditors of A., having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that A. was only the agent of B. & Co., proceeded nevertheless to sign A.'s certificate:—Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor* v. *Sheppard*, 1 Y. & Coll. 271.

3. A. and B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years, A. and B. (upon an agreement that A. should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B. till very lately, viz., when an official assignee was appointed, nor had B. ever acknowledged any liability to account:—Held, first, that, as between B. and the creditors, neither the Statute of Limitations, nor laches, nor other conduct of the assignee would operate as a bar, A. and B. being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. A. had become bankrupt. *Semble*, nevertheless, that he or his assignees were necessary parties. *Exp. Gould, Re Robertson*, 4 Dea. & Ch. 547; 2 Mont. & A. 48; 4 L. J., N. S., Bky., 7.

4. Creditors having, subsequently to the appointment, signed resolutions authorising the assignees to do certain acts as assignees, which they could not have performed without such authority, and to act generally as assignees, are debarred from questioning the validity of the appointment at a subsequent period, upon grounds of which they were aware at the time of signature. *Semble*, also, that the appointment is not complete till the declaration of appointment is signed by the commissioner. *Exp. Nash, Re Wyatt*, 1 Dea. & Ch. 445.

5. A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810, notwithstanding which the same partner continued to receive the dividends and pay them to the intestate's widow up to the period of his own death, which happened in 1822, some time after which the assignees of the bankers claimed a lien on the debenture for a debt due from the intestate to the banking-house:—Held, that after so long an abandonment of any claim of lien, the assignees could not now support such claim; and that the debenture also could not be considered as having been left in the order and disposition of the bankers, having been deposited as in the nature of a trust. *Exp. Douglas*, 3 Dea. & Ch. 310.

6. Bringing debt upon a judgment is no waiver of lien created by that judgment. *Erby* v. *Erby*, 1 Salk. 80.

7. Proof under a commission is equivalent to payment; therefore, when solicitors had obtained an order to have their bill taxed, and to prove for the amount, it was:—Held, that they had relinquished their lien upon the papers in their hands belonging to the bankrupt. *Exp. Hornby*, Buck 351.

8. The plaintiff having parted with title-deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor; the annuity fell into arrear, and the plaintiff paid it. On a bill for specific performance and adequate security:—Held, that the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed. *Brough* v. *Oddy*, Taml. 215.

9. In 1780 A. and B. were partners as army agents, having been in the habit of receiving money from the Government for the pay of certain regiments. In that year A. retires, and B. and C. carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of A. and B. at the time of A.'s retiring. In 1783 B. and C. are required by the Government to render the account of moneys issued for the several regiments during the period of the existence of the firm of A. and B., and of B. and C., which they do without any break appearing in them at 1780, when A. retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of B. and C., the old ledgers are used; there was no agreement to take to the liabilities of A. and B., and everything is carried on in the same manner as before, till 1783, when the 23 Geo. 3, c. 30, was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the secretary at war the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the secretary at war the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and

annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when B. and C. became bankrupts, and a balance of 150,000*l.* is found due the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of A. *Semble*, under these circumstances, that B. and C. could not be presumed to have adopted the debt of A. and B., and that the Government could not be presumed to have assented thereto, had such adoption existed; and, consequently, that the Government had no right to prove the entire sum of 150,000*l.* against B. and C.'s estate. (*Cross, J., dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate; and the Government having, on the other hand, sued the representatives of A. in Scotland (subsequently to the discovery of the balance being due), so as to charge A. alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending against the representatives of A., was ascertained. *Clayton's case* (1 Meriv. 572) discussed. *Exp. Sandham*, 4 Dea. & Ch. 818.

1. Where a director was, under the company's deed, entitled to a remuneration for his attendance:—Held, that non-claim for a number of years amounted to a waiver of his rights and of his lien on the funds of the company. *Re Arigna Iron Mining Co.*, 1 Eq. Rep. 269.

2. If, in an agreement, it is one of the stipulations that a mortgage is to be given on a certain day, and it is not given till two days afterwards, and is then accepted by the creditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract. *Thompson* v. *Hudson*, 4 L. R., H. L., 1; 38 L. J., Ch., 431.

3. Creditor, by petitioning to stay certificate, makes his election to come in under the commission for every provable debt which may be owing to him from the bankrupt; and therefore the bankrupt must be discharged from any action pending against him by creditor in respect of any such debt before the petition can be proceeded in. *Exp. Bostock, Re Wright*, 1 Dea. & Ch. 383.

4. At the time of executing a bond to secure a sum of money, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest be regularly paid; the letter is a binding undertaking. Payments of interest made one or even two days after they become due are no defeasance of the undertaking, if the grantor accepts them without objection. *Norton* v. *Wood*, 1 Russ. & M. 178.

5. A. and B., a solicitor, were executors. B. deposited some of his deeds in the trust box, to secure some money due to the testator's estate. The box remained in B.'s possession, and on his death the deeds were found to have been abstracted from it, and they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—Held, assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still that he had waived it by taking the particular security from the legal personal representative. *Mason* v. *Morley*, 34 Beav. 471; 11 Jur, N. S., 459; 34 L. J., Ch., 422; 13 W. R. 669; 12 L. T., N. S., 414.

6. The mere fact that a judgment creditor, who is entered in the debtor's statement of affairs as having no security for his debt, is present in silence at the first meeting of the creditors, not proving his debt or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition. *Exp. McLaren, Re McColla*, 16 L. R., Ch. D., 534; 50 L. J., Ch., 203; 44 L. T. 36; 29 W. R. 389.

7. Held, that the provision in a composition agreement for the revivor of the original debt upon default being made in the performance of any of the conditions was not a penalty, but that on the dishonour of the third bill the creditor was remitted to his original right, and that he had not waived that right by suing the acceptor. *Exp. Burden, Re Neil*, 16 L. R., Ch. D., 675; 44 L. T. 525; 29 W. R. 879.

8. Demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, allowed on the grounds that the statement in the bill did not furnish such a case of matter of account between the parties as to entitle the plaintiff to interference of the Court on the principles of equity, in that it was nothing more than matter of a set-off, or other defence at law; and if it had been a stronger case, the plaintiff, after having suffered the action at law to be tried and determined at Nisi Prius, had come too late to ask the interference of the Court. *Cooper* v. *Hatton*, 12 Price 502.

9. The Court refused to open an account acquiesced in during twenty-two years, though it was of a general and summary nature, not containing the items, and though the widow and personal representative of the party giving such account had, upon being first applied to, rendered accounts of matters included in such account; but the Court decreed an account, limited to the subsequent receipts, which it was admitted had taken place. *Scott* v. *Milne*, 5 Beav. 215. Affirmed 12 L. J., N. S., Ch., 233; 7 Jur. 709.

10. Under a decree made in 1817, in a suit by the grantee of an annuity, charged upon lands against judgment creditors of the grantor, who were in possession by elegit, an account was taken of what was due to the grantee, and a receiver was appointed over the lands. The grantor was not a party to the suit, and died in 1842 without impeaching the account of 1817. The grantee having also died, his executor in 1848 (up to which time the receiver had continued in possession) filed a bill against the co-heiresses of the grantor for an account of what was due for arrears. The defendants insisted that the account taken in the former suit was not binding on them, as being taken in the absence of the grantor:—Held, that by reason of the acquiescence of the grantor for twenty-five years, and of the defendants for

six years, afterwards they were not entitled to an account *de novo* of what was due in 1817, but that they might surcharge and falsify. *L'Estrange* v. *White*, 1 Ch. Rep. 15.

Mortgagor and Mortgagee] 1. A mortgagee takes a bond from the assignee of the devisee, for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage. *Hardwick* v. *Mynd*, 1 Anstr. 111.

2. A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis* v. *Battine*, 2 Russ. & M. 76.

3. Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Exp. Smith*, 2 Dea. & Ch. 60.

4. The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sales; but that he was entitled to be indemnified from the ground-rent and all expenses incurred since the first sale. *Exp. Baldock*, 2 Dea. & Ch 60.

5. Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, a waiver of the default; and an injunction was granted in equity to restrain an ejectment brought within the two years. *Langridge* v. *Payne*, 2 John. & H. 423; 10 W. R. 726; 7 L. T., N. S., 23.

6. A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded, but was not paid; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee:—Held, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal. *Keen* v. *Bisco*, 8 L R., Ch. D., 201; 47 L. J., Ch., 644; 38 L. T. 286; 26 W. R. 552.

XI. TESTAMENTARY PROVISIONS.

7. Where bond creditors acquiesce in sale of lands charged by will of debtor with their debts, and for sixteen years receive interest regularly, they shall not disturb purchaser. *Elliot* v. *Merriman*, 2 Atk. 41; Barnard 78.

8. Where the heir-at-law had for many years acquiesced and acted as a devisee in trust:—Held, to have lost his right to an issue *devisavit vel non*, and even an issue to try the question of parcel or not; and having misconducted the defence, ordered to pay all costs of the suit. *Man* v. *Ricketts*, 7 Beav. 93; 13 L. J., N. S., Ch., 194; 8 Jur. 159.

9. Whether a devisee in remainder of leaseholds, who is himself the executor of the testator, could, after having acquiesced for nearly thirty years in the tenant for life's receiving the rents, insist that, according to the terms of the will, the property ought to have been converted immediately after the testator's death, *quære*. *Pickering* v. *Pickering*, 4 Myl & C 289; 8 L. J., N. S., Ch., 336; 3 Jur. 331. Affirming 2 Beav. 31; 3 Jur. 743.

10. Plaintiff, devisee of A, taking it for granted that certain copyhold premises, contracted for by A., but not surrendered until after making his will, did not pass thereby, allowed defendant to enter and hold the same for twenty years, plaintiff paying her rent as tenant for that time. If plaintiff had come in in time, he would have been relieved, notwithstanding his acquiescence in defendant's title. *Davie* v. *Beardsham*, 1 Ch. Ca. 39.

11. Acquiescence material to determine property; as where a freeman's widow acquiesces under husband's will she is bound thereby. *Pawlet* v. *Delavel*, 2 Ves. 668.

12. Bill against the devisee and personal representative, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the plaintiff, who eighteen years ago had compromised a suit instituted by him upon the subject, in consequence of which the right to compel an election depending on a doubtful question on the will was not ascertained, and the party having possessed under the will during her life, had disposed of her estate, real and personal, by will. *Yate* v. *Moseley*, 5 Ves. 180.

13. The plaintiff, deliberately and with full notice, accepted the benefits under his mother's will, which prohibited him from setting up any claim on account of any error, irregularity, or impropriety in the execution of the trusts of her father's will:—Held, that he could not maintain a suit against the executor of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business. *Egg* v. *Devey*, 10 B. 444; 16 L. J., N. S., Ch., 409; 11 Jur. 1023.

14. Where testator directs government annuities of a certain amount to be purchased for his wife, within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representatives will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 1 Russ. & M. 606; Taml. 465; 8 L. J., Ch., 153; and 9 *id.* 249.

15. Legacy at twenty-one, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit, nor by a legacy, larger, but of a different nature, received under the will of the executor, there being no positive relinquishment, though no demand for ten years. *Lee* v. *Brown*, 4 Ves. 362.

16. A testator having directed his trustees

and executors, after sale of his estates, to stand possessed of the money arising from the sales upon trust, in the first place to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W. C.; and upon further trust, out of the residue of the money, to invest 400*l* in trust for J. R. for life, and after his death for his children; and upon further trust to pay other sums to persons named; and having bequeathed the residue of his estate to W. C., and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt; it was:—Held, that by that dealing the two legatees had waived whatever priority the will might have given to them, and the dividends payable on the whole sum proved under the commission against the executor in respect of the testator's estate were divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each. *Exp. Chadwin*, 3 Swan. 380.

1. A testator bequeathed to A., a married daughter, the income arising from a legacy for her separate use for life. In 1839 a change of investment of a portion of the testator's property, comprising the legacy to A., took place, and a loss arose from such investment. In 1841 the solicitor of the executors informed A., by letter, that there might be a question between her and the residuary legatees as to her right to be paid the whole of her interest on her legacy, to the prejudice of and as against those residuary legatees, but advised her to submit to the loss, and proposed that it should be borne ratably between A. and the residuary legatees. A. continued to receive income on her legacy on that footing down to 1855. In 1856 the Court held that A.'s legacy must be paid in full. In 1857 A. presented a petition for the purpose of having the deficiency in the income which she had received since 1839 made good to her by the residuary legatees:—Held, that A. had precluded herself by acquiescence from all right to be paid such difference by the residuary legatees. *Stafford* v. *Stafford*, 1 De G. & J. 193; 4 Jur., N. S., 149.

XII. TORTIOUS ACTS.

2. Injunction refused to restrain alleged infringement of copyright, before trial at law, where the conduct of the plaintiffs had been such as, in the opinion of the Court, was calculated to induce the defendants to believe that the course taken by them would not be objected to by the plaintiffs. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., N. S., Ch., 227; 2 Jur. 491, 536.

3. As to fraudulent abstraction by one partner being converted into contract by subsequent acquiescence so as to debar right of proof against such partner's joint estate. See *Exp. Turner*, 4 Dea. & Ch. 169; 1 Mont. & A. 54, 337, and cases therein cited.

4. To have a work, erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complaint to law. *Jones* v. *Royal Canal Co.*, 2 Moll. 319.

5. Acquiescence by one of several co-plaintiffs in the act complained of precludes the interference of the Court upon an interlocutory application, as much as upon decree; and the rule is the same although some of the co-plaintiffs are infants. *Marker* v. *Marker*, 9 Hare 15; 15 Jur. 663.

6. Where party allows and acquiesces in erecting a nuisance, he shall be stayed in action at law. *Anon.*, 2 Eq. Abr. 522.

7. An encroachment of a water-course was made in the infancy of the ancestor, who acquiesced for twenty-one years after he became of age. The Court would not afterwards notice his complaint. *Guernsey* (*Lord*) v. *Rodbridges*, Gilb. Eq. Rep. 3.

8. The defendants, the owners of a cotton mill on the banks of a canal belonging to the plaintiffs, were authorised by the Act of Parliament under which the canal was made, and the plaintiffs incorporated, to draw water from the canal for condensing steam, but not for any other purpose. Nevertheless, they used the water for other purposes, in consequence of which the plaintiff brought an action and obtained a verdict against them, but only for nominal damages. The defendants moved to arrest the judgment in the action, but without success, and afterwards the judgment was affirmed on a writ of error in the Exchequer Chamber. The defendants, however, continued to use the water as before, whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of the plaintiffs:—Held, that the plaintiffs had sufficiently established their title at law, and that but for their acquiescence they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action. *Rochdale Canal Co.* v. *King*, 2 Sim., N. S., 78; 20 L. J., N. S., Ch., 675; 15 Jur. 962.

9. Turning cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, is not an assertion of right so acquiesced in as to raise a presumption of title. *Att.-Gen.* v. *Chambers*, *Att.-Gen.* v. *Lewis*, *Att.-Gen.* v. *Rees*, 5 Jur., N. S., 745; 4 De G. & J. 55.

10. Held, that a claim for compensation was no acquiescence, because he was then ignorant that they were doing an illegal act, and took proceedings as soon as he was aware of it. *Pentney* v. *Lynn Paving Commissioners*, 13 W. R. 983; 12 L. T., N. S., 818.

11. *Semble*, that mere submission to a wrongful act which has been completed without the knowledge or assent of the person whose right is infringed cannot, without some conduct amounting to accord and satisfaction, or a release under seal being shown, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances. *De Bussche* v. *Alt*, 8 L. R., Ch. D., 286; 47 L. J., Ch., 386; 38 L. T. 370.

See also INJUNCTION, and CROSS REFERENCES there.

XIII. VOIDABLE DEEDS, CONVEYANCES AND TRANSFERS.

1. A grantor discovering that his annuity was bad, and complaining of distress or circumvention after he had joined the grantee in an assignment of it, which he ratified and undertook to pay, has but a slender equity, and the assignee ought not to be assisted; but Arden, M.R., would not refuse relief on that ground, lest every annuity should be assigned in order to avoid objections. This decree, however, was varied by Eldon, C., and account directed of the consideration paid by the original grantee of the annuity, with interest at 5 per cent., and of the payments of the annuity to the grantee, or any person claiming under him by assignment or otherwise, which was ordered to be applied in discharge of the principal and interest, and if the consideration with interest shall appear fully repaid, or if not, upon payment by the plaintiff of what shall be remaining due from him, the securities to be delivered up, etc., without costs; Lord E.'s opinion being in favour of the jurisdiction: that the principle of relief is not redemption, but the invalidity of the grant, and that the assignee, unless under special circumstances, is in the situation of the grantee. *Bromley* v. *Holland*, 5 Ves. 619. Varied 7 Ves. 3; Coop. 9.

2. Where a building lease was granted during the minority of infants, with a covenant that they, when of age, should confirm it, and the infants accepted rent for ten continued years after coming of age:—Decreed, that the lease should be established. *Smith* v. *Low*, 1 Atk. 489.

If a person of age grant a lease, having no title in premises, and the lands afterwards descend to him, the lease shall enure by way of estoppel; otherwise if he had been an infant. *Ib.*

3. A. having 500*l.* given him by his uncle in case he should survive the testator's wife, sells it for 100*l.*, to be paid by 5*l.* per annum; but that if the testator's wife should die before A., and the legacy become due, in such case the rest of the money to be paid within a year next. A. does survive the testator's wife, and knows the legacy was become due to him, and being fully apprised of the whole fact, confirms the bargain; he shall be bound thereby. *Cole* v. *Gibbons*, 3 P. W. 290.

4. A., tenant for life, remainder to first, etc., son in tail, remainder to his nephew B. B. enters into several statutes to C. for payment of ten for one upon the death of A. in case he died without issue male in the life of B. C. in the life of A. brings a bill to compel B. either to pay principal and interest, or to be foreclosed of any relief against the bargain. B., by answer, declares the bargain fairly made, and intends to abide by it, and that he would seek no relief against it. A. dies. B. brings a bill against the executor of C., and notwithstanding B.'s former answer, he is relieved against the bargain on payment of principal and interest without costs. *Wiseman* v. *Beake*, 2 Vern. 121.

5. Voluntary agreement endorsed on lease by one not a party to it, not binding. *Dowling* v. *Mill*, 1 Madd. 541.

6. The several owners of lands in the parish of C. enter into an agreement that a particular common should be enjoyed as a cow pasture for ninety-nine years; and this agreement is signed by the bailiff of one of the owners "so far as he had power." Though no particular authority could be shown, yet, after an acquiescence of above thirty years on the part of this owner, an authority shall be presumed, and he shall be bound by the act of his servant. *Tufton* v. *Wentworth*, 1 Bro. P. C. 165.

7. Lord D., tenant for life, purporting to exercise a leasing power, made a lease, in 1767, covenanting for quiet enjoyment against the acts of all claiming through him. In 1791 and 1792 Lord D. and his son, tenant in tail in remainder, joined in suffering recoveries, and resettled the estates subject to then existing leases, Lord D.'s son having secured to him an annuity of 2,000*l.* and 30,000*l.* for his debts. Lord D. died in 1799, and the estates were subsequently again resettled by his son and the then remainderman. In 1848 the lease was impeached as an excess of the power, and the owners of the estate being obliged under the circumstances to raise the objections to the lease in equity, *semble*, the mere lapse of time, and acquiescence from 1767 to 1848, would bar them from relief. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

8. A person entitled to real estate by voluntary conveyance settled it in strict settlement. After the decease of the settlor, his heir-at-law, who was also tenant for life under the settlement, upon his marriage, by indenture reciting the voluntary settlement, conveyed all his interest in the lands upon trust to secure a provision for his wife. *Quære*, can he afterwards insist that the voluntary settlement was void because the settlor was in a state of mental imbecility when he executed it. *Roddy* v. *Williams*, 3 J. & L. 1.

9. If a vendor who has a right, upon equitable grounds, to impeach the sale, not only neglects to do so, but, by the subsequent execution of other deeds, adopts the sale, and acts upon it as binding, he cannot afterwards impeach the title of equitable mortgagees, who, subsequently to this act, advanced their money *bonâ fide*, and without notice to the purchaser. *Nagle* v. *Baylor*, 3 Dr. & War. 60.

10. On the marriage of a female infant, her reversionary interest in choses in action were settled under the Court for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed:—Held, that the third husband, who had notice of the settlement previous to his marriage, and had for some years after acquiesced in it, was bound thereby, and had no interest in the settled property. *Ashton* v. *M'Dougall*, 5 Beav 56; 11 L. J., N. S., Ch., 344; 6 Jur. 447.

11. A feme covert was entitled to a reversionary interest in a sum of money vested in her husband and another as trustees. By deed expressed to be made between the tenant for life, of the one part, and the trustees (including the husband), of the other part, the tenant for life, who alone executed the deed, declared that the trustees should hold the fund on certain modified trusts whereby the wife's reversionary interest was made subject to her power of appointment by deed or will. The wife died, leaving her husband surviving, having appointed the reversionary interest away from

her husband. The husband afterwards died, and the reversionary interest subsequently came into possession. The Court considered that, under the circumstances, the husband ought to be deemed to have acquiesced in the arrangement and accepted the trusts for the benefit of the wife's appointees; and held, that the appointees of the wife were entitled as against the representatives of the husband. *Inman* v. *Whitley*, 7 Beav. 337.

1. In a suit to impeach a deed of gift to an agent and trustee, it was held that, though it was voidable in its origin, and could not be sustained if it stood alone and had been impeached in reasonable time, yet that the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid and binding on him. *De Montmorency* v. *Devereux*, 7 Cl & F. 188; West 64; 2 Dr. & Wal. 410. Affirming, with a slight variation, 1 Dr. & Wal. 119.

2. Acknowledgment by conusor of judgment in reply to inquiry by intended assignee, that the sum secured by the judgment is justly due to the conusee, shuts out the equitable defence which the conusor may have had against the conusee, subject, however, to inquiry as to the *bona fides* of the transaction. *Hickson* v. *Aylward*, 3 Moll. 1.

3. Where a release has been executed, and the parties have for a long space of time acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question whether the release was fairly obtained. *Millar* v. *Craig*, 6 Beav. 433.

4. A deed, apportioning rent between A. and B., executed without any consideration or intention of bounty, by his agent, without authority, and in ignorance that the rent had been conclusively apportioned by a former deed, not enforced against A. But A., when afterwards apprised of his rights, obtaining from B. a settlement according to the former apportionment and for several years after, during the life of B., paying the whole rent, without demanding contribution, not entitled, after the death of B., to an account against his assets; as from A., being in active litigation with B., during his whole life, it was not to be presumed that the forbearance arose from kindness; but that A. knew if he stirred his demand, during B.'s life, he might have started some countervailing demand, which B.'s representative had no means of setting up. A. entitled to contribution according to the former apportionment against C., the remainderman from the death of B., when he went into possession. Also from a purchaser of parts of the lands from the time of the purchase. *Stratford* v. *Aldborough* (*Lord*), 1 Beat. 228.

5. B. purchases of lord copyhold for lives, who makes lease of freehold of soil to A., reserving rent, and after levies a fine of manor to B., who accepts rent from A. *Quære*, is B.'s copyhold gone. *Compton* v. *Brent*, 1 Dyer 30. pl. 207.

6. F. C., tenant for life, with a power of leasing for thirty-one years, demises, in 1749, for three lives to his attorney; M. C., his son, tenant in tail, four years afterwards, in consideration of 20*l*., executes an agreement, which was endorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives. Eleven years after this M. C. dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney files a bill for the specific performance of the son's agreement:—Held, that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeney* v. *Baggott*, 1 Dow N. S. 405; 3 Bli. N. S. 237.

7. The commissioners of a canal make an agreement for letting the tolls, not warranted by the Act under which they derive their authority, and prejudicial to an interest expressly reserved by the Act to the public; this agreement is acquiesced in for forty-seven years, without complaint on the part of any of the shareholders, and during that period the lessee remains in undisturbed possession of the tolls; the Court will not at the suit of the shareholders disturb his possession by the appointment of a receiver. *Gray* v. *Chaplin*, 2 Russ. 126.

8. Length of time, or long acquiescence in a transaction, may bar relief, in cases where the transaction, if impeached within a reasonable time, would be set aside. *Hicks* v. *Cooke*, 4 Dow 16.

9. A son, tenant in tail in remainder when just of age in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3,000*l*. for the father, and resettling the estate, the son taking back only an estate for life, with remainder to his first and other sons, etc. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793, though under the circumstances there was no probability of issue. Upon this ground a bill by trustees under a general trust for his creditors, claiming as purchasers under the statute 27 Eliz, c. 4, was dismissed, without deciding whether they could sustain that character, or how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth. *Brown* v. *Carter*, 5 Ves. 862.

10. A. by deed, for a nominal consideration, assigned a policy of assurance upon his own life to trustees for his children, of whom B. was one, and the entire interest in the policy became vested in B. and C. No notice of the deed was ever given to the assurance company. C. married D., and by deed, reciting that she was entitled to one moiety of the policy, the moiety was then put in settlement. A. afterwards, by deed, made without consideration, professed to assign the residue of the policy to D., and stated that he had led B. to believe that he would be entitled to 100*l*. out of the proceeds, and that B. ought to be made one of the granting parties. B. declined to execute the deed, but did not allege during the life of A. that he had any claim on the produce of the policy, and the assignment to D. was executed by A. D. gave to the company notice of the assignment, and paid premiums during A.'s life, and he was not proved to have had any knowledge of B.'s rights:—Held, that B. was precluded by his own conduct from enforcing

his claim upon the produce of the policy. *Justice* v. *Wynne*, 10 Ir. Ch. R. 489.

1. A father appointed his sons J. and S. his executors, and bequeathed his property to them on trust for all his children as joint tenants, and not as tenants in common. Ten years after his death questions arose as to the children entitled, on account of the illegitimacy of the eldest three children, of whom J. was one. To avoid litigation a deed was executed by all the adult children, by which it was agreed that all the children should share equally and should take as tenants in common. A bill was filed in 1872 by two of the children who had been infants at the date of the deed, but who came of age respectively in 1857 and 1861, to have the rights of all parties under the will declared:—Held, that the rights were as declared by the deed; that the arrangement come to between the members of the family to avoid litigation was a sufficient consideration to support it as between the parties to it, and that the children were bound by acquiescence. *Smith* v. *Mogford*, 21 W. R. 472.

2. Very clear and strong evidence is necessary to impeach a lease at a distance of time, on the ground of fraud originally practised in obtaining it. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 397.

3. A tenant at a bulk rent of lands, over a part of which a receiver was appointed, having for years made payments generally on account of rent to receiver, and allowed him to allocate them partly to the credit of the cause, and partly to the person to whom the rent of that part of the land not in the cause belonged, and having for a long time acquiesced in that allocation:—Held, that he is bound by such acquiescence. *Colthurst* v. *Colthurst*, 7 Ir. Eq. R. 305.

4. Where tenant for life and remainderman joined in a lease for twenty-one years to the steward of the former, in which certain rights of disputed title were omitted, but in respect of which, six years after, valuable allotments were made, and the reversioner afterwards accepted the rent for five years:—Held, that the lease could not after so long acquiescence and many acts be impeached for fraud; although, considering the relation of the parties, the transaction might have been questioned recently after *Selsey* v. *Rhodes*, 1 Bli. N. S. 1.

There is no policy which prevents a steward from being a lessee of his employer, nor from receiving a beneficial lease; but where transactions are upon contract, steward must prove he gives full consideration, and where transaction was mixed with motives of bounty, he must show that employer was aware of every circumstance relating to transaction. S. C. 2 Sim. & S. 49.

See also FRAUD.

XIV. OTHER CASES

5. In a cause which has been much delayed, the Court will not, at the expense of further delay, relieve the plaintiff from the consequences of the gross neglect of his solicitor. *Turner* v. *Turner*, 1 Swan. 156.

6. Delay, however great, in the progress of a suit cannot deprive the plaintiff of rights which existed at the time of its commencement. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

7. When a suit has once been instituted for the purpose of raising a sum of money bearing interest, the Court has no jurisdiction to withhold from the plaintiff the interest which accrued after filing the bill, on the ground of laches in the prosecution of the suit, however gross. *Reilly* v. *Fitzgerald*, 6 Ir. Eq. R. 335; 1 Dr. 122.

8. A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination; and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Exp. Gingell*, 2 Dea. & Ch. 546; 2 L. J., N. S., Bky., 22.

9. After bankrupt has surrendered and acquiesced a year and a half since the taking out the commission, an issue at law will not be directed to try the bankruptcy. *Exp. Mitt*, 1 Atk. 102.

10. W., as administrator with the will annexed of his mother, was entitled to a mortgage of a colliery, W., C. W., and N. being entitled in equal shares to the mortgage money. W. was also receiver of the colliery and other estates held under the same title, in a suit in which the title of the mortgagor was disputed, and to which W. was a party as representative of his mother. This suit was compromised in 1847, upon the terms, that out of the profits of the colliery certain yearly sums should be paid to Y, who claimed by a title paramount to the mortgage, and that, subject to those payments, 20,000*l.* should be raised out of the colliery and paid to W. in satisfaction of the mortgage, and provisions were made for letting the colliery. In February 1853 W. entered into an agreement with Y., for the purchase from him of the colliery and some other property. Up to this time the colliery had been a losing concern. In May 1853 N. filed a bill to have the agreement of 1847 carried into effect, and in June 1853 C. W. filed a bill to have it declared that W. had made the purchase of February 1853 as a trustee interested for the person in the 20,000*l.* In July 1853 W. answered C. W.'s bill, setting out the principal particulars of the agreement of February 1853. In January 1854 N. filed a supplemental bill against W., C. W., and Y., treating the purchase as a purchase made by W. for his own benefit, and seeking to establish that it had the effect of postponing the yearly payments to Y. in the 20,000*l.* In February 1855 C. W. allowed his bill to be dismissed for want of prosecution. In April 1855 a decree was made in N.'s suit, establishing the priority of the annual payments over the 20,000*l.*, and giving directions for raising the 20,000*l.* In June 1855 W. bought up N.'s rights under this decree. C. W., in 1857, filed a second bill, to have it established that the purchase of 1853 was made by W. as a trustee for the persons interested in the 20,000*l.*:—

Held, that C. W. had, by his conduct, disentitled himself to the relief sought by his bill. *Whalley* v. *Whalley*, 2 De G. F. & J 310.

1. Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference. *Owen* v. *Homan*, 4 H. L. Ca. 997; 17 Jur. 861.

2. The waiver in the first instance of giving in an allegation on the common *condidit.*—Held, not to operate as a renunciation altogether of the right. *Hitchings* v. *Wood*, 2 Moore, 355.

3. After a judgment in ejectment for nonpayment of rent, everything, after an acquiescence for seventeen years, will be presumed to have been regularly done. *Blennerhassett* v. *Day*, 2 Ball. & B. 124.

4. Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts; and is bound by them upon the death of the trustee without an heir. A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:—Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be readmitted as tenant in fee, according to the custom of the manor. That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt. *Weaver* v. *Maule*, 2 Russ. & M. 97.

WALES.

—*New South.* See COLONIES AND COLONIAL LAW, X. XXVI.

See also INJUNCTION, II. 1 5.

5. Jurisdiction of Wales allowed, suit under 10*l.* *Eastcourt* v. *Tanner*, Cary, 74; but not for cause concerning title to lands. *Morgan* v. *Bithell*, Cary 84. *Keyes* v. *Hill*, *id.* 89.

6. Jurisdiction of Wales over misdemeanors committed in Chancery, overruled. *Griffith* v. *Penrine*, Cary 90.

7. Jurisdiction over matters of lease for years admitted. *Moore* v. *Mashall*, Cary, 92.

8. Promise made within Wales, not sufficient to give jurisdiction. *Hatton* v. *Prince*, Cary, 99.

9. Wales is a district of England within the Endowed Schools Act 1869, and if a college holds a fund in trust for exhibitioners to be selected from a particular district in England, and these exhibitions are tenable at the university, such college must give the endowed schools commissioners any information they may require as to the fund. *Re Meyricke Fund*, 41 L. J., Ch., 187; 13 L. R., Eq., 269; 20 W. R. 258; 25 L. T., N. S., 787. Affirmed 41 L. J., Ch., 553; 7 L. R., Ch., 500; 20 W. R. 715; 26 L. T., N. S., 596.

10. An original independent decree may be had in this court, where all the facts are stated by the bill, notwithstanding a former decree for the same matter in Wales. *Morgan* v. ——, 1 Atk. 408.

11. Where a matter which arises within the jurisdiction of the courts of Wales is of value or difficulty, parties may take their remedy here; but if of small consequence, it is an inducement with this Court to dismiss the bill with costs. *Brace* v. *Taylor*, 2 Atk. 253.

12. The Court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the Court of Great Sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Exp. Partridge*, 2 Meriv. 500; 3 Swan. 398.

WAR.

— *Prize of.* See PRIZE AND PRIZE MONEY.
— *Contraband of.* See CONTRABAND.

See also COLONIES AND COLONIAL LAW—WAR INDEMNITY.

13. If a foreign power takes prisoner an enemy, and thereby obtains possession of documents establishing his right to a debt due from another to him in his private capacity, the prisoner is entitled to relief; and the circumstance that the foreign power is also the debtor, will not alter the right; but if such documents are the property of the prisoner in his sovereign character, and are taken possession of by the conqueror in the exercise of his sovereign and political rights, the Court cannot interfere. *Wadeer* v. *East India Co.*, 7 Jur., N. S., 350; 30 L. J., Ch., 226; 9 W. R. 247. S. C. *nom. Coorg* (*Rajah of*) v. *East India Co.*, 29 Beav. 300.

14. The rights which the laws of war give to a belligerent for his protection do not involve as a consequence that the act of the neutral in transporting munitions of war to the other belligerent is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint against either the neural trader, or the government of which he is a subject. *Exp. Chavasse, Re Grazebrook* 11 Jur., N. S., 406; 34 L. J., Bky., 17; 13 W. R. 627; 12 L. T., N. S., 249.

All that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power of whose enemy the contraband is destined. *Ib.*

15. A Prussian ship, carrying a cargo of nitrate of soda (contraband of war), arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, and whilst lying there waiting for the tide, her master heard that war had broken out between France and Prussia, and he thereupon put back to the Downs, where he arrived on July 17th, to make inquiries, but hearing nothing more, and being

stopped by his owner, he put into Dover on the 18th, and there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not actually declared till July 19th, but was imminent on July 16th:—Held, that the ship on July 16th was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country and capture by French cruisers; that even if war did not actually exist till July 19th the master was justified in pausing for a reasonable time to make inquiries, and that under the circumstances he did not exceed that time by staying in Dover till after the declaration of war. *The Teutonia*, 3 L. R., Adm., 394; 41 L. J., Adm., 57; 24 L. T. 521; 20 W. R. 261. Affirmed, 4 L. R., P. C., 171; 41 L. J., Adm., 57; 26 L. T. 48; 20 W. R. 421; 8 Moo. P. C., N. S., 411.

Whilst the ship was lying at Dover, the consignees demanded the delivery of cargo without any payment of freight. The master refused to deliver without payment:—Held, that he was entitled to freight. *Ib.*

WAR INDEMNITY.

1. The foreign wife of a British subject is not entitled to compensation for the loss of her separate property under a treaty providing such a compensation for British subjects, unless she has herself acquired a domicile in Great Britain at the time of her loss. A foreigner domiciled in Great Britain is, under such a treaty, entitled to claim compensation for his losses. *Conway's (Countess) case*, 2 Knapp 364.

2. The son of a British father who had entered into the service of France, and taken the oath of a Knight of the Order of St. Louis, is entitled to the character of a British subject, although he himself was born in France of a French mother, and had served in the French army. *Wall's (Count) case*, 3 Knapp 13.

The *matrices de roles*, or assessments to the land tax of the year 1791, the primary evidence required by the Convention No. 7, for the purpose of ascertaining the value of confiscated estates, not being forthcoming, it was held by the Judicial Committee, that the commissioners for liquidating the claims of British subjects in France were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase money; the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack rent; the rent, allowing a certain number of years' purchase, or the sum for which the property had been sold at the time of the confiscation. *Ib.*

3. A person who possesses the characters both of a French subject under the municipal law of France, and of a British subject under the stat. 13 Geo. 3, c. 26, as the grandson of a natural-born British subject, although he himself and his father were born in a foreign country, is not entitled to claim compensation for a loss he has sustained from a confiscation of his property by the French government, under a treaty between Great Britain and France, giving compensation for such a loss to British subjects. *Drummond's case*, 2 Knapp 295.

4. A corporation of Irishmen, existing in a foreign country, and under the control of a foreign government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property under a treaty, giving the right of doing so to British subjects. *Semble*, it makes no difference whether the purposes for which such a corporation existed were or were not contrary to the law of Ireland. *Long* v. *Commissioners for Claims on France*, 2 Knapp 51.

5. A corporation of British subjects in a foreign country, existing for objects in opposition to British law, and under the control of a foreign government, is not entitled to claim any compensation from the government of the country in which they existed, for the confiscation of their property, under a treaty giving that right to British subjects. The individual members of such a corporation are also equally incapacitated from making any claim, as British subjects, for the loss of their income, arising from the funds of such a corporation. *Daniel* v. *Commissioners for Claims on France*, 2 Knapp 23.

6. The French government having, in consequence of a decree confiscating the property of British subjects, seized the books and papers of a British mercantile house, amongst which were the obligations for certain rents, the property of the house, but purchased in and standing in the name of a French subject, who was afterwards executed for high treason to France:—Held, that the partners of the house were entitled to compensation. *Genesse's case*, 2 Knapp 345.

7. In order to establish a claim for compensation for a loss, in consequence of a decree confiscating all debts belonging to British subjects, it must be shown that the confiscating government exercised some control over the debt in question. *Bourdieu's case*, 2 Knapp 353.

8. The mere circumstance of a French debtor having, in consequence of a decree confiscating all debts to British subjects, made a declaration to the French government of his debt to a British creditor, is not sufficient to entitle that creditor to compensation for the loss of it, unless there is evidence of the French government having done some act respecting it. *De Tastet's case*, 2 Knapp 358.

9. A loss arising from a forced loan to a government, which is afterwards nominally repaid by it in a depreciated currency, is such a loss as entitles the lender to compensation from that government, under a treaty providing it for losses by illegal confiscation or sequestration. *Johnston's case*, 2 Knapp 356.

10. A loss arising from the depreciation of the currency, during the imprisonment of a British subject, does not entitle him to compensation under a treaty, providing it to British subjects for the value of their property, moveable or immoveable, illegally confiscated by the French government; as also for the total or partial loss of their debts, or other property, illegally detained under sequestration since the year 1793. *Salvin's case*, 2 Knapp 350.

1. A state having issued a decree confiscating all the debts due to the subjects of its enemy's country, held that the confiscation was complete of a debt which a subject of the confiscating state acknowledged, before the proper authorities, to be due from him to a subject of the enemy, although he was excused from actually paying it over to the state, and the decree of confiscation was subsequently repealed. After the repeal of the decree of confiscation, the debtor paid into the national treasury of the confiscating state, in the name of his creditor, the amount of his debt, in the currency of the time; which, however, was very much depreciated since the date of his declaration of his debt under the decree of confiscation: —Held, that the confiscating state, having entered into a treaty to make compensation for all undue confiscations and sequestrations, were answerable for the debt in the currency at the time of the debtor's declaration, it not being a case between a debtor and creditor, but a reparation by a wrong-doer. *Pilkington* v. *Commissioners for Claims on France*, 2 Knapp 7.

2. Under a treaty providing compensation for losses of moveable and immoveable property unduly confiscated:—Held, that no compensation was provided for confiscations of immoveable property out of the territory of one of the contracting powers. *Webster's case*, 2 Knapp 386.

3. Under the conventions made with France in 1814, funds were set apart for compensation to be awarded to English subjects whose property had been confiscated during the French revolution:—Held, that French mortgagees on such property had no lien on the compensation so awarded to an English subject. *St. Victor* v. *Devereux*, 8 Jur. 946.

4. If a party claims before the commissioners appointed under the conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government, in a character which he really sustains, and an award is made to him in that character, this Court has no jurisdiction to interfere at the suit of a party claiming to have a better title to the compensation. *Lloyd* v. *Trimlestown* (*Lord*), 4 Sim. 296.

5. By the terms of French contract, *rentes viagères*, for two lives in succession, were after death of first life payable with all arrears to survivor. The representative of first life relieved against the loss of arrears occasioned by the revolution. *Hatchett* v. *Pattle*, 6 Madd. 4.

6. Under the convention with France for indemnifying British subjects for the confiscation of their property by the French revolutionary government, and the Act of the 59 Geo. 3, c. 31, compensation for an estate and the moveable property on it was awarded by the commissioners to A. as executrix and residuary legatee of B.; a bill was filed by one of the co-heiresses of the wife and children of B., all of whom had died in his lifetime, alleging that, by the then existing laws of France, the will of B. was inoperative, and that a moiety of the property did not belong to him, but to his wife, from whom it had descended to the children, and from them to the plaintiff and another person, co-heiress with her, and claiming for such co-heiress a moiety of the compensation. No claim had been duly made before the commissioners, in respect of the alleged title which the plaintiff sought to enforce; neither had there been any discussion before them as to that title: but the facts out of which it arose were disclosed or alluded to in the proceedings which led to the award:— Held, that under such circumstances, the Court of Chancery would not interfere to relieve the plaintiff. *Hill* v. *Reardon*, 2 Russ. 608. Affirming 2 Sim. & S. 431; 4 L. J., Ch., 127.

Where a person, in whose favour an adjudication, under these conventions, has been made by the commissioners of the Privy Council, is affected by a trust or by fraud, the Court has jurisdiction to enforce the trust, or relieve against the fraud. *Ib.*

Semble. These conventions and treaties, and the Act for carrying them into effect, do not exclude the jurisdiction of a court of equity to examine and enforce equities attaching upon the compensation in the hands of the person in whose favour the award of the commissioners has been made. *Ib.*

Notwithstanding a decision of the commissioners appointed by the stat. 59 Geo. 3, c. 31, and the commissioners for liquidating the claims of British subjects on the French government, or of the Privy Council on appeal, in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him for other persons showing themselves to be entitled, *semble*. Injunction refused, the affidavits of the plaintiffs not being positive. S. C. Jac. 84.

No appeal from commissioners of British claims, etc., to Chancery. *Ib.*

7. A country re-conquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch and afterwards re-conquered by the French, ought therefore to have had, after its re-conquest, the same protection that they were entitled to under the treaty of commerce of 1786; and were awarded compensation in respect of losses, after the re-conquest, by sequestration of their property in contravention of that treaty by the French government. *Gumbes's case*, 2 Knapp 369.

8. The plaintiff was guarantee to the owner of an American ship, for a merchant who freighted her to Bordeaux; she was detained there by an embargo, and dismissed by the freighter. The French government having declared themselves bound to indemnify all neutral owners for the effects of the embargo, and the plaintiff (an English subject) not being able to take advantage of that order, the defendant must endeavour to get an indemnity in France, before he can sue the plaintiff. *Cottin* v. *Blane*, 2 Anstr. 544.

9. The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the *Alabama*, a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an Act of Congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the

Act of Congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured —Held, that the underwriters were not entitled to recover the compensation from the respondents. *Burnand* v. *Rodocanachi*, 7 L R, App. Cas., 333; 51 L. J., Q. B., 548; 47 L. T. 277, 31 W. R. 65.

1. The loyalists' estates in America were, under the Forfeiture Acts, to be sold for the payment of debts. This is no ground for an injunction to restrain an action here on a bond. *Kempe* v. *Antill*, 2 Bro. C. C. 11.

2. The plaintiff's testator's property in America being confiscated, subject to his debts, a creditor there ought first to apply to make that property available for payment of his debts before he sues him personally here. *Wright* v. *Nutt*, 3 Bro. C. C. 326; 1 H. Black. 136.

3. The property of an American loyalist, having been confiscated during the American War, subject to the claims of such of his creditors as were friendly to American independence, to be made within a limited time, and in fact, according to evidence, farther restrained to inhabitants of particular state, a bill to have bond delivered up, or to compel the creditor in the first instance to resort to the fund arising from the confiscation, was dismissed on the ground, that it did not appear that creditor had the clear means of making his demand effectual against that fund. The Lord Chancellor, also, expressing an opinion in favour of the right to sue personally, even in that case, against the authority of *Wright* v. *Nutt* (3 Bro. C. C. 326; 1 H. Black. 136). *Wright* v *Simpson*, 6 Ves. 714.

4. A creditor having it in his power to obtain warrants for payment of an American loyalist's debt out of his estate there, is bound, on being referred to that property by the defendant, to make it available as far as he can; but where the creditor is not informed of that property, no laches can be imputed to him; he therefore shall not be restrained by injunction from prosecuting his suit here; although the debtors shall have liberty to make use of the creditor's name to obtain the warrants, to make them available, as far as may be. *Peters* v. *Erving*, 3 Bro. C. C. 54.

5. A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French Revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims, which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh, under a petition of right:— Held, that he had no remedy except under the provisions of the statute. *De Bode* v. *Reg.*, 3 H. L. Ca. 449.

WARD.

— *General Rights and Duties of Guardian and Ward.* See GUARDIAN AND WARD.
— *Marriage of Ward of Court.* See INFANT, II. iv.
— *Settlement on Marriage of Ward of Court.* See INFANT, IV. v.

WARDEN OF THE FLEET.

See PRACTICE (OFFICERS OF COURT).

WAREHOUSEMAN AND WHARFINGER.

See WHARF, WAREHOUSEMAN, AND WHARFINGER.

WARRANT OF ATTORNEY.

See BANKRUPTCY, XX. xix.—XLIV. vi.—JUDGMENT, II.

WARRANT OF COMMITMENT.

See BANKRUPTCY—PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT).

WARRANTY.

— *On Sale of Goods.* See SALE OF GOODS, I. 6.
— *On Insurance Policies.* See INSURANCE.

See also LANDLORD AND TENANT—VENDOR AND PURCHASER.

6. The word "grant" does not amount to an entire warranty in equity, nor always at law where particular covenants are inserted.

In such cases the insertion of what is express excludes the intendment of all presumption. *Clarke* v. *Samson*, 1 Ves 100

1. The plaintiff having inspected certain plans and specifications which had been prepared by an engineer for the defendants, contracted with the latter to build a bridge according thereto The work was begun, but the mode of erection prescribed by the plans and specifications proved defective, and an alteration was necessarily made under the direction of the engineer, which occasioned great delay in the execution of the work, in consequence of which the plaintiff sustained considerable damage. In an action against the defendants for damages as for a breach of warranty:—Held, that there was no implied warranty on their part that the work could be done in the mode prescribed by the plans and specifications, and that the plaintiff was not therefore entitled to recover. *Thorn* v. *London (Mayor)*, 1 L. R., App. Cas, 120; 45 L. J., Exch. D. 487; 24 W. R. 932; 34 L. T., N. S., 545. Affirming 44 L. J., Exch., 62; 10 L. R, Exch., 112.

WARREN.

See GAME.

WASTE AND TIMBER.

I. General Principles.

2. The Court will restrain waste in an under-lessee at the suit of the ground landlord. So against a first tenant for life, at the suit of the remainderman, notwithstanding an intermediate life estate; so, against a mortgagee (not applying the produce of timber in sinking the principal and interest), at the suit of the mortgagor; so, against a mortgagor committing waste to the prejudice of the mortgagee. *Farrant* v. *Lovel*, 3 Atk. 723.

3. The erection of a new building which increases the value of the property is not waste, unless it destroys the identity of the property, or impairs the evidence of title. *Jones* v. *Chappell*, 44 L. J., Ch., 658; 20 L. R., Eq., 539.

4. The Court will not refuse to restrain waste, by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit the estate; therefore, an injunction to restrain cutting turf will not be refused on the ground that the tenant has converted the cut-out bog into arable land. *Coppinger* v. *Gubbins*, 3 J. & L. 397.

Quære, whether the Court will restrain acts of meliorating waste. *Ib.*

Waste will be restrained in Chancery, although the act done may lead to the improvement of the land, if it immediately occasions any damage to the inheritance. In execution of an arrangement for carrying off incumbrances, A., being owner in fee, conveyed the fee simple to B., who re-demised for lives renewable for ever to A., at a rent equal to 6*l.* per cent on his purchase money, to hold in the same manner as A. then held and enjoyed the same. The lease contained the common covenants, including one to deliver up the premises in repair, except casualties by fire —Held, that A. did not retain the rights of an owner in fee subject to the rent, but was restrainable from committing waste. S. C. 9 Ir. Eq. R. 304.

1. A court of equity will not grant an injunction to prevent waste unless there is some real and substantial injury to the inheritance. *Doherty* v. *Allman*, 3 L. R., App. Cas., 709; 39 L. T., N. S., 129; 26 W. R. 513. Affirming 10 Ir. R., Eq., 460.

Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry for rent in arrear and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, etc., will "during the term granted preserve, uphold, support, maintain, and keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto" the lessor, his heirs, etc. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair; it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—Held, that the waste alleged was meliorating waste, and that, under the circumstances, the Court had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction. *Ib.*

2. *Semble*, that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner, having regard to the class of tenement to which they belong, is not waste. *Sarer* v. *Bilton*, 7. L. R., Ch. D., 815; 47 L. J., Ch., 267; 38 L. T., N. S., 281.

3. The Court of Chancery will award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of down land. *Worsley* v. *Stuart*, 4 Bro. P. C. 377.

4. Cutting young trees under twenty years' growth, though of the kinds which may be timber by common law or by local custom, is not necessarily waste, but will be so if they are cut unseasonably or in such a manner as to injure the reproductive power of the stools. In all cases it is a very important considera-

tion that they have or have not been previously or usually cut. *Dunn* v. *Bryan*, 7 Ir. R., Eq., 143.

The mere cutting of a hedge in such a manner as that it will grow again is not waste; but grubbing up the thorns of which it is composed, or allowing the germine to be destroyed by cattle, or cutting them so unreasonably or improperly as that they will not grow again and replace what has been cut, is waste. *Ib.*

The Court will not interfere by injunction to prevent the cutting of hedges with a saw instead of with a hatchet or knife, and will not go into a consideration of the different modes of operation; all that it will look to being that no permanent injury to the inheritance is done. *Ib.*

5. The words "without impeachment of waste" do not give a power inconsistent with an estate tail, or at least will not defeat it. *Bagshaw* v. *Spencer*, 2 Atk. 576.

II. Tenant in Common.

6. Injunction between tenants in common against destruction; not against pure equitable waste. *Hole* v. *Thomas*, 7 Ves. 589.

7. Injunction against waste between tenants in common, on the ground that one was occupying tenant to the rest: otherwise not, except as to destruction. *Twort* v. *Twort*, 16 Ves. 128.

8. Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, but granted on affidavit of defendant's insolvency. *Smallman* v. *Onions*, 3 Bro. C. C. 621.

9. The Court will restrain one tenant in common from the wilful destruction of the common property: but where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, which at law had been held to be an ouster, the Court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, etc., though the rent agreed to be paid by the company was three times the former rent. *Durham & Sunderland Railway Co.* v. *Wawn*, 3 Beav. 119; 4 Jur. 764.

10. The Court will, as between tenants in common, only interfere to restrain waste in cases of destructive spoliation or waste. *Arthur* v. *Lamb*, 2 Dr. & Sm. 428; 12 L. T., N. S., 338.

A tenant in common cannot be restrained by injunction, upon the application of his cotenants, from cutting down and selling trees and timber, where it appears that he is managing the estate according to the proper course of husbandry, and destructive waste cannot be proved. *Ib.*

11. Although the Court has jurisdiction, after a decree in a partition suit, to grant an injunction restraining a tenant in common in possession from committing destructive waste, it will not interfere to restrain a tenant in common in possession merely from farming contrary to the custom of the country, as be-

tween landlord and tenant (that relation not existing between him and the other tenants in common). *Bailey* v. *Hobson*, 5 L. R., Ch., 180; 39 L. J. Ch., 270; 22 L. T. 594

III. Copyholds.

1. Lord of a manor is entitled to injunction and account in respect of waste by a copyholder. *Richards* v. *Noble*, 3 Meriv. 673.

2. Forfeiture of copyholder for waste during minority. *Litton's case*, 3 Swan. 493; Cary, 6.

3. Lessee of copyholder punishable for waste, though copyholder is not. *Dalton* v. *Gill*, Cary 63.

4. Generally, if there is no custom for the tenants of a manor to cut timber, it belongs to the lord. *Whitechurch* v. *Holworthy*, 19 Ves. 214.

It seems there may be, as to timber on copyhold premises, what may exist unquestionably as to mines, a custom that the lord cannot take without consent of the copyholder, and *vice versâ*. *Ib.*

Copyholder may by custom have such an interest in the timber, that he may himself cut: so he may have a special interest to prevent the lord's cutting; but such a custom ought to be proved by extremely strong evidence. *Ib.*

5. Copyhold tenant subject to waste unless by act of God. *Rook* v. *Worth*, 1 Ves. 462.

IV. Jointress.

6. Injunction to stay waste granted against jointress. *Cooke* v. *Whaley*, 1 Eq. Abr. 400.

7. Where it was covenanted that jointure should be of certain value, which it was not, Court refused the injunction against waste. *Carew* v. *Carew*, 1 Eq. Abr. 400.

8. Motion to stay a jointress tenant in tail after possibility, etc., from committing waste: —Held, that she, being a jointress within 11 Hen. 7, ought to be restrained from wilful waste, and the injunction was granted; for by the statute she is restrained from aliening. *Cook* v. *Winford*, 1 Eq. Abr. 221, pl. 2.

9. Jointress giving leave to the next of kin in remainder for life without impeachment, etc., to cut timber, the remainderman in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston* v. *Aston*, 1 Ves. 396.

10. The under-tenant of a jointress commits waste *sparsim*; but had improved the yearly value, and offers to take a lease at the improved rent, and to pay for the timber cut. *Quære*, whether the Court will relieve as to the waste. *Ligo* v. *Smith*, 2 Vern. 263.

11. Settlement, on marriage, of lands of husband to the use of husband for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to wife for life for her jointure, and in bar of dower; remainder to first and other sons of the marriage in tail male; remainder to the daughters in the same manner; remainder to the heirs of the body of husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it when severed, as tenant in tail after possibility of issue extinct, either in possession by the effect of merger, if the estates can unite, or, if not, in remainder, *quære*. *Williams* v. *Williams*, 15 Ves. 419.

V. Tenant for Life.

I. *Voluntary Waste*, 7503.
II. *Equitable Waste*, 7504.
III. *Permissive Waste*. See LIFE ESTATE FOR, III. III.
IV. *Timber*. See VIII. III. *post*.
V. *Limitations to without Impeachment of Waste under Executory Trusts*. See TRUSTS, V. XII.

I. VOLUNTARY WASTE.

12. *Quære*, does the Statute of Gloucester extend to tenancies for life, created by subsequent statutes. *Cockburn* v. *Hussey*, Wall. Lyn. 234.

13. A., tenant for life; remainder to B. for life, remainder over. A., though dispunishable of waste at law by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity. But tenant for life, without impeachment of waste, shall not be enjoined from committing waste. *Tracy* v. *Tracy*, 1 Vern. 23.

14. Injunction refused to restrain the father, who was tenant for life without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, etc. To ground such an injunction, there must be waste and spoliation, and no delay in applying for it. *Peirs* v. *Peirs*, 1 Ves. 521.

15. Where a bill, by the person next in remainder, charged that the tenant for life, who was dispunishable of waste, and who had power to make leases not dispunishable of waste, had demised a part of the lands to a third person, and that such person, in collusion with the tenant for life, was committing waste, by turning up, tilling, and burning the land; and the defendant admitted the turning up, etc., but stated it was land which the tenant for life had reclaimed and laid down in grass thirty years before, the Court refused to grant a motion for an injunction. *Semble*, that such pasture is not ancient meadow. *Davies* v. *Davies*, 2 Ir. Eq. R. 414.

16. On a devise of a park to tenants for life, with successive remainders in tail, containing a proviso against mowing it, but no devise over in case of breach of the restriction:— Held, to be one which the Court would enforce

by injunction. *Blagrave* v. *Blagrave*, 1 De G. & Sm. 252; 16 L. J., N. S., Ch., 346; 11 Jur. 744.

1. A testator, by a codicil to his will, devised lands to trustees during the life of his daughter, without impeachment of waste, for her separate use, with restraint on anticipation. He subsequently conveyed the same and also other lands by a deed, which did not notice the codicil, to a different trustee, for the life of the daughter, but not making the trustee unimpeachable for waste, also for the separate use of the daughter, and with restraint on anticipation:—Held, that the daughter's life estate given by the codicil was revoked, with all its incidents, by the deed, and that she was impeachable of waste *Lowndes* v. *Norton*, 33 L. J., Ch., 583; 11 L. T., N. S., 290.

2. A court of equity will not interfere, unless it is shown that there is danger from the mode in which a tenant for life in possession is dealing with the property. *Dutt* v. *Dossee*, 6 Moo. Ind. App. 433.

The mere fact of a tenant for life keeping on hand for about three months part of the corpus for the alleged purpose of an eligible investment, does not amount to waste, nor is in derogation of the rights of those entitled in reversion. *Ib.*

3. Exemption from liability to waste annexed to a life estate is a special power in the tenant for life to appropriate part of the inheritance:—Held, under the terms of a deed of settlement it this case, that it was made subordinate to a discretionary power of cutting timber conferred on the trustees. *Kekewich* v. *Marker*, 3 Macn. & G. 311; 15 Jur. 687.

4. A., on marriage of his son, settles a messuage on himself for life, *sans* waste, remainder to his son. The father, though his estate be *sans* waste, cannot pull down the house, nor commit any voluntary waste therein; if he does, the Court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. *Vane* v. *Barnard* (*Lord*), 2 Vern. 738; Pre. Ch. 454; Gilb. Eq. Rep. 127; 1 Salk. 161.

5. A trust to keep premises in repair by a tenant for life will not be implied. A trustee to whom real property is devised in trust to one for life cannot interfere with the possession of the equitable tenant for life, because he neglects to keep the property in repair; but if the tenant for life should be committing active waste the trustee may interfere, at least if the parties entitled in remainder are under disability. *Powys* v. *Blagrave*, 2 Eq. Rep. 1204; 2 W. R. 700; 24 L. J., Ch., 142; 4 De G. M. & G. 448. Affirming 2 Eq. Rep. 395; 2 W. R. 359; 1 Kay & J. 495; 18 Jur. 462.

Courts of equity have no means of interfering in cases of permissive waste by a tenant for life of real estate. *Ib.*

6. A tenant for life of farming lands let parts at low rentals, with liberty for the tenants to get turf, but under the obligation to level and prepare the surface for agricultural purposes. Large quantities of the turf, to the value of over 1,000*l.*, were taken away, but the value of the land was thereby increased for agricultural purposes:—Held, that the tenant for life was not liable to any proceedings for waste. *Harris* v. *Elkins*, 26 L. T., N. S., 827; 20 W. R. 999.

7. By its inherent jurisdiction to restrain fraud, the Court of Chancery will, although the party may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself: and as such a suit may be instituted by trustees to preserve contingent remainders during the life of a tenant for life in remainder, so may it be instituted by the tenant for life in remainder himself. *Birch-Wolfe* v. *Birch*, 9 L. R., Eq., 683; 18 W. R. 594; 23 L. T., N. S., 216; 39 L. J., Ch., 345

On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession. *Ib.*

But, before giving relief in a suit so instituted, the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. *Ib.*

8. When an executory trust for the settlement of freehold estates in strict settlement directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste. *Stanley* v. *Coulthurst*, 10 L. R., Eq., 259; 39 L. J., Ch, 650; 23 L. T. 761; 18 W. R. 969.

II. EQUITABLE WASTE.

1. In General.

9. Equitable waste by tenant for life is a breach of his trust, and his assets, after his death, are answerable for the same. *Ormond* v. *Kynnersley*, 5 Madd. 369.

10. The Court will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed or is threatened. *Potts* v. *Potts*, 3 L. J., Ch., 176.

11. Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. *Semble*, usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea. *Coffin* v. *Coffin*, Jac. 70.

In equitable, as in legal waste, if one act of waste be established, the Court will restrain equitable waste generally. S. C. 6 Madd. 17.

12. The statutory rule, which gives to a remainderman twenty years from the time when his title accrues in possession for bringing an action or suit for the property, applies to a claim for compensation for

equitable waste, as well as to a claim to the land itself, and, therefore, an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff, as remainderman in tail, having accrued within twenty years before the filing of the bill. Upon a claim to compensation for equitable waste, the Court does not consider whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs, for a tenant for life has no right to alter the nature of property belonging to another person. Distinction between acquiescence and the release of a right. *Leeds* (*Duke*) v. *Amherst* (*Earl*), 2 Ph. 117; 10 Jur. 956. Affirming 14 Sim. 357; 15 L. J., N. S., Ch, 351.

1. Under a devise of a mansion house and estate with the appurtenances to A. in fee, subject to an executory devise over in the event of his dying without leaving issue to B. for life, *sans* waste, remainder to C. in fee:—Held, that A. was entitled to commit legal waste, but not entitled to commit equitable waste. *Turner* v. *Wright*, Johns. 740; 6 Jur., N. S., 647; 29 L. J., Ch., 470; 8 W. R. 387. Affirmed 6 Jur., N. S., 809; 29 L. J., Ch., 598; 8 W. R. 675; 2 De G. F. & J. 234.

The doctrine of equitable waste applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life interests or estates in fee with executory devises over. *Ib.*

Quære, whether a tenant in fee simple, subject to an executory devise over, can, in the absence of any indication of a contrary intention, be restrained from committing legal waste. *Ib.*

Equitable waste is that which a prudent man would not do in the management of his own property. *Ib.*

2. Ornamental Timber.

2. The Court will restrain a tenant for life, without impeachment of waste, from cutting down trees in lines or avenues or ridings in a park, as they are for ornament; and whether trees grow naturally, or where planted, if they serve for ornament or shelter, it is the same thing. *Packington's case*, 3 Atk. 215.

3. Injunction to stay waste not granted without positive evidence of title. *Davies* v. *Lee*, 6 Ves. 784.

Injunction against waste granted in favour of tenant for life, particularly as to ornamental timber, not so much upon his interest as his enjoyment. *Id.* 787.

4. R. N., by his will, devised to F. N., and his assigns, for life, all his real estates in W., without impeachment of waste, except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage, called Arbury, remainder in trust for C. N. N., for life, remainder to his first and other sons in tail male:—Held, that the restriction as to cutting timber was confined to the premises specified in the exception clause, and ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and that no proceeding for equitable waste could be maintained as to trees planted, etc., for ornaments, etc., as to a house which had formerly been a principal mansion, and having gone into decay, had been restored by F. N., the tenant for life:—Held, also, that the plaintiff having made a case by his bill, for an inquiry and account as to equitable waste, and having had the opportunity of supporting that case by evidence, which he had omitted to do, was not entitled to an issue as to the equity, nor to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree. *Newdigate* v. *Newdigate*, 8 Bli. N. S. 734; 2 Cl. & F. 601. Reversing 1 Sim. 131; 5 L. J., Ch, 52; 1 Jur. 636.

5. Ornamental timber protected, though the mansion-house had been pulled down, and the bill did not complain of that act. *Morris* v. *Morris*, 15 Sim. 505; 16 L. J., N. S., Ch., 201; 11 Jur. 196.

6. The Court, by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created. *Marker* v. *Marker*, 9 Hare 1; 20 L. J., N. S., Ch., 246; 15 Jur. 663.

In the preservation of ornamental timber, the protection of the Court is confined to timber planted and left standing for shelter or ornament: and the question whether the protection should be extended to particular timber, is therefore one of fact, and the determination must depend upon the evidence which can be collected to establish the fact. *Ib.*

The case of a trust or restriction created for the preservation of ornamental timber, is not like a trust for the purposes of benevolence (as to which the objects are unlimited, and no standard can be found); but, *semble*, is a trust or restriction which the Court will endeavour to execute or enforce. *Ib.*

There are cases in which the Court may execute a trust for the application of money to purposes of taste or ornament, and in doing so may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon the opinions of persons who are consulted by others in such matters, as it acts in other cases upon the opinions of persons of science. *Semble.* *Ib.*

Where a tenant for life, without impeachment of waste, had sold a quantity of timber trees, which the Court afterwards restrained him from felling, on the supposition that it would be equitable waste, the Court held that the purchasers of the timber were not necessary parties to the injunction suit, but required the plaintiff to give security to the defendant, not only for the value of all the trees which the defendant should be prevented from cutting by the injunction, but also for any loss or damage the defendant might incur or sustain by reason of his being prevented from completing the sale. *Ib.*

The Court may more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the common law case of equitable waste in

the absence of any such trust. *Semble.* S. C. 9 Hare 18; 20 L. J., N. S., Ch., 246; 15 Jur. 663.

1. A mansion-house, park, and pleasure grounds, with certain villas on the estates, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials, and apply the proceeds in paying off incumbrances on the estates. The house was accordingly pulled down, but the tenant for life, unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. *Willesley* v. *Willesley*, 6 Sim 497.

2. Tenant for life, without impeachment, restrained from cutting timber, planted or left standing for ornament; and whether ornamental or fanciful; the protection extending beyond the mansion house to rides through a wood at a considerable distance; but not to the whole wood, to prevent cutting other parts for repairs and sale. *Wombwell* v. *Belasyse* cited, 6 Ves. 110 note (*a*), 2*nd* edit.

3. Injunction against cutting ornamental timber, confined to timber standing for ornament, or shelter; the Court refusing to extend it by inserting the words, "contribute to ornament." *Williams* v. *M'Namara*, 8 Ves. 70.

4. Injunction granted to restrain tenant for life, without impeachment, from cutting timber and other trees, planted, etc., for ornament, etc., and from cutting, except in husbandman-like manner. *Tamworth* (*Lord*) v. *Ferrers* (*Lord*), 6 Ves. 419.

5. Injunction against tenant not impeachable, etc., for cutting down ornamental trees, etc. *Packington* v. *Packington*, Dick. 101.

6. Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber. *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549. And see S. C. 1 Bro. C. C. 166; S. C. *nom. Chamberlain* v. *Dummer*, Dick. 600.

7. Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees planted for the purpose of excluding objects from view. *Wheldale* v. *Wheldale*, 16 Ves, 375.

8. Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively, without impeachment of waste, with various limitations, in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee; the trustees laid out part of the fund in an estate, with a considerable quantity of timber upon it; taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole. *Burges* v. *Lamb*, 16 Ves. 174.

Equitable waste has not been extended beyond trees planted, or growing for ornament, as in avenues or vistas, or timber merely ornamental, viz., an extensive wood. *Ib.*

Cutting timber where necessary for the growth of underwood, not waste. *Id.* 179.

Land devised to be sold, the money to be laid out in other estates to be settled; the rents and profits, until sale, to go to the persons entitled to the estates to be purchased. Tenant for life without impeachment of waste, cannot cut timber on the estates to be sold. *Id.* 180.

Right of tenant for life, without impeachment of waste, to cut timber generally in a husbandman-like manner, independently of the effect upon the beauty of the place, except equitable waste. *Id.* 185.

9. Injunction granted to restrain tenant, not impeachable for waste, from cutting clumps of trees for ornament, two miles from house. *Downshire* (*Marquis*) v. *Sandys* (*Lord*), 6 Ves. 107.

10. Injunction to stay tenant for life from committing waste by cutting trees growing for ornament; and saplings not proper to be felled. *O'Brien* v. *O'Brien*, Ambl. 107; 1 Bro. C. C. 168. n.

11. Whether timber is intended for ornament, etc., by devisor of tenant for life, is to be proved from his conduct concerning it. *Lushington* v. *Boldero*, 6 Madd. 149.

Ornamental timber, though decayed and injurious to other trees, is not to be cut unless essential to objects of such devisor. *Ib.*

The assignees of a bankrupt tenant for life have no right to cut ornamental timber any more than the tenant for life himself, and if they do, the money proceeding from the sale will go to the first person entitled to the inheritance, and the assignees will be deprived of the income even during the life of the tenant for life. S. C. 15 Beav. 1; 21 L. J., N. S., Ch., 49; 16 Jur. 140.

The doctrine and principle of the interference of a court of equity in the case of a tenant for life cutting timber, is that no man shall obtain a benefit by his own wrong, and a tenant for life would do so if he were allowed the interest of the fund produced by the sale of the timber. *Ib.*

An estate was devised to A. for life without impeachment of waste, with remainder to his issue in tail; with remainder to B. for life without impeachment, etc.; with remainder to his issue in tail. A. had no issue, and his assignees having committed equitable waste, it was held, that the right to the produce could not be determined until the death of A., as he might have issue, who possibly would be entitled to an interest in such produce. S. C. 13 Beav. 418.

12. Where an owner of an estate, with residence, purchases adjoining lands with ornamental woods, the Court will not, from that fact alone, infer that he intended to be left standing for ornament all such trees as he did not in his lifetime cut down; there must be some act of dedication, *e.g.*, planting an avenue, cutting a vista, erecting obelisks, etc. *Halliwell* v. *Phillips*, 4 Jur., N. S., 607; 6 W. R. 408

A tree or trees may be highly ornamental, and yet not be entitled to the protection of the Court as being planted or left standing for ornament. *Ib.*

Saplings are not within the doctrine. *Ib.*

Hedge-row trees, or any trees, however ornamental, if not planted also for profit, are not within the doctrine. *Ib.*

A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; and therefore he may fell

and sell trees planted for ornament, if done in a proper course of husbandry. *Ib.*

1. What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament. *Ford* v. *Tynte*, 2 De G. J. & S. 122.

A tenant for life without impeachment of waste will not be allowed to cut trees planted or left standing by any former owner, for the ornament or shelter of, or for the interception of any view from, the mansion-house, unless such trees have been ordinarily cut, or impede the growth of other ornamental timber. S. C. 10 Jur., N. S., 429; 12 W. R. 613; 10 L. T., N. S., 209.

The report of an expert, to whom a reference has been made by the Court, is not final and conclusive. *Ib.*

Form of inquiry as to ornamental timber. S. C. 3 N. R. 676.

2. A testator left his mansion-house on the B. estate, went to reside on another estate, at the distance of about eight miles, pulled down the B. mansion-house, cut down some of the ornamental timber about it, turned the estate into a cover for game, and altogether acted so as to show that he had no intention that the mansion-house should be re-built:—Held, that the rest of what had originally been ornamental timber on the B. estate was not, as between the parties claiming under the will, protected as ornamental, but might be cut by a tenant for life, whose estate was without impeachment of waste. *Micklethwait* v. *Micklethwart*, 1 De G. & J. 504; 3 Jur., N. S., 1279; 26 L. J., Ch., 721; 5 W. R. 640. Reversing 3 Jur., N. S, 721; 5 W. R. 861.

The testator, when he did the above acts, was only tenant for life in possession, with an ultimate reversion to himself in fee expectant on the failure or determination of a subsequent estate for life, and raising estates tail, which did not fall and determine till after his death:—Held, that as between the parties claiming under his will, the case stood on the same footing as if he had been entitled in fee simple in possession. *Ib.*

The testator devised his estates to A. for life without impeachment for waste, "except voluntary waste in pulling down houses, and not re-building the same, or others of equal or greater value." A. pulled down the mansion-house, with the intention of forthwith building a better on the site, and was proceeding with all reasonable despatch to carry such intention into effect:—Held, that the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the re-building of the mansion. *Ib.*

3. Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damage. *Leeds* (*Duke*) v. *Amherst* (*Earl*), 20 Beav. 239.

Therefore where an account of the equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported. *Ib.*

4. Where tenant for life unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Butler* v. *Kynnersley*, 15 Beav. 10 n.; 8 L. J., Ch., 67; 7 L. J., Ch., 150.

5. Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority, and the onus of showing that the trees are prejudicial lies on the trustees. *Campbell* v. *Allyood*, 17 Beav. 623.

A bill filed against trustees and the tenant to prevent equitable waste, was dismissed with costs, as against the tenant, it not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request. *Ib.*

6. The doctrine of equitable waste considered. *Baker* v. *Sebright*, 13 L. R., Ch. D., 179; 49 L. J., Ch., 65; 41 L. T. 614; 28 W. R. 177.

An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. *Ib.*

Form of inquiry as to ornamental timber. *Ib.*

7. Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. *Bubb* v. *Yelverton, Exp. Hastings*, 10 L. R., Eq., 465; 40 L. J., Ch., 38; 18 W. R. 1127, 1146.

A tenant in fee simple having contracted to sell the reversion after his own life, cut down ornamental timber. After his death, in a suit for the administration of his estate, the purchaser of the reversion brought in a claim for damages. In the opinion of the Court the evidence did not show that any injury had been done to the reversion:—Held, that as the purchaser had not applied for an injunction to restrain the cutting, he could not claim damages. But, *semble*, that if he had applied for an injunction, any timber, the loss of which would, in his opinion, have been injurious to the ornamental effect, would have been protected. *Ib.*

See also VIII. III. 3 *post.*

3. Mansion-house.

1. Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him, in and about the mansion-house, refused. *Lansdowne* v. *Lansdowne*, 1 Jac. & Walk. 522; 1 Madd. 116. See *Att-Gen.* v. *Marlborough* (*Duke*), 3 Madd. 498.

2. Injunction granted to prevent tenant for life dispunishable for waste from pulling down a castle. *Vane* v. *Bernard* (*Lord*), 1 Salk. 161.

A., on marriage of his son, settles a messuage on himself for life *sans* waste, remainder to his son; the father, though his estate for life be *sans* waste, cannot pull down the house nor commit any voluntary waste therein; if he does, the Court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. S. C. *nom.* *Vane* v. *Barnard* (*Lord*), 2 Vern. 738; Pre. Ch. 454; Gilb. Eq. Rep. 127.

3. Injunction refused to restrain the father who was tenant for life, without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, etc. To ground such an injunction there must be waste and spoliation, and no delay in applying for it. *Piers* v. *Piers*, 1 Ves. 521.

4. A tenant for life without impeachment of waste pulled down a mansion-house, the abandonment of which had, in consequence of coal mines being thereunder, and also of the close proximity of copper works, been contemplated by the settlor (his father), and he used the materials thereof, so far as they were available for the purpose, in building, at his own expense, a new and suitable mansion-house on another part of the settled estates, where the settlor had himself, some years before the date of the settlement, made preparations for the same purpose. The settlement contained powers of sale and exchange, and of granting building leases, extending over the whole of the settled estates. Upon a bill by a remainderman against the personal representative of the tenant for life, for the purpose of making the estate of the latter liable for equitable waste in having pulled down the mansion-house:—Held (affirming 4 Jur., N. S., 967), that, under the circumstances of the case, the estate of the tenant for life was not chargeable with equitable waste. *Morris* v. *Morris*, 5 Jur., N. S., 229; 28 L. J., Ch., 329; 3 De G. & J. 323; 6 W. R. 427.

Semble, that if any part of the materials of the old mansion-house had been sold, the estate of the tenant for life would have been liable to account. *Ib.*

Held, also, that the answer and evidence setting up a *primâ facie* case to show that the whole of the personal estate of M. had been exhausted in the payment of his debts, the plaintiffs were not, after such a long lapse of time, entitled to the account prayed, without first meeting the *primâ facie* case set up by the answer. S. C. 4 Jur., N. S., 964.

5. A tenant for life in possession without impeachment of waste, except as to buildings, under the will of an owner in fee of an estate on which there were ornamental trees around or about a mansion-house, which had been pulled down by the testator without any intention of re-building it:—Held, to be entitled to cut down such trees. *Micklethwait* v. *Micklethwait*, 3 Jur., N. S., 1279; 26 L. J., Ch., 721; 1 De G. & J. 504; 5 W. R. 861. Reversing 3 Jur., N. S., 765; 5 W. R. 640.

A., being tenant for life in possession of an estate without impeachment of waste, "other than and except voluntary waste in pulling down houses or buildings, and not re-building the same, or others of equal or greater value," with the remainder to his first and other sons successively, with remainders over, pulled down the mansion-house on the estate; whereupon B., the next tenant for life in remainder, filed a bill against A., praying that he might be decreed to complete a suitable mansion, and to give sufficient security for that purpose. A. having by his counsel undertaken to erect on the estate a substantial mansion-house, exceeding or at least equal in value to the mansion-house demolished, the Court directed the cause to stand over, with liberty to apply, it appearing that A. intended to erect a suitable mansion-house, and that there had been no delay on his part in carrying out his intention. *Ib.*

VI. Mere Possessor or Trespasser.

6. Injunction against a mere trespasser committing waste, not granted. *Mogg* v. *Mogg*, Dick. 670.

7. Injunction against trespass upon irremediable mischief, in nature of waste, or a bill by the lord of a manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor. *Cowper* (*Earl*) v. *Baker*, 17 Ves. 128.

8. The jurisdiction against waste by injunction and account, applied to trespass by exceeding a limited right to enter, and take stone from a quarry, being a destruction of the inheritance as in the case of timber, coal, etc., and the distinction between waste and trespass therefore disregarded. *Thomas* v. *Oakley*, 18 Ves. 184.

9. Injunction to restrain a party claiming by an adverse legal title from committing acts of trespass, alleged to be productive of irreparable waste, refused, under the special circumstances of the case. *Semble*, that although a man be in full and complete possession of an estate, by a title adverse to another who claims it against him, and there be no privity between the parties, and the party in possession swear that his own title is just and valid, or that the title of his adversary is unjust and invalid, that state of things does not prevent a court of equity from interfering (before judgment at law or decrees in equity) to restrain the party in possession from committing waste upon the inheritance. *Quære*, what is the present extent and effect of the writ of estrepement. *Haigh* v. *Jagger*, 2 Colly. 231.

10. A possessory bill was filed, to restrain the defendant from cutting turf for sale, on

the allegation that he was tenant to the plaintiff of land adjoining the bog, with a limited permission to cut turf for use in the bog, which plaintiff claimed as his own. On the affidavits showing cause the tenantry of the land was admitted, and it appeared that the predecessors had long claimed the disputed right over the bog, the plaintiff's title to which was vaguely stated. In 1807 an injunction had been obtained in a similar suit, restraining the tenant from cutting turf at all:—Held, that an injunction could not be obtained in this suit, as, if the tenant was a mere trespasser, it was not sustainable to establish a disputed right, there being no triennial possession, and the allegation of a limited permission could not be strengthened by the order of 1807, which set up a different claim. *Congleton* v. *Mitchell*, 12 Ir. Eq. R. 34.

1. Injunction against trespasser cutting timber by collusion with tenant, without prejudice to case of a mere trespasser. *Courthorpe* v. *Mapplesden*, 10 Ves. 290.

2. Injunction against cutting timber in the case of trespass, viz., by a person having got possession under articles to purchase. *Crockford* v. *Alexander*, 15 Ves. 138.

3. In 1859 H. brought ejectment against S. to recover a piece of woodland. S. set up adverse possession for more than twenty years, and the action was discontinued. H. shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he cut down a tree in the wood, and threatened to cut more, upon which S. filed his bill for an injunction:—Held, that, after H. had, by bringing ejectment, admitted S. to be in possession of the wood, the acts done by H. must be looked upon only as acts of trespass not putting him into possession, and that S., being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber. *Stanford* v. *Hurlstone*, 9 L. R., Ch., 116; 22 W. R. 422; 30 L. T. 140.

4. The Court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner* v. *Ringwood Highway Board*, 18 W. R. 424.

5. Injunction against tenant in possession, not party, to stay waste. *Att.-Gen.* v. *Ancaster* (*Duke*), Dick. 68.

6. An injunction will be granted before answer to stay waste, by a person having no interest in the thing wasted, but merely acting as a servant. *Orrery* (*Lord*) v. *Newton*, Ridgw. 252.

7. To the bill of a plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years, that the plaintiff had not discovered his title until a very recent period, and that he had since brought an ejectment against the defendant to recover the premises, which action stood for trial at the next assizes, and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do; a demurrer, for want of equity, was allowed. *Davenport* v. *Davenport*, 7 Hare 217; 18 L. J., N. S., Ch., 163; 13 Jur. 227.

8. Injunction to restrain defendant in possession from stripping an estate of timber, granted upon a motion by a plaintiff claiming under a title at law. *Beale* v. *Cripps*, 4 Kay & J. 472.

9. The Court will, at the instance of a person merely alleging a legal title to realty, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste. *Talbot* (*Earl*) v. *Scott*, 4 Kay & J. 96; 4 Jur., N. S., 1172; 27 L. J., Ch., 273.

Such a case must be clearly made out, and a more general allegation that the tenant has cut down a considerable quantity of timber, some of which was of an ornamental character, and other portions of which were unripe for cutting, is insufficient. *Ib.*

The authorities as to the jurisdiction of the Court to interfere at the instance of parties claiming real property under a legal title, by appointing receiver of the rents and profits, and by injunction to restrain waste, examined. *Ib.*

They establish these propositions: 1st. In the absence of fraud, and where there is no privity between the parties, the Court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. 2ndly. Nor will it interfere at the like instance, to restrain waste, except malicious or destructive waste; *e.g.*, by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at law. 3rdly. But flagrant acts of this exceptional character would, at the present day, be restrained, and that before judgment at law; and notwithstanding plaintiff was out of possession, and his title denied on oath by the defendant. *Ib.*

Therefore, where a bill alleged that the plaintiff was Earl of Shrewsbury, and entitled as such to real estates inalienably annexed to the earldom by Act of Parliament, his title as to part called the settled estates being legal, and as to the rest called the unsettled estates, being equitable; that his claim to the earldom had been heard in the House of Lords, before a committee of privileges, who had already expressed a strong opinion (although they had not actually decided) in his favour; that the defendants, claiming under a will of the late earl, "by favour of some of the tenants," had entered into receipt of the rents of the settled estates, to an amount exceeding 25,000*l.* a year; and they had cut down considerable quantities of timber on the estates generally, some of an ornamental character, and some not ripe for cutting, and charged that many of the tenants of the settled estates, by reason of the conflicting claims to the earldom, had refused to pay their rents to the plaintiff or the defendants, by reason whereof rents, exceeding 5,000*l.* a year, were in danger of being lost; and prayed, that pending the plaintiff's proceedings to establish his claim to the earldom, and his proceedings by ejectment, which he offered to bring when that claim was established, a receiver might be appointed, and the

defendants restrained from cutting timber on the estate. A demurrer was allowed to so much of the bill as sought relief in respect of the settled estates, the Court being of opinion that the amount at stake did not affect the question, that the unpaid rents need not be lost, since, if an action were brought, they could be paid either to the plaintiff or into court, upon interpleader, and that the waste alleged was not such as to justify interference. *Ib.*

And to so much of the bill as sought relief in respect of the unsettled estates, a plea that the plaintiff was not Earl of Shrewsbury was allowed. *Ib.*

1. The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass *Lowndes* v. *Bettle*, 33 L. J., Ch., 451; 4 N. R. 609

Where a defendant is in possession of an estate, and a plaintiff claiming possession of it seeks to restrain him from cutting down trees and digging sods, and other suchlike acts, the Court will not interfere unless the acts complained of amount to such flagrant instances of spoliation as to justify the Court in departing from the general rule. *Ib.*

Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though if the acts tend to the destruction of the inheritance, the Court will grant an injunction. *Ib.*

But where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant an injunction; at least when the acts committed do or may tend to the destruction of the estate. *Ib.*

Where a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years:—Held, upon bill filed by the possessor against the claimant, that as the acts of the defendant might be injurious to the inheritance, he must be restrained by injunction from committing them. *Ib.*

5. Where the power is unlimited, a clause permitting waste does not invalidate the lease. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Sugd. 185. But see S. C. *temp.* Plunk. 182.

6. A. devised all his lands, etc, to his wife; and if it should happen that she should have no son nor daughter by him, begotten upon her body, and for want of such issue, then the said premises to return to his brother B, if he should be then living, and to his heirs for ever, paying to his brother 150*l.* within a year after the wife's death: decreed, to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter" must be understood "no issue;" and that she ought not to be restrained from committing waste. *Wyld* v. *Lewis*, 1 Atk 432.

7. Plaintiff and defendant (partners) having agreed to dissolve, and that defendant on payment of half value of effects should take the whole, though defendant took possession but failed to make the payment, and had begun to pull down part of buildings, injunction to restrain him refused. *Coften* v. *Horner*, 5 Price 537.

8. The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Marshall* v. *Watson*, 25 Beav. 501.

9. Husband, though parted from his wife, charged in equity with his wife's wasting of goods which were devised to her for her life only. *Paget* v. *Read*, 1 Vern. 143.

10. Where a feme sole, tenant for life, with a condition not to commit waste, married, and afterwards, with her husband, cut and sold timber —Held, in opposition to *Ormonde* (*Lord*) v. *Kynnersley* (5 Madd 360), that such condition was not in the nature of a trust, so as to make the wife or her estate liable for the waste, but that the husband alone was answerable. *Kingham* v. *Lee*, 15 Sim. 396; 16 L. J., N. S., Ch., 49; 11 Jur. 4.

11. Tenant restrained from cutting turf for sale (his lease giving a right of estovers only), notwithstanding an uninterrupted practice for eighty years. *Courtown* (*Lord*) v. *Ward*, 1 Sch. & Lef. 8.

12. Estovers from one estate not applicable to the exigencies of another. *Lee* v. *Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. J. 78.

VII. Other Waste.

2. The Court will grant an injunction to stay waste in favour of an infant *in ventre sa mere*. *Wallis* v. *Hodson*, 2 Atk. 117.

3. A tenant for life liable to waste, having sold timber, cannot prevent the vendee from cutting it. *Wentworth* v. *Turner*, 3 Ves. 3.

4. The Court will not grant an injunction to stay waste at the instance of a judgment creditor in a suit by him against the heir and administrator of the debtor. *Leake* v. *Beckett*, 1 Y. & J. 359.

VIII. Timber.

See also V. II. *ante.*

I. WHAT IS.

1. Injunction against cutting young saplings, wavers, and fruit trees. *Kaye* v. *Banks*, Dick. 431.

2. Court will restrain cutting underwood of insufficient growth. *Brydges* v. *Stephens*, 6 Madd. 279

3. Injunction to stay tenant for life from committing waste by cutting trees growing for ornament, and saplings not proper to be felled. *O'Brien* v. *O'Brien*, Ambl. 107; 1 Bro. C. C. 168. n.

4. Cutting down decayed timber may be as much waste as cutting down any other. *Perrot* v. *Perrot*, 3 Atk 95.

5. In a purchase, where timber is agreed to be valued, the custom of the country makes those trees timber which in their nature are not so; as birch, beech, etc. Pollard trees, if the bodies are sound, to be valued as timber; walnut trees, where of considerable value, to be estimated as timber. Where trees are of value, and the parties cannot agree in the valuation of them as timber, the Court will send it to be tried, whether, by the custom of the county, any and which of these are timber trees. *Chandos* (*Duke*) v. *Talbot*, 2 P. W. 606.

6. All cutting of timber is not waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are as regularly cut every second fall, every thirty-two or thirty-six years. *Bagot* v. *Bagot*, 9 L. T., N. S., 217.

There are many cases in which the tenant for life cannot derive any benefit from timber improperly cut by him, knowingly and wilfully. *Ib.*

7. Chapter not being entitled to fell timber on the deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedgerows, and springs," was construed not to include the right of felling timber; and a bill by the lessee for an account of timber felled during the lease by the lessors, was dismissed with costs. *Herring* v. *St. Paul's* (*Dean*), 3 Swan. 492; 2 Wils. 1.

8. A tenant for life, without impeachment of waste, not restrained from felling trees fit for the purposes of timber, though young and not such as would be felled in a course of husbandman-like management of the estate. *Smythe* v. *Smythe*, 2 Swan 251; 1 Wils. 426.

9. Cutting young trees under twenty years' growth, though of the kinds which may be timber by common law or by local custom, is not necessarily waste, but will be so if they are cut unseasonably, or in such a manner as to injure the reproductive power of the stools. In all cases it is a very important consideration that they have or have not been previously or usually cut. *Dunn* v. *Bryan*, 7 Ir. R., Eq., 143.

A tree must attain a growth of twenty years before it can be deemed timber. *Ib.*

It is not waste in a lessee to cut down trees and timber, unless they are planted for the ornament or shelter of the house, or perform some important function, such as supporting a bank or the like, and provided also, that he cuts them so as not to destroy the germinative or reproductive power of the stools. Trees, even of the kinds that may become timber by attaining a growth of twenty years, may, if under that age, be cut by a lessee, provided they are cut seasonably, that is, according to what has been done either with the same trees, if springing from old stools, or other trees in the same place or the same neighbourhood, on former occasions. *Ib.*

The principle that the cutting of saplings or young timber unfit to be felled is, under certain circumstances, equitable waste, does not apply to cases between landlord and tenant when the cutting of them is seasonable. *Ib.*

The mere cutting of a hedge in such a manner as that it will grow again is not waste; but grubbing up the thorns of which it is composed, or allowing the germins to be destroyed by the cattle, or cutting them so unseasonably or improperly as that they will not grow again and replace what has been cut, is waste. *Ib.*

The Court will not interfere by injunction to prevent the cutting of hedges with a saw instead of with a hatchet or a hedge knife, and will not go into the consideration of these different modes of operating; all that it will look to being that no permanent injury to the inheritance is done. *Ib.*

II. ORDERS OF COURT.

10. A term for years is limited for payment of debts, remainder to A. for his life, *sans* waste, remainder to his first, etc., son in tail. A. being in want, the Court gave him leave to cut timber for his support, not exceeding the value of 500*l*. *Aspinwall* v. *Leigh*, 2 Vern. 218.

11. Tenant for life without impeachment of waste, further than wilful waste, is entitled to the interest of money produced, by the sale of decaying timber cut by order of Court. As to any further claim, a question at law, *quære*. The capital laid out in real estate to be settled to the same uses. *Wickham* v. *Wickham*, 19 Ves. 419; Coop. 288.

12. Tenant for life subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber cut by order of the Court. *Tooker* v. *Annesley*, 5 Sim. 235.

13. Devise of real estates to A. and B., and their heirs, to the use of them and their heirs, in trust to permit C. to receive the rents and profits for life, and after her decease to stand seised of the said premises in trust for the second son of D., and the heirs male of his body, remainder in trust for the third, fourth, and other sons of D. in tail male, remainder in trust to E., for life, without impeachment of waste, remainder to trustees to preserve, etc., remainder to the first and other sons of E. in tail male, etc. Proviso that in case there should not be a second son of D. at the time of the death of C., then, until such second son should be born, the said trustees should pay the rents and profits of the said estates to such person as was next in remainder, and should be entitled to receive the same in case no such son should be born. C. having cut timber, this was sold under an order of the Court, and the produce paid into the bank. At C.'s death, D. had no son, and E. was dead, leaving F. his eldest son. The produce of the timber belongs to F. absolutely, and shall not abide the event of D.'s having a son. *Dare* v. *Hopkins*, 2 Cox 110.

1. An estate was limited to one for life, with a clause of forfeiture and a gift over, on his cutting timber. There was on the estate timber which required felling. The Court, on a bill filed for that purpose by the tenant for life, authorised the same to be cut down, and directed a reference to the Master for that purpose. The money arising from the timber in such cases is settled on trusts similar to those on which the estate stands limited. *Peters* v. *Blake*, 6 L. J., N. S., Ch., 157. S. P. *Lygon* v. *Beauchamp* (*Earl*), *Id.* 158.

2. The proceeds of timber cut and sold by order of the Court during the life of a late tenant for life, who was impeachable of waste, ordered to be paid to the tenant for life in possession, who was unimpeachable of waste. *Phillips* v. *Barlow*, 14 Sim 263; 14 L. J., N. S., 35.

3. When the Court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste. *Honywood* v. *Honywood*, 18 L. R., Eq., 306; 43 L. J., Ch., 652; 30 L. T. 671; 22 W. R. 749.

4. By order of the Court, timber was cut upon the estate of an infant, who was equitable tenant in fee simple, with an executory devise over in the event of his dying under twenty-one, and without issue, which event happened: —Held, that the produce of the timber formed part of the personal estate of the infant. *Dyer* v. *Dyer*. 11 Jur., N. S., 721; 13 W. R. 732; 12 L. T., N. S., 442; 34 Beav. 540; 6 N. R. 79.

5. Lord Chancellor thought, that notwithstanding the words of the stat. 17 Edw. 2, s. 1, cc. 9, 10, the Court has authority to order timber decaying on the estate of a lunatic to be cut, but did not absolutely decide the point, or whether the produce should be considered as real or personal estate, directing the point to be argued on a bill filed. *Exp. Bromfield*, 3 Bro. C. C. 510; 1 Ves. J. 453.

6. Where A. is tenant for life, remainder to his children, and B. has an interest in the growing timber, which, in the usual course of management, will come to be felled during the continuance of A.'s estate, the infants can have no interest in, and cannot be made parties to, an agreement between A. and B. for the purchase of B.'s interest in the growing timber. Even if the Master has reported that they have an interest, all the proceedings will be rescinded for irregularity, as having been a surprise on the Court. *Anon.*, 1 L. J., Ch., 33.

Reference to Master.] 7. Where injunction to stay waste has been granted on petition, a reference was made to inquire what timber might be cut with advantage, etc. *Att.-Gen.* v. *Marlborough* (*Duke*), 5 Madd. 280.

8. Power contained in a will for the devisees for life, when in possession, to cut down timber as four trustees, or the survivors or survivor of them, should direct, etc. All the four trustees being dead:—Held, that the Court would execute the trust by referring it to a Master to see what timber was fit to be cut down from time to time. *Hewett* v. *Hewett*, 2 Eden 332; Ambl. 508.

9. A. tenant for life, remainder to B. in tail as to one moiety, remainder to C. an infant in tail as to the other moiety, remainder over. There is timber on the premises greatly decaying. B., the remainderman, brings a bill praying that the decaying timber might be cut down, sold, and the money divided betwixt him and the infant, and the tenant for life insists on his right to have part of the money; tenant for life must have sufficient left for repairs, etc., and an allowance for all damage done to him on the ground, but to have no allowance for the timber, which, when severed by accident or by a trespasser, belongs to the first owner of the inheritance. Decaying timber, if for ornament or safety, not to be cut down; also where an infant is interested in the inheritance, no timber can be cut down but by the approbation of the Master; and the infant's moiety of the money is to be put out for his benefit. *Berwick* v. *Whitfield*, 3 P. W. 267.

10. Bill, by tenant in tail in reversion, to have timber cut; ordered, and that the money be laid out in the funds, and the claim discussed when tenant in tail of age. *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76.

11. Where there is infant tenant in tail in possession, Court will authorise cutting of all timber fit to be felled; but where there is tenant for life impeachable for waste, with remainder over, Court will authorise cutting of timber only where interest of succession requires it. *Hussey* v. *Hussey*, 5 Madd. 44.

12. Reference granted on bill by tenant in tail, whether it be for the benefit of the plaintiff and the other parties to cut timber during the continuance of the estate of a tenant for life of the lands, impeachable of waste. Form of such reference. Principles upon which such references granted. *Tollemache* v. *Tollemache*, 1 Hare 456; 6 Jur. 364.

13. Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainderman in tail, an inquiry was directed, whether any trees, in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled: and whether it would be for the benefit of all parties interested that they should be felled and sold, and the money laid out in other estates to be settled to the same uses. *Delapole* v. *Delapole*, 17 Ves 150.

III. TENANT FOR LIFE.

See also V. II. 2 *ante*—II. *supra*

1. In General.

14. Lessee's damages in waste moderated by death of lessor. *Anon.*, Cary 2.

15. A. tenant for life, remainder to B. in tail, as to one moiety; remainder to C., an infant in tail, as to the other moiety; remainder over. There is timber on the premises greatly decaying. B., the remainderman, brings a bill, praying that the decaying timbe

might be cut down, sold, and the money divided betwixt him and the infant, and the tenant for life insists to have part of the money; tenant for life must have sufficient left for repairs, etc., and an allowance for all damage done to him on the ground, but to have no allowance for the timber which, when severed by accident or by a trespasser, belongs to the first owner of the inheritance. Decaying timber, if for ornament or safety, not to be cut down. Also where an infant is interested in the inheritance, no timber can be cut down but by the approbation of the Master, and the infant's moiety of the money to be put out for his benefit. *Berwick* v. *Whitfield*, 3 P. W. 267.

1. Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber. *Chamberlayne* v. *Dummer*, 3 Bro. C. C. 549. S. C. *nom. Chamberlain* v. *Dummer*, Dick. 600. S. P. *O'Brien* v. *O'Brien*, Ambl. 107; 1 Bro. C. C. 168. n. And see S. C. 1 Bro. C. C. 166.

D. provided, by a codicil to his will, that his wife, whom he had made a tenant for life, might cut timber for her own use and benefit, at seasonable times: what timber the tenant for life shall be restrained from cutting, *quære*. *Ib.*

2. Devise of lands to be sold, and other lands to be purchased in another county. A. to be tenant for life (*sans* waste) of the lands to be purchased, and the rents and profits of the lands to be sold to the same uses. A. cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth* v. *Archer*, 1 Bro. C. C. 159.

3. Tenant for life entitled to timber for repairs, cannot sell the same to reimburse herself expenses incurred in repairs. *Gower* v. *Eyre*, Coop. 156.

4. Right of a tenant entitled to a life interest, in a term of years, unimpeachable of waste, to fell timber for his own benefit. *Bridges* v. *Stephens*, 2 Swan. 150.

5. Lessee for lives renewable for ever will be enjoined from committing waste by cutting timber, if he allows a large arrear of rent to become due. *White* v. *Nowlan*, Hog. 21.

6. Injunction refused to restrain the father, who was tenant for life, without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, etc. To ground such an injunction there must be waste and spoliation, and no delay in applying for it. *Peirs* v. *Peirs*, 1 Ves. 521.

7. Jointress having given leave to the next in remainder for life without impeachment, etc., to cut timber, the remainderman in tail having acquiesced, and encouraged his doing so, the latter was restrained, by perpetual injunction, from bringing action of waste against the jointress. *Aston* v. *Aston*, 1 Ves. 396.

The Court will restrain tenants for life without impeachment of waste, to a reasonable exercise of the right. S. C. 2 Ves. 264.

8. Tenant for life punishable for waste, with powers under an enclosing Act to mortgage, for the expense of the inclosure felled timber, and applied the produce instead; decreed to account to owner of next estate of inheritance. *Lee* v. *Alston*, 1 Ves. J. 78; 3 Bro. C. C. 37.

9. A tenant for life, remainder to his sons successively in tail male, remainder to B. for life, and to her sons in the same manner, the trustees to preserve contingent remainders; A., being also seised of the reversion in fee, cut and sold the timber before the birth of a tenant in tail; afterwards B. had a son, who died soon after his birth, and another son who survived A. The produce of the timber was decreed to be laid out in the funds during the life of A., and upon his death without having had a son, was decreed to be laid out in land, to be settled to the uses of the estate upon which the timber was cut. *Powlett* v. *Bolton* (*Duchess*), 3 Ves. 374.

10. A tenant for life, liable to waste, having sold timber, cannot prevent the vendor from cutting it. *Walworth* v. *Turner*, 3 Ves. 3.

11. A tenant for life without impeachment of waste, not restrained from felling trees fit for the purpose of timber, though young and not such as would be felled in a course of husbandman-like management of the estate. *Smythe* v. *Smythe*, 2 Swan. 251; 1 Wils. 426.

12. A devise of the rents and profits of an estate to the husband for life, without impeachment of waste, shall not only be considered as annual profits, but will empower him to cut timber. *Partridge* v. *Pawlett*, 1 Atk. 467.

13. Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power over it. *Edwards* v. *Heather*, Sel. Ch. Ca. 3.

14. Power of tenant for life under general words "without impeachment of waste," not enlarged by implication from more extensive powers given to trustees for special purposes after her death. *Downshire* v. *Sandys* (*Lady*), 6 Ves. 107.

15. Residue bequeathed in trust, to be laid out in real estates, to be settled to the same uses as estate devised to the trustees for life successively, without impeachment of waste, with various limitations in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee, the trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion; the first tenant for life cannot cut the whole. *Burges* v. *Lamb*, 16 Ves. 174.

Land devised to be sold, the money to be laid out in other estates to be settled, the rents and profits until sale to go to the persons entitled to the estates to be purchased. Tenant for life, without impeachment of waste, cannot cut timber on the estate to be sold. *Id.* 180.

Right of tenant for life, without impeachment of waste, to cut timber generally in a husband-like manner, independent of the effect upon the beauty of the place, except equitable waste. *Id.* 185.

16. Tenant in tail in possession may fell all timber fit; but tenant for life impeachable of waste, can only cut such as will be for the benefit of succession. *Hussey* v. *Hussey*, 5 Madd. 44.

17. As between tenant for life and remainderman, the thinnings of fir-trees under twenty years of age belong to the tenant for life. *Pidgeley* v. *Rawling*, 2 Colly. 275.

18. Where a testator devises the legal estate to trustees, and gives to a tenant for life an

equitable estate only, with remainders over, such tenant for life ought not to cut timber without the consent of the trustees. *Denton* v. *Denton*, 7 Beav. 388; 8 Jur. 388.

1. Exemption from liability to waste annexed to a life-estate is a special power in the tenant for life to appropriate part of the inheritance:—Held, under the terms of a deed of settlement in this case, that it was made subordinate to a discretionary power of cutting timber conferred on the trustees. *Kekewich* v. *Marker*, 3 Macn. & G. 311; 15 Jur. 687.

2. Devise to A. and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family, being restrained to an estate for life by decree at the Rolls, the devisee was enjoined from cutting timber pending an appeal. *Wright* v. *Athyns*, 1 Ves. & B. 313. See also 19 Ves. 299; 17 Ves. 255; Coop. 111; T. & R. 143.

3. A tenant for life, without impeachment of waste, in order to preserve the timber, assigned for valuable consideration "all timber and timber-like trees then growing and being, and which should thereafter grow and be, upon the estate":—Held, that this included both ordinary timber, and that which, by the custom of the country, was considered timber and the thinnings, and the right of determining what were proper thinnings belonged to the grantees. *Gordon* v. *Woodford*, 27 Beav. 603; 6 Jur., N. S., 59; 29 L. J., Ch., 222; 1 L. T., N. S., 260.

4. A tenant for life impeachable for waste is entitled to the thinnings of plantations if properly made, and to the crops of all coppices cut in due rotation. *Bateman* v. *Hotchkin*, 32 L. J., Ch., 6; 31 Beav. 486.

5. By marriage settlement an estate belonging to the husband was settled upon him for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same," with remainders over:—Held, that such a construction must, if possible, be put upon the exception as not to destroy the effect of the whole clause, and that the tenant for life was entitled to cut all such timber and wood, not planted or standing for ornament, as an owner of the estate in fee simple, having regard to his interest and the permanent advantage of the estate, might properly cut in a due course of management. *Vincent* v. *Spicer*, 2 Jur., N. S., 654; 25 L. J., Ch., 589; 22 Beav. 380; 4 W. R 667.

6. An equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; but it does not follow that the Court will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary and proper to cut, and direct that the cutting be done under its supervision. *Baker* v. *Seabright*, 13 L. R., Ch. D., 179; 49 L. J., Ch., 65; 41 L. T. 614; 28 W. R. 177.

7. Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timberlike trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings. *Honywood* v. *Honywood*, 18 L. R., Eq., 306; 43 L. J., Ch., 652; 10 L. T. 671; 22 W. R. 749.

Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance. *Ib.*

A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste. *Ib.*

8. Power contained in a will, for the devisees for life, when in possession, to cut down timber, as four trustees, or the survivors or survivor of them, should assign, allow of, or direct; all the four trustees being dead:—Held, that the Court would execute the trust by referring it to a Master to see what timber was fit to be cut down from time to time. *Hewett* v. *Hewett*, 2 Eden 332; Ambl. 508.

9. As to security for reimbursement of tenant for life, for loss sustained by being wrongfully restrained from cutting timber, etc. *Wombwell* v. *Belasyse* cited, 6 Ves. 110.

10. Settlement of estates on trustees and their heirs, during the joint lives of W. H. and his wife, without impeachment of waste, upon trust, out of rents and profits, to pay all expenses and outgoings, and to raise and pay a sum, by way of pin-money, to the wife, and subject thereto to pay the clear residue of rents, etc., to W. H. during the lives of himself and his wife, remainder to W. H. for life, without impeachment of waste, remainder over, with power for the trustees to sell and lay out the produce in the purchase of other lands to the same uses; the land being sold under the power, W. H. was held entitled to the produce of timber cut down by him previously to the sale, not to the value of timber then standing. *Wolf* v. *Hill*, 2 Swan. 149.

2. Windfalls.

11. The first owner of the inheritance *in esse* shall have timber blown down; for the trees must become the property of somebody. *Garth* v. *Cotton*, 3 Atk. 755.

12. Windfalls of timber and other casualties to whom the property belongs, tenants for life, remainderman, etc. *Aston* v. *Aston*, 1 Ves. 396.

13. The tenant for life may gain a benefit indirectly by no act of his own, as in the case of timber thrown down by storm, etc. *Lushington* v. *Boldero*, 6 Madd. 149.

14. A tenant for life committing waste by cutting timber, can gain no advantage from his wrongful act, but the produce is invested and accumulated for the benefit of the first estate of inheritance. Where timber is blown down, a tenant for life impeachable for waste is absolutely entitled to such parts as he would be entitled to cut himself, as thinnings, etc., and also to the interest by the investment of the produce of the rest. *Bateman* v. *Hotchkin*, 31 Beav. 486; 32 L. J., Ch. 6.

15. Notwithstanding the popular notion to the contrary, the proceeds of windfalls of

timber must be invested and dealt with as part of the corpus of the settled estate. *Bagot* v. *Bagot*, *Legge* v. *Legge*, 32 Beav. 509; 33 L. J., Ch., 116; 2 N. R. 297.

1. Where timber is cut or blown down the property in it belongs to the owner of the first estate of inheritance *Honywood* v. *Honywood*, 18 L. R., Eq., 306; 43 L. J., Ch., 652; 22 W. R. 749; 30 L. T., N. S., 671.

3. Proceeds when cut.

See also V. II. 2 *ante*—II. *supra*.

2. G., tenant for ninety-nine years, if he so long live, *sans* waste (except voluntary), remainder to trustees to preserve, etc., remainder to his first, etc, sons in tail male, remainder to A. in fee. G., before a son born, and A. agreed to cut down timber on the estate, and to divide the produce between them; A. agreeing not to take advantage of the waste. They cut timber of the value of 2,000*l*. G.'s son, on attaining twenty-one, suffered a recovery to the use of himself and his heirs:—Held, that G.'s son shall have satisfaction for so much of the value of his inheritance as A. had received under the agreement, with interest at 4 per cent. from the filing of the bill. *Garth* v. *Cotton*, 3 Atk. 751; 1 Ves. 524, 546.

3. A. devises lands encumbered with debts to B. for life, remainder to C. in fee; B. cuts down timber from the estate; B. decreed to pay two-fifths of the debts, and C. the remaining three-fifths, and B. to account for the timber which he had cut, and this to be taken as part of the three-fifths, which the remainderman was to pay. *James* v. *Hales*, 2 Vern. 267; Pre. Ch. 44.

4. Settlement of estates on trustees and their heirs, during the joint lives of W. H and his wife, without impeachment of waste, upon trust, out of the rents and profits, to pay all expenses and outgoings, and to raise and pay a sum by way of pin-money to the wife, and subject thereto to pay the clear residue of the rents, etc., to W. H., during the lives of himself and his wife; remainder to W. A. for life, without impeachment of waste; remainder over; with power for the trustees to sell and lay out the produce in the purchase of other lands to the same uses; the land being sold under the power, W. H. was held entitled to the produce of timber cut down by him previously to the sale, but not to the value of timber then standing. *Wolf* v. *Hill*, 2 Swan. 149.

5. The thinnings of fir trees, under twenty years' growth:—Held, as between the tenant for life and the remainderman, to belong to the former. *Pidgeley* v. *Rawling*, 2 Colly. 275.

6. Devises of land to be sold, and other lands to be purchased in another county; A. to be tenant for life (*sans* waste) of the lands to be purchased, and the rents and profits of the lands to be sold to the same use: A. cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth* v. *Archer*, 1 Bro. C. C. 159.

7. Where tenant for life, unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Ormonde* v. *Kynnersley*, 15 Beav. 9. n.

8. A tenant for life; remainder to his sons successively in tail male; remainder to B. for life, and to her sons in the same manner, the trustees to preserve contingent remainders. A., being also seised of the reversion in fee, cut and sold before the birth of a tenant in tail; afterwards, B. had a son, who died soon after his birth, and another son, who survived A.; the produce of the timber was decreed to be laid out in the funds during the life of A., and upon his death, without having had a son, was decreed to be laid out in land, to be settled to the uses of the estate upon which the timber was cut. *Powlett* v. *Bolton* (*Duchess*), 3 Ves 374.

9. Tenant for life shall keep down interest by rents and profits: but portions and principal money due on any other incumbrance shall be borne by the whole estate. Therefore tenant for life shall not account for rents, or value of timber cut down, in order that they might be applied towards raising portions. *Saville* v. *Saville*, 2 Atk. 463.

10. Tenant for life, punishable for waste, with power, under an inclosing Act, to mortgage for the expense of the inclosure, felled timber and applied the produce instead; decreed, to account to owner of next estate of inheritance. *Lee* v. *Alston*, 1 Ves. J. 78; 3 Bro. C. C. 37.

11. Devise of real estates to A. and B., and their heirs, to the use of them, and their heirs, in trust to permit C. to receive the rents and profits for life, and after her decease to stand seised of the same premises, in trust for the second son of D, and the heirs male of his body; remainder in trust for the third, fourth, and other sons of D. in tail male; remainder in trust for E. for life, without impeachment of waste; remainder to trustees to preserve, etc; remainder to the first and other sons of E. in tail male, etc.; proviso, that in case there should not be a second son born, the said trustees should pay the rents and profits of the said estates to such person as was next in remainder, and should be entitled to receive the same in case no son should be born. C. having cut timber, this was sold under an order of the Court, and the produce paid into the bank. At C.'s death, D. had no son, and E. was dead, leaving F., his eldest son. The produce of the timber belongs to F. absolutely, and shall not abide the event of D.'s having a son. *Dare* v. *Hopkins*, 2 Cox 110.

12. Where guardian of an infant tenant in tail cuts down timber, the money for it shall be personal estate of the infant; but if the infant has the fee, it shall be considered as real estate. *Tullit* v. *Tullit*, Ambl. 370; Dick 322.

13. Tenant for life, *sans* waste, is restrained by injunction from selling timber; afterwards his creditors obtain an order for a sale, and a receiver is appointed for the money arising from the sale; but the tenant for life dies before the timber is felled. *Quære*, whether his representatives are entitled to the benefit of the timber. *Partridge* v. *Pamlett*, Ridgw. 254.

14. A. tenant for life, remainder to first, etc., sons in tail, remainder to B. for life, remainder

to first, etc., sons in tail, remainder to C. in tail. A. cut down timber; A. and B. having no son born, C. is entitled to timber. *Rolt* v. *Somerville* (*Lord*), 2 Eq. Abr. 759.

1. A., tenant for life, remainder to his first, etc., son in tail, remainder to B. for life, remainder to his first, etc., son in tail, remainder to C. in tail. A. cuts down timber; A. and B. having no son born, C. is entitled to the timber both in law and equity. *Whitfield* v. *Bewitt*, 2 P. W. 240.

One seised in fee conveys the lands and all trees and mines to trustees in fee, to the use of A. for life, remainders over; A. cannot open the mines or cut down the trees. *Id.* 242.

2. A tenant for life, without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate. *Doran* v. *Wiltshire*, 3 Swan 699.

3. B. was tenant for life, with remainder to his first and other sons in tail, remainder to O. for life, remainder to her first and other sons in tail, with other contingent remainders, with remainder to B. in fee. O. had a child, who died almost immediately before any other contingent remainderman came *in esse*. B. cut down timber, his own remainder in fee being the next existent estate of inheritance, but afterwards O. had another child. B. shall not take advantage of his own wrong, by taking the timber so cut, nor is the second child of O. entitled until it shall be seen whether B. shall have a child; but the produce shall be paid into court by B., with interest at 4 per cent., and accumulate for the benefit of such person as shall appear at the death of B. to have title to it. *Williams* v. *Bolton*, 1 Cox 72.

4. Tenant for life has no property in the underwood till his estate comes into possession, and therefore cannot have an account of what was cut wrongfully by a preceding tenant. *Pigot* v. *Bullock*, 1 Ves. J. 479; 3 Bro. C. C. 589.

5. Estates were devised to A. in fee in trust to settle them on B. for life, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail. Soon after the testator's death A., with the consent of B. and C., cut and sold some timber on the estates which was going to decay, and invested the proceeds in consols. Afterwards, a suit was instituted by C. against A. and B., and C.'s eldest son, in which the stock was ordered to be transferred into court. The Court having ascertained the circumstances under which the timber had been cut down, ordered the dividends of the stock to be paid to B. for life, and afterwards B. having died, the capital to be transferred to C. *Waldo* v. *Waldo*, 12 Sim. 107; 10 L. J., N. S., Ch., 312.

Testatrix devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life, *sans* waste, remainder to his first and other sons in tail. The trustee, under a surveyor's advice, and with the consent of the tenants for life, ordered timber on the estate to be felled, and invested the proceeds of stock in his own name:—Held, that A. was entitled to the dividends of the stock for her life. S. C. 7 Sim. 261.

6. The proceeds of timber cut down during the life of a late tenant for life impeachable of waste, ordered to be paid to the tenant for life in possession, being unimpeachable of waste. *Phillips* v. *Barlow*, 14 Sim. 263; 14 L. J., N. S., Ch., 35.

7. Case in which an account of timber felled during the life of tenant for life, etc., refused on account of the power given to trustees being void, etc. *Ferrand* v. *Wilson*, 4 Hare 344; 15 L. J., N. S., Ch., 41; 9 Jur. 860.

8 Husband of female tenant for life, with condition not to commit waste:—Held (in opposition to *Ormond* (*Marquis*) v. *Kynnersley*, 5 Madd 369), liable for timber cut, and not the wife or her estate. *Kingham* v. *Lee*, 15 Sim. 396; 16 L. J., N. S., Ch., 49; 11 Jur. 4.

9. Lord O. being equitable tenant for life, mortgaged his life estate as a security to certain creditors, and afterwards committed waste by felling and selling large quantities of timber:—Held, that, as against the mortgagees and incumbrancers upon the life estate, the remaindermen had an equity to have the injury done to the inheritance made good, and had for that purpose a lien upon the rents and profits in the hands of the trustees of the settlement accrued during the life of Lord O. *Briggs* v. *Oxford* (*Earl*), 1 Jur., N. S., 817; 3 W. R. 588; 4 W. R 38.

10. Where an equitable tenant for life, unimpeachable of waste, was entitled to estates, subject to a trust for payment by the trustees out of the rents and profits, but not by sale or mortgage of such estates, of certain mortgages on the estates; and timber had been cut on the estates by the direction of the Court:—Held, that the term "rents and profits" meant annual rents and profits, and that the tenant for life in possession, though not in possession of the rents and profits of the estate, was entitled to all other rights incident to his estate, and, therefore, that he was entitled to the proceeds of the timber which had been cut. *Lovat* (*Lord*) v. *Leeds* (*Duchess*), 2 Dr. & Sm. 75; 10 W. R. 398.

11. A tenant for life may cut oak coppice in due course for his own benefit, when the custom of the country so permits, and may also take the profits which arise from the periodical thinnings of woods. *Bagot* v. *Bagot*, *Legge* v. *Legge*, 2 N. R. 297; 32 Beav. 509; 33 L. J., Ch., 116.

The proceeds of timber cut and minerals won, with a proper regard to the benefit of an estate, by a tenant for life impeachable of waste, will, by the rules of the Court of Equity, be invested and dealt with as part of the corpus of the estate, the tenant for life, though impeachable of waste, receiving the income. *Ib.*

The proceeds of timber and minerals improperly cut and won at a time when there is no person *in esse* unimpeachable for waste, must be similarly dealt with, except that the tenant for life, improperly acting, cannot receive the income. *Ib.*

The proceeds of timber and minerals improperly cut and won by a tenant for life impeachable of waste, at the time when there is in existence a remainderman entitled indefeasibly to the first estate, unimpeachable of waste, belong absolutely to such remainderman. *Ib.*

Notwithstanding the popular notion to the contrary, the proceeds of windfalls of timber must be invested and dealt with as part of the corpus of the settled estate. *Ib.*

When a tenant for life impeachable for waste improperly, knowingly, and wilfully commits waste, he cannot derive any benefit from the timber cut. *Ib.*

Semble, tenant for life may be entitled to recommence working abandoned or dormant mines which were not worked by the settlor. S. C. 2 N. R. 297.

1. A. was tenant for life without impeachment of waste, with remainder to her issue in tail, with remainder to B. for life, with remainder to his issue in tail, with remainder to B. in fee. The Court directed some timber to be cut in the life of A., and the produce to be invested. Both A. and B. died without issue:—Held, as between the heir and executor of B., that the timber money was realty, and belonged to the heir. *Field* v. *Brown*, *Smith* v. *Brown*, 27 Beav. 90.

2. Where timber, ripe for cutting, is cut by a tenant for life, impeachable for waste, he is entitled to the income of the fund produced by the sale thereof, and the first person taking an estate unimpeachable for waste will, on coming into possession, be entitled to the capital. *Gent* v. *Harrison*, Johns. 517; 29 L. J., Ch., 68; 5 Jur., N. S., 1285; 1 L. T., N. S., 128.

Where the timber so cut is not ripe for cutting, *semble*, the produce belongs immediately to the first person having an estate of inheritance, passing over all the intermediate life estates, whether impeachable for waste or not. But whether it belongs to him, or to the first tenant for life, unimpeachable for waste, the cutting being a *tort*, the remedy is by action, and not in this court. Therefore, under no circumstances can a tenant for life, unimpeachable for waste, be entitled, on coming into possession, to back interest on the produce of timber, whether properly or improperly cut by a previous tenant for life impeachable for waste. *Ib.*

3. An estate stood limited to A. for life without impeachment of waste, with remainder to his issue in tail, with similar remainder to B. for life, with remainder to his issue in tail. A. and B became bankrupt, and the assignees under their joint commission committed equitable waste by cutting ornamental timber. The produce was brought into court:—Held, that the assignees were entitled to no part of the income, either in respect of the estate of A. or that of B., but that the whole produce and accumulation belonged to the eldest son of C., as first tenant in tail. *Lushington* v. *Boldero*, 15 Beav. 1; 16 Jur. 140; 21 L. J., Ch., 49.

4. On a case submitted to the Court by trustees, as to certain questions arising between the equitable tenant for life and the remainderman in the management of the estate:—Held, that the produce of the sale of underwood and of timber cut periodically, in the regular course of thinning, was to be treated as income, and that of timber not cut in the regular course, but to improve the growth of the remaining trees, as capital. *Cowley (Earl)* v. *Wellesley*, 1 L. R., Eq., 656; 14 W. R. 528; 14 L. T., N. S., 425.

Held, also, that the produce of the sale of gravel on the waste lands, and likewise the fines payable on grants of waste lands made by the trustees, and moneys payable in consideration of the waiver by the trustees of restrictive conditions in grants made by them (but not where the grants were made by the testator), and likewise preliminary fines paid to the trustees as lords of the manor on the enfranchisement of copyholds by persons admitted before the 1st July 1853, pursuant to the Copyhold Act of 1852, were respectively to be treated as income. *Ib.*

Held, also, that the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of capital; and that the costs of rendering accounts for the succession duty, payable for the first equitable tenant for life, must be paid out of income. *Ib.*

The owner of woodlands had been accustomed, every year, to cut about one-twelfth of the underwood and also such of the trees on the same ground as were likely to obstruct and prejudice the growth of the timber:—Held, that the tenant for life under his will was entitled to the produce both of the underwood and trees cut according to that custom. S. C 35 Beav. 635.

The trustees of a will felled some trees in the woodlands for the purpose of improving the growth of those remaining, but during the testator's lifetime the trees had not been thinned:—Held, as between tenant for life and remainderman, that the produce was capital and not income. *Ib.*

5. Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timber-like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings. *Honywood* v. *Honywood*, 18 L. R., Eq., 306; 43 L. J., Ch., 652; 22 W. R. 749; 30 L. T., N. S., 671.

Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance. *Ib.*

A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste. *Ib.*

6. Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting: yet when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. *Bubb* v. *Yelverton*, *Exp. Hastings*, 10 L. R., Eq., 465; 18 W. R. 1127, 1146; 40 L. J., Ch., 38.

A tenant in fee simple having contracted to sell the reversion after his own life, cut down ornamental timber. After his death, in a suit for the administration of his estate, the

purchaser of the reversion brought in a claim for damages. In the opinion of the Court the evidence did not show that any injury had been done to the reversion:—Held, that as the purchaser had not applied for an injunction to restrain the cutting, he could not claim damages. But, *semble*, that if he had applied for an injunction, any timber, the loss of which would, in his opinion, have been injurious to the ornamental effect, would have been protected. *Ib.*

1. An equitable tenant for life impeachable for waste cut timber not otherwise than in due course of management. The proceeds had been brought into court and the income ordered to be paid to her. On her death her son, being the next tenant for life dispunishable for waste, petitioned for payment to him of the timber money in court:—Held, that he was entitled to the money, as he would have been entitled to the trees which produced it. *Lowndes* v. *Norton*, 6 L. R., Ch. D., 139; 46 L. J., Ch., 613; 25 W. R. 826.

See also V. II. 2 *ante*—II. *supra*.

IV. TENANT IN FEE WITH EXECUTORY DEVISE OVER.

2. Where there is an executory devise over, even of a legal estate, this Court will not permit timber to be cut, more especially in the case of a trust estate. *Stansfield* v. *Habergham*, 10 Ves. 278.

3. A tenant in fee, with an executory devise over, is entitled to cut timber, but not to commit equitable waste, but a provision against cutting timber may be annexed to his estate. *Blake* v. *Peters*, 9 Jur., N. S., 836; 32 L. J., Ch., 200; 1 De G. J. & S. 345; 1 N. R. 503; 11 W. R. 409; 9 L. T., N. S., 247. Affirming 31 L. J., Ch., 884; 10 W. R. 826.

The estate of the tenant in fee under such circumstances, may be liable for the waste committed, though the instrument creating the estate declared that such waste should forfeit the estate. *Ib.*

Real estate was devised to a person in fee with a gift over in the event of his dying without leaving issue living at his death, and it was declared that he should not cut timber, except for necessary repairs, on pain of forfeiting his estate, and that if he did so the estate should go over. The devisee died without issue, having cut and sold timber:—Held, that this restriction was legal, that the clause of forfeiture was only an additional means of securing its observance, and that the value of the timber could be claimed against the estate of the devisee. S. C. 1 De G. J. & S. 345.

The will directed the devisee, during his life, to keep certain renewable leaseholds fully estated with three lives, which leaseholds were subject to the same limitations as the real estate:—Held, that the whole expense of renewals during the life of the first devisee was to be borne by him. *Ib.*

Held, also, that the tenant in fee was under no obligation to repair, and was not liable for permissive waste. S. C. 31 L. J., Ch., 884; 10 W. R. 826.

4. A devisee in fee, subject to an executory devise over in the event of his not leaving issue living at his death:—Held, dispunishable for legal, but not for equitable, waste. *Turner* v. *Wright*, 2 De G. F. & J. 234; 6 Jur., N. S., 809; 29 L. J., Ch., 598; 8 W. R. 675; Affirming Johns. 740; 6 Jur., N. S., 647; 29 L. J., Ch., 470.

5. A. was tenant in fee-simple of an estate, subject to an executory devise over in the event of his death under twenty-one without issue. During the minority of A., timber which was deteriorating was cut with the sanction of the Court. A. died under twenty-one without issue:—Held, that the produce of the timber passed as personalty to his legal personal representative. *Dyer* v. *Dyer*, 34 Beav. 540; 11 Jur., N. S., 721; 6 N. R. 79; 13 W. R. 732; 12 L. T., N. S., 442.

V. TENANT IN TAIL.

6. Several persons were entitled successively to life estates in real property, limited in strict settlement. They became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H. L., the then first tenant in tail *in esse*, who was an infant, the assignees were ordered to bring the money into court. This, with the accumulations, amounted to 26,133*l.* 2*s.* 10*d.* Two of the tenants for life died without issue. H. L. attained twenty-one, and, being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations, which were ordered to be transferred to him. *Lushington* v. *Boldero*, 15 Beav 1; 21 L. J., N. S., Ch., 49; 16 Jur. 140.

7. Bill by tenant in tail in reversion to have timber cut, ordered; and that the money be laid out in the funds, and the claim discussed when tenant in tail of age. *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76.

8. One settles lands upon his daughter in tail, and takes a bond from her not to commit waste; bond not binding in equity. *Jervis* v. *Bruton*, 2 Vern. 251.

9. A father, tenant for life of family estates, and a son, tenant in tail in remainder, concurred, shortly after the son attained twenty-one, in a re-settlement of the estates, whereby provision was made for payment of the debts of the father, to a specified large amount, and a small present provision was made for the son. The estates were previously subject to heavy mortgages, and, by the re-settlement, the estates were vested in trustees in fee upon trusts to keep down the interests upon the incumbrances out of the rents, and by mortgages and sales to raise moneys towards the discharge of the principal, and subject thereto in trust for the father for life, remainder in trust for the son for life, without impeachment of waste, subject to a power thereinafter given to the trustees to fell timber; remainder in trust for the first and other sons of the son in tail male, remainder in trust for the heirs and assigns of the father in fee. Power was given to the trustees at any time or times thereafter, so long as there should be any mortgage on the estates (but after the death of the father, not without the consent of the son, if living, in writing), to fell timber upon the estates, and to apply the proceeds in dis-

charge of the mortgages. A bill was filed by the trustees for a declaration of the true construction of the settlement, and for an injunction restraining the son from preventing the trustees from receiving the proceeds of the sale of timber felled with his consent, and also from felling timber; and a demurrer was put in to the bill:—Held, that as the interference with the sale was by a *cestui que trust* and not by a mere stranger, the proceeding was properly the subject of equitable jurisdiction. *Briggs* v. *Oxford (Earl)*, 5 De G. & Sm. 156; 16 Jur. 53; S. C. 21 L. J., N. S., Ch., 829; 1 De G. M. & G. 363; 16 Jur. 558.

1. Tenant in tail restrained by statute from barring issue and those in remainder, is not, for that reason, within the principle of equitable waste. *Att.-Gen.* v. *Marlborough (Duke)*, 3 Madd. 498.

2. Tenant in tail in possession may fell all timber fit. *Hussey* v. *Hussey*, 5 Madd. 44.

3. A testator bequeathed a sum of stock to trustees, upon trust, during sixty years from his death, if the law should allow, or, if not, then during the lives of his two sons and of the survivor, and twenty-one years after his death, to lay out the dividends in repairing and insuring the houses, etc., on his farms called H. and S. (it being his desire that upon no account should the timber of such farms be cut down during the said term of sixty years, on pain that the person so cutting such timber should lose all interest in the said estates, as if he were dead), and upon trust to pay the surplus, if any, of the said dividends equally among the persons for the time being in possession of the estates under his will, during the continuance of the said trust; and immediately after the expiration thereof, to transfer one moiety of the said stock to the person then in possession of the H. farm, such person being one of his sons, or a descendant of a son; but if not, then to the descendants of the testator's brothers and sisters, and to pay the other moiety in like manner to the person in possession of the S. farm. And the testator devised the H. farm to the same trustees in fee, upon trust for his son John, for ninety-nine years, if he should so long live, remainder to the use of his first and other sons in tail, with divers remainders over. And the testator devised the S. farm in like manner for the benefit of his son James and his issue. John and James, and their eldest sons, barred the entail in remainder in the said farms, and resettled the same, and, the stock having been transferred into court under the Trustee Relief Act, petitioned for the payment out of the fund to them:—Held, that the fund being intended for the benefit of the sons and their issue, the period for the enjoyment of the capital had been accelerated by barring the entail, which had determined the restriction against cutting down timber. *Re Colson's Trusts*, 1 Kay 133.

After Possibility of Issue Extinct.] 4. Settlement on marriage, of lands of the husband, to the use of husband for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the daughters in the same manner; remainder to the heirs of the body of the husband and wife. The husband being dead, without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it, when severed, as tenant in tail, after possibility of issue extinct, either in possession, by the effect of merger, if the estates can unite, or, if not, in remainder, *quære*. A case directed *Williams* v. *Williams*, 15 Ves. 419.

Tenant in tail, after possibility of issue extinct, being dispunishable for waste by the law, has, equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber. *Id.* 427.

Tenant in tail, after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may not only commit waste, but also convert to her own use the property wasted; therefore, not to be restrained in equity, except for malicious waste. *Id* 430.

See also II. *supra*

VI. TRUSTEES.

5. Trustees to preserve, etc., may bring title to stay waste by tenant for life. *Perrot* v. *Perrot*, 3 Atk. 95.

6. Power contained in a will for the devisees for life, when in possession, to cut down timber as four trustees, or the survivors or survivor of them, should direct, etc.: all the four trustees being dead:—Held, that the Court would execute the trust, by referring it to a Master to see what timber was fit to be cut down from time to time. *Hewett* v. *Hewett*, 2 Eden 332; Ambl. 508.

7. A., seised in fee of land, demised the premises to trustees, B., C., and D., for three hundred years, in trust to pay debts, etc., for a charity. B., one of the trustees, being in possession, and as a receiver appointed by the Court, cuts down 1,000*l.* worth of timber; D., one of the other trustees, consenting, B., the trustee for the charity, or as a receiver, ought not to take advantage of his having possession, without which he could not cut down the timber; yet the timber must be valued according to what it would be worth at the end of the term of five hundred years. *Bays* v. *Bird*, 2 P. W. 397.

8. Devise of real estate to M. for life, and direction, "that the timber or wood which should be on his real estates, should from time to time be used for repairing the houses thereupon, or otherwise for the benefit and advantage of his estate, or that the same should be sold, and the money arising therefrom should be applied," etc.:—Held, devise to M. carried the underwood, and that trustees leaving sufficient timber for repairs might cut all fit timber, except ornamental. *Butler* v. *Borton*, 5 Madd. 40.

9. Held, on the construction of a charity-deed, that estates were given as one fund for the benefit of two distinct institutions, the whole to be managed for the benefit of both, in a due course of provident ownership; that the trustees were not restrained after the expiration of the forty years from cutting for

the purposes of repairs, nor from cutting timber on one part of the estates, for repairs on another part, nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; and that the power of cutting young slabs and tillers still continued, with the qualification annexed thereto. *Att.-Gen.* v. *Geary*, 3 Meriv. 514.

1. The general controlling power of the Court over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust, which will not be presumed, but must be apparent or made out by evidence. The Foundling Hospital is an institution of this kind; therefore, on motion, injunction to restrain the governors from building round it, refused, breach of trust or probability of it not being made out, and held not in nature of waste to turn meadow into buildings, unless clearly injurious. *Att.-Gen.* v. *Foundling Hospital* (*Governors*), 2 Ves. J. 42.

2. Testator devised his real estates to trustees in fee, in trust for T. M. for life, with remainder in trust for all the children of T. M., as tenants in common in tail, with remainders over, and ultimately in trust for his own right heirs; and he bequeathed his personal estate to the trustees, in trust for Mary B. for life, with remainder in trust for all her children who should attain twenty-one, with remainder in trust for T. M. and his children in like manner; and he directed that the timber or wood which should be upon his real estates should be from time to time made use of for repairing the houses thereon, or otherwise for the benefit and advantage of his estates; or that the same should be sold, and the proceeds applied in the manner in which his personal estate was thereinbefore directed to be applied.—Held, that the direction or trust respecting the timber and wood on the estates was not perpetual, but ceased on the inheritance vesting in possession in adult persons. *Silvester* v. *Bradley*, 13 Sim. 75; 11 L. J., N. S., Ch., 365.

3. Power of tenant for life under general words "without impeachment for waste," not enlarged by implication from more extensive powers given to trustees for special purposes, after her death. *Downshire* v. *Sandys* (*Lady*), 6 Ves. 107.

4. Direction to trustees to cut trees in aid of testator's real and personal estate:—Held, not a trust, but a mere power, upon the whole of the will. *Gower* v. *Eyre*, Coop. 156.

5. By an indenture of settlement, certain estates, consisting of a mansion-house and other premises, were limited to the use of trustees for a term of one thousand years, without impeachment of waste, save only the cutting of ornamental timber, and subject to the said term to the use of the settlor for life, without impeachment of waste, save as aforesaid, then to the use of A. B. and his assigns for life without impeachment of waste, save as aforesaid, with divers limitations over. The trusts of the term were, in the first place, by cutting and felling and selling and converting into money all or any part or parts of the timber standing and growing on the said lands, which should be of full and ripe growth, and not ornamental to the mansion or pleasure-grounds attached thereto, or any of the views or prospects of the same, of which timber it was declared that enough of the most ornamental should always remain to preserve the beauty of the place unimpaired, or by demising, mortgaging, or selling the premises comprised in the said term, or any part or parts thereof, save and except the mansion-house and certain other premises therein mentioned, or by all or any of the said ways and means, to levy and raise the sum of 10,000*l.* for the settlor, and, after the death of the settlor, in like manner to levy and raise two sums of 10,000*l.* each for other parties:—Held, upon the equitable construction of the trusts of the term, that the trustees had a discretionary power to enter on the estates, and cut fit and proper timber, and apply the proceeds in discharge of the sums directed to be raised; and that the Court would protect them in the exercise of that power, there being an absence of all *mala fides*, or of any wanton or unreasonable exercise of their discretion. *Kekewich* v. *Marker*, 3 Macn. & G. 311; 21 L. J., N. S., Ch., 182; 15 Jur. 687.

An injunction was in this case granted at the suit of the trustees, restraining A. B., the tenant for life in possession, from cutting the timber on the estates, on the ground that his doing so would interfere with the discretionary power vested in the trustees. *Ib.*

Exemption from liability to waste annexed to a life-estate is a special power in the tenant for life to appropriate part of the inheritance:—Held, in this case, that it was by the terms of the settlement made subordinate to the discretionary power conferred on the trustees. *Ib.*

6. Where estates were devised in trust for A. for life, remainder to B. for life, without impeachment of waste, remainder to his first and other sons in tail, and timber was cut by the trustee, with the consent of A. and B., and the proceeds paid into court in a suit instituted by B., to which his eldest son was a party, the fund arising from the timber was ordered to be paid to B. *Waldo* v. *Waldo*, 12 Sim. 107.

Testatrix devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life, *sans* waste, remainder to his first and other sons in tail. The trustee under a surveyor's advice, and with the consent of the tenant for life, ordered timber on the estate to be felled, and invested the proceeds of stock in his own name:—Held, that A. was entitled to the dividends of the stock for her life. S. C. 7 Sim. 261.

7. A perpetual injunction was granted against trustees who cut down three ornamental trees, and failed in proving to the satisfaction of the Court that they were prejudicial to the residence. *Campbell* v. *Allgood*, 17 Beav. 623.

Trustees, although acting with *bona fides*, and with a view to increase the value of the estate, are not justified in cutting down ornamental timber, which was stated to be injurious to the enjoyment of the property, without the assent of the parties beneficially interested or the sanction of the Court, and

the onus of proving that the timber was injurious rests on the trustees; and in such a case the trustees failing to prove that the timber was injurious, the Court granted a perpetual injunction to restrain them from cutting trees on the estate. *Ib.*

1. A testator, by his will, devised all his real estates to trustees for ninety-nine years, without impeachment of waste, and subject thereto, to the use of his son for life, without impeachment of waste, with remainder to the use of his granddaughter for life, without impeachment of waste, with remainder to her first and other sons in tail, etc. The trustees of the term were, in the event of his personal estate being deficient, to raise money to pay debts and legacies. The will contained an express provision against cutting down any timber on the estates, except for necessary repairs, until the granddaughter should attain twenty-one, at which time the trustees were empowered to cut such timber "as they shall think fit," and to sell and pay the proceeds to the granddaughter. The son entered into possession, and died before the granddaughter attained twenty-one. She then became tenant for life. Some time afterwards, and after she attained her majority, the trustees sold the term by auction in order to pay debts. It was stated in one of the conditions of sale that the estate was sold subject to any rights under the provisions in the will:—Held, that the will created no obligatory trust in favour of the granddaughter, but that power to the trustees to cut, etc., was merely discretionary. *Watlington* v. *Waldron*, 4 De G. M. & G. 259; 18 Jur. 317; 23 L. J., Ch., 713; 2 W. R. 120.

2. By a settlement, real estates were limited to the use of A. for life, with remainder to the use of M. and N., to preserve contingent remainders, remainder to the use of the plaintiff for life, with divers remainders over; and it was declared that it should be lawful for M. and N., at the request and by the direction of the plaintiff or other the tenant for life for the time being, to cut timber upon the estates. A., by will, devised real estates to S. and P., their heirs and assigns, to the same or the like uses, upon and for the same or the like trusts, intents, and purposes, and with, under, and subject to the same or the like powers, as the estates comprised in the settlement were subject to:—Held, that the power of cutting timber on the devised estates was vested in the trustees of the settlement, and not in the trustees of the will. *Taylor* v. *Miles*, 6 Jur., N. S., 1063.

3. By indenture of settlement, dated in 1832, certain real estates were vested in trustees in fee, upon trust to keep down the interest upon the incumbrances affecting the estates out of the rents, and by mortgages and sales to raise moneys towards the discharge of the principal; and subject thereto upon trust for the Earl of O. for life; with remainder in trust for his son, Lord H., for life, without impeachment of waste, but subject to the power thereinafter given to the trustees to fell timber; with remainder in trust for the first and other sons of the son of Lord H. in tail male; with remainder in trust for the heirs and assigns of the earl in fee. Power was then given to the trustees at any time or times thereafter, so long as there should be any incumbrances upon the estate (but after the death of the earl, not without the consent of the son, Lord H., if living, in writing), to fell timber upon the estates, and to apply the proceeds in discharge of the incumbrances. After the death of the earl the son claimed the right to fell timber, and apply the proceeds for his own use:—Held, that the timber growing upon the estate during the life of the defendant, the son, was to be applicable, not to his own purposes, but to relieve the inheritance from the incumbrances; and that the power to fell timber given to the trustees was not void as an infringement of the law against perpetuities. *Briggs* v. *Oxford* (*Earl*), 1 De G. M. & G. 363; 21 L. J., N. S., Ch., 829; 16 Jur. 558. Affirming 5 De G. & Sm. 156; 16 Jur. 53

In 1832 certain estates, of which A. was tenant for life, with remainder to his son B. in tail, and certain other estates to which A. was entitled in fee-simple, were settled, subject to certain charges, to trustees, upon trust to pay the rents (after paying the interest of mortgages) to A. during the joint lives of himself and B., and, if B. died in A.'s life, to pay an annuity to B.'s wife, and, subject thereto, to pay such clear rents to A. for life; but if A. died in B.'s life, then to stand seised of the estates to the use of B. for life, without impeachment of waste (but subject to the power thereinafter limited to the trustees or trustee thereof, to fell timber and underwood growing on the said hereditaments), with remainder, subject to an annuity to B.'s wife, to his first and other sons in tail, with remainder to the heirs of A. And in the settlement was contained a power to the said trustees, or the survivor of them, at any time thereafter, so long as there should be any mortgage or incumbrance subsisting on the said hereditaments (but not, after A.'s death, without the consent of B., to be signified in writing), to cut all or any of the timber and underwood on the said estates, and to sell the same, and apply the proceeds in or towards the discharge of the subsisting mortgages or incumbrances in manner therein mentioned. A. died in B.'s life. After A.'s death, the surviving trustees filed a bill against B. and the other persons interested under A.'s will and otherwise in the estate, stating the above facts, and that a considerable quantity of timber had been cut down and sold for the purposes of the trust, and that the trustees, in exercise of their discretionary power, had entered into various contracts for sale to various persons of certain timber, etc., which had been cut and carried away; and that part of the purchase moneys had been paid, but the remainder, though due, had not been received by the trustees, for the reasons after mentioned; that B. had claimed the right to cut timber, and had given notice that he would not consent to the trustees selling more, and had also given notice to the purchasers from them not to pay the purchase money to the trustees, and that the plaintiffs were thereby prevented from receiving the purchase moneys: and the bill prayed a declaration, that by the construction of the settlement, the trustees had, during the existence of any mortgage or incumbrance on the said estates, a discretionary power, with the consent of B., to cut and sell all or any of the timber for the

purpose of applying the proceeds in liquidation of such mortgages or incumbrances, and that the right of B. was subordinate to their right; and for an injunction to restrain B. from cutting or attempting to cut any such timber on the said estates, or from disposing thereof, so long as any such mortgage or incumbrance should be subsisting; and from receiving or attempting to receive, or applying to his own use, the proceeds of any timber already sold by him; and from doing or attempting to do or continue any act to prevent the plaintiffs from receiving any of the purchase moneys payable under their said contracts, or any other proceeds of such timber. Upon demurrer to this bill, it was held that the allegations were sufficient to support the prayer for a declaration of the rights of the trustees, and to have the trusts executed by the Court, if not for the injunction; and if that were an unnecessary part of the prayer, that would be a question of costs; and the demurrer was overruled. Upon motion the injunction was granted, it being held, upon the construction of the settlement, that the scheme of it was that the timber should be used to relieve the inheritance of the charges upon it, and that for this purpose the power given to the trustees was expressly made paramount to the privileges of the tenant for life, without impeachment of waste, to cut the timber, and that his consent was made necessary to enable him to regulate the mode of exercising the power. *Ib.*

VII. OTHER CASES

1. See the cases of waste in felling timber. *Skelton* v. *Skelton*, 2 Swan. 170; *Abrahall* v. *Bubb*, *id.* 172.

2. By the effect of a settlement, certain estates stood limited to trustees for a term of 1,000 years, and subject to such term, and to the trustees thereof, to the use of a tenant for life, with remainder over; and the trusts of the said term were thereby declared to be, upon trust, in the first place, by cutting and felling, and selling, and converting into money all or any part or parts of the timber then standing and growing on the said lands which was or should be of ripe or full growth, or by demising, mortgaging, or selling the premises comprised in the said term, or by all or any of the said ways or means, or any other reasonable ways or means, forthwith to levy and raise three several sums of 10,000*l.*, and to pay the same to the persons and in manner therein mentioned. The trustees of the term being about to raise the whole of the charges by sale or mortgage of the premises comprised in the term, the parties beneficially interested in remainder in the estates filed their bill to restrain them from so doing, till they had first applied the whole of the ripe timber upon the estates in reduction of the sums charged. To this bill demurrers were put in by the tenant for life of the premises, and by the trustees of the term. The demurrers were allowed, the Court holding that the mode proposed by the trustees was the proper mode of raising the charges in question. *Marker* v. *Kelsewich*, 8 Hare 291; 19 L. J., N. S., Ch. 492; 14 Jur. 544.

3. Upon a bill filed by an infant devisee for life, without impeachment of waste (except as to ornamental timber), praying the establishment of the will, the administration of the trusts, and maintenance, an inquiry was directed as to timber in the form adopted in *Tooker* v. *Annesley* (5 Sim. 235), excluding ornamental timber. *Consett* v. *Bell*, 1 Y. & Coll. C. C. 569; 11 L. J., N. S., Ch., 401; 6 Jur. 869.

4. Heir who is entitled by way of resulting trust until the determination of an event upon which the future contingent estates were to arise, was restrained from cutting timber. *Stansfield* v. *Habergham*, 10 Ves. 273.

5. Injunction to stay waste in cutting trees granted on bill by party who was only tenant for life, and had no right to trees, and though party entitled to inheritance was not joined. *Dayrell* v. *Champness*, 1 Eq. Abr. 400.

6. Order made to prevent removal of timber wrongfully cut. *Anon*, 1 Ves. J. 93.

7. A testator devised freehold lands to trustees for a term of ninety-nine years, without impeachment of waste, and subject thereto, to his son, W., for life, without impeachment of waste, remainder to his granddaughter C., for life, without impeachment of waste, remainders over. The trusts of the term were, out of the rents and profits, or by demise, mortgage, or sale of the whole or part thereof, to raise such sum of money as should be sufficient for the purposes therein mentioned. The will then provided that no part of the timber growing upon the premises should, upon any pretence whatever, except for necessary repairs, be cut until his granddaughter, C., should attain the age of twenty-one years, at which time it should be lawful for his said trustees to cut down such of the timber as they should think fit, and to sell the same, and pay the money to arise therefrom to his granddaughter, C., to whom he gave and bequeathed the same. W. died in 1835, and C. attained twenty-one in 1836, but none of the timber was cut by the trustees. In 1843 the term of years was sold for the purposes of the trust; and one of the conditions of sale, after reciting the above clause as to cutting timber, stated that the property was put up for sale "subject to any rights under such provision":—Held, reversing the decision of the Master, that the purchaser of the term was entitled to the timber. *Watlington* v. *Waldron*, 18 Jur. 317; 23 L. J., Ch., 713; 2 W. R. 120.

8. A trustee had vested in him a term of 500 years without impeachment of waste. For the purpose of his trust, he sold and conveyed it by grant and demise, omitting the words "without impeachment of waste":—Held, nevertheless, that the estate of the purchaser was unimpeachable of waste. *Beaumont* v. *Salisbury* (*Marquis*), 19 Beav. 198; 1 Jur., N. S., 458; 24 L. J., Ch., 94.

9. Allowance of income pending a suit to a married woman, who having a life interest to her separate use, had with her husband cut timber. *Stacey* v. *Southey*, 1 Drew 400.

IX. Account.

See also V. II. 2—VIII. III. 3 *ante.*

10. Patron of a living may have an injunction against the incumbent to stay waste. So may

the attorney-general against a bishop. But they cannot pray any account of the profits for their own benefit as patrons. *Knight* v. *Mosely*, Ambl. 176.

1. Lord of a manor may bring a bill for an account of ore dug or timber cut by defendant's testator: otherwise of ploughing up meadows or ancient pasture, or such torts as die with the person. *Winchester* v. *Knight*, 1 P. W. 406.

2. The Irish Society in 1618 granted lands to the Fishmongers' Company, reserving the timber. By deed of 1741, the society declared they would not claim trees thereafter planted, but that the company might cut them, so as they should be first applied in the improvement of the estate. In 1747 the company demised to a lessee, excepting the trees, with liberty to themselves to cut them for the improvement of their estates, according to their interest, but not for sale. He cut for sale:—Held, that neither the nature of their title nor the timber Acts were any objection to a suit by the company for an account and injunction. *Fishmongers' Co.* v. *Irish Society*, Beat. 607.

3. Tenant for life punishable for waste, with power, under an inclosing Act, to mortgage for the expense of the inclosure, felled timber and applied the produce instead; decreed to account to owner of next estate of inheritance. *Lee* v. *Alston*, 1 Ves J. 78; 3 Bro. C. C. 37.

Admission that any timber has been wrongfully cut, gives right to account. S. C. 1 Ves. J. 82.

In case of lands exchanged under Inclosure Acts, tenants for life, impeachable for waste, cannot cut timber for inclosures by mortgage, under the powers in the Act. Estovers from one estate, not applicable to the exigencies of another. S. C. 1 Bro. C. C. 194.

4. A. devises lands incumbered with debts to B. for life, remainder to C. in fee; B. cuts down timber from the estate; B. decreed to pay two-fifths of the debts and C. the remaining three-fifths, and B. to account for the timber which he had cut, and this to be taken as part of the three-fifths which the remainderman was to pay. *James* v. *Hales*, 2 Vern. 267; Pre. Ch. 44.

5. Tenant for life has no property in the underwood till his estate comes into possession; therefore cannot have an account of what was cut wrongfully by a preceding tenant. *Pigot* v. *Bullock*, 1 Ves. J. 479; 3 Bro. C. C. 589.

6. B. was tenant for life, with remainder to his first and other sons in tail, remainder to O. for life; remainder to her first and other sons in tail, with other contingent remainders, with remainder to B. in fee. O. had a child, who died almost immediately, before any other contingent remainderman came *in esse*. B. cut down timber, his own remainder in fee being the next existent estate of the inheritance; but afterwards O. had another child; B. shall not take advantage of his own wrong by taking the timber so cut; nor is the second child of O. entitled until it shall be seen whether B. shall have a child; but the produce shall be paid into court by B. with interest at 4 per cent., and accumulate for the benefit of such person as shall appear at the death of B. to have title to it. *Williams* v. *Bolton*, 1 Cox 72.

7. A., tenant for life, remainder to his sons successively in tail male, remainder to B. for life and to her sons in the same manner, the trustees to preserve contingent remainders. A., being also seised of the reversion in fee, cut and sold timber before the birth of a tenant in tail. Afterwards B. had a son who died soon after his birth, and another son who survived A.: the produce of the timber was decreed to be laid out in the funds during the life of A.; and upon his death, without having had a son, was decreed to be laid out in land to be settled to the use of the estate upon which the timber was cut. *Powlett* (*Duchess*) v. *Bolton*, 3 Ves. 374.

8. The clerk of a patron who had recovered in a *quare impedit*, filed a bill under the Act of 1 Geo. 2, c. 23, against the bishop presenting and his clerk, for an account of the profits of the benefice pending the litigation, and it contained charges of acts of interference with the profits, and of waste by the cutting of trees and otherwise, "by the defendants or one of them," and of a conversion of a portion of the profits "to their own use;" a general demurrer by the bishop was allowed:—Held, also, that such clerk defendant is liable, in a suit instituted in the Chancery Courts under 1 Geo. 2, c. 23, to account for the waste committed, and that the incumbent's remedy for such dilapidation is not confined to a proceeding in the Ecclesiastical Court under 11 Will. 3, c. 6, and 12 Geo. 3, c. 10. *Crampton* v. *Meath* (*Bishop*), 1 Sau. & Sc. 297.

9. Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him in and about the mansion-house:—Refused. *Lansdowne* v. *Lansdowne*, 1 Jac. & Walk. 522. And see S. C. on demurrer 1 Madd. 116.

10. Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable. *Ormond* (*Marquis*) v. *Kynersley*, 5 Madd. 369.

11. Where tenant for life, unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance; and parties having intervening estates for life, have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Butler* v. *Kynnersley*, 8 L. J., Ch., 67; 7 L. J., Ch., 150; 15 Beav. 10. n.

12. Lord Chancellor Manners would not restrain a tenant for lives, with covenant for perpetual renewal, from cutting timber, though it did not appear when planted:—Ordered, that defendant do keep an account of the produce, and let plaintiffs proceed at law. *Conolly* v. *Ely* (*Lord*), 2 Moll. 515. S. P. *Percy* v. *Shanly*, *id.*, *Montgomery* v. *Cunninghame*, *id.* 536. *Sed secus*, for sale. *Bouchier* v. *O'Grady*, *id.* 536.

13. *Quære* as to the right of a parson with the consent of the patron and ordinary to open mines under the glebe. *Holden* v. *Weekes*, 6 Jur., N. S., 1288; 30 L. J., Ch., 35; 9 W. R. 94; 3 L. T., N. S., 437.

The patron is the proper person to institute a suit for the purpose of restraining waste by the incumbent. The patron coming to the Court to restrain waste is not entitled to an account. *Ib.*

1. The right to an account in equity of the proceeds of timber wrongfully felled in commission of waste is only incident to the right to an injunction. *Higginbotham* v. *Hawkins*, 41 L. J., Ch., 828; 7 L. R., Ch., 676; 20 W. R. 955; 27 L. T., N. S., 328.

When after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. *Ib.*

2. A tenant for life permitted her tenants to dig turf from fen lands. The turf, when sold, realised a considerable sum. It being proved that such digging, though technically an act of waste, had considerably improved the lands for agricultural purposes:—Held, that the tenant for life was not bound to account to the persons entitled for the value of the turf so removed. *Harris* v. *Ekins*, 26 L. T. 827; 20 W. R. 999.

3. A tenant for life, without impeachment of waste, of estates, felled and converted to his own use timber growing thereon. The tenant in tail in remainder filed a bill to restrain the cutting of the timber, and for an account of the timber already felled. The tenant for life refused to account on the ground that he was entitled to the timber in right of his interest in the estate:—Held, that the tenant for life must set forth the accounts. *Newry* (*Viscount*) v. *Kilmorey* (*Earl*), 24 L. T. 15; 19 W. R. 271.

See also V. II. 2—VIII. III. 3 *ante*.

When barred by Lapse of Time.] See LIMITATIONS. STATUTE OF, IX. XVI.

X. Injunction. Proceedings by.

I. IN GENERAL.

4. Analogy between bill of interpleader and to restrain waste. *Martinius* v. *Helmuth*, cited in *Stevenson* v. *Anderson*, 2 Ves. & B. 212. n.

5. Injunction to stay waste only granted on interlocutory application. *Kettle* v. *Corbin*, Dick. 314.

6. Injunction to stay judgment wrongfully obtained in action of waste. *Cavendish* v. *Cavendish*, Cary. 76.

7. Order made to prevent removal of timber wrongfully cut. *Anon.*, 1 Ves. J. 93.

8. Suits for an injunction to restrain waste should not be brought to a hearing, where no account is sought, or the account is waived, if an injunction has been obtained, and the right to continue it is not disputed. *Dunsany* v. *Dunne*, 15 Ir. Ch. R. 278.

If, however, the case is forced to a hearing by the conduct of the respondent, the petitioner, if successful, will be entitled to his costs of suit. *Ib.*

9. Injunction must be prayed against previous waste. *Anon.*, Lofft. 151.

10. Injunction to stay waste refused, the acts of waste committed being trivial, and the plaintiff's proceedings having been dilatory. *Barry* v. *Barry*, 1 Jac. & Walk. 651.

A small degree of waste manifesting an intent to do more, is sufficient for the Court to act upon. *Id.* 653.

In cases of waste, it is the business of the reversioner to apply to the Court promptly. *Ib.*

11. An injunction to stay waste, will not be granted where it is doubtful whether the acts complained of are waste; the plaintiff must first try the question of waste or no waste, at law. *Lyon* v. *Wilkinson*, 1 L. J., Ch., 155.

12. Injunction may be obtained upon motion to restrain purchaser under decree, not a party to cause, who has not paid purchase money, from committing waste on property purchased. *Casamajor* v. *Strode*, 1 Sim. & S. 381.

13. If a defendant, by his answer, admits that he has committed waste before the filing of the bill, though he swears he has committed none since, yet the Court will not dissolve the injunction. *Anon*, 3 Atk. 485.

14. Defendant denying he had committed waste since filing of bill, no inducement to refuse injunction. *Att.-Gen.* v. *Burrows*, Dick. 128.

15. Where a bill is filed to stay waste, and a demurrer is put in, the Court will hear the demurrer immediately. *Const* v. *Harris*, T. & R. 514.

16. Defendant having appeared, motion for injunction, in matter of waste not immediate, without notice, refused. *Collard* v. *Cooper*, 6 Madd. 190.

17. Injunction to restrain waste issued without bill filed, in a lunacy matter, on application of the receiver. *Re Chinnerys*, 6 Ir. Eq. R. 469; 1 J. & L. 90.

18. Injunction to stay tenant in possession, not a party, from committing waste. *Att.-Gen.* v. *Ancaster* (*Duke*), Dick. 68.

19. Injunction against waste not prevented by appearance the day before the motion. *Allard* v. *Jones*, 15 Ves. 605.

20. Subpœna will issue, and leave to serve notice of motion for an injunction will be given, before bill filed in cases of bills for injunctions to stay waste. *Fosbrook* v. *Woodcock*, 12 Jur. 956.

21. In a bill to stay waste, a plaintiff is not entitled to a discovery unless he waives the double penalty. *Boteler* v. *Allington*, 3 Atk. 457.

22. R. N. by his bill devised to F. N. and his assigns, for his life, all his real estates in W., without impeachment of waste, except the timber growing in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury; remainder in trust for C. N. N. for life, remainder to his first and other sons in tail male:—Held, that the restriction as to cutting timber was confined to the premises specified in the exception clause: Held, also, that the plaintiff, having made a case by his bill for an inquiry and account as to equitable waste, and having had the opportunity of supporting that case by evidence,

which he omitted to do, was not entitled to an issue as to that equity, nor to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree. *Newdigate* v. *Newdigate*, 8 Bli. N. S. 734; 2 Cl. & F. 601.

1. Although an injunction *ex parte* will not be granted to stay waste, yet an interim order will be given, with leave to discharge it, where the object of the application is to preserve property during litigation. *Annyl* v. *Owens*, 22 L. J., Ch., 995; 1 W. R. 205, 207.

II. WHERE TITLE DOUBTFUL OR DISPUTED.

2. Injunction against cutting timber refused where the title was disputed as between the devisee and heir-at-law. *Smith* v. *Collyer*, 8 Ves. 89.

3. Injunction against felling timber for devisee against heir-at-law in possession, admitting the waste, but disputing the will, refused. *Beatty* v. *Beatty*, 2 Moll. 541.

4. Injunction against cutting timber, granted, although the will was not established and the title disputed as between the devisee and heir-at-law. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

Injunction to stay waste at the suit of the devisee in trust against heir-at-law in possession, who disputed the will, refused, and order affirmed on appeal by Ld. Ch. Manners, considering the law of the court as settled in cases between heir-at-law and devisee, not to grant an injunction against defendant, who impeaches plaintiff's title. The order reversed on re-hearing by Ld Ch. Hart. S. C. 2 Moll. 542.

5. The plaintiff claimed, under a settlement, an estate in the possession of the defendant for nineteen years, stating that he had only discovered his title very recently, and had brought an ejectment, and asking an injunction to restrain the defendant from cutting down ornamental timber; a demurrer, for want of equity, allowed. *Davenport* v. *Davenport*, 7 Hare 217.

6. Where the plaintiff in the cause had obtained an order for a receiver, and was proceeding to cut timber upon the estates before the receiver had been appointed, the Court refused to grant an injunction upon the application of the defendant, it appearing that the latter, who was the agent of the owner of the estates (also a defendant), had no interest in such estates, and no authority from his principal to make the application. *Hunter* v. *Nockolds*, 15 L. J., N. S., Ch., 320; 10 Jur. 771.

7. Injunction to stay waste not granted against defendant in possession claiming by an adverse title. *Pillsworth* v. *Hopton*, 6 Ves. 51.

8. The Court will not interfere, by way of injunction, to stay waste where the defendant may be turned immediately out of possession. *Mortimer* v. *Cotterrell*, 2 Cox 205.

9. Injunction granted to stay waste against defendant, who insists on his own title, but admits he received possession from plaintiff's tenant without plaintiff's knowledge, in breach of tenant's duty. *Norway* v. *Rowe*, 19 Ves. 154.

10. Injunction against waste not granted without positive evidence of title. *Davies* v. *Lee*, 6 Ves. 784.

11. Injunction for waste denied, plaintiff's right being doubtful. *Field* v. *Jackson*, Dick. 599.

12. The Court will not entertain a motion for an injunction, in the nature of a writ of estrepement, to restrain waste, except where the title is clear. *Lowe* v. *Lucey*, 1 Ir. Eq. R. 93.

III. AFFIDAVIT IN SUPPORT.

13. Where an affidavit was made in order to obtain an injunction to restrain waste, the Court thought the affidavit certain enough by reason of the reference it had to the bill. *Bradly* v. *Stratchy*, Barnard. 399.

14. In order to obtain an injunction to stay waste, the affidavit must set out a particular title. *Whitelegg* v. *Whitelegg*, 1 Bro. C. C. 57.

15. In case of an injunction to stay waste, the Court will, on the answer coming in, use its discretion whether it is to be continued till the hearing or not; and, in such cases, affidavits may be read. *Potter* v. *Chapman*, Ambl. 99; Dick. 146.

16. To obtain an injunction against a tenant to stay waste in cutting turf, the affidavit must state that the turf was cut for the purpose of sale, the tenant being entitled to fire bote. *De Salis* v. *Crossan*, 1 Ball. & B. 188.

17. In the case of waste it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threat of waste. *Hannay* v. *M'Entire*, 11 Ves. 54.

18. Affidavit verifying bill for an injunction to restrain waste by breaking up ancient meadow, should state deponent's knowledge of the land for a considerable period (*semble*, twenty years), and that it had not been in tillage during that time. Leave given to file affidavit to that effect. *Creagh* v. *Carmichael*, 7 Ir. Eq. R 334.

19. Where irreparable waste has been committed, and is about being repeated, the Court will, without a positive affidavit of the facts, grant a conditional order for an injunction, and restrain the party in the meantime if there be danger that the waste will be committed before such affidavit can be procured. *Beere* v. *Head*, 7 Ir. Eq. R. 60.

20. A plaintiff in a bill for an injunction to stay waste, cannot read a supplemental affidavit in support of a conditional order for the injunction. The proceedings under such a bill are peculiar to Ireland. *Joley* v. *Stockley*, 1 Hog. 247.

21. *Ex parte* application for special injunction to stay waste, should be promptly after knowledge of such waste; and affidavit in support should state when party came first to the knowledge of such waste. *Calvert* v. *Grey*, before Vice-Chancellor 22nd February 1830.

22. Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, but granted on affidavit of defendant's insolvency. *Smallman* v. *Onions*, 3 Bro. C. C. 621.

IV. COSTS.

1. Costs of proceedings for an injunction in the nature of a writ of estrepement, and which does not pray an account or answer, are seldom if ever given to the landlord. *Chatterton* v. *White*, 1 Ir. Eq. R. 200.

2. Trustees, in whom an estate is vested, ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority, and the onus of showing that the trees are prejudicial lies on the trustees. *Campbell* v. *Allgood*, 17 Beav. 623.

A bill filed against trustees and the tenant to prevent equitable waste, was dismissed with costs, as against the tenant, it not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request. *Ib.*

WASTES.

See also COMMON—COPYHOLD.

3. It is presumption of law that the strip of waste between the high road and the adjoining old inclosures belongs to the owner of such inclosures. *Scoones* v. *Morrell*, 1 Beav. 251.

WATER AND WATERCOURSE.

— *Navigable Rivers, Rights in respect of.* See RIVER.

See also CANAL AND CANAL COMPANY—EASEMENT—RAILWAY—MINES—SEWERS—WATER COMPANY—VENDOR AND PURCHASER, XXVII.

I. GENERAL PRINCIPLES.

4. A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. *Lord* v. *Sydney (Commissioners)*, 12 Moo. P. C. 473; 7 W. R. 267; 3 L. T., N. S., 1.

5. The principles which apply to the right to water flowing in a certain and defined course, whether in an open and a visible stream, or in a subterranean channel, are inapplicable to water percolating through underground strata, having no certain course or defined limit, but oozing through the soil wherever the rain penetrates. *Chasemore* v. *Richards*, 5 Jur., N. S., 873; 7 H. L. Ca. 349; 7 W. R. 685.

The right to the enjoyment of a natural stream of water on the surface *ex jure naturæ* belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. *Ib.*

6. Claim by a plaintiff to use water which flowed from his land to the land of the defendant, and was there collected in a reservoir, whence it reflowed into the plaintiff's land. And a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff. The claims being supported by evidence of twenty years' use:—Held, that these were not maintainable. *Ennor* v. *Barwell*, 2 Giff. 410; 6 Jur. N. S., 1233. See S.C. on appeal, 4 L. T., N. S., 597; 1 De G. F. & J. 529.

But held, that the plaintiff was entitled to water flowing from surface springs on the defendant's lands, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's lands, and was entitled to an injunction to restrain the defendant from diverting it. *Ib.*

ACQUISITION OF.

1. By Grant.

7. Permission was obtained from E. and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands to supply the town of G. with water. The watercourse was made, but no grant was executed, and no sum arranged. It was alleged that the subscribers agreed to pay to E. 2*s.* 6*d.* a year, but this was denied. E. subsequently diverted the watercourse into the old channel; and, upon a bill filed by several of the subscribers:—Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E.; and an injunction was granted to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiffs' use of the watercourse, and a reference was made to the Master to settle a proper compensation. *Devonshire (Duke)* v. *Eglen*, 14 Beav. 530; 20 L. J., N. S., Ch., 495.

1. In 1860, the owner of properties A. and B. made a drain from a tank on property B. to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property A., for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A. to the plaintiff, with all waters, watercourses, etc., to the same hereditaments and premises belonging or appertaining, or with the same or any part held, used, enjoyed, or reputed as part, or as appurtenant. The plaintiff had the use of the water after his conveyance, until a subsequent purchaser of property B. stopped it:—Held, that the watercourse was a continuous easement necessary for the use of property A., and would have passed by implication; that the plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it. *Watts* v. *Kelson*, 6 L. R., Ch., 166: 40 L. J., Ch., 126; 19 W. R. 338; 24 L. T., N. S., 209.

Held, also, that the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds. *Ib.*

2. A grant by the Crown of land bounded by a stream may include by implication the soil of the stream, *ad medium filum aquæ*. *Lord* v. *Sydney* (*Commissioners*), 7 W. R. 267; 12 Moo. P. C. 473; 3 L. T., N. S., 1.

The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter grant may expressly reserve to the grantor the right to divert the water generally. *Ib.*

3. A landowner granted to a company all the watercourses, dams, and reservoirs upon lands of his, which watercourses, dams, and reservoirs were laid down upon an annexed plan, which was to be taken as part of the deed, and were thereon coloured blue, and also the several streams and springs of water flowing into or feeding the watercourses, dams, and reservoirs, with right for the company solely to take and use the water from the springs or streams of water, watercourses, dams, and reservoirs, with powers to cleanse and repair, and with all such other powers as should be requisite for enabling the company to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the company, but was not to exercise this power if the company resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered and partly open, the dimensions of various parts of which were specified on the plan, and in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs and streams feeding the watercourse were marked on the plan. The watercourse was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel, which after heavy rain backed up the water and caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having occasion for more water proceeded to remove the obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down into their reservoir:—Held, that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such other water as should find its way into and run down the channel as it stood, and not a grant of all the water on the land, and that the grantees had no right to alter the levels of or enlarge the channel so as to enable it to carry off all the water that ran into it in times of heavy rain. *Taylor* v. *St. Helens* (*Corporation*), 6 L. R., Ch. D., 264: 46 L. J., Ch., 857; 37 L. T., N. S., 253; 25 W. R. 885.

4. A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal:—Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. *Newby* v. *Harrison*, 9 John. & H. 393; 2 W. R. 849; 4 L. T., N. S., 397. Affirmed 4 L. T., N. S., 424.

2. On Severance of Land.

5. In 1860, the owner of properties A. and B. made a drain from a tank on property B. to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property A., for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A. to the plaintiff, with all waters, watercourses, etc., to the same hereditaments and premises belonging or appertaining, or with the same or any part held, used, enjoyed, or reputed as part, or as appurtenant. The plaintiff had the use of the water after his conveyance, until a subsequent purchaser of property B. stopped it:—Held, that the watercourse was a continuous easement necessary for the use of property A., and would have passed by implication; that the plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it. *Watts* v. *Kelson*, 6 L. R., Ch., 166; 40 L. J., Ch., 126; 24 L. T. 209; 19 W. R. 338.

6. A. and B. occupied adjoining premises under C., their landlord, and B.'s premises were supplied with water by means of a pipe from A.'s premises. A. and B.'s premises were put up for sale by auction in different lots, it being made a condition that the premises were to be sold subject to rights of water and other easements subsisting thereon. A. and B. purchased at the sale the premises severally occupied by them:—Held, that B.'s supply of water from A.'s premises was not an easement which could be enforced against a purchaser, it being simply a licence from the landlord for B. thus to obtain water during his tenancy. *Russell* v. *Hanford*,

2 L. R., Eq., 507 ; 14 W. R. 982 ; 15 L. T., N. S., 171.

1. The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion from diverting the water by virtue of a right which existed prior to the first purchase. *Miner* v. *Gilmour*, 12 Moo. P. C. 131 ; 7 W. R. 328; 3 L. T., N. S., 78.

3. By Prescription.

2. After a long enjoyment of a watercourse running to a house and garden through the ground of another, it shall be presumed the owner of the house has a right to the watercourse, unless the other party can show a special licence or an agreement to restrain it in point of time. *Finch* v. *Resbridger*, 2 Vern. 390.

3. Water passing from the opening of the lock of a canal does not constitute a watercourse within 2 & 3 Will. 4, c. 71, s. 2. *Staffordshire Canal Co.* v. *Birmingham Canal Co.*, 1 L. R., H. L., 254 ; 35 L. J., Ch., 757.

The defendants' canal communicated, under the authority of their Act, with the plaintiffs' canal ; the defendants' canal was of the higher level. The defendants had for more than seventy years, whenever a barge passed from their canal to that of the plaintiffs, allowed a lockful of water to flow into the plaintiffs' canal :—Held, in the absence of express legislative enactment, grant, and agreement, that the plaintiffs had not acquired a right to the continued supply of water by prescription. Observations on the acquisition of rights by prescription in canals and artificial watercourses. S. C. 5 N. R. 261.

4. Under agreements, the plaintiff became entitled for a term of years, to the exclusive right of working the minerals under a close of land in a county, and also to the use of the water and watercourses arising or running in or through the same. A. was in possession of land adjoining the plaintiff's, from which several springs or streams had from time immemorial flowed, in certain defined natural channels, into and across the plaintiff's close. A. caused dams to be erected and trenches to be cut, for the purpose of obstructing and diverting the water of the springs or streams, and such obstructions were from time to time removed by the plaintiff. Upon A.'s land was a reservoir, to the use of the water of which the plaintiff claimed a right through a trench leading therefrom into his close :—Held, that as the plaintiff had not shown uninterrupted enjoyment of the same for twenty years, nor that there had not been an interruption for one year before filing the bill, he had not established his right to the flow of water from the reservoir. *Ennor* v. *Barwell*, 6 Jur., N. S., 1233 ; 2 Giff. 410 ; 4 L. T., N. S., 597.

A. having cut a channel, by which the water from a pond situate in an adjoining land was drained into the reservoir, the plaintiff claimed the right to the overflow from the pond :—Held, that the plaintiff had not shown a twenty years' enjoyment, uninterrupted during one year from the institution of the suit, and consequently had not established his right to this overflow of water. *Ib.*

5. Action for obstruction of a watercourse to which plaintiffs alleged themselves to be entitled by reason of their possession of a mill. An agreement for such a watercourse, made twenty-eight years before with those under whom plaintiffs claimed, being given in evidence by the defendants, it should nevertheless be left to the jury to presume whether a grant has not been executed. *Dewhirst* v. *Wrigley*, C. P. C. 329.

6. The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin :—Held, in this case that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed ; subject to the defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 L. R., App. Cas., 121.

7. The plaintiff was the owner of a farm supplied with water by a small watercourse originating in a natural spring on the plaintiff's land, flowing, first, through the plaintiff's land, next through the defendant's land, and then through the plaintiff's land to the plaintiff's house. For seventy years and upwards, prior to 1879, the plaintiff had almost exclusively enjoyed the watercourse. In 1879, however, the defendant, by means of a pipe, appropriated nearly all the water for the use of newly-built houses. The plaintiff claimed the exclusive use of the water, and alleged that the watercourse through the defendant's land was artificial, and constructed, at a time immemorial, for the sole benefit of the plaintiff and his predecessors :—Held, that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream ; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. *Sutcliffe* v. *Booth* (32 L. J., Q. B., 136) considered and approved. *Roberts* v. *Richards*, 50 L. J., Ch., 297 ; 44 L. T. 271.

On appeal the order discharged on undertaking. See 51 L. J., Ch., 944.

8. Riparian rights identical with those attaching to natural streams may be acquired by prescription in artificial watercourses of a permanent character. These rights depend upon the character of the watercourse and the purposes for which it was constructed. If the watercourse be of a permanent nature, and constructed for lasting purposes, and for the general benefit of those in its vicinity, and not

merely with the temporary and private object of benefiting the property of those by whom it was constructed, riparian rights may be acquired in its waters just as in a natural stream. From the time beyond the memory of living men a stream appeared to have flowed in its present channel, which, so far as it was artificial, bore all the appearances of having been constructed for permanent use. There was no proof that there was any temporary purpose for which the watercourse could have been formed, or that there was any person who formed it for private use:—Held, that the watercourse, assuming it to be artificial, was one of that permanent nature that admitted of the existence of riparian rights in its waters of the same nature as those attaching to a natural stream, including the flow of the stream through the lands of a lower riparian proprietor in a pure, unpolluted state. *Blackburne* v. *Somers*, 5 L. R., Ir., 1.

1. Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tanyard. The owner afterwards sold the property to different persons, and the conveyances contained no reference to the drain and cesspool:—Held, that there was an implied grant of the easement of the cesspool in the conveyance of the tanyard. *Ewart* v. *Cochrane*, 7 Jur., N. S., 925; 10 W. R. 3; 5 L. T., N. S., 1.

2. Where an owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a waterpipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply does not pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements." *Russell* v. *Harford*, 2 L. R., Eq., 507; 14 W. R. 982; 15 L. T., N. S., 171.

Acquisition by Tenant against Landlord.] 3. By deed in 1791 A. obtained a demise from B. of an underground goit or drain to be then constructed in B.'s land for the purpose of conducting water from A.'s mill so long as an annual rent of 2*l.* 2*s.* should be paid by A. to B. In 1836 the demise of 1791 was put an end to, and liberty was given to A., who was at that time yearly tenant from B. of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent of 2*l.* 2*s.* The new cut was made and used for pure water, and the old goit (as the plaintiff alleged) continued to be used for foul water. In 1866 the land through which the goits ran was sold to C., and in 1867 A.'s yearly tenancy of the land was determined. In an action by A. in 1879 to restrain C. from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1836:—Held, that until 1867 A. could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against B., his landlord, and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against C. *Outram* v. *Maude*, 17 L. R., Ch. D., 391; 50 L. J., Ch., 783; 29 W. R. 818.

4. The rights of tin-bounders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein. See *Ivimey* v. *Stocker*, 2 Dr. & Sm. 537; 1 L. R., Ch., 396; 12 Jur., N. S., 419; 14 W. R. 743; 14 L. T., N. S., 427; 34 L. J., Ch., 633.

III. EXTINGUISHMENT OF EASEMENT.

Where the same person is owner of land bound to supply water, and also one of the persons for whose use it is supplied, if his title to the easement is not as extensive as his title to the land charged, there is no unity of possession so as to cause an extinguishment of the easement. *Ib.*

IV. COVENANTS RESPECTING.

5. In 1849 A. purchased from B. a plot of freehold land on which was a well, and covenanted for himself and his assigns to supply water to all houses erected, or to be erected, on B.'s adjoining lands, which had been laid out for building purposes, B. covenanting to insert in the conveyances to the purchasers of any of the houses covenants by them to take water from A. at a fixed price. A. subsequently conveyed to C., and B. conveyed two of the houses to the plaintiff:—Held, that A.'s covenant to supply water ran with the land purchased by him, but that, independently of that, C. had purchased with notice of the covenant, and was therefore bound to supply water to the plaintiff's houses. *Cooke* v. *Chilcott*, 3 L. R., Ch. D., 694; 34 L. T., N. S., 207.

6. The B. company, possessing springs of water of their own, covenanted, upon selling to the A. company a portion of those springs, to take from the A. company the entire supply of water they might require for certain specified purposes, and that they would not supply any of the places (their own premises forming part of the district) which the A. company was authorised to supply by Act of Parliament. The B. company afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream:—Held, that the B. company was precluded by the covenant from using their own supply of water for the purposes for which they had stipulated to take water from the A. company. *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Railway Co.*, 12 L. T., N. S., 366.

Held, also, that it could not be decided, in the absence of the lessees of the B. company, whether the supply of water furnished to them by the B. company could be stopped, but the

Court directed an inquiry as to what damages the A. company had sustained and was sustaining, by reason of the B. company supplying their lessees with water. *Ib.*

A delay of twelve years in making the complaint did not amount to acquiescence, or to an abandonment of the plaintiff's rights. *Ib.*

1. A. sold a piece of land to B., and covenanted for quiet enjoyment. Afterwards, A. raised the level, by three inches, of a brook running past B.'s grounds, through his, A.'s, property:—Held, that this was not a proper subject of complaint for the interference of a court of equity. *Ingram* v. *Morecraft*, 33 Beav. 49.

V. ALVEUS, RIGHTS IN RESPECT OF.

2. A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. *Lord* v. *Sydney City (Commissioners)*, 12 Moo. P. C. 473; 7 W. R. 267; 3 L. T., N. S., 1.

A grant by the Crown of land bounded by a stream may include by implication the soil of the stream, *ad medium filum aquæ*. *Ib.*

The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter grant may expressly reserve to the grantor the right to divert the water generally. *Ib.*

In 1810, the Crown made a grant to R. of 135 acres of land in New South Wales, described as bounded on the west by N. farm, on the north by an east line of thirty chains, on the east by a south line to a small creek, and on the south by that creek and the water of Botany Bay at the mouth of Cook's River. It was not necessary to include any portion of the creek to make up the quantity of land specified in the grant. In 1823 the Crown made a grant of 600 acres of land higher up the creek to L., in which the land was described as bounded on the north-west by a line from the south-east corner of R.'s farm to the south-west corner of W.'s farm, on the north-east by W.'s farm, on the south-east by a line bearing west, south to Botany Bay, a creek, and R.'s farm. This grant contained a reservation that the Crown was to be entitled to "any quantity of water and any quantity of land, not exceeding ten acres, in any part in the said grant, as might be required for public purposes." S. afterwards became owner of the land comprised in the grant to R. The water of the creek was used for turning a mill erected on R.'s land and for other beneficial purposes. On resumption by the Crown, under the powers of a colonial Act, of a portion of such land, and diversion of the stream flowing in the creek:—Held, first, that the grant by the Crown in 1810 to R. of land bounded by the creek passed the soil of the creek *ad medium filum aquæ*, as the description of the boundaries in the grant did not exclude from it that portion of the creek which, by the general presumption of law, would go along with the ownership of the land on the banks of it. *Ib.*

Held, secondly, that the right to the use of the flowing water of the creek in respect of the land below, originally granted to R., was not lost by the acceptance of L. of the land above, although in the latter grant the Crown had reserved the right to take the water, the only effect of the reservation being that L. waived his own rights as riparian owner, to the use of the water as it flowed past his land. *Ib.*

3. The bed of a flowing stream is the property of each riparian owner to the middle of the stream, and each is entitled to make use of it so long as he does not injure his neighbour or interfere with the flow of the water, and an encroachment on the alveus of a running stream may be complained of without the necessity of proving that damage has been sustained or is likely to be sustained. *Edleston* v. *Crossley*, 18 L. T., N. S., 15.

But where upon a balance of testimony it appears that the quantity of water sent on to the plaintiff's works will not, in all probability, be substantially diminished in quantity or quality, by the means adopted by the defendants with that object, the Court will not proceed mandatory by injunction, but leave the plaintiffs to their remedy at law, if any. *Ib.*

4. Riparian proprietors have a common interest in the water of a running stream, and a separate property in the alveus or channel thereof *usque ad medium filum fluminis*. *Bickett* v. *Morris*, 1 L. R., H. L., 47; 12 Jur., N. S., 803; 14 L. T., N. S., 835.

But no proprietor may so use his property in the alveus as to affect the interest of *ex adverso* proprietors in the stream; and in order to entitle a riparian proprietor to relief against building upon the alveus, it is not necessary for him to prove that damage to him has been, or is likely to be, caused thereby. *Ib.*

In such a case the onus of showing that no damage will arise lies on the person making the encroachment. *Ib.*

Anything done *in alveo* which produces no sensible effect upon the stream is allowable. *Ib.*

Semble, a riparian proprietor may build a bulwark on his bank *ripæ muniendæ causâ*, but he must so build as to cause no actual injury to the opposite proprietor; in this case, however, mere apprehension of danger would not be sufficient ground for relief. *Ib.*

Semble, the interest of a riparian proprietor in the stream extends not only to the prevention of a diversion or diminution thereof, but to the prevention of any such interference with its course as might possibly be attended with damage at a future period in another proprietor. The general rule is, that even though immediate danger cannot be described, or actual loss predicated, an obstruction to the current of a stream constitutes an injury of which the courts will take notice as an encroachment which adjacent proprietors have a right to have removed. *Ib.*

Mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions. *Ib.*

5. An information and bill was filed by the plaintiff, a riparian proprietor on a tidal navigable river, to restrain the defendant, an opposite riparian proprietor, from constructing a jetty in the alveus of the river so as to injure the plaintiff's property and interfere with the navigation:—Held, that a riparian proprietor had no greater right to use the alveus of a tidal than a non-tidal river, and that although the plaintiff had proved no serious injury to his property he was entitled to an injunction.

Att.-Gen. v. *Lonsdale* (*Earl*), 7 L. R., Eq., 377; 38 L. J., Ch., 335.

Held, also, that the suit being by information and bill was properly framed in respect of the private and public wrong complained of. *Ib.*

1. A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river *ad medium filum aquæ*. *Crossley* v. *Lightowler*, 3 L. R., Eq., 279.

VI. USER, EXTENT OF.

2. Principle of the right to use of river water. *Wright* v. *Howard*, 1 Sim. & S. 190; 1 L. J., Ch., 94.

Every owner of land on the banks of a river has *primâ facie* an equal right to use the water, and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant, or twenty years' enjoyment, which is evidence of a grant. *Ib.*

3. Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency upon proprietors lower down the stream. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. *Miner* v. *Gilmour*, 12 Moo. P. C. 131; 7 W. R. 328; 3 L. T., N. S., 98.

Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. *Ib.*

Where a party purchased a piece of land with the right to use the water of a river in Lower Canada, subject to a preference in favour of a mill thereafter to be built, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill. *Ib.*

The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion from diverting the water by virtue of a right which existed prior to the first purchase. *Ib.*

4. Rights of the seigneur, in Lower Canada, to the water of an unnavigable river flowing through his fief, does not entitle one of his co-seigneurs to divert the waters for his exclusive use which had been accustomed for eleven years to supply the mills of another of his co-seigneurs. *St. Louis* v. *St. Louis*, 3 Moo. P. C. 398.

5. By an Act of Parliament authorizing the construction of a railway, it was provided that nothing in the Act should authorize or empower the railway company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein or which now supply the river":—Held, that this clause applied only to the time of construction of the railway, and did not take away the rights of the company as riparian proprietors. *Att.-Gen.* v. *Great Eastern Railway Co.*, 18 W. R. 1187; 23 L. T., N. S., 344. And see 6 L. R., Ch., 572; 19 W. R. 788.

The ordinary right of the riparian proprietor is to take so much water as he requires for domestic or similar purposes:—Held, that the fact that the railway company did not require water for such purposes did not entitle them to take it for other purposes, such as supplying their locomotives. *Ib.*

6. A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations took water for supplying their engines and for the general purposes of the station. On a bill filed by a mill-owner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day:—Held, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that in this case the quantity taken was reasonable. *Sandwich* (*Earl*) v. *Great Northern Railway Co.*, 10 L. R., Ch. D., 707; 49 L. J., Ch., 225; 27 W. R. 616.

7. By a canal Act, the owners of steam-engines on the banks were empowered to lay pipes and take water from the canal for the purpose of condensing steam. In 1830 K. built a steam-engine, and laid pipes to the canal, with the cognisance of the canal company, and used the water for the purpose of raising as well as condensing steam, till the year 1847, when disputes arose, and an action was brought by the company, who recovered 1*s.* damages. K. continued to take the water, and the company filed their bill, praying that he might be restrained. K., by his answer, alleged and produced evidence that the company were aware, when the mill was built, that the water would be used for raising steam:—Held, that the smallness of the damage would not prevent the Court from interfering, and that the Court would not compel the company to bring other actions, but that there was so much evidence of acquiescence that the Court would not interfere on motion. *Rochdale Canal Co.* v. *King*, 2 Sim., N. S., 78; 20 L. J., N. S., Ch., 675; 15 Jur. 962

The Court at the hearing, although the company's right had been established at law, held that it was bound by their acquiescence, and refused a perpetual injunction to restrain K. from taking water for the purpose of "generating" steam. S. C. 16 Beav. 630; 17 Jur. 1001; 22 L. J., Ch., 604.

An injunction was, however, granted as to another mill, acquiescence and encouragement on the part of the company not having been established. *Ib.*

8. When a corporation acquires riparian lands under parliamentary powers, all riparian rights, whether ordinary or prescriptive, already subsisting in respect of those lands, attach to such corporation; and if the special objects of its incorporation include purposes requiring the use of the water, the supply of water to which the corporation is entitled will be measured by the extent of user necessary for the purposes of the Act, if such user would be more extensive than that to which the corporation would be entitled as the successor of the former riparian owner. *Swindon Water-*

works Co. v. *Wilts & Berks Canal Co.*, 33 L. T., N. S., 513; 24 W. R. 284; 7 L. R., H. L., 697. Affirming 9 L. R., Ch., 451; 30 L. T., N. S., 443; 22 W. R. 444; 43 L. J., Ch., 393. Reversing 22 W. R. 212; 29 L. T., N. S., 722.

A canal company incorporated by Act of Parliament claimed to be entitled to the flow of water in a certain stream for the purposes of navigation under the Act, as the purchasers under the Act of a tenement upon which was an ancient mill. A waterworks company, without parliamentary powers, acquired lands higher up the stream than the canal company, and diverted the water of the stream, and stored it in a reservoir for the purpose of selling it to the town of Swindon, claiming to do so as a matter of right:—Held, first, that the canal company was entitled to the flow of water to the extent claimed under both heads. *Ib.*

Held, secondly, the user claimed by the waterworks company not being a user connected with the servient tenement was inconsistent with the right of the canal company. *Ib.*

Held, thirdly, that such user being claimed as of right might be restrained by injunction without proof of substantial damage already sustained or imminent therefrom. *Ib.*

1. The owner of land not abutting on a river, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river undiminished and unpolluted:—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Northam* v. *Hurley*, (1 E. & B. 665) and *Sampson* v. *Hoddinot* (1 C. B., N. S., 590) distinguished. *Kensit* v. *Great Eastern Railway Co.*, 23 L. R., Ch. D., 566; 52 L. J., Q. B., 608; 48 L. T. 784; 31 W. R. 603. Affirmed 27 L. R., Ch. D., 122; 54 L. J., Ch., 19; 32 W. R. 883.

Observations on the rights which can be acquired by a riparian owner in an artificial stream. *Ib.*

2. What conditions are required in order to induce a court of equity to grant an injunction to restrain the infringement of a right, acquired by long user, to use the water of a stream for certain purposes. *Wood* v. *Sutcliffe*, 2 Sim., N.S., 163; 21 L. J., N. S., Ch., 253; 16 Jur. 75.

VII. DIVERSION AND OBSTRUCTION OF.

3. Injunction to restrain defendant from preventing water flowing in regular quantities to a mill. *Robinson* v. *Byron*, 1 Bro. C. C. 588.

4. Injunction against the obstruction of the flow of water through a goit in defendant's lands to plaintiff's mill. *Dewhurst* v. *Wrigley*, C. P. C. 319.

Where, pending proceedings at law to try the right to a watercourse, the defendants were proceeding to take the law into their own hands:—Held, that the plaintiff was entitled to file a bill for an injunction; but where the application for dissolving it, on the ground of the bill showing a legal title acquired by lapse of time, had been refused, the Court said that it ought to make provision for having the question between the parties tried at law. *Ib.*

5. Bill stated plaintiff to be lessee of an ancient mill, and that defendant had erected flood-gates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones, such works having been erected above three years: such a bill will not lie until the right be established at law, and a demurrer for want of equity is good. *Weller* v. *Smeaton*, 1 Cox 102; 1 Bro. C. C. 572.

6. Where a mill-stream broke through the bank nearing of the defendant's ground, and the stream was escaping into a new channel, and irreparable injury was to be apprehended, the Court made a conditional order before appearance, to restrain defendant from preventing plaintiff, etc., from repairing the bank for the purpose of bringing back the stream into its proper channel, and also to restrain the said defendant from preventing the plaintiff from entering on that part of the lands in the possession of the defendant which formed part of the bank of the stream to repair the breach, and also to restrain the defendant from cutting, etc., any channel for the water of the said stream on the lands in his possession, whereby the watercourse might be diverted from plaintiff's mill, unless cause within six days. *M'Swiney* v. *Haynes*, 1 Ir. Eq. R. 322.

7. Permission was obtained from E. and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands, to supply the town of G. with water. It was alleged that the subscribers agreed to pay to E. 2*s.* 6*d.* a-year, but this was denied. E. subsequently diverted the watercourse into the old channel; and, upon a bill filed by several of the subscribers:—Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E.; and an injunction was granted to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiff's use of the watercourse. *Devonshire* (*Duke*) v. *Eglin*, 14 Beav. 530; 20 L. J., N. S., Ch., 495.

8. The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the Lord Chancellor dissolved an injunction which had been granted by the Vice-Chancellor restraining the defendant from diverting and using the water. *Elmhirst* v. *Spencer*, 2 Macn. & G. 45.

9. Claim by a plaintiff to use water which flowed from his land to the land of the defendant, and was there collected in a reservoir, whence it reflowed into the plaintiff's land. And a claim also by the plaintiff to the over-

flow into his land of a pond which flowed through the defendant's land into that of the plaintiff. The claims being supported by evidence of twenty years' use:—Held, that these claims were not maintainable. *Ennor* v. *Barwell*, 2 Giff. 410; 4 L. T., N. S., 597; 6 Jur., N. S., 23.

But held, that the plaintiff was entitled to water flowing from surface springs on the defendant's lands, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's lands, and was entitled to an injunction to restrain the defendant from diverting it. *Ib.*

A. having cut trenches in his land, and, by permission, in neighbouring lands, whereby the water from surface springs, not flowing in any defined channels, was drained into his reservoir, and prevented from flowing into the plaintiff's close:—Held, that the plaintiff was entitled to this water, on the ground that an occupant is not entitled to intercept the natural flow of such water from surface springs. *Ib.*

In order to ascertain the geological formation of the land, the plaintiff was not allowed to cut down an embankment or to remove the soil; but, on giving notice, he was allowed to enter and inspect it for the purpose of ascertaining the natural flow of the water. *Ib.*

1. Turning watercourses from mills may be determined in chancery, but was referred to commissioners of sewers. *Swain* v. *Rogers*, Cary 26.

2. The plaintiff was entitled, for the purposes of his mill, to a supply of water by means of a stream running through and over the lands of the defendant. The defendant, in working the minerals lying under the bed of the stream, had caused a subsidence of the bed to the extent of four feet for some distance. In order to maintain the original level of the stream, the defendant had constructed embankments on either side, and there was no actual diminution in the supply of water to the mill. Upon a bill for an injunction, the Court refused to make a hostile decree against the defendant, but by reason of the subsidence which had taken place in the bed of the stream, he was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow and passage of the water to the mill, staying further proceedings, giving no costs, but reserving liberty to the plaintiff to apply if occasion should require. *Elwell* v. *Crowther*, 8 Jur., N. S., 1004; 6 L. T., N. S., 596.

3. A count for diverting and turning a stream of water is not supported by proof of penning back and checking its course, whereby the water was made to overflow the plaintiff's meadow. *Griffiths* v. *Marson*, 6 Price 1.

4. A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream. *Norbury* (*Earl*) v. *Kitchin*, 15 L. T., N. S., 501.

5. The owner of the banks of a non-navigable river may, without any illegality, build a mill-dam across the stream within his own property, and divert a mill-lade without asking the leave of the proprietors above him, provided he does not obstruct the water from flowing as freely as it was wont, and without asking the leave of those proprietors below him, if he takes care to restore the water to its natural course before it enters their land. *Orr Ewing* v. *Colquhoun*, 2 L. R., App. Cas. (Sc.), 839.

6. The Metropolitan Board of Works constructed a sewer on the high road, and the Lewisham District Board made a branch sewer running into it. The combined effect of the two was to drain an ornamental pond and rivulet on the adjoining lands of the plaintiff. In a suit to obtain an injunction:—Held, first, that neither of the Boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners. *Staunton* v. *Woolrych*, 23 Beav. 225; 3 Jur., N. S., 257; 26 L. J., Ch., 300.

Held, secondly, that they had not exceeded their statutory right, so as to be liable to be restrained by injunction. *Ib.*

Held, thirdly, that if either of the Boards was producing injury to the plaintiff by the unskilful or improper construction of the sewer, the Court would interfere to prevent it. *Ib.*

Held, fourthly, that such not being the case, the rights of the plaintiff were limited to a claim for compensation under the 11 & 12 Vict., c. 112, s. 50, and the 18 & 19 Vict., c. 120, s. 86. *Ib.*

7. Though there is no remedy for the injury caused by sewers tapping underground springs, the Court will interfere where it is shown that water is abstracted from definite channels flowing above ground. *Grand Junction Canal* v. *Shugar*, 19 W. R. 569.

A canal was supplied from a pond fed by springs, and by streams flowing into it. A local board constructed a sewer with a branch running parallel to one of the streams and under the pond. The sewers tapped the springs so that the pond would no longer hold water, and affected the stream so that a great part of its water was absorbed:—Held, the latter injury was a ground for the Court's interference. The water was discharged by the sewer into a lower reservoir of the canal, so that the same use of it as before could be obtained at the expense of pumping. *Ib.*

Held, however, that the Court would grant an injunction, as the Board was exceeding their parliamentary powers. *Ib.*

8. Where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of contract affords sufficient ground for the Court to interfere by injunction. *Tipping* v. *Eckersley*, 2 Kay & J. 264.

Semble, the Court may so interfere, whether the breach has or has not actually been committed, provided the defendant claims and insists on a right to do the act which would constitute such breach. *Ib.*

The defendants demised to plaintiff a plot of land, one-half of an adjoining brook, a cotton-mill, reservoir, and steam engine of 100 horse power on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining

the plot of land, as should be necessary for effectually supplying with water and working the steam-engine, or any other steam-engine of like power and capacity"; and covenanted not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the premises, according to the tenor of the demise. Shortly afterwards, the defendants erected, a little below the bridge, but above the plaintiff's mill, a new cotton-mill and steam-engine, with a reservoir, which drew off water from the brook between the plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water which the plaintiff had to use for condensing his engine, from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes. It was also deposed, that on another occasion, in consequence of the increased temperature, the plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute. Upon motion for a decree, the Court granted a perpetual injunction, restraining the defendants from discharging heated water, so as to increase the temperature of the water which the plaintiff used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, showed a material interference with the quality of the water to which the plaintiff was entitled under the demise, and that the question whether such interference was such as to give him a right to damages, was one which he was not obliged to try. *Ib.*

But so much of the motion as sought to restrain the defendants from diverting the water for their new mill was directed to stand over, upon terms of the plaintiff bringing an action, the plaintiff having failed to show that he had ever yet been deprived by the defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared that he had great reason to fear that he would be so deprived. *Ib.*

VIII. POLLUTION OF.

1. Where an owner of land complained that a bleaching manufactory rendered the water which passed through his grounds impure, it was held, that he must prove that he sustained some substantial damage; it was not sufficient to show that the water did not come out of the defendants' grounds in as pure a state as when it entered. Where there were two streams, one passing through the defendants' grounds to their bleaching factory, the other, after it had received the water from the factory, passed through the plaintiff's land, an injunction which restrained the defendants from using both streams was, on that ground alone, untenable. *Embrent* v. *Spencer*, 2 Macn. & G. 45.

The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the Lord Chancellor dissolved an injunction which had been granted by the Vice-Chancellor, restraining the defendant from diverting and using the water. *Ib.*

2. A., by diverting a watercourse, brought a nuisance upon B., who connived at it; yet the Court granted an injunction, for every continuance is a fresh nuisance. *Anon.*, 2 Eq. Abr. 522, pl. 3.

3. On an information of the attorney-general, at the relation of an individual, and a bill by the relator, the Lord Chancellor granted an injunction *ex parte*, on affidavits, to restrain a purpresture in the river Thames, and it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the King's Bench was pending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of defendants, stating that the act complained of was beneficial to the navigation; it was also held, that it was immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject, to use it for any purpose amounting to a nuisance. *Att.-Gen.* v. *Johnson*, 2 Wils. 87.

4. An order restraining persons from polluting a stream should restrain them from such a pollution as would be to the injury of the plaintiff. *Lingwood* v. *Stowmarket Paper Making Co.*, 11 Jur., N. S., 993; 14 W. R. 78.

5. If one has anciently pits which are separated by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the watercourse. *Brown* v. *Best*, 1 Wils. 174.

6. In the absence of any allegation of prescriptive right in the plaintiff, the Court will not restrain the draining of gravel-pits into a stream, to the injury of watercress beds of the plaintiff's supplied by such stream. *Weeks* v. *Heward*, 10 W. R. 557.

7. What conditions are required in order that a person establishing works on a running stream may, by long user of the water, acquire a right therein, although he has no proprietorship in the river or the water; and may, as against new comers, obtain a right to pollute such stream. *Wood* v. *Sutcliffe*, 2 Sim., N. S., 163; 21 L. J., N. S., Ch., 253; 16 Jur. 75.

8. Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. *Crossley* v. *Lightowler*, 2 L. R., Ch., 478; 36 L. J., Ch., 584; 15 W. R. 801.

The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one. *Ib.*

The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye-works had been used for more than twenty years, and had been

allowed to go to ruin :—Held, that any right of fouling a stream attached to them was lost. *Ib.*

The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him. *Ib.*

C. wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object :—Held, that in the absence of any express reservation by the owners of the dye-works of the right of fouling, C. could maintain a suit to restrain it. *Ib.*

A suit was instituted for an injunction to restrain the defendants from fouling the waters of a river. The plaintiffs were occupiers of print-works on the banks of the stream, and were also owners of a piece of land bordering the river, which they had purchased from the defendants or person under whom he claimed. The defendants were the owners of dye-works on a higher part of the stream, on the spot where a similar manufacture had formerly been carried on to a smaller extent, but had been entirely given up more than twenty years. The Vice-Chancellor had granted an injunction to restrain the fouling of the river generally : —Held, that the owners of the land on which the defendant's dye-works stood had, by giving up the works for so many years, lost any right which they might have had to foul the stream, but that the increase in size of the works would have made no difference. Nor did the fact that other people fouled the river affect the right of the plaintiffs. S. C. 16 L. T., N. S., 438.

1. The owner of an ancient paper mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before this change the refuse arising from the paper manufacture had been discharged into a stream which ran past the plaintiff's house : —Held, that the easement to which he was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washing produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the onus lay on the plaintiff to prove any increase of pollution. *Baxendale* v. *M'Murray*, 2 L. R., Ch., 790 ; 15 W. R. 32.

2. There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to public health. Even assuming that a prescriptive right to foul a stream with sewage can be acquired, such right must be restricted to the limits of it when the period of prescription commenced ; and if the pollution be substantially increased, whether gradually or suddenly, the Court will interfere by injunction to prevent the wrongful excess ; and if it be possible to separate the illegal excess from the legal user, the wrongdoer must bear the consequences of any restriction necessary to prevent the excess, even if it unavoidably extends to a total prohibition of the user. *Blackburne* v. *Somers*, 5 L. R., Ir., 1.

3. In an action by mill owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where the defendant asked that damages, in lieu of an injunction, might be given, an injunction was granted. *Pennington* v. *Brinsop Hall Coal Co.*, 5 L. R., Ch. D., 769 ; 46 L. J., Ch., 773 ; 37 L. T. 149 ; 25 W. R. 874.

4. As to pollution of a well supplied with water percolating through the earth, and not flowing in any defined channel. See *Womersley* v. *Church*, 17 L. T., N. S., 190.

See also MINES AND MINERALS, IV. 6—NUISANCE, II. VI.

IX. CLEANSING AND REPAIRS.

5. A watercourse, whether called by the name of sewer or brook, cannot be allowed to remain in such a state as to be a nuisance to the neighbourhood, or to be covered over and turned into a sewer so as to take away from the occupiers of adjoining lands any rights they may have to use it as a watercourse. *Att.-Gen.* v. *Hackney Board of Works*, 44 L. J., Ch., 545 ; 20 L. R., Eq., 626 ; 33 L. T. 244.

6. A local Act incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called the Muddock. The second clause directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the river Bann at all seasons of the year ; and to enter on the lands of the different streams named ; to do what was necessary for the conveyance and due regulation of the supply of such waters, and to "make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," etc. The 82nd clause gave similar directions, and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining. The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the Muddock to supply the Bann, but, after a time, neglected to cleanse the channel of the Muddock, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors :—Held, that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it. *Geddis* v. *Bann Reservoir Co.*, 3 L. R., App. Cas., 430. Reversing 11 Ir. R., C. L., 160.

1. The right of one proprietor to an uninterrupted flow of water, by means of pipes which run through the land of another, carries with it the right to enter upon that land for the purposes of cleaning and repairing or otherwise for the preservation of the pipes; and the Court will grant an injunction to restrain the servient owner from the commission of any act which causes the dominant owner greater difficulty and expense in the exercise of his rights, or which, if suffered, might materially affect his rights in future. *Goodhart* v. *Hyett*, 32 W. R. 165.

X. SUBTERRANEAN.

2. *Quære*, whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off, or diminished. *Hammond* v. *Hall*, 10 Sim. 551; 4 Jur. 694.

3. The principles which apply to the right to water flowing in a certain and defined course, whether in an open and visible stream, or in a subterranean channel, are inapplicable to water percolating through underground strata, having no certain course or defined limit, but oozing through the soil wherever the rain penetrates. *Chasemore* v. *Richards*, 7 H. L. Ca. 349; 5 Jur., N. S., 873; 33 L. T. 350; 7 W. R. 685; 29 L. J., Exch., 81.

The right to the enjoyment of a natural stream of water on the surface *ex jure naturæ* belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. *Ib.*

Such a right in no way depends upon prescription or the presumed grant of his neighbour, nor from the presumed acquiescence of the proprietors above and below, as stated in *Acton* v. *Blundell* (12 M. & W. 324); and *Smith* v. *Kenrick* (7 C. B. 515). *Ib.*

A millowner upon a river had for upwards of sixty years enjoyed the use of the water in the river for the purpose of working his mill. The river was, and always had been, fed and supplied above the mill by (among other sources of supply) the rainfall upon a district of many thousand acres in extent, which, either by streams or by percolating through the strata, found its way into the river. A local board of health for the town dug a well upon their own ground, within the above district, and, by constantly pumping, abstracted large quantities of water, which would otherwise have found its way underground to, and have been applicable and serviceable to, the mill. The natural effect of such constant pumping would be the sensible diminution of the water supply of springs and streams in the vicinity. The question was, whether the millowner could maintain an action for the interception of the underground water:—Held, that the action was not maintainable. *Ib.*

4. Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water floating in a defined surface channel through the adjoining land. *Grand Junction Canal Co.* v. *Shugar*, 6 L. R., Ch., 483; 24 L. T., N. S., 402.

The Grand Junction Canal was, near Tring, supplied with water from a mill pond, which pond was supplied partly by water flowing above ground from a horse pond, and partly by subterranean springs. The Local Board of Health of Tring constructed a sewer, which, through defective construction, as the canal company alleged, diminished both supplies of water to the mill pond, and so injured the canal company, who filed a bill to restrain the local board:—Held, that there was no remedy for the abstraction of the underground water, but that there must be an injunction to restrain the interference with that flowing above ground. *Ib.*

5. When a well is supplied with water which percolates through the earth, and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well. *Womersley* v. *Church*, 17 L. T., N. S., 190.

6. T., who was lessee for lives renewable for ever of a parcel of ground expressed in the original lease to be demised, "together with the free use of all springs and streams of water arising in or running through the demised premises, or any part thereof, for any bleach-green or other works which then were, or at any time thereafter should be, erected on the premises," made two sub-leases to different persons, for lives renewable for ever of portions of the premises, the first sub-lease being made in 1851, and describing the premises therein comprised as "that parcel of ground formerly used as a bleach-green, together with the free use of all waters running in or running through the demised premises or any part thereof, theretofore used for the purposes of linen manufacture on the said lands, as fully as T. was entitled thereto"; and the second being made in 1853, of the remaining portion of the lands, "together with the free use of all water, if any, arising in or running through the demised premises, or any part thereof, as fully as T. was entitled thereto." The interest in both sub-leases, as well as the equity of redemption in the superior lease (which had been mortgaged), afterwards became vested in W., who was subsequently adjudicated a bankrupt, and the lands were sold by the Court of Bankruptcy. The plaintiff purchased the portion of the lands comprised in the sub-lease of 1851; and one C., under whom the defendant claimed, became the purchaser of the portion included in the sub-lease of 1853. Both portions of the lands were put up for sale by auction on the same day, one of the conditions of sale providing that each would be sold "subject to existing easements;" but the Court, having refused the plaintiff's first tender, he subsequently increased it, and was not actually declared the purchaser until a few days after the confirmation of the sale to C. By deed of the 15th March 1876, made between the assignee of W. and certain other persons and the plaintiff, which recited (*inter alia*) the superior lease, the sub-lease of 1851, with

the water-rights thereby respectively granted, and the sub-lease of 1853, the grantors conveyed to the plaintiff the parcel of land formerly used as a bleach-green, together with the full use of all water rising in or running through the demised premises, or any part thereof, theretofore used for the purposes of linen manufacture, as fully as T. was entitled thereto under the recited superior lease or otherwise; and all other (if any) the premises comprised in the lease of 1850, "excepting thereout and out of this grant" the premises purchased by C. By deed of the 11th April 1876, made between the same grantor and C., and containing similar recitals to those in the conveyance to the plaintiff, the grantors conveyed to C. the lands comprised in the sub-lease of 1853. The testatum of this deed made no mention of water-rights. The plaintiff's lands were at a lower level than the lands of C., and in the plaintiff's lands, a few feet from the fence dividing them from C.'s lands, a copious stream of pure water issued from the ground. This water was peculiarly suitable for bleaching purposes; and the plaintiff, who was a bleacher, deposed that he intended to use it for bleaching; and, at the time of action brought, it was used for domestic purposes in the dwelling-house on the plaintiff's grounds, and for the supply of a large mill thereon. The defendants, who were the local sanitary authority, entered into an agreement with C. to permit them to bore for water on his lands, and they made a cutting on them a few feet from the fence, and obtained a large supply of water, whereupon the stream on the plaintiff's land ceased to flow. The plaintiff having applied for an injunction to restrain the defendants from diverting and obstructing the water from his stream, the Vice-Chancellor decided that the conveyance to the plaintiff expressly granted him this water, and that, as the grantors could not derogate from their own grant, neither C., who derived his title from those grantors, nor the defendants claiming through him, could lawfully deprive the plaintiff of the use of the water in question:—But, held, on appeal, (*a*) that the conveyance to the plaintiff did not grant him the right claimed, and that he would not have been entitled to it even if the conveyance to C. had contained an exception of all existing easements; and (*b*) that although the water flowed subterraneously in a channel which was, and by excavation could have been, ascertained to be defined, the principle of *Chasemore* v. *Richards* (7 H. L. Ca. 349) applied, as the channel was not known. *Ruart* v. *Belfast Poor Law Guardians*, 9 L. R., Ir., 172.

1. Injunction against draining preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515.

XI. INJURIES BY.

2. If a person brings on to his own land any matter which, if it escapes, may prove injurious to his neighbour's property, such as a large body of water, he is liable to make compensation for any injury that may accrue from its escape out of his land; and it is no defence, if it escapes and causes damage to his neighbour, that the injury was caused without any default or negligence on his part. *Fletcher* v. *Rylands*, 1 L. R., Exch., 265; 12 Jur., N. S., 603; 35 L. J., Exch., 154; 14 W. R. 799; 4 H. & C. 263; 14 L. T., N. S., 523. Affirmed *sub. nom. Rylands* v. *Fletcher*, 3 L. R., H. L., 330; 37 L. J., Exch., 161; 19 L. T., N. S., 220.

3. The principle that if a man brings and accumulates upon his land anything which, if it escapes, may cause damage to his neighbour, he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people. *Madras Railway Co.* v. *Carvetinagarum* (*Zemindar*), 30 L. T., N. S., 770; 22 W. R. 865.

See also MINES AND MINERALS, IV. 5.

WATER COMPANY.

I. SUPPLY OF WATER.

4. A company is established by Act of Parliament, for supplying the inhabitants of several districts with water, at such terms as they should mutually agree upon; and a subsequent Act provides, that the company shall only demand reasonable sums:—Held, that a court of equity has no jurisdiction, upon an offer to pay either a reasonable price, or that which was originally agreed upon, to compel the company to continue a supply to any inhabitant, beyond the term of his contract; or to restrain it from discontinuing such supply, until the decision of the question by a trial at law. *Weale* v. *West Middlesex Waterworks Co.*, 1 Jac. & Walk. 358.

If the supply of water was to depend upon the reasonableness of the price, and not upon contract, a court of equity cannot interfere, as there is no mutuality, the company not being able to compel a person to take water. *Ib.*

5. Plaintiff, through several mesne assignments, being in possession of a right, originally in the city of London, of supplying Southwark with water, prayed injunction to restrain defendant from encroaching on this right by raising engines, laying pipes, etc. Defendant demurred to bill, for that plaintiff ought first to have established his right at law; demurrer allowed. *Whitchurch* v. *Hide*, 2 Atk. 391.

6. The Public Health (Scotland) Act 1867,

s. 89, subs. 4, provides that "the local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants to be continued, maintained, and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water. Situated in one corner of a private field in the parish of Denny is a well. From the well to the entrance of the field a footpath leads, and from this entrance to the public road going through the village of Denny there is a cart road. The inhabitants of Denny had for the prescriptive period used the water of the well for domestic purposes, and had had the well, *inter alia*, cradled with stones at their own expense. Up to 1877 Denny was a mere village, without any burghal territory. But in that year Denny, with the adjoining village of Dunipace, was constituted a police burgh under the provisions of 25 & 26 Vict., c. 101, and the police commissioners of the burgh then became the local authority under the Public Health (Scotland) Act 1867 (30 & 31 Vict., c. 101). In 1878 the commissioners, in their character as local authority, and under the authority of subs. 4, s. 89 of the last-mentioned statute, caused the well to be covered in with an iron plate, and placed therein a handpump, with the avowed object of keeping the well free from pollution. The proprietor of the field, alleging the well to be his private property, raised a process of interdict and suspension against the local authority praying for removal of the cover and pump, etc.:—Held, that the well was a public well within the meaning of the statute, and that the local authority, as representing the inhabitants, had not done anything in excess of their powers. *Smith* v. *Archibald*, 5 L. R., App. Cas. (Sc.), 489.

1. Upon a contract by a water company in Scotland to supply a town with pure and wholesome water, at a certain rate of charge, in consideration of the privilege to do so exclusively, the company insisted that it was entitled to prevent the use of salt water coming from the sea, and for that purpose sought an interdict or injunction, which, however, was refused. The refusal was confirmed on appeal by the House of Lords. *Shaw's Water Co.* v. *Greenock* (*Magistrates*), 2 Macq. H. L. Ca., 151.

2. An Act for supplying with water the town and port of C. and the neighbourhood thereof, after reciting that the town of C. and the neighbourhood thereof were insufficiently supplied with water, incorporated a company, and gave it the usual powers, and enacted that the limits of the Act for the supply of water should comprise "the whole of the town and port of C., and the parishes and places within and adjoining to such town":—Held, that the word "port" was used in its popular sense, and did not extend to the district fixed by the Commissioners of the Treasury as the port of C. for the purposes of the customs duties. The C. company was proceeding to lay down pipes, which they alleged were necessary for the supply of C., but which they admitted they intended to use for the purpose of carrying water beyond the limits of their powers. At the suit of the board of health of C., the Court restrained the company from laying down pipes under the streets of C. for the purpose of supplying with water any parish or place not being part of the port of C., or any parish or place within or adjoining such town. *Cardiff* (*Mayor*) v. *Cardiff Waterworks Co.*, 5 Jur., N. S., 953.

3. A corporation obtained parliamentary power to collect all the water from the gathering grounds of a district, but was bound to supply to a particular township not less than 25,000 gallons, or more than 75,000 gallons of water per day, at the price of 6*d*. per 1,000 gallons, and the amount to be supplied between the maximum and minimum limits was to be at the option of the purchaser:—Held, that the township might enforce the supply of more than 25,000 gallons per day for the purpose of selling part of it at a profit to a neighbouring township. *Halifax* (*Mayor*) v. *Soothill Upper Local Board*, 30 L. T., N. S., 513. Affirmed 31 L. T., N. S., 6.

4. A waterworks company is not within the meaning of the Public Health Act 1875, s. 52, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water. *Richmond Waterworks Co. and Southwark and Vauxhall Waterworks Co.* v. *Richmond* (*Vestry*), 3 L. R., Ch. D., 82; 45 L. J., Ch., 441; 34 L. T., N. S., 480.

When company R. had the necessary powers but no water, and company S. had the requisite supply of water but no powers within the district, and company R. sold its plant to company S., and certain members of company S. bought all the shares in company R. with the intention of allowing company S. to exercise the powers of company R.:—Held, that the powers could not be so delegated, and that neither company was able and willing within the meaning of the Act, and consequently that neither was entitled to notice under the Public Health Act 1848, s. 75, or under the Public Health Act 1875, s. 52. *Ib.*

II. WATER-RATE.

5. By one of the special Acts of a waterworks company (7 Geo. 4, c. 140, s. 27), it was provided that the water-rate was to be payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's-rate is computed." By a later special Act (15 & 16 Vict., c. 157, s. 46), the waterworks company were compelled to supply water to occupiers of dwelling-houses for domestic purposes at the following rates, viz., "where the 'annual value' of the dwelling-house shall not exceed 200*l*., at a rate per cent. per annum on such value not exceeding 4*l*., and where such 'annual value' shall exceed 200*l*., at a rate per cent. per annum on such value not exceeding 3*l*." D. was the occupier and the lessee for a long term at a ground rent

of a house supplied with water by the waterworks company:—Held, that whether the later Act repealed the provisions of the former or not the case must be dealt with under the later Act; and that the words "annual value" in the later Act meant "net annual value" as defined in the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), s. 1. Held, also, that "annual value" had the same meaning in the earlier as in the later Act. *Coaltille* v. *Wood* (2 C. B. 210) commented on. *Dobbs* v. *Grand Junction Waterworks Co.*, 9 L. R., App. Cas., 49; 53 L. J., Q. B., 50; 49 L. T. 541; 32 W. R. 432. Reversing 10 L. R., Q. B. D., 337; 52 L. J., Q. B., 90; 47 L. T. 504; 31 W. R. 359.

1. The Sheffield Waterworks Company was authorized to receive payment by measure and not by a rate for water supplied to fixed baths in private houses. There is no express provision in the principal or general Acts as to how the water for such a purpose is to be measured, or whether the company or the consumer shall bear the cost of providing a meter or measuring the water, but by the Waterworks Clauses Act 1863, s. 14, where the company supplies water by measure, it may let to a consumer a meter for such remuneration in money as they may agree upon:—Held, that a consumer taking water from the company for a fixed bath in his private house was bound at his own expense to measure the water so used by some automatic and self-registering meter or other instrument, or in some other equally accurate way, and to record the amount from time to time taken. *Sheffield Waterworks Co.* v. *Bingham*, 52 L. J., Ch., 624; 48 L. T. 604; 25 L. R., Ch. D., 443.

III. COMPULSORY POWERS.

1. Taking Water under.

2. An injunction to restrain the Grand Junction Waterworks Company from applying to Parliament for an Act authorising the company to procure its supply of water by means of an aqueduct from the river Colne, instead of the Thames, as authorised by the existing Acts under which it was incorporated, was refused. *Ware* v. *Grand Junction Water Co.*, 2 Russ. & M. 470.

A court of equity will not, at the instance of a shareholder, restrain a joint-stock company, incorporated by Act of Parliament, which prescribes its constitution and objects, from applying in its corporate capacity to Parliament and from using its corporate seal and resources to obtain the sanction of the legislature to the re-modelling of its constitution, or to a material alteration and extension of its object and powers. *Ib.*

3. Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. Therefore where a waterworks Act empowered a company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones, and they were diverting it by means of a culvert:—Held, that another company, which was entitled to the water of a stream into which the diverted stream had flowed, was not entitled to an injunction to restrain a violation of the terms of the Act as to the mode of diversion. *Liverpool (Mayor)*, v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852.

4. The Waterworks Consolidation Clauses Act 1847 (10 & 11 Vict., c. 17) places the taking of streams upon the same footing as the taking of lands under the Lands Clauses Consolidation Act (8 & 9 Vict., c. 18); and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit and giving a bond in accordance with the provisions of the Lands Clauses Consolidation Act. *Ferrand* v. *Bradford (Mayor)*, 21 Beav. 412; 2 Jur., N. S., 175.

5. The abstraction by a waterworks company of water from a stream does not entitle a riparian proprietor below to require the company to treat, under the Waterworks Clauses Act 1847, s. 6, for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected. *Bush* v. *Trowbridge Waterworks Co.*, 10 L. R., Ch., 459; 44 L. J., Ch., 645; 23 W. R. 641; 33 L. T., N. S., 137. Affirming 44 L. J., Ch., 235; 23 W. R. 330; 32 L. T., N. S., 182; 29 L. R., Eq., 291.

The Trowbridge Waterworks Company was empowered to take certain brooks and streams for the purposes of its undertaking. B. was the owner of a water meadow which was watered by a stream called Biss Brook. Biss Brook was supplied in part by Biss Springs. The company took Biss Springs and so diminished the amount of water in the Biss Brook, and thus caused injury to the plaintiff's meadow. The company had served no notice on B. under the Lands Clauses Act 1845, s. 18. B. then filed a bill for an injunction to restrain the company from taking the Biss Springs:—Held, that the Biss Brook was injuriously affected and not taken within the meaning of the Waterworks Clauses Act 1847, s. 6, and that, therefore, the company was not bound to serve a notice on B. under the Lands Clauses Act 1845, s. 18. *Ib.*

6. A waterworks company purchased a mill on the upper part of a stream, and thereby became riparian owners. It collected the water from the stream into a reservoir and applied it for the purpose of supplying a neighbouring town with water. A canal company being the riparian owners lower down the stream, finding its flow of water affected, brought a suit for an injunction, and the waterworks company by its pleadings claimed the right to use the water in the manner complained of:—Held, that such user of the water by it was neither a user in connexion with the tenement of the waterworks company, nor a reason-

able user such as an upper riparian owner had a right to make, and that the canal company was entitled to an injunction to restrain such user of the water. *Swindon Waterworks Co.*, v. *Wilts and Berks Canal Navigation Co.*, 45 L. J., Ch., 638; 7 L. R., H. L., 697; 24 W. R. 284; 33 L. T. 513. Affirming 9 L. R., Ch., 451; 43 L. J., Ch., 393; 30 L. T. 443; 22 W. R. 444. Reversing 22 W. R. 212; 29 L. T., N. S., 722.

Held, also, that such user being claimed as of right might be restrained by injunction without proof of substantial damage already sustained or imminent therefrom *Ib.*

A canal company was established by Acts of Parliament which gave it the right of taking water from streams within the distance of 2,000 yards, for the purpose of making and maintaining its canal. It purchased a mill on the stream in question, and so became riparian owner. It afterwards ceased to use the mill:—Held, that by the purchase of the mill it acquired all the rights incident thereto, in the same way as such rights would have been acquired by a private individual, and not fettered or restricted within the limits of its statutory powers as a canal company. *Ib.*

When a corporation acquires riparian lands under parliamentary powers, all riparian rights, whether ordinary or prescriptive, already subsisting in respect of those lands, attach to such corporation; and if the special objects of its incorporation include purposes requiring the use of the water, the supply of water to which the corporation is entitled will be measured by the extent of user necessary for the purposes of the Act, if such user would be more extensive than that to which the corporation would be entitled as the successor of the former riparian owner. *Ib.*

2. Taking Land under.

1. When a corporation was under an Act empowered to make a conduit for water through a field at some distance below the surface:—Held, that it was not necessary for it to make compensation for damage by severance of minerals where it was not required by the provisions of the Waterworks Clauses Act 1847 to purchase them. *Re Huddersfield Corporation and Jacomb*, 17 L. R., Eq., 476; 30 L. T., N. S., 78. Affirmed 23 W. R. 100; 31 L. T., N. S., 466; 44 L. J., Ch., 96; 10 L. R., Ch, 92.

2. The meaning of the Waterworks Clauses Act 1847, s. 12, is, that subject to a company having authority to take lands and construct works, then, if the company has power and space and room enough in the land which it is authorized to take to afford it an area for additional works, it may be empowered to make the collateral and auxiliary works referred to in the section. *Simpson* v. *South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679; 11 Jur., N. S., 453; 34 L. J., Ch., 380; 13 W. R. 729; 13 W. R. 131; 11 L. T., N. S., 411; 5 N. R. 70; 6 N. R. 184, 279.

The whole tenor of the Act is, that it refers by anticipation to the special Act for the purpose of ascertaining therein what is the land to be taken, and what are the works to be done on the land. Referring to that, it invests the company with certain general powers which may be useful or necessary for the purpose of carrying into effect upon the land authorized to be taken the work which by the special Act is definitively described. *Ib.*

A waterworks company, before applying to Parliament, deposited plans, showing that a certain field would be affected by a tunnel passing forty-five feet below the surface, and gave a notice to the owner accordingly. The company obtained its Act, authorizing it to construct its works according to the plans, and afterwards proposed to take the field, sink a well, and erect pumping machinery thereon:—Held, that the company could not, by the exercise of its compulsory powers, take any portion of the field other than so much as was required for the tunnel. *Ib.*

3. Laying Pipes.

3. Under s. 31 of the Waterworks Clauses Act 1847, 10 & 11 Vict., c. 17, it is incumbent upon the undertakers intending to break up a road to communicate beforehand their proposed plan or method of executing the work to the road authority; and this in a sufficient manner to enable the road authority to judge whether what is proposed ought to be done without modification. If the plan is not approved of by the road authority, it rests with the undertakers to apply for the determination of two justices before proceeding to operations. *Edgware Highway Board* v. *Colne Valley Water Co.*, 46 L. J., Ch., 889.

4. Notice by Local Authority.

4. The Public Health Act 1848 (11 & 12 Vict., c. 63), s. 75, is not materially extended by the Public Health Act 1875 (38 & 39 Vict., c. 55), s. 52, and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter Act, given the notices required by s. 75 of the former Act, is not, in consequence of the passing of the latter Act, required to give the notices under s. 52 of that Act. *Richmond Waterworks Co. and the Southwark and Vauxhall Waterworks Co.* v. *Richmond (Vestry)*, 3 L. R., Ch. D., 82; 45 L. J., Ch., 441; 34 L. T., N. S., 480.

IV. NUISANCE BY.

5. A waterworks company, by its special Act, incorporating the Waterworks Clauses Act 1847 (10 & 11 Vict., c. 17), was empowered to construct a reservoir in a certain locality, and to use the waters which flowed into a certain river, but the Act gave the company no power of acquiring the land compulsorily, and did not provide for the reservoir being of any particular construction; it contained provisions for keeping up the supply of water in the river. Another private Act of the company, passed after the construction of the reservoir, recognized it as an existing work, and gave the company certain rights against mill owners on the stream as regarded the quantity of water, but saved all other rights. The company's works fouled the river with mud, so much as to make the water unfit for the purposes of the trade of silk dyeing theretofore carried on at

mills of the plaintiff on the river bank :—Held, that there was nothing in the Acts to take away his right to have the water pure and in its natural state, or to deprive him of his right of action for the injury sustained thereby. and therefore (the damage having been proved to be substantial) to avoid multiplicity of actions the plaintiff was entitled to an injunction restraining the nuisance. *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 42 L. J., Ch., 107 ; 8 L. R., Ch., 125 ; 27 L. T., N. S., 521 ; 21 W. R. 32. Reversing 27 L. T. 298.

1. Under the Waterworks Clauses Act 1847, there is a clear distinction between the company taking a whole stream and their injuriously affecting it. In the former case they cannot take the stream without consent, except upon payment of the purchase money, or making deposit and giving bond. In the latter case compensation is to be made in the ordinary mode. *Ferrand* v. *Bradford* (*Mayor*), 2 Jur., N. S., 175.

2. A local Act incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called Muddock. The 2nd clause directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the river Bann at all seasons of the year ; and to enter on the lands of the different streams named ; to do what was necessary for the conveyance and due regulation of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits, aqueducts, channels and watercourses, drains, feeders, weirs, dams," etc. The 82nd clause gave similar directions and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining. The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the Muddock to supply the Bann, but, after a time, neglected to cleanse the channel of the Muddock, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors :—Held, that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it. *Geddis* v. *Bann Reservoir Co.*, 3 L. R., App. Cas., 430.

See also III. *ante*.

V. DAMAGE TO PIPES.

3. A railway company, under the powers of an Act of Parliament, took land in which were laid certain pipes belonging to a waterworks company. These pipes were not removed by either of the companies at the time the railway company took the land, but the ground in which they lay was overlaid by that company by additional soil to the depth of several feet. Subsequently, the railway company, in tunnelling through the ground, came upon the pipes and removed them, but did not hand them over to the waterworks company or pay it their value. On these facts it took proceedings under the Lands Clauses and the Railways Clauses Acts for settling the amount of compensation to which it was entitled as for an act injuriously affecting its interest in the land : —Held, that the facts stated gave it no interest in the land, and that it consequently could not maintain proceedings for compensation for injuriously affecting it. *New River Co.* v. *Midland Railway Co.*, 25 W. R. 502 ; 36 L. T., N. S., 539.

VI. SALE OF UNDERTAKING.

4. By a deed executed in 1857, in pursuance of a preliminary agreement and an Act of Parliament confirming the same. certain waterworks and property were transferred by an old company to a new company, upon certain terms, under which the latter was to pay to the former a rent equal to interest upon the share capital of the former at 5 per cent., with a clause for reducing the rate of interest to 4½ per cent. in certain events. The deed contained a proviso that, if the transferee desirous of becoming absolute owner of the works "should, on or before any 25th day of December, after having given to the old company six calendar months' previous notice of its desire to avail itself of the option thereby given, pay unto the old company" the amount of its share capital, the party making such payment should thereupon become entitled to the works freed from the rent thereby reserved. Notice to purchase was given in due course, but the money was not paid at the time specified in the notice :—Held, that the right to purchase had not been lost by the non-payment of the money. *Ward* v. *Wolverhampton Waterworks Co.*, 20 W. R. 85 ; 25 L. T., N. S., 487 ; 13 L. R., Eq., 243 ; 41 L. J., Ch., 308.

VII. SHARES.

Remedies.] 5. Though shares in waterworks are a legal estate and a corporeal inheritance, yet no one proprietor can receive the profits himself, and as there is no other way to get at it, it is proper to come into this court for mesne profits. *Townsend* v. *Ash*, 3 Atk. 337.

Nature of.] See CHARITY, V. IX. 5—DOWER, I. 3—STOCK AND SHARES, VI.

WAY.

— *As to Streets and Public Ways.* See HIGHWAY—LOCAL GOVERNMENT, VII.—TURNPIKE.
— *As to Bridges and Level Crossings.* See RAILWAY.
— *Under Special Statutes.* See COMMON, IV. 9 - RAILWAY—TRAMWAY.

See also EASEMENT—FERRY—VENDOR AND PURCHASER. XXVII.

I. ACQUISITION OF.

1. By Grant.

1. The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards, by assignment from the first lessees, become possessed of the first colliery, and the right of way; an injunction was granted to restrain him from removing the materials and destroying the way. *Newmarch* v. *Brandling*, 3 Swan. 99.

2. A freeholder of land, which was let for building purposes, entered into a covenant that the owners and occupiers of the houses should have a free right of way over certain roads, and should have full use and enjoyment of the roads in as absolute a manner as if they were public roads. The roads had not been dedicated to the public. At the invitation of the occupiers, but without the consent of the freeholder, a gas company broke up the surface of the roads in order to lay down gas to some of the houses. The freeholder filed a bill for an injunction against the company. The occupiers of the houses to which gas had been already laid down, not having been made parties, the cause was ordered to stand over for them to appear. The occupiers appearing, and consenting to the acts of the company, the bill was dismissed, with costs. *Selby* v. *Crystal Palace District Gas Co.* 8 Jur., N. S., 122; 10 W. R. 432. Affirmed, 31 L. J., Ch., 595.

3. P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. P. and M. agreed to alter their boundary, and substitute a new passage for the old one. M. accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to him, his heirs, and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels." By another deed P. released his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading so as to obstruct the access to the yard:—Held, that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it. *Thorpe* v. *Brumfitt*, 8 L. R., Ch., 650.

4. It was stipulated, by an agreement between the parties to a suit, that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defendant's estate." There were two roads traversing the estate, at the further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff, whilst he had the use of the roads over the estate, could not pass beyond it. An injunction was granted to restrain the defendant from making and continuing the obstruction at the extremity of his land. *Phillips* v. *Treeby*, 8 Jur., N. S., 999; 6 L. T., N. S., 796. Affirming 3 Giff. 632; 8 Jur., N. S., 711; 6 L. T., N. S., 212.

5. The grantee of a right of way which has been obstructed by the grantor may without trespass go *extra viam* over the grantor's land. *Selby* v. *Nettlefold*, 22 W. R. 142; 43 L. J., Ch., 359; 9 L. R., Ch., 111; 29 L. T., N. S., 661.

Notice of such an interrupted right of way is notice of all the rights appertaining thereto. This right to go *extra viam* is one which can be protected by injunction, but the injunction must be limited to the time during which the obstruction lasts, and is not to prevent the grantor from substituting any other convenient mode of user, and is not to extend so as to authorise the grantee to use the mode of access, across the defendant's land, for the continuous passage along the way granted. *Ib.*

6. By a lease a demise was made of a dry dock, described as bounded on the west by a roadway or a passage running between the dock and certain newly-erected warehouses, together with free liberty and right of way for the lessee, his workmen and servants, and all other persons and person, by his authority or permission, from time to time, and at all times thereafter during the continuance of the demise, in, by, through, and over the roadway, lying to the west of the demised premises, jointly with the lessor and his tenants. Between the dock and the warehouses was a strip of land of twenty-three feet in breadth. At the date of the lease that part of the strip, fourteen feet in breadth, which lay nearest to the warehouses, was paved, and there was at

the extremity of the pavement a strong kerb three inches high. On this kerb a strong fence was erected either before or soon after the date of the lease:—Held, that the right of way conferred by the lease extended over the whole strip, and not merely to the portion of it adjacent to the dock; but that it was confined to foot passengers. *Cousens* v. *Rose*, 12 L. R., Eq., 366; 24 L. T., N. S., 820; 19 W. R. 792

1. A conveyance to the plaintiff granted to him a right of way through the gateway of the vendor (which opened into a close afterwards bought by the defendant) to a wicket-gate to be erected by the plaintiff at a given point into a piece of garden ground, part of the premises purchased by the plaintiff. The plaintiff built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, and claimed a right of carriage-way to it:—Held, that he was not confined to a right of footway, but was entitled to a right of way for all purposes. *Watts* v. *Kelson*, 6 L. R., Ch., 166; 40 L. J., Ch., 126; 19 W. R. 338; 24 L. T., N. S., 209. Affirming 18 W. R. 745.

Semble, if the owner of a house and land makes a formed road over the land for the apparent use of the house, and conveys the house separately from the land, with the ordinary general words, a right of way over the road will pass. *Ib.*

2. A grant of a right of "ingress, egress, and regress" is a grant of a right of way from the *locus a quo* to the *locus ad quem*, and from the *locus ad quem* forth to any other spot to which the grantee may lawfully go, or back to the *locus a quo*. By a deed of conveyance from a railway company of a close of land the grantee was given a right of free "ingress, egress, and regress," to and from certain private roads which bounded the close and led to the railway station and on to the public highways:—Held, that the grantee was entitled to pass from the close to the private roads, and thence to the public highways, or in the reverse direction, and was not limited to passing from the close to the railway station, or *vice versâ*. *Somerset* v. *Great Western Railway Co.*, 46 L. T. 883.

3. Where two closes in one ownership adjoin, and a formed way leads over one to the other, and is used therewith, and the owner grants the latter close "with all ways now used therewith," a right of way over the way passes to the grantee, whether the way was constructed before the unity of possession or not. The defendant, the owner of two pieces of land P. and B., made an agreement with the plaintiff to convey so that P. should belong to the defendant and B. to the plaintiff. The only access to B. was by a defined gravelled path crossing P., which path it was assumed in this action had not existed before the unity of possession. By a conveyance executed in pursuance of the agreement, P. and B., "with all ways with the same now enjoyed," were conveyed to a trustee as to half thereof to the use of the defendant, and as to half to the use of the plaintiff. P. was then occupied by the defendant, B. by the plaintiff. The defendant stopped up the path, and the plaintiff was compelled to buy a right of way over adjoining land. The plaintiff brought this action, asking that the conveyance might be rectified by vesting B. in her with a right of way over the path, and vesting P. in the defendant, subject to the right of way:—Held, that a conveyance executed in pursuance of the agreement ought to have contained an express grant of the right of way; that such right would have passed by a conveyance containing the common general words; that it was immaterial whether the way was constructed before the unity of possession or not; that the plaintiff had not abandoned her right; and that she was entitled to rectification as claimed. *Barkshire* v. *Grubb*, 18 L. R., Ch. D., 616; 50 L. J., Ch., 731; 45 L. T. 383; 29 W. R. 929.

4. A right of way acquired by prescription is restricted to the purposes for which it was acquired. But where such a right is acquired by grant, the limit to the right of user is a question depending on the construction of the instrument of grant. *United Land Co.* v. *Great Eastern Railway Co.*, 33 L. T., N. S., 292; 44 L. J., Ch., 685; 10 L. R., Ch., 586; 28 W. R. 896. Affirming 17 L. R., Eq., 158; 22 W. R. 126.

2. On Severance of Land.

5. There being two tenants of adjoining premises held under the same landlord, the tenant of one of the premises acquired a right of way to his vaults through the adjoining premises. The landlord sold both premises at one sale, with a condition that they were to be subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage so far as any person might be affected thereby:—Held, that the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other. *Daniel* v. *Anderson*, 8 Jur., N. S., 328; 31 L. J., Ch., 610; 10 W. R. 366; 7 L. T., N. S., 83.

6. General words in a conveyance passing all ways with the land conveyed, occupied, or enjoyed, will not convey to the vendee a way which originated in the user by the vendor of his own land for his own convenience, and which had no existence prior to the unity of possession of the vendor. *Thomson* v. *Waterlow*, 37 L. J., Ch., 495; 18 L. T., N. S., 545; 6 L. R., Eq., 36; 16 W. R. 686.

The case would be different had the way existed prior to the unity of possession of the vendor, and been thereby extinguished or suspended. *Ib.*

The owner of two adjoining closes, A. and B., who had during the unity of possession made and used, for his own convenience for agricultural purposes, a way across B. to A., executed a conveyance of close A. to a purchaser with these general words, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser, who had access to A. from other land of his own, claimed under the conveyance the right to use the roadway over B.:—Held, that as there was no roadway over B. to A. before the unity of possession, the right to use it did not pass under the general words of the conveyance. *Ib.*

1. When a right of way is granted to "the owner and owners for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner for the time being of every part of the severed lands. *Newcomen* v. *Coulson*, 5 L. R., Ch. D., 133; 46 L. J., Ch., 459; 36 L. T. 385; 25 W. R. 469.

2. One entitled to a right of way over a strip of land independently of the ownership thereof, purchased the strip of land:—Held, that during the ownership, his right of way over the plot was suspended, but would revive on his ceasing to be owner. *Charlesworth* v. *Gartsed*, 3 N. R. 54.

See also preceding Subdivision.

3. Reservation of.

3. On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity. *Davies* v. *Sear*, 7 L. R., Eq., 427; 38 L. J., Ch., 545; 17 W. R. 390; 20 L. T., N. S., 56.

A. purchased from B. the lease of a house, part of an estate agreed to be let to B. upon building leases. There was an open archway under part of the house, which was described as a gateway in the ground plan of the house drawn on the lease, and which, when the buildings on the estate were completed in accordance with the plan of the building agreement, formed the only means of access to a mews behind the house. At the time of the purchase, the buildings not being then completed, there were other means of access to the mews. The assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed:—Held, that a right of way through the archway was reserved to B. by implication, the state of the property at the time of the purchase being such as to put A. upon inquiry, and fix him with constructive notice of the building plan. *Ib.*

Held, also, that A., having stood by and allowed B. to build so as to leave no other access to the mews, could not afterwards dispute the right of way. *Ib.*

4. In a lease for ninety-five years, a right of way over the demised premises was reserved to the lessor and his heirs, as long as they should retain adjoining lands held in fee, and after he or they should alienate such adjoining lands then reserving to the lessor, his heirs and assigns, a different right:—Held, that the reservations were valid, and that on alienation of the freeholds the right of way ceased. *Ardley* v. *St. Pancras (Guardians)*, 39 L. J., Ch., 871.

4. Way of Necessity.

5. The lessee of an inner close has by necessity a right of way, suitable to the business for which the lease was made, over an outer close which belongs to the same landlord. *Gayford* v. *Moffatt*, 4 L. R., Ch., 133.

6. On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity. *Davies* v. *Sear*, 7 L. R., Eq., 427; 38 L. J., Ch., 545; 17 W. R. 390; 20 L. T., N. S., 56.

7. A contract to sell land with the appurtenances does not pass a right to a way to the land sold which the vendor has used over adjoining land of his own. Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there are to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select. *Bolton* v. *Bolton*, 11 L. R., Ch. D., 968; 48 L. J., Ch., 467.

8. Where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it. This re-grant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant. *London (Corporation)* v. *Riggs*, 13 L. R., Ch. D., 798; 49 L. J., Ch., 297; 42 L. T. 580; 28 W. R. 610.

For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition: he cannot claim a right of way suitable to the user of the close as building land. *Ib.*

Semble, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land. *Ib.*

9. A vendor sold a piece of arable land, which was surrounded on all sides by the lands of strangers, but no mention was made in the contract of any right of way. The vendor was unable to show a title to a carriage way to the land in question. On a bill for specific performance by the vendor, the Court refused to enforce the contract. *Denne* v. *Light*, 5 W. R. 430; 26 L. J., Ch., 459; 3 Jur., N. S., 627.

5. By Prescription.

Tenants holding under same Landlord.] 10. A prescriptive right of way may be acquired in respect of one tenement, by user for forty years, against another held for a term of years under the same landlord; and such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before. *Fahey* v. *Dwyer*, 4 L. R., Ir., 271.

11. The lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord. *Gayford* v. *Moffatt*, 4 L. R., Ch., 133.

II. NON-USER AND ABANDONMENT.

12. A messuage abutting in the rear on a narrow lane in a city had a back door, which,

after being constantly used for access to or from either end of such lane, was shut up for forty years, during which time also (although the two periods were not exactly commensurate in date) gates were put up at either end of the lane, to abate a nuisance, but only occasionally closed, being in fact the result of an arrangement amongst the occupiers of the houses; and free access being always given, although a key was kept. The back door of the messuage was then re-opened, and continuously used for three and a-half years, when the next but one adjoining house was purchased by the corporation, who proposed, and had plans prepared, to build upon the site of the house and lane an hotel and baths, so as entirely to obstruct the way from such back door through the lane. On a bill filed and injunction moved for to restrain such building, injunction granted. *Cook* v. *Bath (Mayor,)*, 18 L. T., N. S., 123; 16 W. R. 896.

1. When a way is substituted for a pre-existing one, with the consent of the person entitled, and non-user of the original easement is accompanied by acts which warrant the Court or a jury in inferring an intention to release it, the right of resumption becomes forfeited; nor is it necessary in such a case that the non-user should extend over twenty years, or any defined period. *Mulville* v. *Fallon*, 6 Ir. R., Eq., 458.

III. USER, EXTENT OF.

2. The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. *Wimbledon & Putney Commons Conservators* v. *Dixon*, 1 L. R., Ch. D., 362; 45 L. J., Ch., 353; 24 W. R. 466; 35 L. T., N. S., 679.

When a road had been immemorially used to a farm, not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:—Held, that that did not establish a right of way for carting the materials required for building a number of new houses on the land. *Ib.*

Semble, that the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate. *Ib.*

3. User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes. *Bradburn* v. *Morris*, 3 L. R., Ch. D., 812.

The owner of a field with a right of way to it through an occupation road, agreed to sell the surface of the field, reserving the minerals. The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:—Held, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold. *Ib.*

Held, also, that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the Court would not interfere. *Ib.*

4. An indenture of lease demised to K. property, including a yard, together "with the right of way for K., his executors, administrators, and assigns, his and their servants, agents, and workmen, horses, carts and carriages, from D.-street to the yard and workshops as at present by K. enjoyed, which premises respectively are more particularly delineated and described on the plan drawn on the margin of these presents coloured red and green":—Held, both on the construction of the grant, and on the evidence of user, that the right of way was over the whole of the premises coloured green. *Knox* v. *Sansom*, 25 W. R. 864.

Held, also, that where the turning of a carriage or cart is necessary to the convenient enjoyment of the dominant premises such a right of turning over a piece of land may be a part of the right of way to the dominant premises. *Ib.*

The Court will not declare a greater right than is necessary to satisfy the right of the plaintiff as claimed. *Ib.*

5. Under an agreement for a lease, the tenant had power to erect a workshop on a portion of the premises, for the purposes of his business, but was not to obstruct the entrance to the premises, except by using it for the purposes of egress and ingress. The only entrance was through an entrance or a gateway with a paved road under the landlord's house:—Held, that the tenant had an implied right of way through the gateway for horses and carts, as well as for foot passengers, and that he was entitled to an injunction to restrain the landlord from obstructing the gateway by loading and unloading carts there. *Cannon* v. *Villars*, 47 L. J., Ch., 597; 8 L. R., Ch. D., 415; 26 W. R. 751; 38 L. T., N. S., 939.

6. When a right of way is granted to "the owner and owners for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner for the time being of every part of the severed lands. *Newcomen* v. *Coulson*, 25 W. R. 469; 36 L. T., N. S., 385; 5 L. R., Ch. D., 133; 46 L. J., Ch., 459.

Strips of land having been allotted by an award under an inclosure Act to different persons, there was awarded to the owners for the time being of the allotments "a way, right, and liberty of passage for themselves and their respective tenants and farmers of the lands and grounds, as well on foot as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen, and other cattle" as often as occasion should require, from a highway adjoining the outside strip over the east end of the allotments to their respective allotments, "doing as little damage to the soil, or the corn, grass, or herbage," as might be, with a provision that if any owners should street out the way through their respective allotments, the same should be made and for ever remain at least eleven yards wide:—Held, that there was no implied restriction of the right of way to agricultural purposes. *Ib.*

Held, also, that a person entitled to a right

of way is entitled to make an efficient way for any purposes for which he is entitled to use it, and desires to use it; and held, therefore, that the owners of any allotment on converting the same into building land might form a metalled road to the highway over the east end of the intervening plots. *Ib.*

1. A grant of a right of way was made from a certain place "to a wicket-gate to be erected by A. leading into the hereinbefore described piece or parcel of garden ground." A. built a cart-shed on the garden ground with a door in the place where the wicket-gate was intended to be put:—Held, that the way was a way for all purposes, and he was entitled to use it for obtaining access to the cart-shed. *Watts* v. *Kelson*, 18 W. R. 745. Affirmed 6 L. R., Ch., 126; 19 W. R. 338; 24 L. T., N. S., 209.

2. An estate was intersected by a canal company under the powers of its Act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal-pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil of the roadway on the bridge and approaches), in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for 1*l.* damages and costs, and gave an undertaking not to repeat the trespass complained of. The coal-owners having, a few months afterwards, again laid down the tramway, but without breaking the soil on the bridge, the Vice-Chancellor held that, independently of the undertaking in the action, by which the right of the canal company had been recognized and established, the defendant's right of access to and passage over the accommodation bridge did not justify the making by them of a tramway upon the bridge and the approaches thereto, and injunction granted accordingly:—Held, on appeal, that the undertaking given by the defendants formed a good ground for the interference of the Court, without going into the question of their right to make the tramway. *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.*, 10 L. R., Ch., 450.

See also I. *ante.*

IV. ALTERATION OF.

3. A lease contained a covenant by the lessors to make a road, and power was reserved to the lessors to alter the roadway for a particular purpose, provided they made another. Grantees of the lessors proposing to alter the roadway:—Held, that though the particular purpose specified in the covenant might not be their real motive, yet if they chose for its sake to do the particular act mentioned in the covenant, the lessee had no right to prevent their altering the roadway accordingly. *Butt* v. *Imperial Gas-light Co.*, 15 W. R. 92.

Power to take land for a particular purpose under a covenant is distinguishable from the same power under an Act of Parliament. *Ib.*

V. OBSTRUCTION AND INTERFERENCE WITH.

4. It was stipulated by an agreement between the parties to the suit that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defendant's estate." There were two roads traversing the defendant's estate, at the further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff, whilst he had the use of the roads over the defendant's estate, could not pass beyond it. The Court granted an injunction to restrain the defendant from making and continuing the obstructions at the extremity of his land. *Phillips* v. *Treeby*, 8 Jur., N. S., 711; 3 Giff. 632. Affirmed, 8 Jur., N. S., 999; 6 L. T., N. S., 213.

5. In an action for an injunction to restrain the erection of a building on a passage over which the plaintiff claimed a right of way, where he had, on being informed of the defendant's intention, forthwith given him notice of his rights and commenced the action, and the defendant had, notwithstanding, continued and completed the erection of the building, which was a solid and expensive structure, complained of, the plaintiff's right having been established at the trial:—Held, that he was entitled to a mandatory injunction compelling the defendant to remove such obstruction, even though the defendant offered him a substituted right of way. *Krehl* v. *Burrell*, 47 L. J., Ch., 353; 7 L. R., Ch. D., 551; 38 L. T., N. S., 407.

6. A lease contained a covenant to do nothing to the annoyance or damage of the lessor or his adjoining tenants or occupiers. The lease granted a right of way over a certain passage as then used and enjoyed by the lessee. At the date of the lease the lessee used the passage for the purposes of a business carried on in the premises, and the lessor, who occupied the adjoining premises, used to lock the gate of the passage in the evening, and keep it locked until the morning. Many years afterwards the lessee's representative turned part of the business premises into a place for entertainments, and claimed a right of entry to his premises at all hours. The lessor's representative filed a bill for injunction against the nuisance, and against being prevented from locking the gate at night:—Held, that he was entitled to the injunction asked for. *Collins* v. *Slade*, 23 W. R. 199.

7. If the grantor of a right of way obstructs it, the grantee may go *extra viam* over the grantor's land; and the grantor or a purchaser with notice from him will not be allowed to obstruct the substituted mode of access so long as the original obstruction exists. *Selby* v *Nettlefold*, 43 L. J., Ch., 359; 9 L. R., Ch., 111; 29 L. T., N. S., 661; 22 W. R. 142.

Notice of right of way, and also of an obstruction to it, is notice of the grantee's right of deviation. *Ib.*

Notice of such an interrupted right of way is notice of all the rights appertaining thereto. This right to go *extra viam* is one which can be protected by injunction, but the injunction must be limited to the time during which the obstruction lasts, and is not to prevent the

grantor from substituting any other convenient mode of user, and is not to extend so as to authorize the grantee to use the mode of access, across the defendant's land, for the continuous passage along the way granted. *Ib.*

1. P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. P. and M. agreed to alter their boundary, and substitute a new passage for the old one. M. accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to him, his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tynels." By another deed P. re-leased his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard:—Held, that the necessity of the business of the defendants did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass. *Thorpe* v. *Brumfitt*, 8 L. R., Ch., 650.

Held, also, that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it. *Ib.*

2. A. occupied business premises, the only approach to which was by a private road passing a warehouse belonging to B. The roadway was too narrow for vehicles to pass each other, and carts standing at B.'s warehouse created an obstruction, and prevented access to A.'s place of business:—Held, that A., having equal and reciprocal rights with B., was entitled to require the immediate removal of such obstruction. *Shoemith* v. *Byerley*, 28 L. T. 553; 21 W. R. 668.

VI. REPAIR.

3. *Semble*, that where one grants to another a right of way, the latter must bear the expense of making it available, by forming the road, keeping it in repair, and erecting the necessary fences. *Ingram* v. *Morecroft*, 33 Beav. 49.

VII. PROCEEDINGS IN RESPECT OF.

4. The Court of Chancery has no jurisdiction to decide the question of a public or private right of way upon a motion in a partition suit. *Pryor* v. *Pryor*, 27 L. T., N. S., 257.

5. The Court will not declare a greater right of way than is necessary to satisfy the right of the plaintiff as claimed. *Knox* v. *Sansom*, 25 W. R. 864.

6. A bill by a lessee for twenty-one years, under the dean and chapter of W., against a lord of a manor and the tenant of a particular house, which obstructed plaintiff's way, praying that the house might be pulled down, and that plaintiff be quicted in the possession of the way:—Held, that the dean and chapter of W., who were the owners of the inheritance, were necessary parties. *Poore* v. *Clark*, 2 Atk. 515.

Delay.] 7. A railway company had constructed its line so as to leave the passage for a private road two intervals of nine feet three inches each. The interval required by the Railway Clauses Act, for a similar right of way, was twelve feet. The plaintiff's right of way was not disputed; but he had lain by and allowed the railway works to proceed, and the damage accruing to the plaintiff in consequence was of small amount:—Held, that he, having delayed the assertion of his legal right, and the damage slight, the Court would not grant an injunction to restrain the infringement on the legal right. *Wintle* v. *Bristol & South Wales Union Railway Co.*, 10 W. R. 210; 6 L. T., N. S., 20.

WEIGHMASTER.

8. The office of weighmaster in a market town in Ireland is a freehold office. The appointment to it ought to be for life. *M'Mahon* v. *Lennard*, 6 H. L. Ca. 970.

It is not necessary, in an action by the weighmaster for disturbance in his office, to show a formal appointment to it by deed. His having acted in the office for several years is sufficient. *Ib.*

WEIGHTS AND MEASURES.

9. A testator devised "forty-five acres of the lands of Dromquin, known as the house division," to A., and "fifty acres of the same lands" to B.:—Held, that extrinsic evidence was not admissible to show that he meant Irish and not statute acres. *O'Donnell* v. *O'Donnell*, 1 L. R., Ir., 284.

By the statutory definition contained in 5 Geo. 4, c. 74, s. 2, the word "acre" has received a legal signification which must be attributed to that word, whether used in a will or other voluntary instrument, or in a contract. *Ib.*

WEIR.

See CANAL—RIVER—WATER AND WATERCOURSE.

WELLS.

See WATER AND WATERCOURSE.

WELSH MORTGAGE.

See MORTGAGE, II. III.

WESTERN AUSTRALIA.

See COLONIES AND COLONIAL LAW, X. XXXVI.

WEST INDIA ESTATES, CONSIGNMENTS, AND MANAGEMENT.

See COLONIES AND COLONIAL LAW, XI.

WHARF, WAREHOUSEMAN, AND WHARFINGER.

See also BANKRUPTCY, XIX. xii.—RIVER, II.

1. The right of a wharf-owner on the banks of the Thames, between the limits subject to the jurisdiction of the conservators of the river, to have free access for his barges to and from the doors of his wharf, opening and abutting on the river, for the purpose of loading and unloading the barges, and his right of ingress and egress from his wharf to his barge. and *vice versâ*, is a private right within the Thames Conservancy Act 1857, s. 179, and is not to be interfered with by the exercise of the powers conferred on the conservators by s. 53. *Lyon* v. *Fishmongers Co.*, 1 L. R., App. Cas., 662; 46 L. J., Ch., 68; 35 L. T. 146; 25 W. R. 165. Reversing 44 L. J., Ch., 747; 10 L. R., Ch., 676; 24 W. R. 1; 33 L. T., N. S., 146.

2. A navigable river is a public highway, navigable by all her Majesty's subjects in a reasonable manner and for a reasonable purpose. A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time. *Original Hartlepool Collieries Co.* v. *Gibb*, 5 L. R., Ch. D., 713; 46 L. J., Ch., 311; 63 L. T. 433.

The Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel even though the vessel may overlap his own premises; though such would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Ib.*

The plaintiffs were owners of a wharf 125 feet long on a navigable river, and of a collier boat 176 feet long which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft or timber used in his business in front of his own wharf so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and remain a reasonable time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Ib.*

3. By an agreement between G. and C. it was agreed, "that the dock between their wharves, on the eastern side of the line of separation, shall for ever remain open as it now stands; that is to say, that neither of them shall fill it up with wharves or other incumbrances, whereby the convenience of the same may be damaged to either party".—Held, that the effect of this agreement was to create an easement that the dock should remain open as it then stood for the convenience of either party to use it as a dock; and that if it was intended that one party should have a more limited right therein than the other, such limited easement should have been created by express words. *Morton* v. *Snow*, 29 L. T., N. S., 591.

4. If a purchaser buys the fee-simple of a tenement for a valuable consideration, and has it conveyed to him without any reservation, he is not bound to take notice of the manner in which the tenement has, prior to the sale, been used by the vendor for the convenience of the adjoining tenement, on the principle that a grantor cannot derogate from his own grant. *Suffield* v. *Brown*, 10 Jur., N. S., 111; 33 L. J., Ch., 249; 12 W. R. 356; 9 L. T., N. S., 627.

When a purchaser buys a house, and has it conveyed to him without any reservation, he takes the house not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed. *Ib.*

In 1845 an owner of two adjoining tenements, a dock and a wharf, sold the wharf. The owner had been in the habit of allowing the bowsprits of ships in his dock to project over his wharf:—Held, that this was neither a continuous nor an apparent easement. *Ib.*

The wharf having been sold in fee without reservation, it not being shown that there was any existing easement of this kind prior to the unity of possession which ended in 1845, and as this was neither a continuous nor an apparent easement:—Held, that a subsequent purchaser of the dock was not entitled to restrain a grantee of the purchaser of the wharf from interfering with his use of the dock in the manner above mentioned; in other words, that the dock owner could not exercise any right of placing ships in the dock in such a manner as that their bowsprits should overhang the wharf. *Ib.*

5. The nature of rights of quayage and wharfage considered. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

Certificates.] 6. A wharfinger's certificates are not documents of title, nor does their delivery pass any right to goods as against the vendor. *Gunn* v. *Bolckow, Vaughan & Co.*, 10 L. R., Ch., 491; 44 L. J., Ch., 732; 32 L. T. 781; 23 W. R. 739. And see *Exp. & Re Moore*, 23 W. R. 154; 31 L. T., N. S., 812.

Lien.] 7. Wharfingers, on receiving notice that goods in their hands bore a counterfeit of the plaintiff's trade mark, submitted to act in relation to the goods as the Court should direct upon receiving their warehouse charges and costs of action:—Held, that the wharfingers were entitled to a lien on the goods for their charges in priority to any claim of the plaintiff for costs, and ought not to be ordered to pay the plaintiff's costs. *Moet* v. *Pickering*, 26 W. R. 637; 38 L. T., N. S., 799; 8 L. R., Ch. D., 372; 47 L. J., Ch., 527. Reversing 6 L. R., Ch. D., 770.

Semble, the plaintiff could have no lien on the goods for his costs. *Ib.*

8. As to effect of the Merchant Shipping Act (25 & 26 Vict., c. 63), s. 38, on the rights of shipowners and wharfingers. See *Lowther* v. *Belfast Harbour Co.*, 13 Ir. Ch. R. 34; 17 Ir. Ch. R. 54.

Insurable Interest.] 1. Warehousemen and wharfingers with whom goods are deposited have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance. *Waters* v. *Monarch Life and Fire Insurance Co.*, 5 El. & Bl. 870; 2 Jur., N. S., 375; 25 L. J., Q. B., 102. See *Exp. Bateman*, 2 Jur., N. S., 265; 25 L. J., Bky., 19.

Such goods are properly described in a policy as "goods in trust." *Ib.*

The insurers are entitled in such a case to recover from the insurance office the full value of goods destroyed by fire, but are liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods. *Ib.*

Rights in Respect of Goods infringing Trade Marks.] 2. The plaintiffs, who were wharfingers, warehoused certain wines. They were afterwards informed that those wines bore a spurious trade mark; that an injunction had been or would forthwith be applied for by the party injured by such mark, to restrain the plaintiffs from selling the wines; and they were requested not to part with them. The holder of the dock warrants then applied to the plaintiffs to deliver the wines to him, but they refused to do so, whereupon he brought an action against the wharfingers to recover damage for the detention of the wines. Upon a bill filed, and motion made for an injunction to restrain such action:—Held, that the plaintiffs were justified in their conduct, and the injunction should be granted. *Hunt* v. *Maniere*, 13 W. R. 212; 11 L. T., N. S., 469.

3. In an action to restrain the infringement of a trade mark, a wharfinger, who had received goods bearing the pirated trade mark in the ordinary course of business without any knowledge of the fraud, was made a co-defendant, and in his statement of defence disclaimed all interest in the matter in dispute, and submitted to act as the Court should direct, on having his charges for warehouse rent and his costs of the action paid or provided for. At the trial of the action he contended at the bar that the plaintiff ought not to touch the goods for the purpose of removing the trade mark without first paying his charges:—Held, that the wharfinger was entitled to be paid his costs of the action by the plaintiff, and had a lien on the goods in his possession for his warehouse charges in priority to the lien (if any) which the plaintiff might have thereon for his costs. *Moet* v. *Pickering*, 38 L. T., N. S., 799; 26 W. R. 637; 47 L. J., Ch., 527; 8 L. R., Ch. D., 372. Reversing 6 L. R., Ch. D., 770.

Agency of.] 4. *Semble*, that a wharfinger holding goods *in transitu* cannot turn himself into an agent for the consignee, so as to put an end to the *transitus* without the express authority of the consignee. *Exp. Barrow, Re Worsdell*, 46 L. J., Bky., 71; 6 L. R., Ch. D., 783; 36 L. T., N. S., 325; 25 W. R. 466.

Public Wharf.] 5. The absentee owner and manager of a public wharf in the island of Jamaica is liable in law, having reference to the provisions of the 7 Vict., c. 57, to be sued as a public wharfinger for the negligence of his agent in the conduct of such wharf. *Lindo* v. *Barrett*, 4 W. R. 316.

WIFE.

See CURTESY—DOWER—HUSBAND AND WIFE—JOINTURE—SETTLEMENT—WILL.

WILD'S CASE. RULE IN.

See WILL, XVIII. II. 1.

WILFUL DEFAULT OR NEGLECT.

See EXECUTOR AND ADMINISTRATOR, X. XIV.—MINES, IV. VII.—MORTGAGE, VI. I. 1—TRUSTS, XXVI. II.

WILL.

I. Testamentary Capacity.

I. ALIEN.

1. An alien, resident in England, purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which, in terms, conferred upon him, not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired:—Held, that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization. *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383; 3 L. J., N. S., Ch., 171.

2. By the statute 7 Anne, c. 5 (A.D. 1708), it was enacted that the children of all natural-born subjects born out of the legiance of her then Majesty, her heirs and successors, should be deemed, adjudged, and taken to be natural-born subjects of this kingdom to all intents, constructions, and purposes whatsoever. By the statute 13 Geo. 3, c. 21 (A.D. 1772), it was enacted that all persons born, or thereafter to be born, out of legiance to the Crown of England, or of Great Britain, whose fathers were, or should be, by virtue of the statute 7 Anne, c. 5, and the explaining statute 4 Geo. 2, c. 21, entitled to all the rights and privileges of natural-born subjects, should be taken to be and were thereby declared to be natural-born subjects of the Crown of Great Britain, as if born in this kingdom. A devise of real property in England was made by a testator domiciled in England, but having been born in Holland, his parents having been married there, and his mother being a Dutch subject. The testator's father was born in Holland in the year 1744, his mother being also a Dutch subject, and his father having also been born in Holland in the year 1696. The testator's paternal great-grandfather was a natural-born British subject, and the commander of a British regiment sent to serve in Holland in 1691, who had married, while on service, a Dutch wife, the testator's grandfather being the eldest son of that marriage. The testator's grandfather took service in his father's regiment, which, however, had then ceased to be in British pay, and the testator's father, in his turn, also joined it:—Held, that the statute 7 Anne, c. 5 gave the testator's grandfather the status of a natural-born British subject, and the statute 13 Geo. 3, c. 21 gave also to the testator's father the rights belonging to that status. *De Geere* v. *Stone*, 47 L. T. 434.

Held, further, that the testator himself was an alien, and that, as the statute 33 Vict., c. 14 is not retrospective, the real property of the testator belonged to the Crown. *Ib.*

By what Local Law Wills are regulated and construed.] See FOREIGNER AND FOREIGN LAW, V. IV. and V.

II. INFANT.

1. Money to be laid out in land; an infant cannot dispose of it by will as money, but it will on the infant's death descend to his heir, who may take either way. *Carr* v. *Ellison*, 2 Bro. C. C. 56; Dick. 796.

2. Boy of age fourteen is competent to make will of personal estate. *Exp. Holyland*, 11 Ves. 11.

3. An infant male may make a will of his personal estate at fourteen, a female at twelve. *Hyde* v. *Hyde*, Pre. Ch. 316.

4. A female may make a will at twelve, a male at fifteen, if proved to be a person of discretion. *Bishop* v. *Sharp*, 2 Vern. 469.

5. A child entitled to an orphanage share of his father's personal estate, dying under twenty-one and unmarried, cannot devise it by his will, for by the custom it survives to the other children, but he may devise his share under the Statute of Distributions. *Wilcocks* v. *Wilcocks*, 2 Vern. 559.

6. A city orphan cannot by will before twenty-one dispose of his orphanage part, so as to prevent survivorship. *Anon.*, Pre. Ch. 537.

III. MARRIED WOMAN.

1. *In General*, 7562.
2. *Separate Estate*, 7563.
3. *Under Powers.* See POWER, IX. III. 6.

1. In General.

7. Husband, before marriage, gives bond to enable his intended wife to dispose by deed or will of her freehold estate. She devises during coverture. Her heir-at-law is bound and shall convey to the devisee. *Rippon* v. *Dawding*, Ambl. 565.

8. Feme covert without husband's joining, but in his presence, surrenders her copyhold to use of her will or appointment, and devises it. *Quære*, whether good. *Taylor* v. *Philips*, 1 Ves. 229.

9. Feme covert cannot at law make will of copyhold lands, surrendered by her before marriage to the use of her will, nor can she declare the uses of the surrender. *George* v. *Jew*, Ambl. 627.

Surrender before marriage is void or suspended by marriage. *Ib.*

10. Will by feme covert good, and provable in the Ecclesiastical Court if made with assent of her husband. *Marlborough (Duke)* v. *Godolphin (Lord)*, 2 Ves. 70.

11. Power in feme covert to dispose by writing purporting to be a will does not give it authority of one in Ecclesiastical Court, and husband must be examined to his consent before it can be proved. *Henley* v. *Philips*, 2 Atk. 48.

12. Probate of the will of a married woman, which is now necessary, though formerly otherwise, limited to her power by the assent of her husband, with respect to any beneficial interest; not to her right as executrix of another person, to make an executor, and continue the representation. *Stevens* v. *Bagwell*, 15 Ves. 139.

13. A feme covert has power given her by husband to make a will; probate of such will *per testes* is sufficient proof without other proof. *Sed quære. Balch* v. *Wilson*, Pre. Ch. 84.

14. A married woman, having power to dispose of a fund by will, made a will disposing of it, and also of another fund over which she had no power, and appointed her husband her executor, and he proved her will generally:—Held, that as to the latter fund the will was valid, as being made *ex assensu viri*. *Re Trustees' Relief Act*, 16 Sim. 406.

15. Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the Spiritual Court; and if no executor is appointed, they will grant administration to the husband, with the will annexed. *Ross* v. *Ewer*, 3 Atk. 160.

16. Admission of will by feme covert, heiress-at-law living separate from her husband, sufficient to establish it. *Codrington* v. *Shelburne*, Dick. 475.

17. A married woman possesses, under 7 Will. 4 and 1 Vict., c. 26, no greater or different power to make a will than she possessed before that statute. *Willock* v. *Noble*, 7 L. R., H. L., 580; 44 L. J., Ch., 345; 23 W. R. 809; 32 L. T., N. S., 419. Affirming 8 L. R., Ch., 778; 42 L. J., Ch., 681; 29 L. T. 194; 21 W. R. 711. Reversing 42 L. J., Ch., 321; 21 W. R. 353.

The 24th section does not, retroactively, operate to give effect to her will as to property which it was not in her power to dispose at the time when the will was made. *Ib.*

Without the husband's knowledge of the contents of a will made by a married woman, the will cannot be said to be made with his assent. *Ib.*

If a wife, with her husband's assent, makes a will of personalty, in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, she must, to give validity to her will, re-execute it after his death. *Ib.*

So, also, if her will affects property which (by his will made some years before, and never altered) he had bequeathed to her absolutely. *Ib.*

A general assent to a wife's making a will is not sufficient, but the husband's assent to the particular will which his wife has made ought to be proved. *Ib.*

A married woman was entitled to 3,822*l.* consols for her separate use, and, by settlement made on her marriage, she was entitled to 14,000*l.*, if she survived her husband, absolutely, and if she died in his lifetime she had a power of appointing that sum by will notwithstanding coverture. She had also a fee-simple estate over which she had a power of appointment by will. Her husband, who died in her lifetime, bequeathed to her the residue of his personal estate. The wife by will, made in the lifetime of her husband, who consented to her making a will, though it did not appear that he knew the contents of it, after disposing of her separate estate and appointing the fee-simple estate, gave to her niece all the residue of her real and personal estate of which at the time of her death she should have power to dispose. The will was not republished after the husband's death:—Held, that, though the will was valid and effectual so as to pass the consols to which she was entitled for her separate use, and so as to appoint the fee-simple estate, it was not valid or effectual as an exercise of the power of appointing the 14,000*l.*, nor so as to pass the

property acquired by her under her husband's will. *Ib.*

Held, also, that the death of the husband operated as a revocation of any assent he had given to his wife's will. *Ib.*

1. Sections 8, 24, and 27 of the Wills Act leave unaltered the testamentary capacity of a married woman, though it may give her will, when duly made, a different and more extended operation. The contrary intention required by the 24th and 27th sections of the Wills Act must be one which can be attributed to a testator up to the time of his death. *Thomas* v. *Jones*, 1 N. R. 138; 2 John. & H. 475; 8 Jur., N. S., 6124; 31 L. J., Ch., 732; 10 W. R. 853; 7 L. T., N. S., 154. Affirmed 1 De G. J. & Sm. 63; 9 Jur., N. S., 161; 32 L. J., Ch., 139; 7 L. T., N. S., 610.

Husband under Disability.] 2. A wife (whose husband is by Act of Parliament banished for his life) may make a will, and in everything act as a feme sole, and as if the husband was dead. *Portland* (*Countess*) v. *Prodgers*, 2 Vern. 104.

3. Where the husband was attainted of felony, and pardoned on consideration of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, this personal estate decreed to belong to the wife as to a feme sole. *Newsome* v. *Bowyer*, 3 P. W. 37.

2. Separate Estate.

4. A feme covert may dispose by will of property settled to her "sole and separate use, to be disposed of by her as if sole." She may also dispose by will of property which was hers previous to the marriage, and on her separation was conveyed to trustees for her sole and separate use. *White* v. *Dillon*, Wall. Lyn. 302.

5. Power of disposition by will is incident to trusts for separate uses of feme covert, and husband is a trustee, having taken a transfer. *Rich* v. *Cockell*, 9 Ves. 369.

6. Wife, having specific effects to her separate use, disposes of her separate property by will. After her death her husband sells part of these effects and dies: his representative is accountable to the wife's administratrix with the will annexed. *Peacock* v. *Monk*, 2 Ves. 190.

7. A feme covert who has pin-money, or a separate maintenance settled on her, may, by writing in nature of will, dispose of what she saves out of it; and such disposition shall bind the husband. *Herbert* v. *Herbert*, Pre. Ch. 44.

8. A wife may, by a deed duly acknowledged to which her husband is a party, acquire a power to dispose by will of her real estates, whether in possession or in reversion. *Pride* v. *Bubb*, 7 L. R., Ch., 64; 41 L. J., Ch., 105; 25 L. T. 890; 20 W. R. 220.

By a deed of separation made between husband and wife and trustees, and duly acknowledged by the wife, it was agreed that the wife should hold all the real and personal estate of the husband and wife, or either of them in right of the wife, as her separate property, and should have power, by will, to devise or bequeath the same. The husband then purported to convey to a trustee all such real and personal estate, to be held upon corresponding trusts:—Held, that though the wife did not expressly convey real estate vested in her, it was the intention of the deed that she should have power to dispose thereof as if she was unmarried, and accordingly that an estate of which a trustee was seised in trust for her separate use during her life, with remainder to herself in fee, passed by her will. *Ib.*

9. Where a personal estate is given to the separate use of a feme covert, she is considered as a feme sole, and may dispose of it and all the accrual when beyond seventeen. And where a father gives his daughter a power to dispose of all his real estates, if he had intended to exclude the disability of infancy, he would have taken care to express it, and *expressio unius est exclusio alterius*. *Hearle* v. *Greenbank*, 3 Atk. 709, 714; 1 Ves. 303.

10. Will, by a wife, of her separate property and its produce, whether derived from her husband or a third person, is good. *Fettiplace* v. *Gorges*, 1 Ves. J. 46.

11. Husband conveys lands to a trustee in fee, in trust out of the rents to pay 6*l.* per annum, for the separate use of the wife, and to be at her disposal, then to the use of the husband for life; after his decease, to the use of the heirs of the wife, until the heirs or assignees of the husband should pay to the executors, or administrators, or assigns of the wife, 100*l.* with interest, from the death of the husband, then to the wife for her jointure, remainder over. The wife dies first, and having by her will disposed of this 100*l.*:—Held, the wife had no power to dispose of this money *Sawyer* v. *Bletsoe*, 2 Vern. 328. S. C. 1 Vern.. 244.

If a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not provided. *Id.* 329.

Feme covert may in life of husband dispose of money saved out of her separate maintenance. S. C. 1 Vern. 244.

12. A married woman invested a sum of 525*l.* stock, out of moneys which she had as pin-money, to her separate use, in the names of trustees, in confidence that the fund should be held by them in trust for such persons as she should direct or appoint. She afterwards made a will, giving the interest of the money she had in the stocks to her servant maid for life, and afterwards to the poor of certain parishes. The wife having died, administration, with the will of his deceased wife annexed, was granted to her husband. To a bill filed by the husband alone, as such administrator, against the surviving trustee of the stock, the defendant, by her answer, suggested that the legatees under the will were necessary parties: but the Court, without requiring the legatees to be parties to the suit, ordered payment of the stock to the plaintiff, with costs. *Musters* v. *Wright*, 2 De G. & Sm. 777.

13. A. and B., two domiciled English subjects resident in Paris, with the intention of permanently residing there, entered into a contract of marriage, in the French form, in contemplation of a marriage "intended immediately to take place according to law," and also of a marriage in conformity with the rites of the Church of England. The English marriage was duly solemnised in the chapel of the English Ambassador at Paris, but the intended French marriage never took place.

The contract of marriage stipulated that the future couple should have the enjoyment in common of all property, according to the disposition of the custom of Paris, which should regulate their future community, even in the event of their residing in foreign parts, where different laws prevailed; that the portion which the wife was to bring into community should be received by the husband, and be accounted for by him to his wife; that whatever should come in future to the wife should be invested by the husband, and that the principal should belong to the wife as her own separate property (*bien personnel*), and that the interest alone should enter into the community. The effect of this contract by the French law, supposing it to be valid, would be to give the wife a testamentary power over her separate estate, independently of her husband. Part of the property brought by the wife into community consisted of a sum of 2,000*l.* charged upon real estates in England. Shortly after the English marriage, and before the solemnisation of the contemplated French marriage, the parties, never having cohabited together, separated entirely. The wife, in the lifetime of her husband, made her will, in the English form, disposing of, among other property, the 2,000*l.*:—Held, that the marriage contract gave the wife a testamentary disposition, and that the property passed by the will. *Este* v. *Smyth*, 18 Jur. 300; 23 L. J., Ch., 705.

1. A wife who lives with her husband and has separate property, over which she has a power of appointment by deed or will, is entitled to dispose, not only of the capital, but also of the savings out of income, and that by a general residuary clause in her will. *Humphrey* v. *Richards*, 2 Jur., N. S., 432; 25 L. J., Ch., 442.

The income of property settled to the separate use of a wife is not converted into general personalty, nor is the right of control over it abandoned by its being transmitted by the halves of notes of the Bank of England, one half of which only had been received and acknowledged by her before her death, or by being invested in the names of trustees in the purchase of long annuities, without any reference to her settlement or to the source whence the purchase money arose, or by its being secreted in the house of her husband; but a sum of money found after her death secreted in the house of her husband, without any evidence of the source whence it was derived, was held to be the property of the husband. *Ib.*

2. A devise of real estate, without the interposition of trustees, to a married woman and her heirs for her separate use, free from marital control, gives her a right of disposition by will of the equitable fee, in like manner as if she were *discoverte*. *Hall* v. *Waterhouse*, 11 Jur., N. S., 361; 13 W. R. 633; 12 L. T., N. S., 297; 5 Giff. 64; 6 N. R. 20.

3. A married woman, to whom alimony has been granted by the Ecclesiastical Court, may dispose by will, as against her husband, of her savings thereout, in the same manner as if she was a feme sole. *Moore* v. *Barber*, 11 Jur., N. S., 539; 34 L. J., Ch., 667; 13 W. R. 935; 12 L. T., N. S., 664.

4. A feme covert, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will. *Taylor* v. *Meads*, 4 De G. J. & S. 597; 11 Jur., N. S., 166; 34 L. J., Ch., 203; 13 W. R. 394; 5 N. R. 348; 12 L. T., N. S., 6. Reversing 10 Jur., N. S., 1012; 12 W. R. 846; 10 L. T., N. S., 475; 4 N. R. 203.

5. The will of a married woman who had no personal estate belonging to her for her separate use at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use which she afterwards acquires and is entitled to at her death. *Charlemont* (*Earl*) v. *Spencer*, 11 L. R., Ir., 490. Affirming 11 L. R., Ir., 347.

6. By ante-nuptial articles, reciting the intended marriage and an agreement to the following effect, the husband agreed to pay to the wife for her sole and separate use during the coverture, or to such person as she should by writing appoint, an annuity of 500*l.*; and also that he, his heirs, executors, and administrators would pay to her, her executors, administrators, or assigns, immediately after his death, the sum of 10,000*l.* for her sole and absolute use and disposal. The wife died in her husband's lifetime:—Held, that she was entitled to the 10,000*l.* for her separate use, and had power to dispose of it by will in her husband's lifetime. *Baker* v. *Ker*, 11 L. R., Ir., 3.

7. A married woman, entitled under her marriage settlement to a rent-charge for life for her separate use, made a will operative to pass separate estate, became a lunatic, survived her husband, and died without having republished her will or made another. Her rent-charge was accumulated by her husband during his life to the amount of 13,000*l.*, which sum on his death was handed over to the trustee of the marriage settlement. The rent-charge and the income of the 13,000*l.* were both accumulated by the trustee after the husband's death:—Held, that the 13,000*l.* and all accumulations passed under the will; but that the rent-charge payable after the death of the husband did not pass. *Re Wilson*, *Menteath* v. *Campbell*, 26 W. R. 848.

The will purported to be, but was not, in exercise of a power of appointment; the fund purported to be appointed, except so much as passed as separate estate, fell into the general residue:—Held, that the fund which passed by the will was liable to the costs of letters of administration with the will annexed. *Ib.*

8. By a marriage settlement, the income of certain property was settled on the wife, for her life, for her separate use, without power of anticipation; and the corpus, if there were no children of the marriage, and she survived her husband, on her absolutely, for her separate use; if she should not survive her husband, then as she should by deed or will appoint. She made a will in pursuance of the power in her husband's lifetime, and survived him, but did not republish the will after his death. There were no children of the marriage:—Held, that the will passed her separate property. *Bishop* v. *Wall*, 45 L. J., Ch., 773; 3 L. R., Ch. D., 194; 25 W. R. 93.

IV. BLIND TESTATOR.

9. A codicil prepared by a solicitor, appoint-

ing him a joint executor, with a legacy, which was read over to the testator, who was blind, and, at the time of the execution, of fluctuating capacity, in the presence of the attesting witnesses, pronounced against, there being no direct evidence that it was prepared in consequence of instructions from the testator, or satisfactory proof that at the time of the execution he was cognisant of its contents, and in a condition to exercise, and did exercise, thought, judgment, and reflection respecting the act he was doing. *Dufaur* v. *Croft*, 3 Moo. P. C. 136.

1. Will executed by a blind testatrix established, the will being in conformity with the instructions given by the testatrix to her solicitor, though not proved to have been read over to her previously to execution. *Edwards* v. *Fincham*, 4 Moo. P. C. 198.

V. MENTAL CAPACITY.

2. Will of a resident in a receptacle for lunatics, established upon the then state of his mind, compared with antecedent declarations. Distinctions, if not then competent. *Bootle* v. *Blundell*, 19 Ves. 508.

3. Will of a testator subsequently found a lunatic directed to be deposited in the custody of the Master. *Re Thompson*, 1 Russ. & M. 355.

4. When will is to be established, the testator must be proved to be of sound and disposing mind. *Wallis* v. *Hodgeson*, 2 Atk. 56.

5. Exposition of the doctrine of monomania and partial insanity, as applied to wills. *Waring* v. *Waring*, 6 Moo. P. C. 341; 12 Jur. 947.

If the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind. *Ib.*

Delusion is the belief of things as realities, which exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind. *Ib.*

To constitute a lucid interval, the party must freely and voluntarily, and without any design, at the time, of pretending sanity and freedom from delusion, confess his delusion. *Ib.*

Where delusions are proved to have existed, both before and after the factum, the presumption is, that they existed at the time of the factum, and in such case proof of a lucid interval, at the time of the factum, is thrown upon the party propounding a will. It is immaterial that the delusions do not appear on the face of the will. *Ib.*

A will written in 1834 by a widow (without children, a person originally eccentric, and, in after life, developing unsound delusions), conferring great benefit on a stranger, the will not betraying, on the face of it, marks of insanity, in the circumstances pronounced against. *Ib.*

6. Where a testamentary disposition is propounded under circumstances of suspicion, as where the party propounding it was the drawer, and was benefited by it, and it was executed at a time when the testator was of doubtful capacity, without any evidence of instructions previously given, or knowledge of its contents, the party propounding it must prove the testator knew and approved the contents of the instrument. *Mitchell* v. *Thomas*, 6 Moo. P. C. 137.

A codicil, which varied the bequests contained in the will of the testator, to the benefit of the drawer, and executed at a time when the testator was supposed to be dying, in the absence of proof of the knowledge by the testator of its contents, pronounced against. *Ib.*

Proof of the actual reading over of the instrument to the testator before execution is not necessary. *Ib.*

7. Although the instructions for a will may not have originated with a testator, yet his subsequent approval of them is sufficient to render his will valid. Weakness of mind and forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of testator was, when called to exertion, capable of attention and application. *Tufnell* v. *Constable*, 3 Knapp 122.

8. A bill in equity will lie to set aside a will made under the influence of superstitious terrors. *Middleton* v. *Sherburne*, 4 Y. & Coll. 358.

9. A will executed by a testator on his death-bed in favour of his wife, to the exclusion of the other members of his family, the testator being of a weakened and impaired capacity at the time of the factum, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused, pronounced against; the disposition in the will being a total departure from and contrary to the previously expressed intentions of the testator. To constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, and the nature of the claims of others whom by his will he is excluding from participation in that property. *Harwood* v. *Baker*, 3 Moo. P. C. 282.

10. A will and five codicils being propounded, the will and four codicils were established, but the last codicil, which was drawn up by a solicitor in his own favour, was rejected, the testator being of fluctuating capacity, and the proof that he knew the contents of the instrument being insufficient. *Dufaur* v. *Croft*, 3 Moo. P. C. 136.

11. Where the parol evidence is of a very contradictory nature, it is safer to judge by collateral facts, where they are sufficiently strong, as to the competency of a party to make a will. *Wright* v. *Tatham*, 9 L. J., Ch., 265.

A long and varied correspondence, carried on by and with the testator for a series of years, and the execution of various deeds by him, and of others to him, involving property

to a large amount, is sufficient to show his general competency to dispose of his property. *Ib.*

1. Insanity having been once established, proof of recovery is upon the other party; otherwise, the insanity must be established by proof applying to the particular date. *White* v. *Wilson*, 13 Ves. 88

2. A will was held to be invalid, on the ground that the testator, though sane in his general conduct, laboured under an unsound delusion of mind with respect to his only child. *Dew* v. *Clarke*, 5 Russ. 163; 6 L. J., Ch., 180.

3. Where a will and codicils where made by a person of the age of eighty-six, of feeble and impaired mind, in favour of her medical attendant, with whom she resided, and the will was prepared by her solicitor, the instruments were pronounced for, upon the balance of evidence negativing alleged fraud, although inconsistent with former testamentary dispositions; but, on a further allegation as to facts *noviter ad notitiam perventa* being admitted, the second codicil was pronounced against, and the sentence below reversed as to it. *Jones* v. *Goodrich*, 5 Moo. P. C. 16.

4. A testator gave to his niece all his bond-debts, and he gave C., a person in whom he reposed great confidence, besides other benefits, all the residue of his property. Four months after the date of the will the testator took from a bond-debtor a conveyance of an estate to himself for life, with remainder to C. in fee, and the bond was delivered up to be cancelled. C. took a part in promoting this transaction, but no direct fraud was established against him, and it did not appear that he exercised any positive control over the testator. Two days afterwards the testator committed suicide. The evidence as to the soundness of the testator's mind was conflicting, many acts consistent with sanity having been done by him up to the time of his death; but the Court being of opinion, upon the whole evidence, that the testator, at the time of purchasing the estate in exchange for the bond, was of unsound mind, and considering the state of his mind in connection with the confidence which he placed in C., without directing an issue, set aside the conveyance, and declared the testator's niece entitled to the benefit of the bond. *Steed* v. *Calley*, 1 Keen 620.

Where sanity is impeached, and the evidence is conflicting, the question is not, whether the facts adduced in support of it are not in general indications of sanity, but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced on the other side on which the onus lies. *Ib.*

5. When a testator has been found to be of unsound mind under a commission of lunacy, which commission has not been superseded, the legal presumption is against the validity of any testamentary instrument, and the onus of proving the soundness of mind of the testator is imposed upon the party setting up the instrument. Under such circumstances it is competent to the party setting up a testamentary instrument to maintain either that the testator was always of sound mind, or that though he may have been formerly of unsound mind, he had completely recovered, or that the will was made during a lucid interval. In such a case, where unsoundness of mind has been before proved, though previous circumstances are entitled to some weight, the true inquiry is, whether the deceased testator had entirely recovered, or was of sound mind at the time of giving instructions for and the execution of the instrument in question. A will and codicil made and executed under such circumstances, when it was clearly proved that at the time of their execution the insane delusions of the testator which existed at the time the commission of lunacy was issued still continued to exist, were held by the Judicial Committee of the Privy Council, affirming the judgment of the Prerogative Court, to be invalid. The circumstances of the case being deemed to be such as to make it essential to the purposes of justice that the validity of the testamentary instruments should be submitted to judicial decision, the appellants (the executor and the parties interested under the will) were allowed one set of costs between them out of the estate, including the costs of the appeal. *East India Co. and Prinsep* v. *Dyce Sombre*, 4 W. R. 714.

6. An Englishman who had resided for many years in India, and become imbued with Eastern notions, professing himself at different times a believer in the Hindoo and Mahomedan faiths, and to a great degree adopting the habits of life of the latter, by his will (which, with the exception of a small legacy, excluded his brother, his only next-of-kin, from any benefit), after bequeathing several legacies and specific bequests, gave the residue of his property to the Turkish ambassador, or the person for the time being representing him, to be applied for the benefit of the poor of the city of Constantinople, and for the erection of a cenotaph at Constantinople, with a light burning, and a description of the testator engraved thereon. This will, which was in conformity with his written instructions, was duly executed during the last illness of the testator. The Prerogative Court, by its sentence, refused probate, upon the ground of the extraordinary nature of the bequest, coupled with the wild and extravagant conduct of the testator about the time of execution, which the Court considered as amounting to insanity. Such sentence reversed upon appeal, and the will established, the Judicial Committee being of opinion that, as the will was in conformity with the written instructions of the deceased, the true test to ascertain its validity was to look into the previous habits and opinions of the testator to account for the extravagant behaviour and language; and that though the dispositions in the will might be absurd and irrational in a native of England, and a Christian according to English habits, they were accounted for in the case of the testator, who had, in early life, adopted the manners and mode of living of a Mahomedan. *Austen* v. *Graham*, 8 Moo. P. C. 493.

7. A will cannot be admitted to probate in a contested case, unless the strength or degree of proof offered is such as to satisfy the Court, without reasonable doubt, that the testator was, at the time of execution, of sound mind, memory, and understanding. *Keays* v. *M'Donnell*, 6 Ir. R., Eq., 611.

Therefore, when the evidence was inconsistent and unsatisfactory, and the balance was

against his competency, the Court refused to grant probate of the will. *Ib.*

Testamentary incapacity established by the cross-examination of the plaintiff's witnesses merely, without any direct evidence on the part of the defendant. *Ib.*

VI. UNDUE INFLUENCE OR FRAUD.

1. *In General.*
2. *Secret Trusts.* See XLVI. *post*—CHARITY, V. XII.
3. *Wills Prevented by Promises.* See XLVI. *post.*
4. *Gifts to Persons in a Fiduciary Character.* See FRAUD, II.

1. In General.

1. A will of land may be good at law as well executed, and yet ill in equity, as if obtained by fraud. *Goss* v. *Tracy*. 1 P. W. 288; 2 Vern. 699.

2. Circumstance that one residuary devisee was the attorney who drew the will not decisive evidence of fraud. *Paine* v. *Hall*, 18 Ves. 475.

3. Where an attorney, who draws the will of the testator, takes a benefit under it, the case is to be considered with peculiar jealousy, and the jury who try the validity of the will must be satisfied that the testator knew its contents; but their consideration need not to be confirmed to direct evidence, and they may find for the will upon circumstantial evidence only. *Ravorth* v. *Marriott*, 1 Myl. & K. 643.

4. Where a legacy is given to the party employed to draw the will, it may raise a presumption more or less strong, according to circumstances, against the validity of the will; but there is no such rule as that it is necessary in every such case to prove that the will was actually read over to the testator, or prepared from instructions given by him. *Barry* v. *Butlin*, 2 Moo. P. C. 480.

5. A will written, or procured to be written, by the party to be benefited by it is not void, but is open to suspicion, and if not clearly shown to be according to the intentions of deceased will be rejected. Accordingly, a will of a married woman, under a power prepared by husband's solicitor, unknown to testatrix, by which he was appointed sole executor and residuary legatee, and executed by the wife under his control, was declared void, as, according to the evidence, contrary to her previously expressed intentions. *Baker* v. *Batt*, 2 Moo. P. C. 317.

6. Exaggeration of the conduct of a party benefited by a will towards the testatrix, though it induce her to revoke the will, and the bequest made in his favour, and to execute another will to his exclusion, is not such a fraud as to destroy free agency, and render the will invalid. Neither does such conduct amount to undue influence or importunity. *Browning* v. *Budd*, 6 Moo. P. C. 430.

7. Although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind as will give effect to his will. *Quære*, what evidence will be sufficient to establish such a case. *Mountain* v. *Bennet*, 1 Cox 353.

8. Injunction granted to restrain executor claiming under a will, and also by gift from testatrix in lifetime, from selling, upon affidavit of undue influence. *Edmunds* v. *Bird*, 1 Ves. & B. 542.

9. Where the latter part of a will in favour of a party was clearly executed under undue influence:—Held, inoperative as to the party suggesting it, but valid as to others. *Trimlestown* (*Lord*) v. *D'Alton*, 1 Dow N. S. 85; 1 Bli. N. S. 427.

10. Where there are circumstances of suspicion attending the making and execution of a testamentary paper, as where the party propounding it is the person benefited, and he prepared the paper, and had it executed at a time when the testator was supposed to be dying, the Court of Probate requires proof to satisfy it that the testator was aware of the contents of the paper, and approved of it. And this rule has not been altered by the late Wills Act, 7 Will. 4 and 1 Vict., c. 26, which assimilates the formalities for the execution of wills of real and personal estate. But proof of actual reading over of the paper to the testator is not necessary. *Michell* v. *Thomas*, 12 Jur. 967.

11. Several authorities, in which the fact of a legatee being the writer of a will and similar suspicious circumstances have been held to raise presumptions against it, reviewed and compared, and the principle of the decisions observed on. *Von Stentz* v. *Comyn*, 12 Ir. Eq. R. 622.

12. Legatee of a bond, which after the will and shortly previous to the suicide of the testator, had been cancelled on a conveyance of the estate held as a collateral security, decreed entitled to have the bond replaced; the transaction being one of doubtful sanity and fraudulent exercise of influence. *Steed* v. *Calley*, 1 Keen 620.

13. Undue influence may exist in the form of bad companionship, and bad example, and yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion; imaginary terrors may be sufficient for that purpose. *Boyse* v. *Rossborough*, 6 H. L. Ca. 2; 3 Jur., N. S., 373.

In order to set aside the will of a person of sound mind, it must be shown that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shown to have been exercised, and exercised in relation to the will itself, and not merely to other transactions. *Ib.*

14. Where a will is prepared and written by a medical man in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the testatrix's bounty, to the exclusion of her near relations, a court of justice, regarding the subsisting relation of a medical man and patient, will view his conduct with the utmost jealousy. *Greville* v. *Tylee*, 7 Moo. P. C. 320.

15. Where a portion of will has been intro-

duced through fraud or perhaps inadvertence, it may be rejected and probate granted of the remainder if the two are severable. But where the rejection of part alters the sense of the remainder, *quære*, whether there is a valid will within the meaning of 7 Will. 4 and 1 Vict., c. 26, s. 9. *Rhodes* v. *Rhodes*, 7 L. R., App Cas., 192; 51 L. J., P. C., 53; 46 L. T. 463; 30 W. R. 709.

Jurisdiction of Courts of Equity to Set Aside Wills obtained by Fraud.] See III. VI. *post.*

Legacies obtained by Undue Influence by Persons in a Fiduciary Character.] See FRAUD, II.

II. Testamentary Instruments, What are, and Execution and Attestation.

I. *What Instruments are Testamentary*, 7568.
II. *Proof of Testamentary Character*, 7569.
III. *Holograph Will*, 7569.
IV. *Incomplete Instruments*, 7569.
V. *Consolidation of Several Testamentary Papers*, 7570.
VI. *Incorporation of Documents by Reference*, 7570.
VII. *Nuncupative Will*, 7572.
VIII. *Execution and Attestation*, 7572.
See also VI. XVI. 3 *post.*
IX. *Establishing Wills.* See III. *post.*
X. *Appointment of Executors.* See EXECUTOR AND ADMINISTRATOR, II.

I. WHAT INSTRUMENTS ARE TESTAMENTARY.

1. Instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. *Habergham* v. *Vincent*, 2 Ves. J. 228; 4 Bro. C. C. 353.

2. A. by deed, attested by one witness, covenanted that his devisees, or heirs, executors, or administrators, should, after his death, make over to B. and C. all the real and personal estate of which he should be beneficially entitled at his death.—Held, that this was not a testamentary instrument, but a valid deed. *Patch* v. *Shore*, 1 N. R. 157; 32 L. J., Ch., 185; 9 Jur., N. S., 63; 11 W. R. 142; 2 Dr. & Sm. 589.

3. A deed-poll was executed with the formalities required for the execution of wills:—Held, that it was capable of being admitted to probate. *Re Robson, Emley* v. *Davidson*, 51 L. J., Ch., 337; 45 L. T. 418; 30 W. R. 257.

By a deed, dated 8th August 1868, A. covenanted with B. and C. to pay to them at or before twelve months from the date thereof 20,000*l.*, to be held by B. and C. upon trust to pay the income to W., the wife of A., for life, and after her death to A. for life, and after the death of the survivor upon such trusts as W. should by will appoint. By a will dated the same day W., in exercise of the above power, appointed the 20,000*l.* (subject to her husband's life interest) to B. and C. (thereby appointed her executors), upon trust to pay certain legacies thereout, and to pay the residue to such persons as W. should by deed-poll direct for the purposes in the deed-poll mentioned. By a deed-poll of the same date W. directed the trustees of her will to pay the residue of the 20,000*l.* to certain persons to be elected as trustees for ever, for certain charitable purposes. The above three instruments were prepared by a solicitor on the joint instructions of A. and W., and were all executed on the same day. W. died in 1870; and A. died in 1877, leaving pure personalty and personalty savouring of the realty:—Held, that the instruments were not void as a devise to evade the Mortmain Act, but that the sum of 20,000*l.* was a debt owing from the estate of A., and payable out of his estate generally, and not out of his pure personalty alone. *Jeffries* v. *Alexander* (8 H. L. Ca. 594) distinguished, first, because there was in that case a plain devise to apply the real assets for charitable purposes; and, secondly, because in that case no action could be brought in the covenantor's lifetime. S. C. 45 L. T. 418.

4. In 1873, a father, in contemplation of the marriage of his son, signed, and two witnesses attested, a written instrument. The contemplated marriage having been solemnised, and the father having died:—Held, first, that by the solemnisation of the contemplated marriage the instrument had been rendered irrevocable. *Halpin, In goods of*, 5 Ir. R., Eq., 567.

Held, secondly, that the words, "I give them supreme command," were words of present operation, and the postponed interest had vested immediately; and that, therefore, the instrument could not be admitted to probate as a will. *Ib.*

5. A British subject, resident in France, made his will and died there, having appointed A. and B., who were resident in France, and C. and D., who were resident in England, his executors. The will was translated into French, and the translation was registered by A. and B. in the proper court in Paris. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in London, and that translation was proved by C. and D. in the Prerogative Court. *Bain* v. *Lescher*, 11 Sim. 397.

6. Testator, having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be *enceinte* with, by an instrument executed in the East Indies, during his last illness, empowers A. and B. to invest any gold dust, etc., which he had in bottomry, etc., as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk:—Held, that this instrument, though it had been proved in the Ecclesiastical Court, was merely an act *inter vivos*, and not a revocation of the will. *Pigott* v. *J'Anson*, 1 Eden 469.

7. A codicil, expressed to be in event of testator's death before he joins his wife, was executed after their separation in West Indies, upon an intended voyage to England. The voyage being prevented by accident, he joined her, and they lived together there and in England, having returned together; and the testator having afterwards gone to Corsica, and thence to Lisbon, died there. The codicil

held to be contingent, and did not take effect under circumstances. Probate is not conclusive, not being refused except in plain case. *Sinclair* v. *Hone*, 6 Ves. 607

1. A person being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executor should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named 60,000*l.*, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in Chancery. On the same day he made a will, giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from the drawers, and handed them to the persons attending his deathbed. They were tied up with a memorandum, which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that if probate duty was paid, in the first instance, it might be got back again in consequence of the covenant creating a debt to be paid out of the assets:—Held, that the indenture was a deed, and not a testamentary paper. *Jeffries* v. *Alexander*, 8 H. L. Ca. 594; 7 Jur., N. S., 221; 31 L. J., Ch., 9; 2 L. T., N. S., 768. And see S. C. *nom. Alexander* v. *Brame*, 1 Jur., N. S., 1032; 7 De G. M. & G. 525; 2 W. R. 633.

2. A testator gave a policy of assurance to two trustees, "to hold the same upon uses appointed by letter, signed by them and myself." No such letter existed at the date of the will, but the testator had previously asked the trustees, who had consented to accept the bequest for the benefit of persons and objects then named by the testator. Long after the date of his will the testator wrote a letter, addressed to his executors, stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim, by one of the persons beneficially interested under the memorandum, against the executors and the trustees:—Held, that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. *Johnson* v. *Ball*, 5 De G. & Sm. 85; 21 L. J., N. S., Ch., 210; 16 Jur. 538.

3. Devise and bequest of all the testator's real and personal estate in Grenada to pay all such annuities, legacies, or bequests as he should give or bequeath, to be paid out of, or charged upon his real or personal estate in Grenada by his will or any codicil, whether witnessed or not. A charge by an unattested codicil is void, this being not a charge by the will of legacies, but a reservation by a will executed according to the Statute of Frauds of a power to charge by an unattested paper. As to the objection that the real estate was not charged as a subsidiary fund to the general personal estate, *quære*. *Rose* v. *Cunningham*, 12 Ves. 29.

See also V. III. *post*—XLVI. *post*.

II. PROOF OF TESTAMENTARY CHARACTER.

4. Evidence not admissible that devisor did not mean what he has expressed, but admissible to show that a particular expression was not his will. *Powell* v. *Mouchett*, and *Lichfield* v. *Mouchett*, 6 Madd. 216.

5. Parol evidence is admissible to show that instrument is not the will of testator as to particular estate, but not to set up the disappointed intention of the testator. *Newburgh* (*Earl*) v. *Newburgh* (*Countess*), 5 Madd. 364.

6. A will made on the eve of a journey abroad, under some words used in the will:—Held, a contingent will, and avoided by the testator's return. And collateral proofs of his afterwards taking notice of the will cannot be admitted, unless some acts were done to republish the will. *Parson* v. *Lanoe*, Ambl. 559; 1 Ves. 189; 1 Wils. 243.

7. Where a testatrix made her will disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses, and where the will was found at her death, wrapped in a envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons":—Held, that the instrument, appearing incomplete (something more having been intended), was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker* v. *Walker*, 1 Meriv. 503.

8. Where something to suggest a doubt as to whether an instrument is intended to be testamentary appears on the face of it, extrinsic evidence as to the circumstances of its execution is admissible, but the burden of proof is not thereby thrown upon the person propounding the instrument. *Whyte* v. *Pollok*, 7 L. R., App. Cas. (Sc.), 400; 47 L. T. 356.

III. HOLOGRAPH WILL.

9. The mere fact of proving a testamentary instrument to be a holograph does not shift the onus of proving the handwriting of the testator from the party propounding the instrument. *Anderson* v. *Anderson*, 6 W. R. 526.

IV. INCOMPLETE INSTRUMENTS.

10. A holograph paper found concealed in the bedstead where the testator slept, beginning, "head of instructions to my solicitor, J. Lee, to add to my will the following codicil," and concluding, "this is my last will and testament," and then signed, containing various

legacies to a large amount to persons described by the initial letters of their names, the testator having lived four months afterwards, when he died suddenly through accident, admitted to probate, there being evidence that the testator had spoken of some testamentary paper which would be found after his death, and of his having often during the four months talked of going to Mr. Lee, his solicitor, and having made two appointments to go there (with important papers), one of which he put off and the other was prevented by accident. *Castle* v. *Torre*, 2 Moo. P. C. 133.

1. Probate refused to a paper, professing to dispose of a testator's real and personal property, and subjecting them both to the payment of his debts and funeral expenses, which was in the testator's handwriting, and sealed and signed by himself, but not attested, although an attestation clause was subjoined to it. The circumstance of a testator having subjected his real estate to the payment of his debts and funeral expenses, in a writing not attested, so as to pass real estate, furnishes a strong, though not a completely irresistible, presumption against his final intention that that writing should be his last will. *Douglass* v. *Smith*, 3 Knapp 1.

2. An unfinished testamentary paper is of no effect as a will, the party having lived eight days afterwards. *Griffin* v. *Griffin*, 4 Ves. 197.n.

3. The presumption raised against the intended finality of a paper by the existence of an attestation clause without actual attestation:—Held, to be sufficiently rebutted by the evidence, particularly that of the testator having been told, with reference to the will of another person, that actual attestation was not necessary, the Court observing upon the weight that was due, in such cases particularly, to the opinion of the judge below. *Stewart* v. *Stewart*, 2 Moo. P. C. 193.

4. When the Ecclesiastical Court has given probates of two instruments, as constituting one will or testamentary document, the whole is to be construed as one will. *Semble*, that a testamentary instrument which is left incomplete by reason of the testator's sudden death, or other incapacity of making a will suddenly supervening, is not void *in toto*, but is good as far as it goes. *Armstrong* v. *Millar*, L. & T. 557; Ir. Eq. R. 659.

5. If it appears upon a will of personal estate that something more is intended to be done, and the party is not arrested by sickness or death, the usual declaration at the beginning that it is testator's will is not sufficient. *Coles* v. *Trecothick*, 9 Ves. 249.

Admission of Parol Evidence—Reference to Instructions for Will.] See VIII. III. *post.*

V. CONSOLIDATION OF SEVERAL TESTAMENTARY PAPERS.

6. Two papers, A. and B., wafered together and sealed up in an envelope, endorsed, "The will of James Wood, 2nd and 3rd December 1834," were propounded as a will. Paper A., which was headed, "Instructions for the will of me, James Wood," and was dated the 2nd December, and signed by the testator but not attested, purported to appoint four gentlemen by name executors, whom he desired to take possession of his personal estate, subject to the payment of his debts and to such legacies as he should thereafter direct, and the paper went on to declare that he would dispose of his real estates by writing endorsed thereon. Paper B., dated 3rd December, signed by the deceased and attested by the three witnesses, began, "I, James Wood, do declare this to be my will for disposing my estate as directed by my instruction," and gave all his real and personal estates "which he might not dispose of," and, subject to his debts and to any legacies or bequests which he might thereafter make, to "his executors," not naming or describing them. Both papers were in the handwriting of one of the executors, the attorney of the deceased, and it appeared in evidence that they had been annexed together, sealed up in an envelope, endorsed, and deposited in testator's bureau, by such attorney during the last illness of the testator, and without his directions or knowledge:—Held, that the two papers constituted a valid will. *Hitchings* v. *Wood*, 2 Moo. P. C. 355.

A paper being propounded which was alleged to be a holograph of and signed by the deceased, and to have been sent to one of the legatees named in it in an anonymous note by the threepenny post, leaving legacies amounting to 210,000*l.*, and referring to a legacy in another codicil not forthcoming (there being traces in the evidence of other testamentary papers which were not forthcoming), partially torn and partially burnt, as was alleged to have been done to this and other testamentary papers since the death of the testator, or in his lifetime without his knowledge, the evidence as to the handwriting being contradictory, though the affirmative greatly preponderated, and the disposition being probable, the Court held the paper to be a valid codicil. *Ib.* See also *Ridout* v. *Bouchier*, 2 Moo. P. C. 428.n.

7. Effect of several testamentary papers. *Morrison* v. *Morrison*, 1 Jur. 671.

8. If a man leave several papers behind him, executed at different times, as to personal property, they shall all be taken as one will, and so construed that all may answer the testator's intention. *Stone* v. *Evans*, 2 Atk. 87

9. If testator, by paper subsequent to will, says he has bequeathed that which he has not bequeathed, that paper may be proved as testamentary, and property will pass. *Druce* v. *Denison*, 6 Ves. 397.

VI. INCORPORATION OF DOCUMENTS BY REFERENCE.

10. Where will recites and refers to a voluntary deed, which is not found at the testator's death, but is by verdict of jury declared to have existed at the time of such death, this reference and recital in the will shall establish the deed, and it shall be considered as incorporated with, and constituting part of, the will. *Healey* v. *Copley*, 7 Bro. P. C. 496.

11. Unattested paper clearly referred to in a devise of real estate considered part of the will if made previously; not if subsequent. *Wilkinson* v. *Adam*, 1 Ves. & B. 445.

Legacies by an unattested paper included

under a charge of legacies on a real estate by a will duly attested; but the produce of the sale of a real estate cannot be directly disposed of by an unattested paper. *Id.* 446.

1. Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. *Habergham* v. *Vincent*, 2 Ves. J. 228; 4 Bro. C. C. 353.

2. Legacies out of real estate given by unattested paper cannot stand unless that paper is clearly referred to by will duly executed so as to be incorporated with it; the circumstance of its being inclosed in same cover with will not sufficient. *Smart* v. *Prujean*, 6 Ves. 560.

3. Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereinafter named; she desires her executors to look upon all memorandums, etc., in her own hand as parts or a codicil to her will, and bequeaths by will her residue to the children of her sisters, E., J., etc. By a codicil she gives legacies to some other nephews and nieces:—Held, that the children of E., J., etc, the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both. *Fuller* v. *Hooper*, 2 Ves. 242.

"Testament" includes a will, codicils, etc. "Instrument' signifies the will alone. *Ib.*

4. Testator, by his will made in 1823, directed his executors to pay any legacies he might afterwards give by any testamentary writing witnessed or not, and, after making various codicils, he in 1838 made a codicil which was signed but not attested, and, by a further codicil in 1839, duly signed and attested, he declared that he thereby "ratified and confirmed his said will and codicils":—Held, that such general reference was not sufficient to identify and so incorporate the codicil of 1838 in that of 1839, and probate of such codicil refused. *Croker* v. *Hertford* (*Marquis*), 4 Moo. P. C. 339.

5. Testator contracts for the purchase of a house, and afterwards, by a codicil to his will, gives to A., his executor, "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down.' This amounts to a direction that the purchase money for the house shall be so provided for; and evidence was admitted to show what was the order given by the testator with reference to the cutting of timber. *Sandford* v. *Raikes*, 1 Meriv. 646.

6. Direction in a will, that "all and every such sums of money which I have already advanced or may hereafter advance to any children, as will appear in a statement in my handwriting," should be brought into hotchpot:—Held, that a subsequent unattested statement in testator's handwriting was admissible in evidence of advances, the Court construing "which" as meaning "as," and the clause, "as will appear," etc., as mere words of reference, forming no part of the identification of the subject. *Whateley* v. *Spooner*, 3 Kay & J. 542.

But such unattested document cannot be looked upon as proving that an advance was made which was not actually made, nor conversely; and a direction therein that shares so advanced, and which had become depreciated in value, should be estimated at their selling price at the time when the estate should be divided is inadmissible. *Ib.*

7. A testator by his will, dated the 22nd day of November 1872, declared for the information of his trustees that the amount or values expressed in his ledger and entered on the twenty-first page, and signed by him and dated the 8th November 1872, were, and were the only, advancements either by way of gift or loan made by him to any of his children before the 8th November 1872. The twenty-first page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children:—Held, that the will must be read as if the entries in the ledger were incorporated into it, and that the entries were conclusive for the purposes of the will. *Quihampton* v. *Going*, 24 W. R. 917.

8. A father gave his residuary estate upon trust for his two sons and four daughters equally, and declared that all such sums of money as he had then already advanced, or should thereafter advance, to or for the benefit of either of his children, as should appear in any account in his handwriting kept by him for that purpose, or as should be shown in any other manner, should be considered and taken in full for or, as the case might be, in part of his or her share of and in the trust estate. Subsequently to the date of his will the testator advanced to one of his sons 1,575*l.*, and to the other 1,560*l.* He afterwards wrote letters to each of them stating that it was his intention to make a present to them of sums of 640*l.* and 650*l.*, part of the 1,575*l.* and 1,560*l.* respectively, and requiring them to send him promissory notes for the balance:—Held, that these letters were not admissible in evidence to vary the operation of the proviso contained in the will, and that the sums of 640*l.* and 650*l.* must be brought into account by the sons. *Smith* v. *Conder*, 9 L. R., Ch. D., 170; 47 L. J., Ch., 878; 27 W. R. 149.

9. A testator empowered his executors to pay his debts and funeral and testamentary expenses out of the proceeds of his property, and after reciting that he was possessed of landed and chattel property, "as stated in the annexed schedule," directed his executors to sell his property. The will was written by the testator himself on three sides of a sheet of paper and duly executed; the schedule was on the fourth side, also written and signed by him, and dated the same day as the will, but unattested; it was omitted from the probate, and there was no extrinsic evidence that it was already written when the will was executed:—Held, that the identity and previous existence of the schedule were sufficiently established by its position and its being referred to in the will as "annexed," and that it was therefore incorporated. *Watson* v. *Arundell*, 11 Ir. R., Eq., 53. Varying 10 Ir. R., Eq., 299.

It is the duty of the court of construction to decide whether a document merely omitted from probate is incorporated or not, and, if incorporated, it is of equal efficacy with the rest of the will both as to real and personal estate. *Ib.*

10. When a will refers to a paper, such paper cannot be incorporated with the will, unless it is clearly identified with the description of it given in the will, and is shown to have been in

existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the will. *Singleton* v. *Tomlinson*, 3 L. R., App. Cas., 404; 38 L. T., N. S., 653; 26 W. R. 722.

The onus of establishing these two matters lies on the person who seeks to make the paper admissible for such a purpose. *Ib.*

A will began, "I direct my executors to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." It went on thus:—"Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell my landed property, namely" (and then four separate pieces of landed property were named), "for its full value." Several legacies were then given, and then a fifth landed property was specially devised to W., a person fully described, with an ultimate remainder to T., and then came the gift of other legacies, and finally the will declared, "I constitute the said T.," describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature and attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of the testator, was signed by him, and bore the same date as the will. It described the four portions of landed estate, and as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to W.; my executors have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—Held, that, as this schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction. *Ib.*

Reference in Codicil.] 1. A testatrix made a will in 1851, which was only attested by one witness. In 1856 she duly executed a codicil, which was headed, "This is a codicil to my last will," but which contained no other reference to the will. Satisfactory evidence was adduced to show that the paper propounded as the will was written by the testatrix, and was found locked up in her possession at her death in a sealed envelope, on which there was an endorsement describing it as her will; and that after diligent search no other paper answering the description, and no other testamentary paper, except the codicil, had been found:—Held, that the two papers must be admitted to probate. Where there is a reference, in a duly executed testamentary instrument, either before or after the Wills Act, 1 Vict., c. 26, to another testamentary instrument, by such terms as to make it capable of identification, it is a subject for parol evidence. *Allen* v. *Maddock*, 6 W. R. 825.

2. A testator made his will, duly attested, so as to pass freehold estate, dated in 1828. In May 1831 he made a codicil, which was attested by two witnesses only, declaring it to be a codicil to his will, and directing that it should be annexed thereto. This codicil varied the disposition of parts of his real estate. In September 1831 he made a second codicil, duly attested, so as to pass freehold estate, which he declared to be a second codicil to his will, and directed the same to be annexed thereto and taken as part thereof. The second codicil concluded by confirming his will:—Held, that the second codicil gave the same effect to the first codicil as if it had been duly attested by three witnesses. *Aaron* v. *Aaron*, 3 De G. & Sm. 475; 14 Jur. 125.

Secret Trusts in General.] See XLVI. *post.*

VII. NUNCUPATIVE WILL.

3. One seised in fee of land limits a term to trustees for one hundred years, upon such trust as he, by deed or will, should appoint, and, for want of such appointment, to attend the inheritance, and afterwards, by a nuncupative will, gives all to J. S., and, being a bastard, dies without issue. This will not pass the trust of the term. *Thruxton* v. *Att.-Gen.*, 1 Vern. 340.

4. A. died beyond the sea, and made a nuncupative will. B. took administration here, and brought his bill for a discovery of the supposed intestate's personal estate. The defendant pleaded the will, and that he was executor, and that A. left no assets but what were beyond seas. Plea allowed. *Jauncy* v. *Sealey*, 1 Vern. 397.

VIII. EXECUTION AND ATTESTATION.

See also VI. XVI. 3 *post.*

1. Under the Statute of Frauds.

5. A will, written on nine sheets, was sealed by the testator, who signed the draft of a new will, and then tore off eight of the seals from the first will; yet the first will was held a good will to pass the real estate, the statute not requiring all the sheets to be sealed; and the second good to pass the personal estate as a *casus omissus* out of the statute. *Hyde* v. *Hyde*, 3 Ch. Rep. 155.

6. Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign the will. *Stonehouse* v. *Evelyn*, 3 P. W. 254.

7. A will of land written by the testator, and published in the presence of three several witnesses, at three several times, and attested by all at the said respective times in the presence of the testator, sufficient within the Statute of Frauds; but whether the man's owning the writing to be his in the presence

of the witnesses be sufficient, *quære*. *Cook* v. *Parsons*, Pre. Ch. 184; 2 Vern. 429.

1. A. devises freehold lands for a charity, but the will was not executed in the presence of three witnesses: adjudged, the will being void as a will, it could not operate as an appointment within the statute of 43 Eliz. *Att.-Gen.* v. *Barnes*, 2 Vern. 597; Pre. Ch. 270; Gilb. Eq. Rep. 5.

But such a will may operate as an appointment as to copyhold lands, where there is a surrender to the use of the will, they passing by the surrender and not by the will. *Ib.*

A. devises by will to which there are no witnesses, and afterwards makes a codicil, executed in the presence of three witnesses; the will is void as to the land, and the codicil will not support it. *Ib.*

2. The shares in the Chelsea Waterworks Company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds. *Bligh* v. *Brent*, 2 Y. & Coll. 268.

3. In December A. made his will; and in January following, designing to make an alteration, he ordered a devise to be interlined. The will was read in this state to the testator, who approved it, and put his seal on the wax in the presence of the same three witnesses who attested his will at first, but he did not subscribe his name *de novo*:—Held, a good signing, for the testator's subscribing is only with a view that the witnesses may know the will again. *Townsend* v. *Pearce*, 8 Vin. Abr. 142. pl. 3.

4. A. gives an annuity of 20*l.* to his daughter, and the heirs of her body, quarterly, without any abatement. B., the surviving executor of A., gives to the daughter of A. and her daughter an annuity of 20*l.* by his will, to be paid quarterly, without any abatement, out of his freehold houses in Holborn, and if they die without issue, then to return to the plaintiff his heir, and by an endorsement upon the will in pencil, not executed according to the Statute of Frauds, he says, "I hope this 20*l.* will not be taken for another 20*l.* annuity her father left her and her daughter." This endorsement held invalid, because nothing can enlarge or diminish what affects real estate, unless it be executed according to the Statute of Frauds. *Heather* v. *Rider*, 1 Atk. 425.

5. Admission of signature by testator to will in presence of the witnesses good as to land. *Grayson* v. *Wilkinson*, Dick. 158; 2 Ves. 454.

Admission of sealing and delivery not sufficient evidence thereof. *Ib.*

Not necessary, under the Statute of Frauds, that a testator should sign in the presence of the witnesses; his acknowledgment of his handwriting is sufficient, although done to the several witnesses at different times. *Ib.*

6. Testatrix executed her will in the presence of two witnesses; she afterwards said, in the presence of a third, "This is my will," but did not put her seal, nor say her name was of her handwriting. Lord Hardwicke inclined this will was void, because not exactly conformable to the statute 29 Car. 2. *Gryle* v. *Gryle*, 2 Atk. 177.

Sealing her will without signing in the presence of a third witness would have been sufficient to make it a good will. *Ib.*

7. Will not duly executed according to statute has no operation even to raise an election against person taking personal estate. *Exp. Ilchester* (*Earl*), 7 Ves. 372.

8. Acknowledgment by devisor of his handwriting to one of the witnesses who did not see him execute, good. *Addy* v. *Grix*, 8 Ves. 505.

9. Execution of a devise under the Statute of Frauds, requiring signature by the devisor in the presence of three witnesses, and their attestation of his act by their subscription. *Wright* v. *Wakeford*, 17 Ves. 459.

Sealing not necessary to the execution of a devise under the Statute of Frauds, nor sufficient without signing. *Ib.*

10. "I, A. B., do make this my will," equivalent to signature, and, if acknowledged before three witnesses, a good execution within the Statute of Frauds. *Morison* v. *Turnour*, 18 Ves. 183.

11. In proving execution of devise, actual signature by devisor in presence of three witnesses is not required, if he declares it to be his will before those who did not see him sign, and separate attestations sufficient. *Westbeech* v. *Kennedy*, 1 Ves. & B. 362.

12. A declaration by the testator, in attestation of part of his will, that lands should go to a certain person, not a sufficient devise of them under the Statute of Frauds, not being signed by the testator or by any person by his direction. *Blennerhassett* v. *Day*, 2 Ball & B. 104.

13 Will subscribed by three witnesses, before whom testator declared it to be his will, but did not sign it; such declaration is equivalent to signing before them, and such will is good within the 5th section of the Statute of Frauds, and is also a good will of revocation within the 6th. *Ellis* v. *Smith*, 1 Ves. J. 11.

Witness may attest separately; in that case, if testator acknowledged before each, or signs before one, and acknowledges before the rest, it is good; but otherwise if he signs it before each only, because three different executions, and no one good within the statute. *Id.* 16.

The construction of the execution of a will is the same in equity as at law. *Ib.*

14. J. O., on the 13th June 1825, made a will devising his real estate to E. O., and on the 25th November following executed another will, disposing of his personal estate merely, but containing a clause revoking all former wills, and attested by three witnesses in the following manner—namely, the testator told two of the witnesses that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally came into the room, and was asked by the testator to become a witness, although he (the testator) said it was unnecessary. The testator then gave the witness to understand that it was his will, but did not point out his name, or acknowledge it to be his signature, to this witness, who might, however, have seen the name J. O. whilst in the act of signing the document:—Held, that the second will was duly executed as a devising will under the Statute of Frauds:—Held, also, that although conversant about personal property merely, it was a good will of revocation of the freehold. *Jones* v. *Ogle*, Sau. & Sc. 1.

Semble, that, even as a "writing of revocation," it was well executed under the statute, the acknowledgment of the testator being equivalent to the signing in the presence of the witnesses. *Ib.*

1. Publication requires no formal words. *Maberley* v. *Sison*, 1 Jur. 558.

2. Direction by will to sell real estates, and after the sale to pay certain legacies:—Held, upon the will, not a conversion out and out, and the surplus produce does not pass by an unattested codicil. *Sheddon* v. *Goodrich*, 8 Ves. 481.

Produce of real estates converted by will:—Held, to pass only where the will attested by three witnesses to the will. *Ib.*

3. Conversion directed by will of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities, subject to that as to the real estate, a resulting trust for the heir, which cannot be affected by an unattested codicil bequeathing a lapsed share of the residue. *Hooper* v. *Goodwin*, 18 Ves 156.

4. Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini* v. *Noble*, 2 Meriv. 691.

5. Will sufficient to pass personal estate will not revoke a prior will of real estate made according to Statute of Frauds. *Limbery* or *Lunbery* v. *Mason*, 2 Com. 451.

Devise of Copyholds.] See XXXV. 1. *post.*

2. Signature under the Wills Act.

6. Where a testator from illness was unable to write, and his signature was made by having his hand guided:—Held, a sufficient signature to satisfy the statute. *Wilson* v. *Beddard*, 12 Sim. 28; 10 L. J., N. S., Ch., 305; 5 Jur. 624.

7. The words, "signed at the foot or end thereof," in the 9th section of the Statute of Wills, 1 Vict., c. 26, are to be construed strictly. *Smee* v. *Bryer*, 6 Moo. P. C. 404; 13 Jur. 289.

Where a holograph will, written on a sheet of foolscap paper, the depositive part of which ended on the third side, leaving, at the foot or end of the third side, a space sufficient to have received the signature of the deceased, and also that of the two attesting witnesses, if not accompanied by a formal attestation clause, was signed, with an attestation clause, in the middle of the fourth side, no part of the will being immediately above it:—Held, not to have been signed "at the foot or end," according to the requisites of the statute, and the will declared invalid. *Ib.*

8. The mere circumstance of the deceased having called in two witnesses "to sign a paper for him" (which they did in his presence), but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it:—Held, by the Judicial Committee of the Privy Council, affirming the judgment of the Prerogative Court, not to amount to an acknowledgment of the signature by the deceased so as to satisfy the provisions of 1 Vict., c. 26, s. 9, and probate refused to such paper. *Ilott* v. *Genge*, 4 Moo. P. C. 265.

9. Where a will terminated with a *testimonium* clause, about two inches from the foot of the second page of a sheet of paper, leaving ample room for the signatures both of the testator and the witnesses, all of whom, however, signed their names opposite to an attestation clause at the top of the third page, upon which no part of the will was written:—Held, that the will was properly signed within the meaning of the statute 1 & 2 Vict., c. 26. *Derinzy* v. *Turner*, 1 Ir. Ch. R. 341.

10. A signature made by some person, but not in the presence (though by the direction) of a testator, is not such signature as can be acknowledged by the testator under the Wills Act, 7 Will. 4 and 1 Vict., c. 26, s. 9. *Kevil* v. *Lynch*, 8 Ir. R., Eq., 244.

An intending testator "held a pen in his hand and put it to his name" (not written in his presence), "or placed on a mark" made on a will prepared for him by a solicitor; but no proof could be given whether any ink was in the pen or any visible trace made when he so held the pen:—Held, though the will was properly attested, that the Court could not presume a due execution. *Ib.*

3. Mode of Attestation.

11. Will attested by the witnesses, where the testatrix could see them through the windows of her carriage and of the attorney's office, well attested. *Casson* v. *Dade*, 1 Bro. C. C. 99.

12. The witnesses to a will subscribe their names at a window in a passage, where they could see but part of the bed on which the testator lay, and he could not, as he lay there, see them attest his will; this will was set aside as not being duly executed. *Clerk* v. *Ward*, 4 Bro. P. C. 71.

13. A witness, proving a will of land, swears that he subscribed it in the same room, and at the testator's request:—Held, good, though not said "in the testator's presence." *Longford* v. *Eyre*, 1 P. W. 740.

A witness, to prove a will of land, ought to prove that the will was executed in his presence, and also in the presence of the two other witnesses, and they that subscribed in the presence of the testator. *Ib.*

14. Implication is, that witnesses to a will saw the testator execute, if so situated that they might have seen him; not where they were in an adjoining room, and could not. *Morrison* v. *Arnold*, 19 Ves. 671.

15. J. O., on the 13th June 1825, made a will devising his real estate to E. O., and on the 25th November following executed another will, disposing of his personal estate merely, but containing a clause revoking all former wills, and attested by three witnesses in the following manner—viz., the testator told two of the witnesses that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally came into the room, and was asked by the testator to become a witness, although he (the testator) said it was

unnecessary. The testator then gave the witness to understand that it was his will, but did not point out his name, or acknowledge it to be his signature, to this witness, who might, however, have seen the name J. O. whilst in the act of signing the document:—Held, *dissentiente* Smith B., that although conversant about personal property merely, it was a good will of revocation of the freehold. *Jones* v. *Ogle*, Sau. & Sc. 1.

1. Where the second witness was not present when the testator executed, and the first witness subscribed, although the testator and the former witness both acknowledged to the latter their subscriptions—Held, an insufficient compliance with the Indian Will Act, which is in effect the same as the 1 Vict., c. 26, s. 9. *Casement* v. *Fulton*, 5 Moo. P. C. 130.

2. To make a valid subscription and attestation to a will there must be either the name of the witness, or some mark intended to represent it. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. *Hindmarsh* v. *Charlton*, 8 H. L. Ca. 160; 7 Jur., N. S., 611; 9 W. R. 521; 4 L. T., N. S., 125.

The signature or acknowledgment of a testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged, subscribe the will in his presence. *Ib.*

A testator produced his will to A., and signed it in A.'s presence. A., whose name consisted of four words, the first of which began with "F.," then, in the testator's presence, signed his own name, but by accident left his first initial letter uncrossed, so that it stood as if it was "T." He afterwards advised the testator that there ought to be two witnesses to the will, and in the afternoon of the same day, B. being present, the testator produced his will, and showed and acknowledged his signature in the presence of both A. and B. B. then wrote his name, and at his desire A. added the date, and then observed and corrected the first initial of his own name by crossing the T., and so making it F.:—Held, that the will was not duly attested within 7 Will. 4 and 1 Vict., c. 6, s. 29. *Ib.*

See also 8 *infra.*

In Case of a Will of Copyholds.] See XXXV. 1. *post.*

4. Attestation by Executor.

3. Will held well attested, though one of subscribing witnesses was executor in trust under will. *Phipps* v. *Pilcher*, 1 Madd. 144.

5. Attestation by Marksman.

4. Attestation of a devise by a mark, good within the Statute of Frauds. *Harrison* v. *Harrison*, 8 Ves. 185.

5. Attestation of a devise by a mark, good within the Statute of Frauds. *Addy* v. *Grix*, 8 Ves. 504. S. P. *Wright* v. *Wakeford*, 17 Ves. 459.

6. Attestation of marksmen good under the Statute of Frauds. *Grayson* v. *Atkinson*, 2 Ves. 454; Dick. 158.

7. Form of attestation to a will by a marksman. *Wigan* v. *Rowland*, 1 W. R. 383; 10 Hare (App.) 18; 1 Eq. Rep. 213.

Where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, the Court held that the signatures of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed, under the statute 7 Will. 4 and 1 Vict., c. 26, s. 15. S. C. 11 Hare 157; 17 Jur. 910.

6. Want of Attestation.

8. A will disposing of real and personal property, with a clause of attestation, but no witnesses, established as to the personal property. *Habberfield* v. *Browning*, 4 Ves. 200. n.

9. Where a testatrix made her will, disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses, and where the will was found at her death, wrapped in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons":—Held, that the instrument, appearing to be incomplete (something more having been intended), was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker* v. *Walker*, 1 Mer. 503.

10. Where an attestation clause is not required, the mere circumstance that there is an attestation clause specifying certain things does not exclude evidence that other things were done besides those which are attested. *Warren* v. *Postlethwaite*, 2 Colly. 108; 14 L. J., N. S., Ch., 422; 9 Jur. 721.

11. The presumption raised against the intended finality of a paper by the existence of an attestation clause without actual attestation:—Held, to be sufficiently rebutted by the evidence, particularly that of the testator having been told, with reference to the will of another person, that actual attestation was not necessary, the Court observing upon the weight that was due, in such cases particularly, to the opinion of the judge below. *Stewart* v. *Stewart*, 2 Moo. P. C. 193.

12. Probate refused to a paper professing to dispose of a testator's real and personal property, and subjecting them both to the payment of his debts and funeral expenses, which was in the testator's handwriting, and signed and sealed by himself, but not attested, although an attestation clause was subjoined to it. The circumstance of a testator having subjected his real estate to the payment of his debts and funeral expenses, in a writing not attested so as to pass real estate, furnishes a strong, though not a completely irresistible, presumption against his final intention that that writing should be his last will. *Douglas* v. *Smith*, 3 Knapp 1.

13. Probate granted of a paper written in ink, but dated and signed in pencil, with the

addition, "in case of accident, I sign this my will," having also an attestation clause unsigned: the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. *Bateman* v *Pennington*, 3 Moo. P. C. 223.

1. Money due on mortgage will pass by will unattested. *Hassell* v. *Tynte*, Ambl. 320.

2. Trust of copyhold estate, and copyhold surrendered to use of will, pass by will unattested. *Tuffnell* v. *Page*, Dick. 76.

3. An unattested codicil (before the Wills Act) cannot be looked at for any purpose by the Court, so far as it affects to devise realty, and no case of election is raised against the heir or devisee in consequence of such attempted devise; but if such codicil imposes a condition respecting the real estate on a bequest of personalty to the heir, he must perform it. *Louis* v. *Louis*, 3 N. R. 369.

7 Number of Witnesses.

4. Will of lands made before the Statute of Frauds had but two witnesses, and the testator died after statute, yet the will being made before, held good. *Serjeant* v. *Puntis*, Pre. Ch. 77.

5. A., possessed of a term of five hundred years in B. acre, afterwards purchases the fee-simple in C.'s name, and devises B. acre to J. in fee; but the will is not attested by three witnesses: the term shall not pass, because attendant on and part of the inheritance. *Whitchurch* v. *Whitchurch*, 2 P. W 236; Gilb. Eq. Rep. 168; 1 Stra. 619; 9 Mod 124.

6. Devise of all lands and tenements in or near F., by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold; *contrà*, if he had only had leasehold. *Chapman* v. *Hart*, 1 Ves. 271.

7. Where real estate is charged with legacies generally, by will, duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge* v. *Ingram*, 2 Ves. J. 665.

8. A trust is limited to A., his heirs and assigns, or to such as he or they may appoint; A. devises these lands by a will attested but by two witnesses: the will void, and shall not operate as an appointment. *Wacstaff* v. *Wagstaff*, 2 P. W. 258.

9. A rent is a tenement; and, therefore, cannot pass by will without three witnesses, if out of freehold; the word "tenement" being in the Statute of Frauds. *Habergham* v. *Vincent*, 2 Ves. J. 231; 4 Bro. C. C. 353.

10. Produce of real estates converted by will:—Held, to pass only where the will is attested by three witnesses to the will. *Sheddon* v. *Goodrich*, 8 Ves. 481.

8. Gifts to Attesting Witness.

11. A child of a residuary legatee is no witness to prove a will relating to the personal estate by the civil law: by which law only such will is determinable. *Thwaites* v. *Smith*, 1 P. W. 10.

12. One of the three witnesses to the will is a devisee of part of the land: whether not a good witness, if he aliens the land, without covenant or warranty, *quære*. *Baugh* v. *Holloway*, 1 P W. 557.

13. Witness to a will, not interested at the execution and death of the testator, is competent, though interested at his examination. *Brograve* v. *Winder*, 2 Ves. J. 634.

14. Persons entitled under will cannot in any respect be witnesses to prove it. *Tucker* v. *Sanger*, M'Clel. 435; 13 Price 119.

15. A legacy to a witness to a will relating to personal estate only, is not void under 25 Geo. 2, c. 6. *Foster* v. *Banbury*, 3 Sim. 40.

16. The statute of the 25 Geo. 2, s. 6, does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will is not void. *Emanuel* v. *Constable*, 3 Russ. 436; 5 L. J., Ch., 191.

17. Legacy to a subscribing witness to a will, though of personal property only, void under the statute 25 Geo. 2, c. 6, extending to all wills and codicils. *Lees* v. *Summersgill*, 17 Ves. 508.

18. A devisee does not lose benefits given him by a will in consequence of his being an attesting witness to a codicil ratifying and confirming the will. *Denne* v. *Wood*, 4 L. J., Ch., 57.

19. Bequest by will, dated in 1849, of an annuity to A. Codicil revoking other legacies, and confirming the will, was signed by A. as an attesting witness:- Held, that the annuity given to him by the will was not thereby made void. *Tempest* v. *Tempest*, 2 Kay & J. 635.

20. A will was executed in 1844 and had the name of the testator, his seal, the word "witness," and the names of two persons, J. T. G. and J. S. H. These names were the last marks on a third side of the sheet of paper on which the will was written. On the top of the fourth side were the words, "This last will and testament was signed in our presence, and in the presence of each other, by him. J. T. G., J. S. H., G. B." This last name was that of a person named as a legatee in the will:—Held, that this was not such an attestation of the will as to deprive G. B. of her right to the legacy. *Randfield* v. *Randfield*, 8 H. L. Ca. 226; 30 L. J., Ch., 177. Reversing 32 L. J., Ch., 668; 11 W. R. 847; 2 N. R. 309.

21. Where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, the Court held that the signatures of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed, under the statute 7 Will. 4 and 1 Vict., c. 26, s. 15. *Wigan* v. *Rowland*, 11 Hare 157; 17 Jur. 910; 1 Eq. Rep. 213; 1 W. R. 383.

22. A bequest of a legacy by a will is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee of a share of a residue lose his title by attesting a codicil which, by revoking legacies, indirectly benefits him by increasing the residue. *Gurney* v. *Gurney*, 3 Drew. 208; 1 Jur., N. S, 298; 24 L. J., Ch., 656; 3 Eq. Rep. 569.

Semble, the attestation, to have that effect, must be to the instrument giving the interest. S. C. 3 W. R. 353.

23. The representatives of a legatee who had

attested the cancellation of a will, and died before the period of distribution, will be excluded from participation under the will, under the 7 Will. 4 and 1 Vict., c. 26, s. 15. *Gaskin* v. *Rogers*, 2 L. R., Eq., 284; 14 W. R. 707.

1. A mother by her will gave a bequest to her son. One of the two witnesses attesting the execution of the will was the wife of the son. By a subsequent codicil attested by two independent witnesses she confirmed her will:—Held, that the execution of this codicil was equivalent to a re-execution of the will; and since the codicil was attested by independent witnesses, the bequest to the son was valid. *Anderson* v. *Anderson*, 13 L. R., Eq., 381; 20 W. R. 313; 41 L. J., Ch., 247.

2. A beneficiary under a will attested the will as a third witness, and deposed that he did so at the testator's especial request as a token of approval:—Held, that the attestation invalidated the bequest. *Cozens* v. *Crout*, 42 L. J., Ch., 840; 21 W. R. 781.

3. At the foot of a will signed by the testator and attested by two witnesses there appeared subscribed beneath the signature of the testator the signature of D., who was the principal legatee and sole executor. The Court, being satisfied by evidence that her signature had not been added with any intention of attesting the execution, ordered her signature to be excluded from the probate. *Murphy, In goods of*, 8 Ir. R., Eq., 300.

4. Where there is a joint tenancy under a will, and one of the joint tenants witnesses the will, the others take the whole. *Young* v. *Davis*, 1 N. R. 419. S. C. *nom. Young* v. *Davies*, 9 Jur., N. S., 399; 32 L. J., Ch., 372 8 L. T., N. S., 80; 2 Dr. & Sm. 167.

5. A witness to a codicil being interested under the parol trust created by the will for objects specified in the will and codicils:—Held, that his interest under the codicil failed. *Re Fleetwood, Sidgreaves* v. *Brewer*, 15 L. R., Ch. D., 594; 49 L. J., Ch., 514; 29 W. R. 45.

III. Establishment of Wills and Issue Devisavit vel Non.

I JURISDICTION. GENERAL PRINCIPLES.

6. A court of equity has no jurisdiction to declare what is or is not a man's last will. *Pemberton* v. *Pemberton*, 13 Ves. 297.

7. Though it be proper to prove a will of lands in equity, yet the same is not absolutely necessary, any more than it is to prove the deed in equity. *Cotton* v *Wilson*, 3 P. W. 192.

8. There is no case in which the Court has established a will of copyholds. *Semble*, the probate copy of a copyholder's will is sufficient to lead the uses of a surrender to the use of his will. *Archer* v. *Slater*, 10 Sim. 624.

9. A question arising in equity that prevents the assertion of a legal right, does not alter the tribunal; therefore, the Court will not determine a question of partnership in the event of bankruptcy, any more than of the death, or than it would determine a claim as heir, without a trial at law, unless perfectly satisfied, though the evidence is all in support of the claim; the Court expressed great doubt whether, the stock-in-trade being in the possession of the bankrupt solely, the claim of the partnership could be sustained upon the statute 21 Jac. 1, c. 19, s. 11. *Binford* v. *Dommett*, 4 Ves. 756.

10. On question of validity of devise, issue at law must determine it. *Dawson* v. *Chater*, 9 Mod. 90.

11. Will of real estate not to be proved on a reference before the Master. *Lechmere* v. *Brasier*, 2 Jac. & Walk. 289.

12. A court of equity has no jurisdiction to determine on the validity of a will either of real or personal estate. *Jones* v. *Jones*, 3 Meriv. 161.

13. Courts of equity determine on devises of legal estate, as courts of law do. *Sayer* v. *Masterman*, Ambl. 345.

14. Where a title depends on the words of a will, this is properly determinable in equity, as by a judge and jury at *nisi prius*. *Tanner* v. *Wise*, 3 P. W. 296; Ca. *temp.* Talb. 284.

15. Bill by an heir-at-law for an issue to try the validity of a will made in England dismissed partly on the ground of his acquiescence both in the Ecclesiastical Court and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike* v. *Hoare*, 2 Eden 182; Ambl. 428.

16. If a British subject domiciled in a foreign country by his will appoints A. his executor, but makes a disposition of his personal property which, though valid by the laws of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted to A. in this country, to hold that the will has no operation beyond appointing A. the executor. *Thornton* v. *Curling*, 8 Sim. 310.

17. A court of equity has no original jurisdiction to try the validity of a will either of real or personal estate, but where on a bill filed for the removal of terms, or for other equitable relief, the validity of a will of real estate incidentally comes in question, the Court will proceed to investigate that question, and will, generally speaking, for the purpose of informing its conscience, direct an issue *devisavit vel non*. *Middleton* v. *Sherburne*, 4 Y. & Coll., Exch. Eq., 358.

1. Wills cannot be set aside for fraud and imposition in equity, because if of personal estate it may be set aside in the Ecclesiastical Court, and if of real estate by issue at law *devisavit vel non*. *Kerrich* v. *Bransby*, 7 Bro. P. C. 437.

2. A bill can be maintained by a devisee of the legal estate in real property, who is in possession, for the purpose of establishing the will against the testator's heir-at-law, although the heir has brought no action of ejectment against the devisee. *Boyse* v. *Rossborough*, 1 Kay 71; 2 W. R. 91, 290; 23 L. J., Ch., 305; 18 Jur. 205; 2 Eq. Rep. 675; 3 De G. M. & G. 817.

Previously to the Statute of Frauds the Court of Chancery frequently took upon itself to determine the validity of wills by inquiry before some of the Masters of the Court, a practice which has ceased since the case of *Kerrich* v. *Bransby* (7 Bro. P. C. 437, A.D. 1727). *Ib.*

But as early as the time of James I. it appears to have been considered that the proper mode of trying the validity or invalidity of a will of real estate was by a trial at law, the Court of Chancery reserving power to deal with the case as justice might require. *Ib.*

The proceeding in equity to establish a will against the heir differs very much from assisting to try its validity or invalidity, either by removing the obstacle of an outstanding term, in which case the trial at law would be by ejectment, or by perpetuating testimony concerning the will; because, by a decree establishing the will, the heir-at-law is so bound, that a perpetual injunction would be granted against him, if after such decree he should attempt to impeach the will. *Ib.*

The origin of this jurisdiction is obscure; but, on principle, it cannot arise from the fact of the devise being upon trust, for that can make no difference to the heir, or because the Court experiences a difficulty, for then, in all other cases of difficulty occurring under deeds, there would be the same jurisdiction. *Ib.*

Nor can it be for the protection of trustees, because the jurisdiction exists where there is no trust, but only the obstacle of an outstanding legal estate, which prevents an action at law. *Ib.*

But upon principle and authority there is an inherent equity on the part of the devisee, whether legal or equitable, arising from the mere fact of the devise, to have the will established against the heir *Ib.*

An averment in such a bill that A. claims to be heir of the testator, supported by a statement that he has sued in that character in Ireland and succeeded, is sufficient. *Ib.*

That the legal estate has been conveyed by the plaintiff to his own trustee since the testator's death cannot give any equity to sustain such a bill. *Ib.*

Bill by heir-at-law against devisee to set aside will as having been obtained by undue influence and misrepresentation from testator, at whose death there were outstanding terms of years and tenancies which would be a bar to ejectment by plaintiff. Issue directed at hearing *Devisavit vel non*; verdict in favour of heir. Motion for new trial refused; and by order on further directions will declared void. Appeal by devisee against the orders directing the issue and declaring the invalidity of the will:—Held, that in such a case, where an action of ejectment is barred by an outstanding term, the fittest relief generally is to restrain the term being set up as a bar, because such a course leaves each party at liberty to assert by legal proceedings what is in substance a mere legal right. But the Court of Chancery has power to direct the legal question to be tried by an issue, and will use that power in cases where effectual relief would not be given by merely restraining a party from setting up the outstanding term, as where the subject matter of the devise is a mere equitable right. Difference between the two modes of proceeding discussed and commented upon. In deciding whether the trial of an issue *devisavit vel non* has been satisfactory, the Court of Chancery does not act on the same principles as a court of law in ejectment, where the same will is in dispute; because, in the latter case, the defeated party may bring a fresh action, but the consequence of a verdict satisfactory to the Court of Chancery on the issue is to stop litigation for ever. In Dom. Proc. S. C. *nom. Boyse* v. *Rossborough*, *Colclough* v. *Boyse*, 5 W. R. 414; 3 Jur., N. S., 373; 6 H. L. Ca. 1; 26 L. J., Ch., 256.

3. Testator by his will devised his lands in Ireland and England to B. The will was disputed by A., the heir-at-law, who filed his bill in Ireland to set it aside. An issue had been directed and a verdict given against the will, and a motion for a new trial refused. B. files a bill in England to have the will established, and to have it declared that the English estates passed under it:—Held, that the proceedings in Ireland were no bar to B.'s obtaining an issue in England to try the validity of the will, the verdict in Ireland having no authority to conclude the question as to the English estates, although pronounced upon the same will. *Boyse* v. *Rossborough*, 3 W. R. 8; 1 Kay & J 124; 24 L. J., Ch., 7; 3 Eq. Rep. 78.

See also VI. *infra*—EJECTMENT—JURISDICTION, II. 2—PERPETUATION OF TESTIMONY.

II. AT SUIT OF DEVISEE, EXECUTOR, OR TRUSTEE.

4. Devisees, filing a bill to establish a will and carry the trusts into execution, have no right to call upon persons who claim paramount the will, to litigate such claims with them. *Devonshire* v. *Newenham*, 2 Sch. & Lef. 199.

5. Although a charge for debts created by will on real estate, in aid of the personal estate, does not entitle the executor to sustain a suit to establish the will against the heir, his duty being confined to administer the assets, and leave the parties who become interested in the real estate to work out their interests as they can, yet if one of the executors is also a devisee in trust such suit is proper. If there is no trust, the Court does not direct the form of the trial in which to establish the will against the heir, but only takes care that a fair trial shall be had. But if there is a trust, that brings all under the control of the Court, and it always directs an issue *devisavit vel non*, and never an ejectment. *Fingal (Lord)* v. *Blake*, 1 Moll. 113.

1. A testator, being subject to a commission of lunacy, gave by his will certain benefits to his only daughter, a married woman, who was also his heiress-at-law, and declared that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable, by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The heiress-at-law, on occasion of her marriage, and during her minority, had joined with her husband in assigning her expectant interest to the trustees of her marriage settlement. The trustees of the will filed their bill to have the will established and the trusts carried into execution, and adduced proof of the sanity of the testator at the date of his will. To this suit the heiress-at-law and the trustees of the settlement were made parties:—Held, without deciding on the validity of the settlement, that the plaintiffs were bound to prove their title as against the trustees of the settlement, and the Court accordingly, at the instance of these trustees, directed an issue *devisavit vel non*. *Cooke* v. *Cholmondeley*, 2 Macn. & G. 18: 2 H. & Tw. 162; 19 L. J., N. S., Ch., 81; 14 Jur. 117. Affirming on this point 15 Sim. 611; 16 L. J., N. S., Ch., 487; 11 Jur. 702

In order to protect the heiress-at-law from the clause of forfeiture contained in the will, the Court directed a statement to be inserted in the order that the issue was directed at the instance of the trustees of the settlement. *Ib.*

2. A testator seised of large real estates made a will, by which he gave certain benefits to his daughter, who was his heir and a married lady, and declared that if she, or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be, in any way, attainable by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her; the testator was the subject of a commission of lunacy when he made his will, and continued so until his death. In a suit by the trustees of the will to establish it, the plaintiffs proved that the testator was of sound mind when he made his will, and there was no evidence to the contrary; nevertheless the Court directed an issue *devisavit vel non* to be tried, the plaintiffs to be plaintiffs at law, and a gentleman (with whom the husband had entered into a covenant, during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to) to be the defendant at law. *Cooke* v. *Turner*, 15 Sim. 611.

3. In a suit by devisees against an heir-at-law, alleging suppression by the heir of the testator's will, and praying delivery up of the premises. No case of suppression was made at the hearing, but the plaintiffs showed distinctly that the will under which they claimed had existed, and was in the house of the testatrix within two years before her death, during which two years the heir-at-law, with his family, had been living in the house:—Held, that this was a case for an inquiry, and for an issue as to whether the testatrix did devise the lands in manner alleged. *Smith* v. *Spencer*, 1 Y. & Coll. C. C. 75; 5 Jur. 1056.

4 A bill, by a devisee of lands who was in possession, for the purpose of establishing a copy of a will which had been abstracted, against the heir-at-law, but raising no case implicating the heir in the abstraction, was retained for a year. The result of an action, in which the copy of the will had been received in evidence, having been in favour of the plaintiff, the Court, by its decree, established the will upon and according to the copy, and restrained the defendant from bringing any action to disturb the plaintiff in the enjoyment of the lands devised to him. *Davies* v. *Evans*, 4 De G. & Sm. 440.

5. Where the point at issue was the validity of the will of A., and the party claiming under it was, at the time of the institution of the suit, the heir-at-law of the testator, while the party opposing it was devisee of the immediate heir of A.:—Held, that the former party claiming as a devisee could not insist upon the privilege of an heir to have an issue as a matter of course. *Lorton* (*Viscount*) v. *Kingston* (*Earl*), 5 Cl. & F. 269.

6. A bill to establish a will against an heir-at-law may be maintained at the suit of a mere legal devisee, not charged with any trust or duty under the will. *Colclough* v. *Boyse*, 6 H. L. Ca. 1; 3 Jur., N. S., 373; 26 L. J., Ch., 256; 5 W. R. 514.

A mere legal devisee may file a bill against the heir-at-law of the testator for the purpose of having the will established against him, though no trusts are declared by the will, and though it is not necessary to administer the estate under the direction or decree of a court of equity. S. C. *nom. Boyse* v. *Rossborough*, 3 De G. M. & G. 817; 18 Jur. 205; 23 L. J., Ch., 305; 2 W. R. 91, 290; 1 Kay 71; 2 Eq. Rep. 675.

7. A decree of the Court of Chancery in Ireland, after verdict upon an issue *devisavit vel non*, does not determine the validity or invalidity of the will, so far as it relates to lands in England, and cannot be pleaded in bar to a suit in this court. *Boyse* v. *Colclough*, 1 Kay & J. 124; 24 L. J., Ch., 7; 3 W. R. 8; 3 Eq. Rep. 78.

The right of the heir and that of a devisee to this issue distinguished: the former is absolute; the latter is in the discretion of the Court. *Ib.*

Issue *devisavit vel non* granted to a devisee after a decree in Ireland against the will, and an order refusing a new trial; and although subsequently an attesting witness, who had been examined in Ireland, and whose cross examination was deposed to have been very effective in support of the heir's case, had died, the devisee having appealed to the House of Lords, and not appearing to be chargeable with delay, either in the appeal or in this suit. *Ib.*

The possibility that the House of Lords might be influenced in the appellant's favour

by the result of the English trial, and the consideration that this was a probable motive for the present application:—Held, not to afford ground for refusing or postponing the trial of the issue. *Ib.*

Whether, under the circumstances, the issue would have been granted in case the devisee had not so appealed, *quære*. *Ib.*

Obiter. The Court may hold a will to be good in part and bad in part. *Ib.*

Obiter. The course, where an instrument is clearly established to be invalid as a will, is, that the heir has a right to have it delivered up as a cloud upon his title, unless it affects to pass real estate out of the jurisdiction. *Ib.*

When this issue is granted, the costs of the heir are reserved till further directions *Ib.*

1. The Court of Chancery can entertain a suit to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim; a devisee being entitled to have the will established and his title quieted not only against the heir, but against all persons setting up adverse rights. *Lovett* v. *Lovett*, 2 Jur., N. S., 1130; 5 W. R. 5; 3 Kay & J. 1.

E., by her will, dated in 1851, gave landed estates to the defendant and his family. By a will dated in 1853 she revoked that will, and gave the property to the plaintiff and his family. By a codicil dated in 1855 she confirmed the latter will, and died shortly afterwards. It was proved that the testatrix was eighty-three at the time of her decease; that she had always been of a very violent and imperious temper, but had become much less firm in her will, and more under the subjection of others, since 1849; that she had always previous to 1853 expressed great bitterness against the branch of the family to which the plaintiff belonged, and had had no communication with him, and there were no other apparent circumstances to alter that feeling. The letter in which the instructions for the will of 1853 were addressed to her solicitor was full of rambling incoherent hallucinations; and there appeared to have been at least one other letter of the same description sent by her about the same time. On these grounds the defendant had contested in the ecclesiastical courts, but unsuccessfully, the will of 1853, under which the plaintiff claimed, probate of that will having been granted as of a good will of personalty. The plaintiff then filed a bill against the defendant to have the will of 1853 and codicil of 1855 established as to the realty:—Held, that such a bill would lie against a devisee as well as against an heir-at-law; and that, consistently with *Boyse* v. *Rossborough* (1 Kay & J. 124), the bill could not be dismissed. *Ib.*

But held also, that the Court would not in such a case take upon itself to act without the intervention of a jury to decide upon the question of *devisavit vel non*, *i.e.*, on the questions of capacity in the testatrix, or undue influence exerted on her. *Ib.*

A document which had been proved in the course of the proceedings in the ecclesiastical courts, but not in the suit in equity, but which had been referred to by one of the witnesses in the suit in an affidavit, and which moreover had been verified, was allowed to be read, for the purpose, not of inducing the Court to make a final decision, but of informing the Court of the nature of the case alleged by the defendant to call for examination elsewhere; and the Court being of opinion that there was a *primâ facie* case for contesting the later will, an issue was directed accordingly. *Ib.*

III. AT SUIT OF HEIR-AT-LAW.

2. Heir-at-law, not sole plaintiff, bringing bill to establish will, Court declared it well proved, and established it. *Penny* v. *Penny*, Dick. 520.

3. Pending a suit for the establishment of a will of real estate, the heir-at-law, who had concurred in the will, and in the establishment of the suit, having commenced actions of ejectment and detinue to recover the estate and the title deeds, the Court, on the application of the trustee, referred it to the Master, to inquire what proceedings ought to be taken to defend the actions, and restrain the actions in the meantime. *Edgecumbe* v *Carpenter*, 1 Beav. 171; 8 L. J., N. S., Ch., 17.

4. Receiver not appointed on behalf of heir-at-law as against a devisee; the heir must try the question at law. *Knight* v. *Duplessis*, 2 Ves. 360.

5. In a bill filed by an heir-at-law to impeach a will of real estate as having been obtained by undue influence or fraud, the Court of Chancery has a discretion to direct an issue *devisavit vel non*, or merely to remove obstacles out of the way of the heir asserting his legal title. The House of Lords, on appeal, will not interfere with the exercise of that discretion, unless it appears that injustice has been, or is likely to be its consequence. *Boyse* v. *Rossborough*, 6 H. L. Ca. 2; 3 Jur., N. S., 373; 26 L. J., Ch., 256.

6. Two suits were instituted, the one by a residuary legatee, and the other by the heir-at-law. In each suit the plaintiff insisted that the devisee was a trustee of the real estate:—Held, that the heir-at-law was entitled to have the will established against him, and that no administration of the estate could be made until the validity of the devise was ascertained; and on the heir-at-law asking for an issue, it was directed in both suits to ascertain whether the devise formed part of the will; but upon appeal the order for an issue was discharged, liberty being given to the heir-at-law to bring an ejectment. *Taylor* v. *Brown*, *Arnold* v. *Brown*, 31 L. J., Ch., 453; 10 W. R. 361.

7. On an application by an heir-at-law to have a will condemned as against the devisees, there being no personal estate to be administered, the Court has a discretion to refuse to try the case. *Lawless* v. *Lawless*, 3 Ir. R., Eq., 87.

When the heir-at-law had been party to acts done by the devisees, and parties claiming under the devisees alleged collusion between the heir-at-law and the devisees, the Court refused to try the case. *Ib.*

8. An heir-at-law admitted by his answer the execution of the will under which the plaintiff claimed, but alleged another will, revoking the former and giving the estate to himself, which he said had been destroyed by mistake, but did not go into any evidence of the second will or its destruction:—Held, that he was not entitled to an issue *devisavit vel non*

as to the validity of the first will, though the plaintiff, by reading the statement in the answer as to the second will, had made it evidence. *Whitaker* v. *Newman*, 2 Hare 299; 12 L. J., N. S., Ch., 350; 7 Jur. 231.

1. An heir is entitled to have the validity of a contested will tried upon an issue, or possibly, under the 25 & 26 Vict, c. 42, by a jury before the Court of Chancery. But when the heir has caused the difficulty, as when he has destroyed the will, or where it is traced into his possession and he does not produce it, he has no such right. *Hampden* v. *Hampden* (3 Bro. P. C. 551) followed. *Williams* v. *Williams*, 33 Beav. 306; 9 Jur., N. S, 1267; 3 N. R. 100; 12 W. R. 140; 9 L. T., N. S., 566.

2. It is at the option of the heir-at-law to have the validity of a will tried in an action of ejectment, or by an issue *devisavit vel non*. *Grove* v. *Young*, 15 Jur. 810.

3. In a creditors' suit, seeking the application of real estate in the payment of debts, both the heir-at-law and devisees of the debtor being parties, and the will not being admitted by the heir, the Court would neither dismiss the bill against the heir, nor direct an issue *devisavit vel non* at his request, the right of the creditors being paramount. *Spickernell* v. *Hotham*, 9 Hare 73; 20 L. J., N. S., Ch., 629.

4. On a bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the Court is bound, under 25 & 26 Vict, c. 42, to determine the question, without remitting the parties to an action. But, by analogy to the old practice, the Court will, in general, direct a trial by jury, and (with a view to the contingency of a motion for a new trial) will direct the trial to be before itself. *Egmont* v. *Darell*, 1 Hem. & M. 563.

5. A., seised of lands subject to mortgages, devised them to B, in whom the mortgages became vested:—Held, that the Court had jurisdiction in a suit instituted by the heir of A., praying the ordinary redemption relief and an issue *devisavit vel non*, to grant such an issue. *Egmont* v. *Darell*, 14 Ir. Ch. R. 564.

6. It is not a matter of course to grant an issue at law, *devisavit vel non*, to the heir-at-law of a testator. In all such cases the Court looks at the will, considers the evidence on both sides, and exercises its discretion in the matter; for an heir-at-law can in a court of equity, since the 25 & 26 Vict., c. 42, examine and cross-examine witnesses in open court, and, if he chooses, before a jury. *Corgill* v. *Rhodes*, 9 L. T., N. S., 595; 33 Beav. 310; 12 W. R. 190; 10 Jur., N. S., 86.

Where, therefore, the heir-at-law filed a bill for the administration of his testator's estate, and for an issue *devisavit vel non*, or an action, to try the validity of his will, and the Court was satisfied that the evidence already adduced in support of the will outweighed that which was brought or could be brought against it:—Held, that the bill must be dismissed, and with costs. *Ib.*

7. The fact that the validity of a will of great and personal estate executed since the passing of the 7 Will. 4 and 1 Vict., c. 26, has been established before the judicial committee as regards the personal estate, in a proceeding to which the heir-at-law was a party in another capacity, does not take away his right to an issue *devisavit vel non*. *Stacey* v. *Spratley*, 2 De G. & J. 94; 27 L. J., Ch., 725; 28 L. J., Ch., 563; 4 De G. & J. 199; 5 Jur., N. S., 503.

8. Where a bill was filed by an heir-at-law against devisees, alleging that the will was forged, and praying that it might be set aside, that the devisees might be directed to convey the estate to him, and that, if necessary, an issue *devisavit vel non* might be directed, the Court, on motion by the plaintiff for an issue, or that he might be at liberty to proceed by ejectment, and for a receiver, made the order for an issue, but directed the motion for a receiver to stand over till the hearing. *Bonsor* v. *Bradshaw*, 4 Jur, N. S., 1011.

An issue *devisavit vel non* was granted, as to a will alleged to have been forged, on an interlocutory application by an heir-at-law who was plaintiff in a suit against the devisee under the supposed will. S. C. *nom. Bonser* v. *Bradshaw*, 6 W. R 427.

Where a jury had found will to be a forgery, and it appearing that the will, which had been proved, was in the custody of the Probate Court, the Court, on motion for a decree, declared that the will must be set aside so far as it related to the real estate, and that the devisees were trustees for the heir-at-law. S. C. *nom. Bonser* v. *Bradshaw*, 5 Jur., N. S., 86.

9. Where a bill is filed by an heir-at-law against a devisee to try the validity of a will of real estate, the Court, under special circumstances, will direct an issue *devisavit vel non*, on motion, before the hearing. *Middleton* v. *Shelburne*, 4 Y. & Coll., Exch. Eq., 358.

Infant.] 10. Heir-at-law is in cases of wills entitled to issue *devisavit vel non;* but if counsel for infant heir feels clear, from evidence, that there is no ground to impeach the will, he is well justified in declining to ask an issue. *Levy* v. *Levy*, 3 Madd. 245.

11. Counsel acting for a minor heir-at-law are justified in exercising their discretion whether or not he ought to take an issue of *devisavit vel non*. *Knape* v. *M'Mahon*, 3 Dr. & War. 295.

Married Woman.] 12. If an heiress-at-law, who is a married woman, does not, at the hearing of the cause, ask an issue to try the validity of a will, the Court will not afterwards grant her a re-hearing, in order to enable her to obtain an issue. *White* v. *Vitty*, 1 L. J., Ch., 188.

Acquiescence and Delay.] 13. Bill by an heir-at-law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence, both in the Ecclesiastical Court, and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike* v. *Hoare*, 2 Eden 182; Ambl. 428.

14. Heir-at-law is usually entitled to an issue *devisavit vel non*, and is not liable to pay costs, notwithstanding issue is found against him and will established. *Tucker* v. *Sanger*, M'Clel. & Y. 425.

An heir-at-law contesting his ancestor's will, in a suit to establish it in equity, is not entitled to an issue *devisavit vel non* to try the validity of it in a court of law in all cases and at any distance of time, but he is not

precluded from the exercise of that usual right except by a case of such acquiescence as would bar his possessory right at law (viz., an acquiescence of twenty years), or would put the adverse parties in a much worse situation than they would have been had he disputed the will originally. *Id.* 424. S. C. 13 Price 119.

1. An heir who disputes the will may, by long acquiescence, lose his right to have its validity tried at law, upon an issue *devisavit vel non;* and where an heir had acted as devisee in trust under the will for a great number of years, he was refused an issue even to try the question of parcels. *Man* v. *Ricketts*, 7 Beav. 93; 13 L. J., N. S., Ch., 194; 8 Jur. 159.

2. An issue directed to try the validity of a will several years after testator's death; as a will cannot be established against the heir in equity by a decree without an issue or ejectment if he require it, and a person claiming under the will has a right to have its validity established. *Blake* v. *Foster*, 2 Ball & B. 387.

IV. ESTABLISHMENT AGAINST THE HEIR-AT-LAW.

1. Absent Heir.

3. Bill to establish will and execution of trusts by sale of estate, heir-at-law not to be found, Court cannot pronounce will proved, heir not being before Court, but real estate to be sold. *French* v. *Baron*, Dick. 138; 2 Atk. 120.

4. Will, though proved *per testes*, not declared well proved in absence of heir, but decreed to be established. *Stokes* v. *Taylor*, Dick. 349. And see *Binfield* v. *Lambert*, *id.* 337.

5. Will not declared well proved in absence of heir, but real estate to be sold in pursuance of trust. *Cator* v. *Butler*, Dick. 438.

6. In a suit to establish a will, and for the administration of real and personal assets, if the heir-at-law of the testator be abroad, it seems the Court does not, as in other cases, declare the will well proved, or establish the same, but merely directs the trusts of the will to be carried into execution. *Thompson* v. *Topham*, 1 Y. & J. 556.

7. If an adult heir-at-law refuse an issue on the hearing of a cause, the Court will establish the will against him, though he does not admit it. *Jackson* v. *Barry*, 2 Cox 225.

8. On a bill to establish a will against an heir though he made default, the Court ordered the proofs to be read, and said that otherwise the will could not be well proved. *Webb* v. *Lidcot*, 3 Atk. 25.

9. Where a bill is not framed to establish a will, and the heir does not dispute it. *Semble*, that the Court has no jurisdiction to declare against the heir the construction of a strictly legal devise as regards the *quantum* of the subject-matter; but if the heir elects to be dismissed, the Court will make such a declaration for the guidance of the trustees. *Stanley* v. *Stanley*, 2 John. & H. 491.

2. Death pending Suit.

10. If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved. *Robinson* v. *Cooper*, 4 Sim. 131. S. P. *Lock* v. *Foote*, *id.* 132.

3. Infant.

11. The Court will not generally decree a will to be established against a plaintiff infant heir. *Hills* v. *Hills*, 2 Y. & Coll. C. C. 327.

12. If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved. *Hollings* v. *Kirkby*, 15 Sim. 183.

13. Heir-at-law by his answer admitted the will, but died before the cause was brought to hearing, and left an infant heir; and by a bill of revivor, the infant was made a defendant and the suit revived; it was:—Held, that the will must be proved *per testes* against such infant heir. *Sleeman* v. *Sleeman*, Dick. 787.

4. Married Woman.

14. Admission of will by feme covert, heiress-at-law living separate from her husband, sufficient to establish it. *Codrington* v. *Shelburne* (*Earl*), Dick. 475.

15. The admission of a will, in the separate answer of a married woman, who is the heiress-at-law of the testator, is not sufficient evidence to enable the Court to declare the will established. *Brown* v. *Hayward*, 1 Hare 433; 6 Jur. 847.

16. At the hearing of a suit to establish a will an issue was directed at the instance of the heiress-at-law, who was a married woman. Before any trial she and her husband presented a petition, stating that at the urgent request of their children (who were devisees) they had agreed to withdraw all opposition to the will, upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms. Upon this petition an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private Act of Parliament was obtained, authorising leases to be made of the devised estates. The married woman was one of the petitioners for the Act, and was excepted from the saving clause, and the Act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was entitled in the cause, and in the matter of the private Act. It stated the subsequent transactions, but not the provisions of the Act:—Held, that the preceding transactions did not constitute grounds for taking the petition off the file, and that such grounds were not afforded by the introduction into the petition of statements as to the matters occur-

ring since the hearing, or by the petition being entitled in the matter of the Act, or by the omission to set out in it the Act itself, especially upon appeal, when these objections of form had not been insisted upon in the court below. *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch., 422. Varying 15 Jur. 711.

Held, also, upon the re-hearing, that the order discharging the direction for an issue was not binding upon the wife, but was upon the husband. *Ib.*

Semble, per Lord Cranworth, that if at the hearing a married heiress-at-law does not ask for an issue she is bound by the decree. *Ib.*

V. PROOF OF WILL.

1. Testamentary Capacity.

1. Where a bill is brought to prove a will of land, the sanity of the testator must be proved. *Secus*, in the case of a deed of trust to sell for payment of debts. *Harris* v. *Ingledew*, 3 P. W. 93.

2. Where the evidence proves the execution of a will, but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned at the hearing, and liberty will be given to exhibit an interrogatory to prove his sanity. *Abrams* v. *Winship*, 1 Russ. 526.

3. Letters addressed by deceased persons to a testator, and found after his death in his bookcase among his private papers, with their seals broken (no act being proved to have been done by him in regard to them), are inadmissible in evidence, upon a question as to his competency to make a will. *Wright* v. *Doe* d. *Tatham*, 5 Cl. & Fl. 670. And see S. C. 7 L. J., N. S., Exch. Eq., 340; 2 N. & P. 305; 7 Ad. & Ell. 313.

4. In considering the validity of a will, where the only question is, not as to unsoundness, but as to absence of mind of the testator, the Court should disregard the contents and dispositions of the will, and be governed solely by the evidence of capacity. *Swinfen* v. *Swinfen*, 5 Jur., N. S., 1276; 28 L. J., Ch., 849; 27 Beav. 148.

5. Testatrix was in a state of great bodily disease which tended to affect her brain, and subject to wanderings and delusions previously and subsequently to the execution of the instrument purporting to be her will. An issue *devisavit vel non* having been directed, a new trial was granted, the Court not being satisfied upon the evidence that the case in favour of the will was clearly established, or that there was that absence of continuous delusion at the time of executing the instrument that she was capable of forming and giving effect to a deliberate intention with respect to the disposition of her property. Where a person much depressed by illness, but with his mind calm and clear, gives instructions for a will of a complicated nature, such a will would not be set aside, although on executing it the next day the testator could not have given those complicated instructions, or even fully understood them; but at a time when the mind is incapable of forming an intention, or arriving at it as a new idea, the mere recollection of an intention vaguely expressed in conversation two months before is not sufficient proof of capacity. Distinction between temporary delusions arising from delirium and rooted delusions arising from insanity. Principles which guide the Court in granting a new trial of an issue. *Bennett* v. *Manchester* (*Duke*), 2 W. R. 644.

6. Upon the trial of the issue, the due execution, the mental competence, and the voluntariness of the act, or absence of undue influence only are inquired into; and evidence touching the legal disability of testator to devise upon another ground ought not to be admitted upon that issue. Upon the return of the verdict establishing the will, the Court will proceed to consider the objections by the heir, against giving it operation: and though the Court will not add to the issue *devisavit vel non* a further issue as to testator's disability to devise legally, the facts upon which that objection is rested being merely allegation in the answer, it might do so if proof was made of the facts, and a reasonable doubt entertained of their effect. *Fingal* (*Lord*) v. *Blake*, 1 Moll. 113.

An issue being directed at the hearing, the decree must be made up before the declaration is filed or delivered. On the issue *devisavit vel non*, the Lord Chancellor, although he thought himself bound to follow the authorities in the terms of his order upon the devisees to lodge papers by confining it to papers relating to the matter, expressed an opinion that that comprised almost all papers, private letters, and memoranda of the testator, inasmuch as inferences might be drawn touching his state of mind, or the influence exercised over it, from apparently trifling or immaterial entries, declaring his preference, if the point was open, of an unqualified order for all papers of the testator indiscriminately. S. C. 1 Moll. 158.

2. Attesting Witnesses or their Handwriting.

7. One of three witnesses to will not to be found; but on sufficient evidence will declared well executed. *Binfield* v. *Lambert*, Dick. 337.

But in *Bird* v. *Butler* will not declared well executed, but trusts to be performed and carried into execution. *Ib.* note. See *id.* 349.

8. On the trial of an issue *devisavit vel non*, directed by this court all the witnesses to the will should be examined. *Booth* v. *Blundell*, Coop. 136.

9. A feme covert has power given her by her husband to make a will; probate of such will *per testes* is sufficient proof without other proof. *Balch* v. *Wilson*, Pre. Ch. 81.

10. In a suit to establish a will in equity, all the witnesses to it should be examined, or proof given of their deaths. *Ogle* v. *Cook*, 1 Ves. 177.

11. Where a will is to be established in equity, it must be proved by each of the subscribing witnesses, if living, and if dead their death

must be substantiated, etc. *Grayson* v. *Atkinson*, 2 Ves. 454.

One of the witnesses being beyond sea, there should have been a commission to examine him, and the Court could only direct a trial at law. *Ib.*

1. Proof of one of the witnesses of an old will, of whom no account could be given, dispensed with. *M'Kenzie* v. *Fraser*, 9 Ves. 5.

2. A subscribing witness to a will disposing of real estate being in Jamaica, his evidence was dispensed with. *Carrington (Lord)* v. *Payne*, 5 Ves. 405.

3. Chancery requires judgment of Ecclesiastical Court that an instrument is testamentary, but is not satisfied with proof in that court, but requires the witnesses to be examined again, or if no witnesses proof of signature. *Rich* v. *Cockell*, 9 Ves. 376.

4. On the trial of an issue *devisavit vel non*, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right, and the rule is not merely technical. *Bootle* v. *Blundell*, 19 Ves. 494, 500; Coop. 136.

5. A motion for a new trial of two issues was made upon three grounds: first, the alleged improper summing up of the judge; secondly, because the weight of evidence was against the verdict; and thirdly, because only one of the attesting witnesses was examined at the trial. The motion was refused, on the ground that, upon the evidence alone, without regard to the summing up of the judge, the Court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in Court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them. *Semble*, the rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law. *Semble*, that rule does not apply where the bill is filed by the heir-at-law, to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tatham* v. *Wright*, 2 Russ. & M. 31.

Where a bill is filed to set aside a will, and, upon an issue directed by the Court, the verdict of the jury is in favour of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment. *Id.* 31.

6. In every issue *devisavit vel non*, the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined. *M'Gregor* v. *Topham*, 3 H. L. Ca. 132. Affirming 3 Hare 488, 496.

7. If, after the deaths of all witnesses who could have spoken to the will, which, while they lived, was, after an investigation by the parties interested and under advice, abandoned as invalid, a jury found a verdict in its favour, a court of equity ought not to act upon it. *Lorton* v. *Kingston (Earl)*, 5 Cl. & F. 269.

8. Practice in a suit to establish a will where one of the witnesses is abroad. *Hare* v. *Hare*, 5 Beav. 629; 12 L. J., N. S., Ch., 344; 7 Jur. 337.

9. It is enough to examine one of the witnesses to a will, except where it is proved against the heir-at-law; in such a case it is necessary to examine all the witnesses. *Brown* v. *Chambers*, Hayes 597.

10. Presumption in favour of a will apparently duly executed, where one attesting witness was dead, the second denied her signature, but was not to be believed, and the third was of defective memory. *Hitch* v. *Wells*, 10 Beav. 84.

11. Witness to devise of real estate becoming insane, proof of his handwriting was allowed. *Bernett* v. *Taylor*, 9 Ves. 381.

12. One witness dead and other out of jurisdiction; proof of handwriting allowed. *Banks* v. *Farquharson*, Dick. 167.

13. Will not allowed to be proved by proof of handwriting of witness without positive proof of his being dead. *Bishop* v. *Burton*, 2 Com. 614.

14. Proof of the handwriting of an attesting witness to a will received under particular circumstances, in order to found a decree establishing the will. *James* v. *Parnell*, T. & R. 417.

15. A will of lands not declared to be well proved, so as to be acted on in a judgment creditors' suit, by proving the deaths and handwritings of two of the subscribing witnesses, and the handwriting of the third witness, against whom an attachment had issued for refusing to be examined. To substitute proof of the handwriting of such witness, for his personal examination, a bill ought to be filed, not by a judgment creditor, who was entitled, whether the will of the deceased debtor was or was not duly executed, to satisfaction out of his real estate, but by a person whose relief depended on the establishment of the will, and the general administration of the assets. *Bomford* v. *Wilme*, Beat. 252.

16. When it is sought to have a will disposing of real property declared well proved, it must be proved by the three witnesses, or proof of their death and handwriting; but for other purposes, not requiring such a decree, but merely to read it as a legal instrument, one witness to prove it is sufficient. *Concannon* v. *Crwise*, 2 Moll. 332.

17. In establishing a will, the attestation of all witnesses must be proved, and if not personally either that they are abroad or dead, and the proof must be positive. In proving will for certain purposes only, such proof as will satisfy the Court is sufficient, and in such case leave will be given to exhibit an interrogatory for further proof of will for the former purpose. *Wood* v. *Stane*, 8 Price 613.

18. When a deceased had executed testamentary instruments having formal attestation clauses, a will was established upon the presumption *omnia esse rite acta*, although the attesting witnesses swore that they had no distinct recollection of the transaction. *Reeves* v. *Lindsay*, 3 Ir. R., Eq., 509.

3. Onus of Proof.

19. The onus of proving a will being on the party propounding it, is in general discharged by proof of capacity, and the fact of executions from which the knowledge of and assent to

its contents by the testator will be assumed. *Barry* v. *Butlin*, 2 Moo P. C. 480.

1. The principles expounded in the cases of *Paske* v. *Ollatt* (2 Ph. 323), and *Barry* v *Butlin* (2 Moo. P. C. 480) that the burthen of proof lies upon the party propounding a will, and that the Court is not bound to pronounce in favour of a will, unless it is judiciously satisfied that it is the last will of a free and capable testator, considered and affirmed. *Browning* v. *Budd*, 6 Moo. P. C. 430.

The execution of a will by a competent testator being duly proved, the presumption is, that the testator was cognisant of its contents, and that the instrument expresses his will, unless there be other circumstances to lead to a different conclusion, or to render it doubtful for the Court to act upon that presumption. *Ib.*

2. It is a settled rule of evidence in the Ecclesiastical Courts, that if a will traced to the possession of the deceased testator, and last seen there, is not forthcoming at his decease, it is presumed to have been destroyed by himself; and in order to let in secondary evidence of the contents of such will, the party propounding it must rebut the presumption by evidence of a contrary import. The onus of proof lies on the party propounding the will in such cases. *Welch* v. *Phillips*, 1 Moo. P. C. 299.

3. Proof of the factum of a will, and the testator's capacity, are not sufficient to encounter suspicious circumstances which may raise a presumption of falsity or fraud, requiring clear and satisfactory evidence to remove it. *Von Stentz* v. *Comyn*, 12 Ir. Eq. R. 622.

It is not necessary to prove the fraud or imposition. It may in such a case be presumed, the onus of proof lying on the party propounding the will. *Ib.*

4. Proof of Foreign Will.

4. Will established on secondary evidence, the original being in the colonies. *Gardner* v. *Myre*, 4 Beav. 143.n.

5. Will proved in the West Indies established on production of a tested copy and prerogative probate. *Bayley* v. *Bayley*, 4 Beav. 143. n.

6 A will proved abroad and retained there established on production of a copy certified under the hand and seal of the proper officer, etc., which had been admitted to probate in the Ecclesiastical Court here. *Pullan* v. *Rawlins*, 4 Beav. 142. See also the cases on the same point reported, *id.* 143. n. *et seq.*

7. A will was proved in the West Indies, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit made by one of the attesting witnesses when the will was proved, showing that the will had been executed and attested pursuant to the Statute of Frauds; and that copy was admitted to probate in this country, and was produced in the Court of Chancery with the affidavit annexed to it. The Vice-Chancellor, however, refused to establish the will without full proof of its due execution and attestation. *Rand* v. *Macmahon*, 12 Sim. 553; 6 Jur. 450.

The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it, provided the due execution and attestation of the original are proved by the attesting witnesses. *Ib.*

8. A will of a personal estate which lies in a foreign country may be proved here. *Jauncy* v. *Sealey*. 1 Vern. 397.

See also PRACTICE (EVIDENCE).

5. Other Cases

9 Answer of heir believing that a will was made will not prevent the necessity of its being proved. *Potter* v. *Potter*, 1 Ves. 274; Ambl. 98.

10. Plaintiffs by their bill sought, as devisees, to set aside a conveyance executed by the devisor. The defendant, by his answer, admitted that the will (which was made after the Wills Act came into operation) was duly proved in the Ecclesiastical Court. By a slip evidence was not adduced of the execution of the will:—Held, that the defect might be supplied; but that the defendant was entitled to require this to be done by an action of ejectment *Davies* v. *Davies*, 3 De G. & Sm. 698.

11. Under the old practice a disputed will could not be proved *viva voce* at the hearing; but liberty was given, under the new practice, to prove a will in court, and the heir was allowed to cross-examine the witnesses. *Chichester* v. *Chichester*, 24 Beav. 289.

VI. BILL TO SET WILL ASIDE.

12. Will is never set aside without issue *devisavit vel non*. *Pemberton* v. *Pemberton*, 11 Ves. 38.

13. The course upon a bill by heir impeaching a will is to direct him to bring an ejectment, removing obstacles from terms, etc. *Pemberton* v. *Pemberton*, 13 Ves. 297.

14. A court of equity will not entertain bill by heir-at-law for setting aside and declaring void an impeached will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which Court can see and reach, to proceeding at law by ejectment, be shown by bill to obstruct heir in that (the regular) course, and that although defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms. *Jones* v. *Jones*, 7 Price 663.

15. A bill in equity will lie to set aside a will made under the influence of superstitious terrors. *Middleton* v. *Sherburne*, 4 Y. & Coll. 358.

16. A fraud in procuring a will cannot be determined in equity, but must be decided by a trial at law. *Webb* v. *Claverden*, 2 Atk. 424.

17. After probate of will, Court of Equity may inquire into fairness of residuary bequest of personal estate. *Marriot* v. *Marriot*, 1 Stra. 666.

18. Wills cannot be set aside for fraud and imposition in equity, because if of personal estate it may be set aside in the Ecclesiastical Court, and if of real estate by issue at law *devisavit vel non*. *Kerrich* v. *Bransby*, 7 Bro. P. C. 437.

1. Where an heir-at-law filed a bill to set aside as unduly obtained a will, purporting to dispose of real estate, alleging the existence of an outstanding legal estate, or in the alternative to have the benefit of legacies on the ground of their being void under the Mortmain Act, but failed to prove the existence of any outstanding legal estate, the bill was dismissed (without prejudice to the right to file another) as to the former alternative for want of equity, and as to the latter alternative as being premature; Knight Bruce, L.J., who thought that the bill might have been retained, to afford an opportunity of bringing the question of the validity of the will, not agreeing in the dismissal. *Wright* v. *Wilkin*, 4 De G. & J. 141.

2. The Court of Chancery has not jurisdiction to entertain a bill by an heir-at-law against a devisee to set aside a will on the ground of imbecility on the part of the testator, and of the exercise upon him of undue influence, no obstacles existing to prevent the heir-at-law from bringing an ejectment. *Jones* v. *Gregory*, 4 Giff. 468; 10 Jur., N. S., 59; 33 L. J., Ch., 679.

A bill was filed by an heir-at-law to have a will of real estate cancelled on the ground that it had been obtained by the direct fraud of persons taking a beneficial interest under it, of whom the principal defendant was one:—Held, that notwithstanding the 21 & 22 Vict., c. 27, and 25 & 26 Vict., c. 42, the bill was demurrable, the heir-at-law's remedy being only at law. S. C. 2 De G. J. & S. 83.

Demurrer to a bill by an heir-at-law for a declaration, that such of the will or paper writing of the testator as related to certain houses, being part of the real estate of the testator, was void, and ought to be cancelled, or that an issue might be directed to try whether the freehold estates of the testator were devised or not, or that the plaintiff might be at liberty to proceed by ejectment for the recovery of such estates, and also for the appointment of a receiver, allowed with costs. S. C. 9 Jur., N. S., 1171; 9 L. T., N. S., 369 Affirmed 12 W. R. 193; 9 L. T., N. S., 556.

3. After probate of a will of personalty has been granted, the Chancery Division has no jurisdiction to entertain a suit to set aside testamentary dispositions on the ground of fraud in obtaining the execution of the will, the Probate Division having exclusive jurisdiction in the matter. *Melwish* v. *Milton*, 45 L. J., Ch., 836; 24 W. R. 892; 35 L. T., N. S., 82.

See also JURISDICTION, IV. 3.

VII. COSTS.

1. In General.

4. Heir-at-law disputing will, though on trial there were shown no grounds for disputing it, yet held he was entitled to his costs at law and equity. *Crew* v. *Jolliff*, Pre. Ch. 93.

5. Bill by devisee against heir-at-law to establish will and execute trusts, but prays no more; plaintiff to pay costs. *Boson* v. *Boson*, Dick. 300.

6. Will established against heir-at-law's bill, he pays costs at law and equity; but on bill by devisee no costs on either side. *Johnson* v. *Gardiner*, Dick. 313. S. P. *Gough* v. *Botevel*, Dick. 396.

7. If an heir-at-law is a creditor, and is brought into court as defendant, the circumstance of his having examined witnesses, and of having failed in the trials of issues at law to ascertain the validity of his ancestor's will, shall not deprive him of his costs in equity. *Burne* v. *Breen*, 1 Ball & B. 308.

8. As to costs given to heir-at-law where he brings bill to dispute will, or bill against him to establish it. *Blinkehorne* v. *Feast*, Dick. 153.

If heir-at-law infant brings bill and fails, he does not pay costs. *Ib.*

9. Heir-at-law raising a point against a will and failing, costs were refused to and against him; but an executor or trustee merely submitting a point for opinion of Court, though he fail, shall have costs. *Rashleigh* v. *Master*, 1 Ves. J. 205; 3 Bro. C. C. 99.

10. Bill of heir-at-law against devisee, where vexatious, dismissed with costs. *Seal* v. *Brownton*, 3 Bro. C. C. 214

11. Heir-at-law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity; no costs on either side as to the issue; ordered to pay costs of a groundless motion for a new trial. *White* v. *Wilson*, 13 Ves. 87.

12. The devisee for a mortgagee filed his bill against the heir and executor of the mortgagor for a foreclosure, and also made the heir of the mortgagee a party, in order to establish the will against him. This latter party cannot have his costs out of the estate. *Shipp* v. *Wyatt*, 1 Cox 353.

13. In a suit to establish a will, one of the witnesses could not depose, positively, to the due attestation of it; and an issue was directed at the heir's request. The verdict was against the heir; but the Court gave him his costs both at law and in equity. *Wright* v. *Wright*, 5 Sim. 449.

14. In a suit to establish a will, the bill stated that A., one of the defendants, was the testator's heir. A. admitted it, and disputed the validity of the will, upon which an issue was directed. The verdict was in favour of the will. The plaintiff then discovered that A.'s elder brother had died, leaving two daughters, who were still living, as A. well knew. The Court refused to give him his costs, either at law or in equity. *Roberts* v. *Scoones*, 7 Sim. 418.

15. Bill by devisee, against an heir to prove a will; the heir cross-examines the plaintiff's witness, and refuses to release his right, yet the heir shall have his costs given him on motion; otherwise, if he examines witnesses of his own. *Bidulph* v. *Bidulph*, 2 P. W. 185.

16. Heir-at-law has a right to his costs though he cross-examines plaintiff's witnesses; but if he examines witnesses on his own part he shall not have costs as to that. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

17. Where a devisee brings a bill merely in *perpetuam rei memoriam*, and the heir only

cross-examines the witnesses, he is entitled to his costs; but where he encounters the will he shall not have them. So if an heir has an issue directed to try a will, he shall have his costs though the will be established, for he has a right to know how he is disinherited; but if the heir sets up a disability against the testator and fails, he shall not have his costs; and the Court will give costs against an heir in a case of spoliation, or secreting a will. *Berney* v. *Eyre*, 3 Atk. 387.

1. Heir-at-law is usually entitled to issue *devisavit vel non*, and is not liable to pay costs, notwithstanding the issue is found against him and will established. *Tucker* v. *Sanger*, M'Clel. & Y. 425; 13 Price 609.

In suit against heir-at-law to establish will, if he examines witnesses in chief, he must pay his own costs. He is in no such case made to pay the costs of others. *Id.* 445.

In what cases an heir-at-law is refused his costs in an issue *devisavit vel non*. *Id.* 439, 445.

2. Heir-at-law, defending *in formâ pauperis*, in a suit to establish a will, was held, under the circumstances, to be entitled only to pauper costs. *Stafford* v. *Higginbotham*, 2 Keen 147; 6 L. J., N. S., Ch., 314.

3. Where the heir-at-law successfully resists probate of a will of real estate, the Court of Probate has no jurisdiction to charge the real estate with the costs of the litigation. *Newton* v. *Newton*, 13 Ir. Ch. R. 245.

4. An heir-at-law of a testator obtained possession of the will by force, and tore it up. The pieces were, however, collected and put together, and proved. The will contained no devise of the real estate, and a claim was filed against the heir to enforce a sale. On the heir's request the Court directed an issue *devisavit vel non*, when the will was established:—Held, that the heir had so misconducted himself, that although his misconduct had not increased the costs of the issue, he must pay the costs of it. *Middleton* v. *Middleton*, 5 De G. & Sm. 656.

5. An heir-at-law burnt a writing, supposed at the time to be a valid will, but which afterwards on trial was found to be invalid. A bill having been filed to establish this writing as a will against the heir, or, failing that, to establish as a will another writing of earlier date, which had also been destroyed, and which was, at the trial, found to be a valid will, the heir-at-law, at the hearing, admitted that he had burnt the writing, and admitted a copy thereof, but refused to admit a copy of the earlier writing:—Held (on the question of costs), that the heir was not entitled to costs up to the hearing, but that the costs of the issues, and the heir's costs, subsequently to the hearing, were payable out of the estate. *Marriott* v. *Marriott*, 12 W. R. 303.

6. One of the next of kin of a testator instituted a suit for the administration of his estate, and obtained a decree directing inquiries whether the testator died seised of any freehold estate, and, if necessary, who was his heir-at-law. The heir-at-law, on being served with notice of the decree, came in and proved his pedigree:—Held, that he was entitled to the general costs of so doing. *Swift* v. *Swift*, 1 De G. F. & J. 160.

7. Heir-at-law ordered to pay the costs of an issue to try the validity of a will in which he had failed. *Swinfen* v. *Swinfen*, 27 Beav. 148; 5 Jur., N. S., 1276; 28 L. J., Ch., 849.

8. When the heir-at-law filed a bill against the devisee and executor impeaching the validity of the will, and an issue was directed which resulted in the validity of the will being established:—Held, that the bill must be dismissed without costs as regarded the devisee, and that the heir-at-law must pay the costs of the executor. *Banks* v. *Goodfellow*, 11 L. R., Eq., 472; 40 L. J., Ch., 511.

9. When the heir-at-law intervened in a suit, which was instituted by the next of kin of the deceased to determine the validity of a will disposing of real and personal property, the Court refused, on the will being pronounced invalid, to condemn the heir-at-law in his own costs, though it was shown he had intervened without being cited to do so. *Rayson* v. *Parton*, 18 W. R. 232.

A testator made his will during his last illness, and thereby gave the bulk of his property, real and personal, to trustees, upon trusts for the benefit of the solicitor who prepared the will, and his children. Shortly after his death the trustees contracted to sell the real property. The heir brought an ejectment against them, alleging that the will had been improperly obtained. He failed on the trial. The trustees filed a bill to enforce specific performance of the contract against the purchaser. The cause was ordered to stand over for the trustees to file a bill against the heir to establish the will. They did so, and in his answer the heir alleged that the testator, at the date of the will, was incompetent to make it, and that the will had been fraudulently obtained. An ejectment was directed to try these facts; on such trial the verdict was in favour of the will:—Held, that the heir must pay the costs of such ejectment, and so much of the suit as was occasioned by the issues he had raised improperly; and no costs of the suit were given to him. *Grove* v. *Young*, 5 De G. & Sm. 38. 21 L. J., N. S., Ch., 95; 15 Jur. 1099. And see S. C. *nom.* *Grove* v. *Bastard*, 1 De G. M. & G. 69; 2 Ph. 619; 17 L. J., N. S., Ch., 851; 12 Jur. 385.

2. Where Testamentary Incapacity pleaded by the Heir-at-law.

10. If an heir brings a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs if he fails. *Webb* v. *Claverden*, 2 Atk. 424.

11. An heir-at-law filing a bill to set aside a will on the ground of insanity, and failing on the trial of the issue, is entitled to have the bill dismissed without costs. *Farnham* v. *Cosby*, Wall. Lyn. 288.

12. Though an heir, brought into equity to have the ancestor's will established against him, may demand an issue, yet, if he sets up insanity, he shall not have his costs of the issue. *Berney* v. *Eyre*, 3 Atk. 387; *White* v. *Wilson*, 13 Ves. 87, 91.

13. The only son of a testator, who succeeded, on the death of his father, to a considerable landed estate, was condemned in costs for contesting, in a litigious and vexatious manner, the validity of a will, by which his father, who

was a weak old man, bequeathed the whole of his personal estate, about 12,000*l.*, to persons in no way related to him, including his solicitor, medical man, and butler. *Barry* v. *Butlin*, 2 Moo. P. C. 480.

1. If an heir-at-law, alleging insanity in a devisor, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife* v. *Scaife*, 4 Russ. 309.

2. An heir-at-law questioning the sanity of his ancestor is entitled to an issue *devisavit vel non*, and if he fails will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed him. *Smith* v. *Dearmer*, 3 Y. & J. 278.

3. A will executed under very suspicious circumstances by a testator, whose testamentary capacity there was reasonable ground for disputing, was established, as regarded personal estate, by proceedings before the Ecclesiastical Court and the Judicial Committee, to which A. was a party as one of the next of kin. After this, at the hearing of a suit instituted by the devisee, A., who was also the heiress-at-law, asked for an issue *devisavit vel non*, which was granted. Further evidence was adduced on both sides, and the jury found in favour of the will:—Held, that under the circumstances the asking for an issue was not such vexatious and unreasonable conduct as to make A. liable to pay costs, but that as she had asked for it with full knowledge of the former proceedings, the result of which made it very improbable that she could succeed on the trial, she ought not to receive costs. *Stacey* v. *Spratley*, 4 De G. & J. 199; 5 Jur., N. S., 503; 27 L. J., Ch., 725; 28 L. J., Ch., 563.

The question of the costs of an issue *devisavit vel non* is in the discretion of the Court. *Ib.*

Heir-at-law, defendant in a suit to establish a will on the ground of insanity, does not as of course lose his costs of the trial of an issue *devisavit vel non*, although he has gone into evidence to prove insanity and failed, but the question of costs is in the discretion of the Court: *obiter*. Circumstances under which the heir in such a case will lose his right to costs, both at law and in equity. *Roberts* v. *Kerslake*, 1 Kay & J. 751.

Upon a bill by a devisee to establish a will where the heir-at-law disputes such will upon the ground of insanity, and fails upon trial of the issue directed at law, the costs of the issue are in the discretion of this Court, and the heir will not be deprived of them, though he has failed to prove insanity, if he has set up such defence upon fair and reasonable grounds. Such question may be tested by considering it as the case of an infant upon inquiry at chambers as to the propriety of allowing such a defence to be set up on his behalf. The heir who has raised such a defence upon his answer without fair or reasonable grounds will not be allowed his costs of the suit. S. C. 3 W. R. 616.

4. Where an heir-at-law disputes the will of a testator on the ground of a testator's insanity, and the Court directs an issue at law, the result of which is to establish the will:—Held, that the heir-at-law is not deprived of his costs on account of his having failed to prove his assertion of insanity, unless he made the assertion without any just or proper grounds. *Waters* v. *Waters*, 2 W. R. 642.

5. An heir-at-law of a testator brought an action of ejectment against the devisee, and failed. In a subsequent suit by the devisee against a purchaser to enforce specific performance, the Court, on the ground that the will was open to suspicion, directed the devisee to substantiate the will against the heir. The devisee thereupon filed his bill against the heir, asking a decree establishing the will. The heir by answer set up as a defence incompetency in the testator, and fraud and undue influence, and went into evidence in support of this defence. At the hearing, an action of ejectment by the plaintiff against the defendant was, on the defendant electing such action instead of an issue, directed to be tried at law. At the trial the devisee called witnesses, but the defendant called none; and a verdict was given for the plaintiff. On the cause coming on upon further directions, the Court established the will, without costs as regarded the general result of the suit and the action of ejectment, but with costs to be paid by the defendant of so much of the suit as was caused by the issues raised of fraud and improper practice by the devisee. *Grove* v. *Young*, 5 De G. & Sm. 3; 15 Jur. 1099; 21 L. J., Ch., 95.

VIII. OTHER MATTERS.

6. In a creditor's suit, since the 3 & 4 Will. 4, c. 104, for making the real estate subject to the debts, it is not necessary to establish the will against the heir. *Goodchild* v. *Terrett*, 5 Beav. 398.

7. When a bill prayed that the rights of all parties interested might be declared, and set forth the testator's will and codicil, and averred that the defendant was untruly described in the codicil as the testator's next of kin and heir-at-law, and that he had obtained probate on an untrue allegation that the executors were dead, there being no distinct averment of the character in which the plaintiff claimed:—A demurrer was allowed with leave to amend. *Parker* v. *Nickson*, 4 Giff. 306.

8. Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established, and the trusts performed at the hearing; the bill was dismissed against the heir, and the Court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold part of the testator's real estate to the plaintiff, who filed a bill for a specific performance:—Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates, and

they, the new trustees, had the same power of giving receipts as the original trustees had. *Drayson* v. *Pocock*, 4 Sim. 283.

1. An issue *devisavit vel non* had been directed to try the validity of a later will as to real property, and a time was limited wherein to try it. The plaintiff in the issue claiming under the later will withdrew the record during the pendency of an appeal to the Privy Council, which resulted in the establishment of that will. An order was made in 1842, directing the issue to be taken *pro confesso;* and as consequential thereto a subsequent order was made vesting the enjoyment of the property in the claimants under the earlier will.—Held, that there were no special circumstances to take the case out of the usual course. *Townley* v. *Deere*, *Mayhew* v. *Fitch*, 1 W. R. 483.

2. A bill filed, in 1757, by H., pretending to be a devisee, charging that B., the only son of testator, was illegitimate, and making M. a party (who, in case of B.'s illegitimacy, was heir-at-law to testator): issue of *devisavit vel non* directed; H. and B. proceed to the trial of that issue, M. taking no part in it; the issue found in the negative, and bill dismissed in 1770. On a bill filed, in 1776, by B. for the possession and title-deeds, he has an equity against H.'s ever insisting on the will, or the illegitimacy, and also against M.'s insisting on the illegitimacy, after having declined to contest it on the issue. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413.

3. A verdict being against the will, the heir is entitled, although a new trial is directed, to be left in possession, provided no danger of insolvency to answer for the interim rents and profits, in the event of the will being established. Devisee casually in the occupation of real estate after death of testator, or let into possession by the favour of the occupiers, acquires no right. The heir on the death of his ancestor in possession may enter and remove everybody, except the widow, who has a right to stay until her dower is assigned to her. *Lloyd* v. *Trimleston* (*Lord*), 2 Moll. 81.

4. Although it is the rule that a will is only established against the heir from the day of its production, the Court allowed, on the application of the plaintiff, that the decree should be dated on the day it was pronounced, though the will was produced on a later day. *Seale* v. *Buller*, 12 Jur. 108.

5. The Court of Chancery, in deciding whether the trial of an issue *devisavit vel non* has or has not been satisfactory, cannot act on precisely the same principles as a court of law, where a similar question might arise on the trial of an ejectment where the same will was in dispute; for in the latter case, if the jury come to an erroneous conclusion, it is open to the defeated party to bring his claim, in a fresh action, under the consideration of a new jury, and so from time to time, until the proceeding should have assumed a character of vexation. But if a verdict is satisfactory to the Court of Chancery, the effect is for ever to shut out further litigation and inquiry, and the Court will put the plaintiff in possession if successful; but if he fails, it will not enable him again to open the question. *Lovett* v. *Lovett*, 3 Kay & J. 1; 2 Jur., N. S., 1130; 5 W. R. 5

IV. Re-publication.

I. GENERAL PRINCIPLES.

6. Testator saying his will was in a box in his study amounted to a re-publication. *Alford* v *Earle*, 2 Vern 209; Nels. Ch. Rep. 162.

7. To make a re-publication there must be *animus republicandi;* and therefore when testator was looking for a paper, and person assisting him took up his will by mistake, testator said, "That is my will," not meaning to re-publish, it was:—Held, not a re-publication. *Abney* v. *Miller*, 2 Atk. 599.

II. BY CODICIL.

1. In General.

8. Bequest of personalty by will dated prior to 9 Geo. 2, c. 36, to be laid out in lands for a charity. It is afterwards confirmed by a codicil dated after the statute; the codicil operates as a new will, and the devise is void. *Att.-Gen.* v. *Hartwell*, Ambl. 451.

9. A will dated before the change of currency, by the 6 Geo. 4, c. 79, and a codicil dated subsequently, was held such a re-publication of the will that the legacies were deemed bequeathed in British currency, although the codicil merely appointed new executors. *Hamilton* v. *Carroll*, 1 Ir. Eq. R. 175.

10. S. R. directed his executors to place out 1,000*l.* at interest, and to apply the interest for the maintenance, etc., of his grandson, empowering them to pay part of the principal as an apprentice fee, and the residue to be transferred to him at twenty-one. Testator put his grandson apprentice, and paid 126*l.* with him; a year after testator made a codicil to his will, and gave him a legacy of 1,000*l.* The question whether paying the apprentice fee was an ademption *pro tanto*:—Held, that as the 1,000*l.* was not given for that purpose alone, the codicil was a confirmation of the legacy, and a re-publication of the will. *Roome* v. *Roome*, 3 Atk. 181.

11. An adeemed bequest is not set up again by a subsequent confirmation of the will. *Comper* v. *Mantell*, 22 Beav. 223; 2 Jur., N. S., 745; 4 W. R. 500.

12. The confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will and codicil. *Montague* v. *Montague*, 15 Beav. 565.

13. Testator, having estates in Jamaica and England, by his will directed his English estates to be sold, and 10,000*l.* to be paid out of the produce to the plaintiff. He afterwards sold his English estates, and, by an unattested codicil, recited that he had so done, and directed that, notwithstanding, the 10,000*l.* should be paid to the plaintiff, and charged all his estates with the payment

thereof. He then made another codicil, which was duly attested, and in which he referred to his will and ratified and confirmed all the provisions and bequests which he had thereby made in the plaintiff's favour:—Held, that the Jamaica estates were liable to the payment of the 10,000*l*. *Gordon* v. *Reay* (*Lord*), 5 Sim. 274.

1. The testator, by a will made before the Wills Act (7 Will 4 and 1 Vict., c. 26) came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of the estate; the son died after the Wills Act came into operation, leaving issue, and after his death the testator made a codicil to his will altering a bequest to another child, but in other respects confirming his will:—Held, that the gift to the son did not lapse, but that the same, so far as it was real estate, descended to the heir-at-law of the son, and so far as it was personal to his executrix, under a will made before the Wills Act came into operation; and that, under the 34th section of the Wills Act, the effect of the re-publication of the will by the codicil was the same as if the testator had at the date of the codicil made a will in the words of the will so re-published. *Winter* v. *Winter*, 5 Hare 306.

2. A. made a will in 1858, which he subsequently destroyed. After its destruction, he made a will containing a disposition of his property different from that contained in his former will, and dated January 1859. These wills were prepared by different solicitors. In February 1859 he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of the will of 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to the provisions of that will. The testator afterwards destroyed the codicil of February 1859 with the intention of setting up the will of 1859, and died without making any further or other testamentary disposition:—Held, that he died intestate. *Newton* v. *Newton*, 12 Ir. Ch. R. 118.

3. Appointment of guardians by an unattested will made good by a codicil with three witnesses on the same paper, referring to the will as annexed, making some alterations as to legacies, and confirming it in all other respects, as in the case of a devise of land. *De Bathe* v. *Fingal* (*Lord*), 16 Ves. 167.

4. All codicils are part of the will; therefore, a codicil merely for particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie* v. *Macdoual*, 4 Ves. 610.

5. A codicil does not for all purposes re-publish a will, so as to make it speak at the time of the testator's death. *Stilwell* v. *Mellersh*, 20 L. J., N. S., Ch., 356.

6. Though a codicil for certain purposes confirms a will, and brings it down to the date of the codicil, it does not necessarily make the will operate as if it had been originally made at the date of the codicil. *Hopwood* v. *Hopwood*, 7 H. L. Ca. 728; 5 Jur., N. S., 897.

7. A testatrix gave a share of her residuary real and personal estate to B., and one of the attesting witnesses to the will was B.'s wife. By a codicil, which was attested by other witnesses, the testatrix, after a direction to her executors to allow an extended time for payment of a debt to her from one of her legatees, confirmed her will in other respects:—Held, that the duly-attested codicil had the effect of republishing and incorporating the will so has to render the gift to B. valid, notwithstanding attestation of the will by his wife. *Anderson* v. *Anderson*, 13 L. R., Eq., 381; 41 L. J., Ch., 247; 20 W. R. 313.

8. A codicil, which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a re-publication of that subsequent codicil. *Burton* v. *Newbery*, 1 L. R., Ch. D., 234; 45 L. J., Ch., 202; 24 W. R. 388; 34 L. T., N. S., 15.

A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a re-publication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Ib.*

9. When a testator by a codicil confirms his will, the will, together with all previous codicils, is taken to be confirmed. *Green* v. *Tribe*, 9 L. R., Ch. D., 231; 47 L. J., Ch., 783; 27 W. R. 39; 38 L. T., N. S., 914.

Where a prior codicil has a proper force of its own, the mere fact that a testator in a subsequent codicil describes the will by reference to its original date is not sufficient to exclude the inference that the will referred to is the will as modified by the prior codicil. *Ib.*

2. Form of Codicil.

10. A codicil, attested by three witnesses, and ratifying a will, amounts to a re-publication of that will, and both ought to be considered together as one will. *Acherley* v. *Vernon*, 3 Bro. P. C. 91; 1 Com. 381; 9 Mod. 68; 1 P. W. 783; 2 Eq. Abr. 209.

11. Making a codicil, and annexing it to the will:—Held, no re-publication of the will. *Hutton* v. *Simpson*, 2 Vern. 722; Pre. Ch. 439; Gilb. Eq. Rep. 115, 120.

12. Codicil does not operate as a re-publication of a will unless it is annexed to it, or the contents show the intention. *Att.-Gen.* v. *Downing*, Ambl. 573.

13. Every codicil properly attested is a re-publication of the will. *Sed quære.* *Gibson* v. *Rogers*, Ambl. 97; 1 Ves. 485; 4 Ves. 288n.

14. Re-publication of will by codicil does not require any precise form, nor need it be annexed to, or endorsed on, the will. *Potter* v. *Potter*, 1 Ves. 442.

1. Since the Statute of Frauds, annexation of a codicil to a will not admissible evidence of re-publication, because parol. *Barnes* v. *Crowe*, 1 Ves. J 495; 3 Bro. C. C. 2. But see 3 Atk 798.

3. Effect on After-acquired Property.

2. A codicil which concerns only personal legacies will not amount to re-publication of the will, so as to pass lands purchased after the making of the will. *Strode* v. *Russel*, 2 Vern 625; 3 Ch. Rep. 169.

3. One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will; whether the renewal of the lease is a revocation, and whether the adding a codicil to his will is a re-publication, *quære*. *Alford* v. *Earle*, 2 Vern. 209; Nels. Ch. Rep. 162.

4. Renewal of a prebendal lease is an ademption of a bequest of it; but a codicil to the will, though to pass after-purchased property, is a re-publication of the will, and the lease shall pass by re-publication. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.

5. A. held a church lease, of which nine months remained unexpired; he made his will in sickness, and devised all his interest in such lands to B.; A., recovering, renewed his lease, and re-published his will:—Resolved, the renewed lease passed by the re-publication. *Anon*, 2 Freem. 116.

6. Where testator, after making his will, surrendered college lease, and took a new lease:—Held, a revocation, and that a re-publication of the will would not alter the case, the very thing itself being entirely annihilated. *Abney* v. *Miller*, 2 Atk. 599.

7. Lands, purchased after a general devise, pass under it, re-publication being implied from a codicil concerning personalty, referring to the will, directed to be taken as part of it, and attested by three witnesses. *Barnes* v. *Crowe*, 1 Ves. J. 486; 4 Bro. C. C. 2.

8. Estate contracted for after general devise will pass by re-publication, and must be paid out of personal estate. *Broome* v. *Monck*, 10 Ves. 605.

9. Codicil, with three witnesses, though relating only to a personal estate, expressing no intention as to re-publication of will, is a re-publication; and therefore, will containing a general devise, lands purchased in the interval pass. *Pigot* v. *Waller*, 7 Ves. 98.

10. Lands purchased after the date of a will held to pass by codicil made subsequently to their purchase, the codicil containing no expressions limiting the effect of the devise to lands comprised in the will. *Yarnold* v. *Wallis*, 4 Y. & Coll. 160; 10 L. J., N. S., Exch. Eq., 5.

11. A testator, by his will, made a general devise of his lands to A. and B., upon trust for sale; he then purchased other lands, and afterwards by a codicil he revoked the appointment, devise, and gift, in the said will contained, so far as regarded B., and appointed C. to be a trustee, to act in conjunction with A. in the place of B:—Held, that the after-acquired lands did not pass. *Ashley* v. *Waugh*, 9 L. J., N. S., Ch., 31; 4 Jur. 572.

12. A testator devised all his freehold and leasehold property whatsoever, of which he was or might be seised or possessed at the time of his decease, upon certain trusts. He subsequently made three codicils, altering the names of his trustees, and devising all his said property described as by the will. He had acquired one estate after the date of his will and first codicil, but before the second codicil:—Held, that this estate passed under the words of the will and codicils. *Bridge* v. *Yates*, 14 L. J., N. S., Ch., 426.

13. Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of re-publishing that will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. *Monypenny* v. *Bristow*, 2 Russ. & M. 117; 1 L. J., N. S., Ch., 88.

14. Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of 3 per cent. stock, he charged them on his real estate, in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil; as to the real estate the will is not revoked, but is re-published by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison* v. *Moore*, 2 Ves. J. 630.

15. A married lady, having, under her settlement, freehold property settled to her separate use, and power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew; and gave all the other freehold tenements which she had in any wise power to dispose of to her nephew for life, with remainder to his children. She afterwards purchased some leasehold tenements out of her separate property, and had them assigned to M., in trust, as she should, by deed, will, or codicil, appoint; and, in exercise of that power, she, by a codicil, bequeathed the leaseholds to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to N., in trust as she should by deed or will appoint. She then made another codicil, in exercise expressly of the power reserved to her by the settlement and of all other powers, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee:—Held, that the second codicil did not re-publish

the will, and, therefore, that the reversion in fee in the leaseholds did not pass by the residuary devise in the will, but the testatrix died intestate as to it. *Jowett* v. *Board*, 16 Sim. 352; 18 L. J., N. S., Ch., 53; 12 Jur. 933.

1. M. D., by a codicil to her will, duly attested to pass real estate, revoked an annuity given by her will; and, after reciting that one of the trustees named in her will was dead, she revoked the estates and powers given by her will to such deceased trustee, and devised the same to a new trustee, thereby placing the new trustee in the place and stead of the deceased trustee, as trustee for the purposes of her said will. She then gave a legacy to the new trustee, in consideration of his taking on himself the trusts thereby in him reposed, and she revoked a legacy given to the deceased trustee:—Held, on a re-hearing, that this codicil did not operate as a re-publication of the testatrix's will, so as to pass an estate purchased between the date of the will and the date of the codicil. *Hughes* v. *Turner*, 3 Myl. & K. 666; 4 L. J., N. S., Ch., 141.

2. A codicil, re-publishing a will, makes the will speak as from the date of the codicil, for the purpose of passing after-purchased lands; but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. *Powys* v. *Mansfield*, 3 Myl. & C. 359; 7 L. J., N. S., Ch., 9; 1 Jur 861. And see S. C. 6 Sim. 528; 5 L. J., N. S., Ch., 153.

3. A testator devised to his wife, who died in his lifetime, certain estates, subject to certain bequests; and also all other his freehold, copyhold, and leasehold estates whatsoever not before otherwise disposed of. By a codicil, after reciting the devise to his wife, he, in case she should die before him, gave and devised all his said estates to trustees upon certain trusts:—Held, that the codicil was not a re-publication of the will, so as to pass estates purchased between the date of the will and the codicil. *Smith* v. *Dearmer*, 3 Y. & J. 280.

4. Testator, by will, charges all his estates with payment of debts, and makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee; the codicil held a re-publication of the will, so as to subject those copyholds to the payment of debts. *Rowley* v. *Eyton*, 2 Meriv. 128.

5. Testator by his will devises all his freehold and copyhold manors, etc., and real estate whatever upon certain trusts; and gives to the same trustees a sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates; and, by a codicil, specifying some of the estates which he had so contracted to purchase, devises them to the same trustees, upon the trusts of his will; and directs that the purchase moneys shall be taken as part of the 35,000*l.*, confirming his will in all other respects. The codicil amounts to a republication of the will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Holme* v. *Hargate*, 1 Meriv. 285.

6. A codicil appointing a new executor:—Held, a re-publication of the will, and to give to the latter the effect of passing after-acquired lands. *Re Earl*, 4 Kay & J. 673.

The cases on this subject reconciled. *Ib.*

7. A testator, by will executed in 1824, made a general devise of all the residue of his real estate not otherwise disposed of, whether in possession, reversion, remainder, or expectancy, to T. and the heirs of his body. By a codicil, made in 1834, he revoked that devise, and devised all his real estate, "not otherwise disposed of" by his will or codicil, to trustees in trust for T. for life, and at T's decease, if he should have lawful issue, to T.'s heirs, and, in default, to the testator's own right heirs. Subsequently to the date of this codicil, and in 1835, the testator acquired by purchase other real estate. In 1836 he executed another codicil, by which he altered the devises contained in the will and codicil, but made no mention of the estate acquired in 1835. This codicil contained these passages:—"And whereas by my will or codicil, or one of them, I did give and bequeath all my real estate, not specifically otherwise disposed of, to trustees, the remainder in trust for my son, T, now I hereby revoke and annul such part of my bequest as relates to my own right heirs, and hereby leave and bequeath the same real estate, in the event of my son's death without issue, to all the children of J. T. and of my nephew, J. H., and of my daughter, H., who shall be then living, share and share alike, as tenants in common":—Held, that the last codicil did not amount to a re-publication of the will and former codicil, so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seised of at the date of the will, and that the testator died intestate as to the after-acquired real estate. *Hughes* v. *Hosking*, 11 Moo. P. C. 1; 4 W. R 755.

8. A testator, before 1837, devised two freehold messuages to his wife, who predeceased him, for her life, and after her death to E. in fee, to whom he also gave certain legacies Afterwards, by settlement on the marriage of E., he conveyed the same two messuages to the use of E.'s husband for life, remainder to E. for life, remainder to certain uses which did not take effect, with ultimate remainder to his own right heirs. Afterwards, by codicil (also before the Wills Act), reciting the provision made for E. by the settlement, he revoked the legacies, and in other respects, except as therein mentioned, confirmed his will. By the death of E. and her husband (after the testator), leaving no issue, the ultimate remainder to the testator's right heirs took effect in possession:—Held, that the specific devise in the will was revived by the codicil, and passed the re-acquired fee. *Harvey* v. *Lloyd*, 38 L. J., Ch., 634; 17 W. R. 990.

See also XXXIX. II. *post.*

V. Revocation.

I. GENERAL PRINCIPLES.

1. The same circumstances ought to be proved to have happened on part of testator, to show his intent of revoking will, in equity as in law, unless they were prevented by party interested. *Piggott* v. *Penrice*, 1 Com. 250.

2. An executor may be admitted to prove the revocation of any legacy though he has proved the will. *Jervis* v. *Duke*, 1 Vern. 19

3. The rule is the same as to revocation of a devise of lands, and a revocation of a sum of money charged on lands; they must be revoked in the same manner. *Brudenell* v. *Boughton*, 2 Atk. 272.

There are virtual as well as express revocations, as by extinguishing or destroying the thing devised, which are out of the statute and remain as they did before. *Ib.*

A feoffment to the use of a testator and his heirs is a revocation If a man charge his lands with a debt, and afterwards pay that debt, it is extinct, though there is no formal revocation. Lands charged with a portion by a will, and the same given by testator in his lifetime, is a virtual revocation, though no actual one. *Ib.*

In all cases where a man gives a personal legacy charged on a real estate, and the will is revoked, the legacies are gone, for when the land is meant only as a collateral security, if the thing secured be taken away, the security itself cannot subsist. *Ib.*

II. BY CANCELLATION.

4. Where there are duplicates of a will, and the testator cancels one of them only, and the other part is left entire, yet it is an effectual cancelling of the will. *Onions* v. *Tyrer*, 2 Vern. 742; Pre. Ch. 149; Gilb. Eq. Rep. 130; 1 P. W. 343.

5. Presumption that the cancellation of one duplicate of a will cancels the other, though both are in the testator's possession, and the cancelled instrument has been altered. In the two latter cases the presumption weaker. *Pemberton* v. *Pemberton*, 13 Ves. 310.

6. If a will is revoked by cancellation for the purpose of giving effect to different disposition, such revocation is ineffectual if the substituted dispositions are not effective. The rule of the English law, following that of the civil law, is this—*Tunc prius testamentum rumpitur cum posterius perfectum est. Ibbott* v. *Bell*, 34 Beav. 395.

7. If a testator tears off that which he has made a substantial, though by law it is not an essential, portion of his will, such tearing is a sufficient tearing within the 7 Will. 4 and 1 Vict., c. 26, s. 20. *Williams* v. *Tyley*, 5 Jur, N. S., 35; 1 Johns. 530.

Therefore, where a will concluded with a testimonium as follows: "In witness whereof I have to this my last will and testament, contained in five sheets of paper, to the first four sheets thereof set my hand, and to the last sheet thereof my hand and seal," and was executed in the manner described in the testimonium, and the testator subsequently tore off the signatures to the first four sheets with the intention to revoke:—Held, that such tearing revoked the will. *Ib.*

8 In 1879, after the decease of W., who had made his will in 1863, there was found among his papers a portion of it torn off, and containing (besides the date as of 1863 and the signature duly attested) only the words, "and appointed the said William Domville Handcock to be executor of this my will;" and at the foot, in the handwriting of the deceased, "as some circumstances have changed":—Held, that W. must be taken to have revoked his will, and, accordingly, that the mutilated document could not be admitted to probate. *White, In goods of*, 3 L. R., Ir., 413.

9. The rule of the law is, that if a will is traced to the possession of the deceased, and last seen there, and is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The *onus* of proof in such cases lies upon the party propounding the will. *Welch* v. *Phillips*, 1 Moo. P. C 299.

10 The Court received parol evidence of the contents of a lost will, and admitted it to probate, upon being satisfied by the evidence, which the Court deemed clear, cogent, certain, and fairly free from suspicion, as to the factum of the alleged will; that its contents were substantially such as were alleged; and that the heir-at-law had, after the death of the testator, got possession of the will, and suppressed or destroyed it. *Mahood* v. *Mahood*, 8 Ir. R., Eq., 359.

The will was made in 1862, and the testator died in 1867; and taking into consideration the delay in applying for probate, the Court named a reduced sum for the costs to be paid by the defendants. *Ib.*

III. BY DEED (WILLS ACT).

11. A will executed since the 7 Will. 4 and 1 Vict. c., 26, can only be revoked by ademption of the subject-matter of the will, or by a subsequent instrument, executed according to the requirements of the statute, or otherwise as therein prescribed. *Ford* v. *De Pontes; De Pontes* v. *Kendall*, 10 W. R. 69; 5 L. T., N. S., 515; 8 Jur., N. S., 323; 31 L. J., Ch., 185; 30 Beav. 572.

Where, therefore, a married woman, having a power of appointment by will, duly executed that power by her last will, and subsequently executed two deeds, which also purported to exercise the power, but dealt differently with the property, and were not duly executed as testamentary instruments:—Held, first, that the will was a valid exercise of the power. *Ib.*

Held, secondly, that the will was not revoked by the deeds or either of them. *Ib.*

What amounts to a Testamentary Instrument in General.] See II. *ante.*

IV. BY MARRIAGE OR MARRIAGE AND BIRTH OF ISSUE.

1. Marriage with a legatee no revocation. *Ewbank* v *Hallilwell*, 2 Bro. C. C. 220.

2. Surrender by feme sole to use of will becomes void or suspended by marriage. *George* v. *Jew*, Ambl. 628.

3. Where power is given to a woman to dispose of estate by will, and she marries; *semble*, it is a suspension of the power. *sed quære. Rich* v. *Beaumont*, 6 Bro. P. C. 152.

4. Marriage and birth of child held revocation of will made prior to both. *Christopher* v. *Christopher*, Dick. 445.

Marriage of feme sole before Statute of Frauds, held revocation of will (4th Co. no cases since the statute). *Id.* 449.

5. Since the decision in *Marston* v. *Roe* (8 Adol. & Ell. 14) the revocation of a will by marriage and birth of child is to be put on the footing not of presumed intention, but of a tacid condition attached to the will, and taking effect when the circumstance happens; a principle which would exclude that sort of evidence that the ecclesiastical courts in particular have been used to admit, as to the intention of the testator. But in this case, in which it was sought to exclude the revocation by the fact of a settlement of part of the property having been made upon the marriage, giving a provision to the wife and children, the Court thought that even upon the footing of presumed intention, the presumption of revocation was not rebutted. *Israell* v. *Rodon*, 2 Moo. P. C. 51.

6. Marriage alone not a revocation of a will, as with the birth of a child it is. Exception where the will provides for children. *Wilkinson* v. *Adam*, 1 Ves. & B. 465.

7. Widower having son and devising away real estate; subsequent second marriage and birth of child:—Held, no revocation of devise. *Sheath* v. *York*, 1 Ves. & B. 390.

But where no heir a revocation may be implied. *Id.* 397.

Marriage and birth of child is an implied revocation of a will of personal property. *Ib.*

8. Second marriage and birth of children, the wife and children provided for by settlement, and there being children by the former marriage, does not revoke the will made prior. *Exp. Ilchester (Earl)*, 7 Ves. 348.

9. Whether a will was revoked by marriage and the birth of a child under particular circumstances; *quære. Baxter* v. *Dyer*, 5 Ves. 663.

10. A subsequent marriage and the birth of a child revokes a will; *quære*, as to the propriety of admitting evidence against the presumption. *Gibbons* v. *Gaunt*, 4 Ves. 848.

11. Marriage and the birth of a child:—Held, a revocation of a will of land. *Spraage* v. *Stone*, Ambl. 721.

12. One devises real estates to certain uses; afterwards by deed he conveys it to the same uses until he marries, and then to new uses; after the deed and before marriage, he, by codicil, attested by three witnesses and directed to be annexed to his will, imposes a forfeiture upon persons disturbing his wife, and after the codicil marries: the settlement revokes the will, but the codicil sets it up again, and the new uses springing on the marriage do not revoke the codicil. The subsequent marriage is no revocation of will. *Jackson* v. *Hurlock*, Ambl. 489; Eden 263.

Marriage and birth of a child revoke a will of personal estate. *Id.* 494.

Marriage simply is not a revocation. *Id.* 495.

13. Subsequent marriage and having children, constructed a revocation of a will. *Cook* v. *Oakley*, 1 P. W. 304.

14. A woman, being about to marry, enters into an agreement with the future husband (without seal or stamp), by which her property is settled upon the survivor for life, with power to the wife to dispose by will made after the marriage: she then immediately makes a will, by which she bequeaths her property to the intended husband absolutely, and afterwards (on the same day) she marries. The articles resting in agreement give the husband an equitable estate for life, but the will is revoked (not being protected by the power) by the subsequent marriage. *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534.

15. Mutual wills by two unmarried sisters under twenty-one; the marriage of one does not revoke the will of the other. *Hinckley* v. *Simmons*, 4 Ves. 160.

16. A domiciled Englishman, married, in 1822, an Englishwoman, in England. In 1839, in consequence of differences, they separated, and a deed was executed, under which a power of appointment was given to the wife, which she executed by a will and codicil in 1854. A decree for a divorce, on the ground of adultery, was subsequently obtained by the wife in Scotland, and she shortly afterwards was married to a Frenchman in Scotland, and went to reside with him in France, where she died, having previously made a will in the words following: "I revoke all foregoing wills made by me up to this date, the 23rd day of June 1856, Paris":—Held, that there was no revocation of the will and codicil of 1854. *Dolphin* v. *Robins*, 5 Jur., N. S., 1271; 29 L. J., P., 11; 7 W. R. 674.

17. By a will a power was given to B. under certain circumstances to dispose, by will, of certain property, and in default of her appointment, the property was to devolve on the person or persons who, at her decease, should be her next-of-kin. B., in pursuance of such power, executed a will in favour of a person whom she afterwards married, but who died in her lifetime:—Held, that the personal estate appointed by the will of B. would not, in default of such appointment, have passed to the person entitled as her next-of-kin under the Statute of Distributions; and, consequently, that her will was not revoked by her subsequent marriage. *Mc Vicar, In goods of*, 1 L. R., P., 671; 38 L. J., P., 84; 17 W. R. 832; 20 L. T., N. S., 1013.

V. MUTUAL WILL.

18. Mutual will can only be revoked by both

jointly or by one separately, by giving notice of such revocation, and not at all after death of one party. *Dufour* v. *Percira*, Dick. 419.

1. Mutual wills by two unmarried sisters under twenty-one; the marriage of one does not revoke the will of the other. *Hinchley* v. *Simmons*, 4 Ves. 160.

2. A. and his wife, who were British born subjects, but who had been naturalised subjects of Denmark, and for several years previous and up to 1805 been domiciled in the Danish island of St. Croix, in that year came to England, where they continued domiciled till their respective deaths. In 1809 they made a joint will, whereby they bequeathed a sum of money invested in mortgage in St. Croix, and to which they were jointly entitled, in certain shares among their children and grandchildren, and appointed as executors a son and son-in-law, both Danish subjects, and domiciled in St. Croix. In 1814 A. made a separate will, expressly revoking all former wills, and bequeathing the money due on mortgage to his wife. She survived him, and, in 1822, also made a will disposing of the property:—Held, that the legatees under this will, and not those under the joint will, were entitled to the money. *Price* v. *Dewhurst*, 4 Myl. & C. 76; 8 L. J., N. S., Ch., 57; 2 Jur. 1006. Affirming 8 Sim. 279; 6 L. J., N. S., Ch., 226.

3. Testator by codicil in 1796, reciting that he had devised his real estate by his last will, dated 25th November 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors: the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound, if not in law, in honour, and did not mean to revoke the will of 1756, and revive that of 1752; and praying that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid: upon an issue directed the will of 1752 was established; evidence of mistake being rejected; on further directions to plaintiffs, relied on agreement, and offered evidence in support of it: the bill was dismissed, the Lord Chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that, upon the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Walpole* (*Lady*) v. *Orford* (*Lord*), 3 Ves. 402.

4. By the Roman-Dutch law, the mutual will of a husband and wife, notwithstanding its form, is to be read as the separate will of each. *Denyssen* v. *Mostert*, 4 L. R., P. C., 236; 41 L. J., P. C., 41; 20 W. R. 1017; 8 Moo. P. C., N. S., 502. And see *Dias* v. *De Livera*, 5 L. R., App. Cas., 123; 49 L. J., P. C., 26; 42 L. T. 267.

The dispositions of each spouse are to be treated as applicable to his or her half of the joint property. *Ib.*

Each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death; but when a spouse who dies first had bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he or she accepts such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. *Ib.*

VI. BY WORDS "THIS IS MY LAST WILL."

5. Words "This is my last will" held to be confirmatory of the testator's intention to revoke a previous will. *Plenty* v. *West*, 1 W. R. 3; 22 L. J., Ch., 185; 17 Jur. 9; 16 Beav. 173.

6. The expression, "This is my last will and testament," does not operate as a revocation of a former will, without words to that effect, as regards real estate. *Freeman* v. *Freeman*, 5 De G. M. & G. 704; 23 L. J., Ch., 838; 2 Eq. Rep. 970.

7. A testator executed a will in 1825, which was found uncancelled at his death, which event took place in 1853. In 1852 he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words, "This is the last will and testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The Prerogative Court held that the instrument, executed in 1852, was not to be considered as a codicil, but as a substantive will, which operated as a revocation of the prior will of 1825, and that, under the 7 Will. 4 and 1 Vict., c. 26, s. 22, the deceased must be considered to have died intestate, as the former will was not revived by the destruction of the latter. Upon appeal:—Held, by the Judicial Committee, reversing such sentence, and decreeing probate to the will of 1825, first, that the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former will. *Cutto* v. *Gilbert*, 9 Moo. P. C. 131.

Held, secondly, that to establish a revocation of a former will relating to personalty, by a subsequent testamentary paper not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions for such instrument, such evidence must be strong and conclusive as to its contents. *Ib.*

Held, thirdly, that the mere fact of such an instrument, commencing with the words, "This is my last will and testament," does not render it a revocatory instrument, as those words do not necessarily import that such instrument contained a different disposition of the property, and that to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument were different from the former. *Ib.*

Held, fourthly, that a subsequent will (the contents of which were unknown) having remained in the custody of the testator, and not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, and did not revoke a prior will uncancelled. *Ib.*

Observations on the report of the case of *Moore* v. *Moore* (1 Phillimore 375, 406). *Ib.*

Subsequently to the order in council made upon the appeal reversing the sentence of the Prerogative Court, a will, dated March 1851, was discovered, and application was made to the Judicial Committee for probate. Such application refused, as the original suit being concluded, the jurisdiction of the Judicial Committee was exhausted, but the Committee intimated that if a petition was presented to Her Majesty to refer the matter specially to them, they would entertain the application. Upon such petition being presented and referred, the Committee revoked the probate of the will of 1825, and granted probate of the will of 1851. *Ib.*

VII. BY ALTERATION OF ESTATE OR INTEREST DEVISED.

See also POWER, VIII. XII.

1. By Bankruptcy.

1. Devise of real estate not revoked by bankruptcy. Distinction in that respect between bankruptcy and disseisin. *Charman* v. *Charman*, 14 Ves. 580.

2. By Conveyance or Settlement. In General.

2. Lease and release of estate, subsequent to will, is a revocation thereof. *Pollen* v. *Huband*, 1 Eq. Abr. 412.

3. Where a feoffment was made to the same uses with those of a preceding will, it was held a revocation, and the rule of revocation of wills is the same in equity as at law. *Abney* v. *Miller*, 2 Atk. 593; 2 Ves. 418.

4. Revocation of a devise by an exchange, though the land, after the death of the devisor, was restored to his heir, under an arrangement in consequence of a defect discovered in the title of the other party to the exchange. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

Disseisin and remitter by entry, no revocation of will. *Id.* 282.

5. Though conveyance for particular purpose will necessarily operate as a revocation of will no further than the particular purpose; yet, if the conveyance goes beyond what the particular purpose requires, it will be a revocation. *Vawser* v. *Jeffery*, 2 Swan. 272.

So a conveyance of whole estate though for a partial purpose. *Id.* 274.

6. Where a man has an equitable interest in fee in an estate, and devises it, and makes a subsequent conveyance of the legal estate "to the same uses," it is no revocation. *Parsons* v. *Freeman*, 3 Atk. 749

7. A feoffment to the use of a testator and his heirs is a revocation. *Brudenell* v. *Boughton*, 2 Atk. 272.

8. A. devises lands to trustees to pay his debts, and then to pay his wife 200*l.* per annum for her life. Testator lived several years, and his debts increased from 2,500*l.* to 10,000*l.*, for 8,000*l.* whereof his said trustees were bound. A., the testator, by deed and fine, conveys his lands to his said trustees to sell, to pay debts, and the surplus to him and his heirs, and his wife joins in the fine and conveyance. Whether this is a revocation of the wife's 200*l.* per annum, or whether she shall have the 200*l.* a year out of the surplus of the money after the debts paid, *quære* Decreed for the wife. *Vernon* v. *Jones*, 2 Vern. 241; Pre. Ch. 32; 2 Freem. 117.

9. Devise of fee-farm rents revoked in equity, as well as at law, by subsequent conveyance to trustee, operating as an alteration of estate beyond mere purpose of securing a mortgage; but on account of laches of plaintiffs, the heirs-at-law, Court would not give relief farther than by retaining bill, with liberty to bring action, etc., to give an opportunity of taking the opinion of a court of law upon the question whether there is a revocation at law, or whether court of law will presume re-publication from the long possession, leaving open the question whether the plaintiffs are entitled to any account, and how far back. *Harmood* v. *Oglander*, 6 Ves. 199.

10. A conveyance of an estate to trustees upon trust to sell for payment of debts is not a revocation of a prior will, because it declares that the surplus moneys arising from the sale shall be personal estate of the testator; but if it have the further purpose to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife will be entitled to the annuity after the death of the husband, if the sale do not take place in his lifetime. *Hodges* v. *Green*, 3 Russ. 28; 6 L. J., Ch., 32.

11. One devises to his wife six messuages, and the rest of his real estate equally to his two daughters in fee, and afterwards, on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband; the devise of the six houses shall be good, and subsist out of the remaining moiety. *Rider* v. *Wager*, 2 P. W. 332.

A. has two daughters, B. and C., and devises one moiety of his real and personal estate to B., the other moiety of his real and personal estate to C.; and afterwards, A., in consideration of marriage, covenants to settle a moiety of his real estate upon the husband that marries B.: the husband shall have one moiety by the settlement, and the wife the moiety of the other moiety by the will. *Ib.*

12. A. devises lands, in trust to permit his daughter S. to receive the rents until her marriage, or death; and in case she should marry with the consent of trustees, then to convey the premises to her and her heirs; but

if she died before marriage, or married without such consent, then to convey to other persons. S. afterwards marries, with the consent of her father, who settles part of the lands on her and her husband, and dies This settlement is no revocation of the will as to the devise of the other lands to S. *Clarke* v. *Berkeley*, 2 Vern. 720.

1. Articles to settle estates of husband subject to certain uses and trusts on first and other sons in tail male; remainder to husband in fee. The husband, confirming the articles, devised the same estates, in case he should die without issue male, or on failure of issue male in life of wife; and by a subsequent settlement in performance of articles conveyed to trustees (after certain uses and trusts) to the use of his first and other sons in tail male; remainder to himself in fee. The whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estate. *Chandos* (*Duke*) v. *Brydges*, 7 Bro. P. C. 505. Affirming 2 Ves. J. 417, 430.

2. Settlement of personal estate upon a second marriage, upon trust to pay such persons, etc., as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole, that it was to operate unless a subsequent instrument should be executed· a prior will, therefore, revoked. *Leigh* v. *Norbury*, 13 Ves. 340.

3. The ultimate limitation of the use in a settlement to raise a sum of money within twelve months, and if the money was not raised then the deed to be void, was to A. in fee. After the expiration of the twelve months A. made his will, devising all his estates. And, after the execution of the will, A. and B. revoked the uses of the settlement, and limited the use to A. in fee. The deed revoking the uses of the settlement operates as a revocation of the will. The will was made before, and the deed of revocation after, the 1 Vict., c. 26:—Held, that the deed revoking the uses of the settlement operates as a revocation of the will. The reversion in fee, of which the devisor was seised at the time of his decease, did not pass by his will. *Langford* (*Lord*) v. *Little*, 2 J. & L. 613.

4. By marriage articles the husband covenanted to convey to the use of himself for life, remainder in trust to secure an annuity to his wife for life, in bar of dower; remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail, remainder to his own right heirs. Afterwards he devised, upon condition that he should have no issue; and, after the will, he, in pursuance of the articles, conveyed to trustees and their heirs to the uses and trusts of the articles; the will is not revoked. *Williams* v. *Owens*, 2 Ves. J. 594.

The rules as to revocation applied to legal estates are, in equity, applied to equitable estates. *Ib.*

Where a devised estate is differently modified there is a revocation; otherwise where the testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. *Id.* 599.

5. A testator devised all his estates to trustees and their heirs to the use of L. for life, without impeachment of waste, with remainder to his sons successively in tail male. By a codicil he revoked in part the disposition made by his will, and devised part of his estates to trustees, their executors, administrators, and assigns, during the life of a married woman, without impeachment of waste, upon trust to permit her to receive the rents, issues, and profits for her life for her separate use, with restraint upon anticipation, and divers remainders over. Subsequently the testator conveyed the hereditaments by deed to the use of a trustee during the life of the same woman upon trust to permit her to receive the rents and profits for life for her separate use without anticipation, with remainders over. Neither the trustee nor the lady herself was made by that instrument dispunishable for waste·—Held, that the life estates given by the codicil were revoked by the settlement, and that the life tenants were impeachable of waste under the latter instrument *Lowndes* v. *Norton*, 33 L. J., Ch., 583; 11 L. T., N. S., 290; 4 N. R. 452.

6. A., in 1830, devised her real estate in trust for the benefit of her brothers and their daughters. In 1837, and subsequently, A. mortgaged the same estate; and in 1844 she conveyed the equity of redemption to the mortgagee, in trust, after payment of the interest upon the mortgages, to pay the surplus rents to W. for life, with remainder to A., or as she should appoint. A. died in September 1846, and her executrix subsequently paid off the mortgage debts out of A.'s personal estate:—Held, that the conveyance of 1844 was a revocation of the devise. *Briggs* v. *Watt*, 2 Jur., N. S., 1041; 4 W. R. 786.

7. Devise by the testator, who died in 1821, of all his estates whatsoever, or which he had contracted to purchase, held not to be revoked *pro tanto* by a subsequent reconveyance to uses to bar dower of real estates mortgaged by the testator prior to the date of his will, nor by a subsequent conveyance to such uses of real estates for the purchase of which the testator had contracted before the date of the will. *Plowden* v. *Hyde*, 16 Jur. 823; 21 L. J., Ch, 796; 2 De G. M. & G. 684.

In April 1811, H. C. P., being the owner of the equity of redemption in fee of certain hereditaments, paid off the mortgage, and took a reconveyance of the premises to the usual uses to bar dower. On the 1st May 1811, H. C. P. again mortgaged the same hereditaments in fee, the trustee in the former reconveyance joining in the mortgage to the mortgagee, and the proviso for redemption being, that on payment of the mortgage money the mortgagee should reconvey the premises to H. C. P., his heirs, appointees, or assigns, or to such person or persons, or to such uses and in such manner, as he or they should direct, free from incumbrances by the mortgagee. On the 15th May 1811, H. C. P., by his will, devised all his real estate whatsoever, or which he had contracted to purchase, or to which he or any person in trust for him was seised or entitled, to trustees, upon trust for sale, and division among certain persons, of whom one was his heir. In December 1813, H. C. P. paid off the mortgage of the 1st May 1811, and took a reconveyance of the

premises comprised therein to the usual uses to bar dower. H. C. P. died in 1821:—Held, that the hereditaments above mentioned passed by the devise contained in his will. Held, also, that certain hereditaments which the testator had contracted to purchase prior to the date of his will, and of which he afterwards took a conveyance to the usual uses to bar dower, also passed by the devise in his will. *Ib.*

1. A., seised in tail of the lands of K., and other lands, suffered a recovery of those lands in 1834, and by will, dated in 1832, devised them. In 1836, A. borrowed money on a mortgage of K., and a collateral judgment. On that occasion a disentailing deed of all the lands was executed and enrolled, by which A. conveyed all the lands to the use of himself and his heirs:—Held, that the deed was a total revocation of the will. *Power* v. *Power*, 9 Ir. Ch. R. 178.

3. By Inoperative or Imperfect Conveyances.

2. A deed obtained by fraud is not a revocation of a prior will. *Hawes* v. *Wyatt*, 3 Bro. C. C. 156. Reversing 2 Cox 263.

3. Grant by a husband to his wife in his lifetime will not revoke his will, giving everything from her. *Beard* v. *Beard*, 3 Atk. 72.

4. Revocation of a will by a conveyance never completed. *Cave* v. *Holford*, 3 Ves. 653.

5. A feoffment in fee, executed after a will, is a revocation, even if there was no livery. *Sparrow* v. *Hardcastle*, 3 Atk. 803.

6. Imperfect conveyance may, as evidence of intent, operate as a revocation. *Vawser* v. *Jeffery*, 3 Russ. 479; 7 L. J., Ch., 38. See this case, 16 Ves. 519.

7. A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson* v. *Walker*, 5 Sim. 1.

8. A testatrix devised real estates, and, by a subsequent deed, attested by two witnesses, she conveyed them on other trusts:—Held, that the deed (assuming it to be void as *turpis contractus*) was not such a "writing declaring an intention to revoke" the will, as is required by 7 Will. 4 and 1 Vict., c. 26, s. 20, and therefore that the will operated on such estate and interest as she possessed in the property at her death. *Ford* v. *De Pontès*, *De Pontès* v. *Kendall*, 30 Beav. 572; 10 W. R. 69; 5 L. T., N. S., 515; 8 Jur., N. S., 323; 31 L. J., Ch., 185.

4. By Covenant to Surrender Copyholds.

9. A testator, having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life; and after his death to the intent that the wife might receive annually a rent-charge, which was secured by powers of distress and entry, and by a term of years; and subject to the rent-charge and the term, to the use of the settlors, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement; the marriage was solemnised, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement. The covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as the particular purposes of the settlement required. *Vawser* v. *Jeffery*, 3 Russ. 479; 7 L. J., Ch., 38.

A covenant to surrender copyhold previously devised is a revocation of the will in equity, if the surrender would have been a revocation at law. S. C. 2 Swan. 268.

Though a conveyance for particular purpose will necessarily operate as a revocation no further than the particular purpose; yet, if the conveyance goes beyond what the particular purpose requires, it will be a revocation. *Id.* 272, 273.

So a conveyance of the whole estate, though for a partial purpose. *Id.* 274.

5. Devise by Purchaser after Contract to Purchase. Subsequent Conveyance.

10. Devise of the equitable fee, under a contract to purchase, revoked by the conveyance to a trustee and his heirs to such uses as the devisor should appoint by deed, with two witnesses, or will, with remainder to him for life; to the trustee for the life of the devisor, to bar dower, and to the devisor in fee. *Rawlins* v. *Burgis*, 2 Ves. & B. 382.

Distinction between intention to revoke and alteration of estate, as the ground of revocation of a will. *Id.* 386.

Revocation by feoffment to such uses as the devisor shall appoint, with remainder to himself in fee. *Ib.*

11. In cases of contract for land before, but executed after making a will of land, the subsequent execution is not a revocation; the legal interest coming *in esse* afterwards, would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. *Perry* v. *Phelips*, 1 Ves. J. 255.

12. Purchasing the reversion in fee, after a devise of the life estate, was a revocation *pro tanto*, and descends upon the heir. *Galton* v. *Hancock*, 2 Atk. 425; Ridgw. 301.

13. Where a written agreement for the purchase of an estate has been executed, the purchaser has the estate in equity, and it will pass by his will, which will not be revoked by the subsequent conveyance. *Rose* v. *Cunyngham*, 10 Ves. 554.

14. If A., being entitled to estate under a contract to purchase, devise it to B., and afterwards takes a conveyance of the estate to himself and C., though only in trust for himself, as to C. and for the purpose of barring dower, it is a revocation of the devise; but *secus*, if he had taken a conveyance simply to himself alone. *Ward* v. *Moore*, 4 Madd. 368.

A., the *cestui que trust*, devised to B., and then directed her trustees to make new conveyances to other trustees to her and her heirs, and died without new publication:—Held a revocation. *Id.* 276.

15. By a written contract for the purchase of an estate, it was stipulated that the conveyance should be made to the purchaser, his heirs, appointees, or assigns. The purchaser immediately afterwards made a devise of the estate,

and subsequently took a conveyance of it to himself and his heirs, to the usual uses to bar dower:—Held, that the devisee could not make such a title as a purchaser would be bound to accept, inasmuch as all the existing authorities show that the devise was revoked by the subsequent conveyance. *Bullin* v. *Fletcher*, 2 Myl. & C. 432; 6 L. J., N. S., Ch., 140. Affirming 1 Keen 369.

1. A party, having contracted to purchase the fee-simple of an estate from a person who was at that time only tenant for life of the same, devised such estate in fee; afterwards, the vendor, having acquired the fee, conveyed the same to a trustee for the testator:—Held, that nothing passed by the will. *Duckle* v. *Baines*, 8 Sim. 525; 6 L. J., N. S., Ch., 327; 1 Jur. 670.

2. A devise by a will made before 1838 (1 Vict., c. 26, ss. 24, 34), of all the real estates of which the testator then was or at the time of his death should be seised, to his heir-at-law, if the testator acquired real estates subsequent to the date of his will, puts the heir to his election. *Schroder* v. *Schroder*, 1 Kay 578; 18 Jur. 621; 23 L. J., Ch., 916; 2 Eq. Rep. 895. Affirmed 18 Jur. 987.

So, also, would such a devise by a testator, who died before 1834 (3 & 4 Will. 4, c. 106, s. 3), from the mere intention thereby shown to give the heir property under the will, notwithstanding that he would take nothing in fact under the will, but by his better title as heir. *Ib.*

In such a case the testator, subsequently to the making of his will, contracted to buy a certain freehold estate, and then made a codicil directing the executors and trustees of his will to complete the purchase, and hold the estate upon the trusts of the will, which were partly in favour of the heir, and then the testator took a conveyance of the same estate to uses to bar dower in his own favour:—Held, that the devise by the codicil was revoked, and that the heir must elect. *Ib.*

6. Devise by Vendor followed by Contract to Sell.

3. Suppose a will is made according to form, and afterwards the lands sold and conveyed to others, though the form of revocation the statute prescribes is not pursued, yet it is a virtual revocation. *Brundenell* v. *Boughton*, 2 Atk 272.

4. One devises land, and afterwards articles for a valuable consideration to sell or settle the premises; this in equity is revocation of the will. *Cotter* v. *Layer*, 2 P. W. 624; Mos. 277.

5. Articles to sell a devised estate are a revocation in equity, but not at law. *Williams* v. *Owens*, 2 Ves. J. 601.

6. Lands devised, and afterwards contracted to be sold, become personal estate. *Mayer* v. *Gowland*, Dick. 563.

7. E., by will, orders his estate to be sold, and the produce to be divided. He afterwards sells the estate; this is a revocation of the will. *Arnold* v. *Arnold*, Bro. C. C. 401; Dick. 645.

8. Revocation by contract to sell a devised estate. *Rawlins* v. *Burgis*, 2 Ves. & B. 382. S. P. *Knollys* v. *Alcock*, 7 Ves. 558.

9. A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants:—Held, that, though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. *Tebbott* v. *Voules*, 6 Sim. 40.

10. Revocation of a devise by a contract for sale, though rescinded after the devisor's death. *Bennett* v *Tankerville* (*Earl*), 19 Ves. 171.

A binding and valid contract for the sale of lands devised is, in equity, as much a revocation as a conveyance would be at law *Id.* 178.

11 A., being seised in fee of an estate subject to a term for raising 5,000*l.* for B., made a devise, in general terms, sufficient to comprise the estate. Afterwards, part of it was sold, for the remainder of the term, for 7,600*l.*, under a decree for raising the 5,000*l.*; and A. sold the reversion to the purchaser for a further sum; and an assignment and conveyance were made to complete the sales. The 5,000*l.* was paid to B. out of the 7,600*l.*; but the surplus remained in court until long after A.'s death:—Held, that as an excessive sale had been made under the decree, the surplus retained the character of real estate, and that, notwithstanding the assignment and conveyance, the devise remained unrevoked with respect to it. *Jermy* v. *Preston*, 13 Sim. 356.

12. A testatrix devised a real estate, and afterwards sold it. The purchase was not completed until after her death:—Held, that the purchase money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase money and the 1 Vict., c. 26, s. 23. *Farrar* v. *Winterton* (*Earl*), 5 Beav. 1; 6 Jur. 204.

13. The subject of an intended provision on marriage being disposed of by will, made after 1 Vict, c. 26 came into operation, and before the offer to settle, forms no objection to its being carried into execution; a contract to sell being a revocation *pro tanto*, as much now as before, though its effect on the estate of the devisee may be doubtful. *Greene* v. *Cramer*, 2 Con. & L 54. S. C. *nom. Saunders* v. *Cramer*, 3 Dr. & War. 87; 5 Ir. Eq. R. 12.

Quære, whether the devisee of an estate which the testator subsequently contracts to sell is entitled to the purchase money. *Ib.*

14. A testator, by will, gave and bequeathed to trustees his "leasehold estates and securities for money." Prior to the date of the will he was owner of leasehold property, but at the date of the will he had contracted to sell it, the purchasers, until completion, becoming his tenants at an agreed rent:—Held, that the leaseholds contracted to be sold did not pass by the will to the trustees. *Goold* v. *Teague*, 5 Jur., N. S., 116.

15. A testator contracted to sell lands which he had devised with stipulations as to easements by reference to a plan, which was lost, and had never been stamped. The purchasers

paid the deposit and entered into possession on the footing of the contract; but before any conveyance was executed, or any further payment made, they became bankrupts. Their assignees elected not to complete the contract, and the property was sold under the bankruptcy, on the petition of the testator, as having a lien for the unpaid purchase money. He bought it back at the sale for less than the amount due to him, and proved for the difference. On his dying without altering or re-publishing his will.—Held, that the will was revoked by the contract, and set up again by its abandonment. *Andrew* v. *Andrew*, 8 De G. M. & G. 336; 4 W. R. 161; 25 L. J., Ch., 799; 2 Jur., N. S., 719. Affirming 3 W. R. 337; 3 Sm. & G. 130; 1 Jur., N. S., 885.

Per Turner, L.J.—There had been such a part performance of the agreement for sale as to make it incumbent upon the Court to ascertain the particulars of the property sold, notwithstanding the loss of the plan, and, *semble*, even without this, parol evidence would have been admissible to fill up the incomplete description in the agreement. The devise, therefore, there being satisfactory extrinsic evidence of what was comprised in the agreement, could not be held unrevoked merely on the ground that it could not be ascertained what was agreed to be sold; and, *semble*, if only part of the land comprised in the agreement could have been identified, the revoking effect of the contract as to that part would not have been affected by the impossibility of identifying the remainder. S. C. 2 Jur., N. S., 719.

Per Turner, L.J.—There having been no abandonment of the contract, but a completion of it, there was revocation of the devise; for a contract continuing in force, but uncompleted at a testator's death, would effect a revocation, and a contract completed in his life could not have less effect. *Ib.*

Per Turner, L.J.—There was no such merger of the equitable interest in the legal estate which all along remained in the testator, as to prevent a revocation. *Ib.*

Per Knight Bruce, L.J.—*Semble*, the devise ought not to have been held revoked. *Ib.*

1. Testatrix devised all her freehold messuages, etc., in S. to trustees, in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate to the trustees, in trust for B. After the date of her will, she sold the houses, and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereof with her, to secure part of the purchase money:—Held, that the security and the money due on it did not pass, under 7 Will. 4 and 1 Vict., c. 27, s. 23, to the trustees in trust for A., but to the trustees in trust for B. *Moor* v. *Raisbeck*, 12 Sim. 123.

2. Devise of land and subsequent contract for sale to a railway company, with compensation for severance and death of testator before completion and conveyance:—Held, first, that the purchase money belonged to the testator's personal representatives, and not to the devisee of the land. Secondly, that the compensation money for severance went in the same way. Thirdly, that the company must pay all the costs except those occasioned by litigation between adverse claimants. *Re Manchester & Southport Railway Co.*, 19 Beav. 365.

3. When a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed—Held, that the rents received between his death and the conveyance of the property passed to the devisee. *Watts* v. *Watts*, 43 L. J., Ch., 77; 29 L. T., N. S., 671.

4. Although the owner in fee of lands which had been sold to a corporation had made a will sufficient to pass personal estate.—Held, that the words of the will being vague and unequivocal, there was not sufficient evidence of an intention to elect that the produce of such lands should pass as personal estate. *Exp. Cramer, Re Stewart's Estate*, 1 W. R. 17; 22 L. J., Ch., 369; 16 Jur. 1063; 1 Sm. & G. 32.

5. Under his marriage settlement, A. had power to appoint the reversion in fee of the settled estates, and the trustees had a power of sale, with his consent. He, by his will, appointed it to trustees, to sell and stand possessed of the produce in trust for a class; and he gave all his real and personal estate, "not thereinbefore specifically disposed of, to his widow." Subsequently the trustees, with A.'s consent, sold the estate; but at his death the conveyance had not been executed by one of the trustees, and the purchase money had not been received:—Held (notwithstanding the 7 Will. 4 and 1 Vict., c. 26, ss. 19, 23), that the gift to the class was inoperative, and that the purchase money passed, under the residuary gift, to the widow. *Gale* v. *Gale*, 21 Beav. 349.

Options to Purchase.] See CONVERSION, I. 11. 2.

7. By Fine or Recovery.

6. Testator makes a feoffment after will to the use of himself in fee, or suffers a recovery; it is a revocation. *Cave* v. *Holford*, 3 Ves. 664.

7. A. devises use of furniture, etc., at B. to his wife for life, on consideration of her residing there. He afterwards suffers a recovery of estate, and, dying without re-publishing will, the estate descends to heir-at-law:—Held, that wife was entitled to use of furniture, etc., discharged of condition of residence. *Darley* v. *Langworthy*, 3 Bro. P. C. 359; Ambl. 653.

A recovery suffered of lands devised by will previously made is a revocation of such will as to the lands. *Ib.*

8. Tenant in tail male, remainder to himself in fee, devises his lands to J., and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. *Marwood* v. *Turner*, 3 P. W. 163.

9. *Semble*, the doctrine of election ought not to be applied to the case of a revocation by a recovery merely. *Tennant* v. *Tennant*, Ll. & G. *temp.* Plunk. 516.

See also FINES AND RECOVERIES, IV. 13.

8. By Lease.

10. A demise of lease for years to the same person to whom the fee is devised, and which

commences in the life of the devisor, is no revocation of the fee. *Villiers* v. *Villiers*, 2 Atk. 72.

1. A man devises land in fee, and then makes a lease for years of the same land. The lease, if not made to the devisee, is a revocation at law *pro tanto* only. *Perkins* v. *Walker*, 1 Vern. 97.

2. A. devises lands to his son B for ninety-nine years, determinable upon three lives, and charges the same with an annuity of 40*l* to his daughter M. The testator afterwards devised these lands to S. for ninety-nine years, determinable on three other lives, reserving a yearly rent of 50*l*.:—Held, that the demise was a revocation of the devise, but not of the annuity, there being rent enough reserved to satisfy it. *Parker* v. *Lamb*, 3 Bro. P. C. 12; 2 Vern. 495.

3. Lease for years or life is a revocation of a will *pro tanto* only. *Cave* v. *Holford*, 3 Ves. 654.

9. By Mortgage.

4. Lands devised to one in fee, and afterwards mortgaged to the same person, is a revocation *in toto*; but if mortgaged to a stranger, a revocation *quoad* the mortgage only. *Harkness* v. *Bayley*, Pre. Ch 514.

5. A. devises lands and then makes a mortgage thereof in fee. This is a revocation in law, but otherwise in equity. *Hall* v. *Dench*, 1 Vern. 329.

6. One by deed and fine mortgages; this is a revocation of a will only *pro tanto*. *Rider* v. *Wager*, 2 P. W. 334.

7. A. devised lands to his executor for payment of his scheduled debts, remainder over; afterwards he mortgaged part of the lands, and paid most of the scheduled debts; this mortgage was held no revocation, but the decree was afterwards reversed, without prejudice to the heir-at-law. *Barnardiston* v. *Carter*, 8 Vin. Abr. 147. pl. 25.

8. A. devised lands, and afterwards mortgaged them for years, and then levied a fine *sur conusance de droit come ceo*, etc., and not a fine *sur concessit*: this will be a revocation; but if there had been a fine *sur concessit*, it would have revoked only *pro tanto*. *Anon.*, 8 Vin. Abr. 136. pl. 10.

9. Power of assignment of a mortgage, and the loan increased after the will, is a revocation only *pro tanto* of the will. *Jackson* v. *Parker*, Ambl. 687.

10. A mortgage in fee after a devise of the estate is, in law, a total revocation; in equity, *pro tanto* only. *Casborne* v. *Scarfe*, 1 Atk. 606. S. P. *Williams* v. *Owens*, 2 Ves. 601.

11. If lands devised are conveyed for a principal purpose as a mortgage or payment of debts, it is a revocation *pro tanto* only. *Brydges* v. *Chandos* (*Duke*), 2 Ves. J. 417.

12. By a mortgage in fee of a devised estate, or a conveyance in fee for payment of debts, the will is revoked *pro tanto* only. *Temple* (*Earl*) v. *Chandos* (*Duke*) 3 Ves. 685.

13. A devise not revoked by a mortgage in fee to the devisee. *Baxter* v. *Dyer*, 5 Ves. 656.

14. Mortgage to devisee, after making of will, is no revocation. *Peach* v. *Phillips*, Dick. 538.

15. No instance of a revocation of a will at law being held not a revocation in equity, where the partial, particular purpose was not for charges or incumbrances, or to pay debts. *Harmood* v. *Oglander*, 8 Ves. 126. Reversing as to this point, 6 Ves. 221.

Devise of fee-farm rents revoked in equity as well as at law, by subsequent conveyance to trustees, operating as an alteration of estate beyond mere purpose of securing a mortgage: but, on account of laches of plaintiffs, the heirs-at-law, Court would not give relief, further than by retaining bill, with liberty to bring action, etc, to give an opportunity of taking opinion of court of law, whether there is a revocation at law, or whether court of law will presume a re-publication from long possession; leaving it open whether plaintiffs are entitled to any account, and for how far back. S C. 6 Ves. 199.

Wherever the whole legal estate is conveyed, whether for a partial or general purpose, with the single exception of the case of partition, a court of law has nothing to do with the purpose, but is to see whether the interest remains the same in the devisor as at the date of the will; if not, whether the purpose is partial or general, by way of charge or not, it is a revocation at law. *Id.* 218.

16. Mortgage in fee, after a devise, is a revocation *pro tanto* only. *Tucker* v. *Thurston*, 17 Ves. 134

17. After will, testator mortgaged estate in fee, with proviso, in case of re-payment, to re-convey to testator, or to such person, or for such estate, and to such lawful trusts, etc, as testator by deed, etc., should appoint, etc. Such conveyance operates as a revocation of the will *pro tanto* only. *Brain* v. *Brain*, 6 Madd. 221.

18. A remainderman in fee joined with his mother, the tenant for life, in a mortgage in fee, by which it was provided that if the remainderman, his heirs, executors, etc., should repay the sum borrowed on a certain day, the mortgagee, his heirs or assigns, should re-convey the estates to the person or persons for the time being entitled to the reversion and inheritance of the estates, and his, her, or their heirs or assigns, or unto such other person or persons, and in such other manner and form, as he, she, or they should direct or appoint:—Held, that a devise of the estates previously made by the remainderman was not revoked by the mortgage. *Youde* v. *Jones*, 14 Sim. 162.

19. A testator mortgaged an estate in fee; he afterwards paid off the mortgage money, and the estate was re-conveyed to him to uses to bar dower. Shortly afterwards the testator again mortgaged this estate, and the proviso upon redemption was, that the estate should be re-conveyed to the testator, his heirs, appointees, or assigns, or to such other person or persons to such uses and in such manner as he or they should direct. Subsequently the testator made his will, and devised all his messuages, lands, tenements, and hereditaments, and all other his real estate whatsoever, or which he had contracted to purchase, or to which he or any person in trust for him was seised or entitled for any estate of freehold and inheritance, or, if freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of by his will, to a trustee to certain uses and upon certain trusts

therein mentioned. Afterwards, the testator paid off the mortgage, and took a re-conveyance of the estate to the common uses to bar dower. Previously to the date of the will the testator had contracted to purchase another estate, which was subsequently conveyed to him to uses to bar dower:—Held, that the will was revoked as to the mortgaged estate, and the estate contracted to be purchased before the date of the will, by the re-conveyance of the mortgaged estate and the conveyance of the purchased estate to uses to bar dower. *Plowden* v. *Hyde*, 2 Sim., N. S., 171; 24 L. J., N. S., Ch., 329; 16 Jur. 512; but this was reversed as to the purchased estates per Lords Justices, S. C. 16 Jur. 823.

10. Devise by Mortgagee. Subsequent Purchase of Equity of Redemption.

1. W., in 1824, became mortgagee in fee of Blackacre. The form of the conveyance was to him on trust to sell, and out of the proceeds to retain the debt, and pay the surplus, if any, to the mortgagor. In February 1826 he made his will, whereby he devised all his real estate (except mortgage and trust estate) and all his personal estate to trustees, upon trust for Y. and H. He also devised to the same trustees all his mortgage estates upon trust, on payment of the moneys due, to convey the same to the person who should be entitled to the equity of redemption, and directed the moneys to form part of his personal estate. In March 1826 the mortgagor of Blackacre became bankrupt, and in June 1826 W. contracted with the assignees in bankruptcy for the purchase of the equity of redemption. The purchase money was paid by W., but no conveyance from the assignees was ever executed. In October 1826 W. died, leaving Y. and C. his co-heirs. C. by deed renounced to the trustees of the will all claim under the contract of June 1826. The trustees under the will entered into receipt of the rents of Blackacre, and administered the same as part of the testator's estate until 1869. Y. then claimed the right to a conveyance of one moiety of Blackacre as co-heir of W.:—Held, that the purchase of the equity of redemption by the testator revoked the devise by his will, not only of the beneficial interest, but of the legal estate in the mortgaged property; that no dry legal estate in Blackacre was remaining in the trustees of the will at the testator's death; that the mortgage estate had by the contract ceased to be a mortgage, and had become a new absolute interest; and that Blackacre was undisposed of by the will. *Yardley* v. *Holland*, 20 L. R., Eq., 428; 33 L. T., N. S., 301.

Held, also, that the claim of Y., as co-heir, against the trustees had become barred by the Statute of Limitations. *Ib.*

2. Mortgaged estates in fee will not pass by a general devise of all lands, tenements, and hereditaments, though the equity of redemption is afterwards foreclosed or released. *Strode* v. *Russel*, 2 Vern. 624.

11. By Partition.

3. Partition is not revocation of will. *Swift* v. *Roberts*, Ambl. 618; 3 Burr. 1488; 1 W. Bla. 467.

4. Partition of estate subsequently to devise is no revocation thereof. *Ward* v. *Moore*, 4 Madd. 372.

5. Partition is no revocation of a devise; otherwise, if the object extends further, even merely to a power of appointment. *Brydges* v. *Chandos* (*Duke*), 2 Ves. J. 429. And see *Rawlins* v. *Burgis*, 2 Ves. & B. 386.

6. Fine for the mere purpose of a partition is no revocation even at law. *Williams* v. *Owen*, 2 Ves. J. 600.

7. The ground upon which a partition does not revoke a devise. If the object is to do anything beyond mere partition, it is a revocation. *Att.-Gen.* v. *Vigor*, 8 Ves. 281.

8. Distinction as to the effect of a partition upon a devise. If the conveyance goes no further, the devise is not revoked, as it is if he takes the divided estate, with a power of appointment. *Maundrell* v. *Maundrell*, 10 Ves. 256.

9. A., having the legal estate in leaseholds, and being beneficially entitled to one-third of them in right of his late wife, and as to another third having, under the will of B., whose executor he was, a life interest in it, with a power to appoint among his children, makes a will, giving one-half of his two-thirds to one daughter, and the other half to another daughter. He subsequently joins with the beneficial owner of the other third in a deed of partition whereby the leaseholds are assigned in trust as to one-third for A., as administrator to his wife, and as to another third for A., as executor of B.:—Held, that the will was not revoked. *Woodhouse* v. *Okill*, 8 Sim. 115; 5 L. J., N. S., Ch., 326.

10. A testator devised his moiety of an estate, and then made partition with his co-tenant; on this the estate was conveyed to a trustee, as to one part to the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance:—Held, that this is not a revocation of the will. *Burton* v. *Croxall*, Taml. 164; 7 L. J., Ch., 188.

11. The effect of revocation in equity, produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed, has no right to compensation from heir. *Knollys* v. *Alcock*, 7 Ves. 558.

Mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition as a power of appointment, prior to the limitation of the uses, is sufficient. *Id.* 564.

Agreement for a partition established against a conveyance, and against a devise, it operating as a revocation, by depriving the testatrix of all interest in the estate devised. S. C. 5 Ves. 648.

12. Joint tenant devises his moiety, and afterwards the jointure was severed; nothing passed by the will. *Swift* v. *Roberts*, Ambl. 617; 3 Burr. 1488; 1 W. Bla. 467.

Partition is not revocation. *Id.* 618.

13. A. and B. were tenants in common of lands in fee; A. devised his moiety in fee, after which A. and B. made partition by deed and fine, declaring the uses as to one moiety

in severalty to B. in fee:—Held, that the will of B. was not revoked by the deed and fine levied in pursuance thereof. *Luther* v. *Kirby* or *Kirby*, 8 Vin. Abr. 148. pl. 30; 3 P. W. 169. n.

1. A testatrix before the Wills Act devised an estate, to which were attached various rights of pasturage and common rights over certain lands. By a subsequent deed she, in conjunction with the other persons entitled, conveyed these rights, and the lands subject to them, to trustees, on trust to allot the same among the several grantors, according to their interests. The trustees afterwards re-conveyed to the testatrix a portion of the allotted lands:—Held, that the conveyance by her to the trustees revoked the devise as to such lands. *Grant* v. *Bridger*, 36 L. J., Ch., 377; 3 L. R., Eq., 347; 15 W. R. 610.

12. Other Cases.

2. A testator bequeathed to his eldest daughter a sum of 3,000*l.*, then on mortgage, and his twenty shares in the Suffolk Fire Office, or in any other office in which the same should be transferred, or in the moneys that might arise from the sale of any of the said twenty shares; and expressed that his reason for making such bequests was to equalise the interest which his two daughters would take in his property. The mortgage debt was afterwards voluntarily paid off by the mortgagor: and the twenty shares were exchanged for a like number of shares in the Alliance Assurance Office, and a sum of 1,200*l.* paid to the testator's account at his banker's by way of equality of exchange:—Held, first, that the bequest of the sum of 3,000*l.* was adeemed; and secondly, that the legatee was only entitled to the substituted shares in the Alliance Office, and not to the money given for equality of exchange. *Phillipps* v. *Turner*, 1 W. R. 376; 1 Eq. Rep. 144; 17 Beav. 194.

3. An equitable tenant for life, with remainder in tail male and reversion in fee, of estates vested in trustees with powers of sale and exchange, contracted to sell a portion, and died without issue male before the purchase was completed, having by his will directed that all sums of money which might have arisen from sales of the estates, and were subject or applicable to the same uses as the estates, should be applied towards payment of certain incumbrances:—Held, that as the purchase money did not arise from a sale of the estate by the trustees, the purpose of which would be convenience, and not conversion, but from a sale of the testator's limited interest therein, it was not to be applied under the direction in the will as money arising from sales of the estates, but that it formed part of the testator's personal estate, and must be dealt with under the clauses relating thereto. *Saville* v. *Kinnaird*, 11 Jur., N. S., 195; 13 W. R. 308; 11 L. T., N. S., 687.

4. Testatrix having a power to appoint to a person for life 150*l.*, out of the interest of 10,000*l.* consols, and to appoint the principal as she chose among certain other persons, by will appointed the 150*l.* for life, part of the interest and dividends of the 10,000*l.*; and as to so much of the said sum, or the securities in which it might be invested at the time of her decease, as might not be necessary to be set apart to make good the 150*l.*, she appointed it to A, and afterwards by a codicil she appointed to B, after the death of the appointee for life, so much of the said sum, or the stocks and securities in which it might then be invested, from which the 150*l.* should have arisen. Between the dates of the will and codicil the 10,000*l.* had been sold out, and the proceeds, viz., 6,600*l.*, invested on mortgage at 5 per cent.:—Held, that on the death of the testatrix, B. was entitled, subject to the life interest of the annuitant, to so much of the 6,600*l.* as would produce 150*l.* in the 3 per cents, and A. only to the remainder. *Bullock* v *Thomas*, 9 Sim. 634; 3 Jur. 312.

VI. Operation of Wills and Codicils Inter Se. Revocation and Construction where Inconsistent.

See also XXXIX. *and* XLIX *post.*

I. GENERAL PRINCIPLES.

5. A will and codicil are to be taken to-

gether as one act. *Reeves* v. *Newenham*, 2 Ridgw. P. C. 43.

1. A codicil is, in its nature, a part of the will; an extension of the intention of the testator. *St. Albans* (*Duke*) v. *Beauclerk*, 2 Atk. 639.

2. Codicil considered as part of the will, and intent drawn from the whole. *Hill* v. *Chapman*, 1 Ves. J. 407; 2 Bro. C. C. 612.

3. The prerogative courts having admitted testamentary papers to probate as a will and codicil, is conclusive evidence upon their being distinct instruments. *Russell* v. *Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133; 4 Ir. Eq. R. 339.

4. There being several codicils to a will, some of which were bare repetitions of others, the Court declared them to be only substitutions. *Campbell* v. *Radnor* (*Earl*), 1 Bro. C. C. 271.

5. Construction of several testamentary papers, that some revoked others, probate having been granted of all. *Beauchamp* v. *Hardwicke* (*Earl*), 5 Ves. 280.

6. A codicil to a will does not affect the construction of the will itself as an independent instrument. *Rolfe* v. *Perry*, 1 N. R. 428.

7. In the construction of a gift in a codicil, the Court may and must look at the previous will and codicils. *Hartley* v. *Tribber*, 16 Beav. 510.

8. A codicil not to be presumed a revocation unless it distinctly appears. *Griffiths* v. *Griere*, 1 Jac. & Walk 31.

9. A testator, by his will, gave a specific chattel to A. Afterwards, by a codicil, he gave a number of articles, and of a different kind, and of much less value, to B., and, in enumerating those articles, introduced an imperfectly written word, which might be supposed to designate the chattel previously given to A.:—Held, that the bequest to A. was not thereby revoked. *Goblet* v. *Beachy*, 2 Russ. & M. 624. Reversing 8 Sim. 24; 9 L. J., Ch., 200.

10. Where a will shows plainly that the original intention of a testator was to give a legatee an absolute interest in a legacy, a subsequent alteration of such bequest in a codicil will not vary the will to any greater extent than is plainly expressed on the face of the codicil. *Norman* v. *Kynaston*, 7 Jur., N. S., 129; 9 W. R. 259; 3 L. T., N. S., 826. 3 De G. F. & J., 29. Affirming 30 L. J., Ch., 189; 29 Beav. 96; 9 W. R. 50.

11. A distinct gift by will is not to be revoked by a codicil, unless by direct words or necessary implication. Such implication will exist where the clear intention of the codicil is inconsistent with the particular gift, but not where the inconsistency existed to an equal degree in the will itself. *Butler* v. *Greenwood*, 22 Beav. 303.

12. A codicil is never held to revoke a will further than is necessary to give effect to the intentions of the testator. *Young* v. *Hassard*, 1 Dr. & War. 638.

13. The intention to revoke in a codicil must be as clearly expressed as the intention to devise in the will, otherwise the codicil will not operate as revocation. A doubt, however reasonable, is not sufficient, if the two instruments are not absolutely inconsistent. *Pilsworth* v. *Moss*, 14 Ir. Ch. R. 163.

14. Upon the construction of a will and various codicils:—Held, first, that the residuary gift in the first codicil was not revoked by the fourth codicil, the language of the alleged revocation being ambiguous, whereas that of the gift was clear; and, secondly, that certain funded property mentioned in the will did not fall into the residue, but was made subject to a specific disposition in the fourth codicil. *Patch* v. *Graves*, 3 Drew. 347.

15. A will disposing of the whole of the testator's property will act as a revocation of a will disposing of a part only of the property of the testator. *Moorhouse* v. *Lord*, 9 Jur, N. S., 677; 32 L. J., Ch., 295; 11 W. R. 637; 8 L. T., N. S, 212.

16. The doctrine that a will disposing of the whole property of a testator is *ex necessitate* a revocation *in toto* of a former will, also disposing of the whole, only applies where the dispositions are so inconsistent that the papers cannot stand together. *O'Leary* v. *Douglass*, 1 L. R. Ir. 45.

17. All codicils are part of the will; therefore a codicil merely for particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie* v. *Macdoual*, 4 Ves. 610.

18. Codicil reciting a specific and limited purpose revokes the whole devise, declaring the trusts again, with the proposed alteration, and confirms the will in every particular not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot be supplied. *Holder* v. *Howell*, 8 Ves. 97.

II. FORMALITIES OF CODICIL.

19. Will sufficient to pass personal estate will not revoke a prior will of real estate made according to Statute of Frauds. *Limbery* or *Lunbury* v. *Mason*, 2 Com. 451.

20. One devises his land, by will, attested by three witnesses, and afterwards makes another will of his land, which revokes all former wills, but this will is not duly executed. The last will being no will, and void, will not amount to a revocation of the former. *Onions* v. *Tyrer*, 2 Vern. 742; Pre. Ch. 459; Gilb. Eq. Rep. 130; 1 P. W. 343.

21. Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini* v. *Noble*, 3 Meriv. 691.

22. An envelope containing a will and codicil properly executed, and also a subsequent will (all of real estate), not so executed, and bearing an endorsement relative to the first will and codicil erased, and, by fresh endorsement, specifying to contain the will of last date, as "the last will," etc.:—Held, that first will and codicil were not revoked thereby. *Grantley* v. *Garthwaite*, 2 Russ. 90.

23. A paper writing, signed by the executors and others, purporting to be an acknowledgment of what they understood to be the will of the testator, when he was unable to speak, although proved in the Spiritual Court as a

testamentary paper, yet will not operate as a codicil in this court, and the bill claiming legacies under such an instrument will be dismissed. *Gowler* v. *Standerwick*, 2 Cox 16.

1. Where a testamentary instrument incomplete as a will appears, on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the Spiritual Court. *Jackson* v. *Jackson*, 2 Cox 35.

2. Testator, by his will, gave an annuity payable out of his freehold, copyhold, and personal estate, and, by a codicil not duly attested, revoked the annuity:—Held, that this was a subsisting charge upon the freeholds. *Mortimer* v. *West*, 2 Sim. 274. See *Smith* v. *Newbould*, 1 W. R. 230.

3. Testator, by his will made in 1823, directed his executors to pay any legacies he might afterwards give by any testamentary writing witnessed or not, and, after making various codicils, he in 1838 made a codicil which was signed but not attested, and, by a further codicil in 1839, duly signed and attested, he declared that he thereby "ratified and confirmed his said will and codicils":—Held, that such general reference was not sufficient to identify and so incorporate the codicil of 1838 in that of 1839, and probate of such codicil refused. *Croker* v. *Hertford* (*Marquis*), 4 Moo. P. C. 339.

4. Testamentary appointment of guardian is not revoked by a subsequent testamentary appointment not executed according to the Statute of Frauds, and not directly importing revocation. *Exp. Ilchester* (*Earl*), 7 Ves. 348.

5. The Wills Act (7 Will. 4 and 1 Vict., c. 26, s. 20) does not alter the law as to revocation of wills, except by requiring that the instrument of revocation shall be executed in the same manner as a will. *Baker* v. *Story*, 23 W. R. 147; 31 L. T., N. S., 631.

6. A testator, by a codicil to his will, imposed a condition respecting real estate of which he had, by his will, made a specific devise. The condition was to have effect upon the personalty bequeathed by the will. The codicil was unattested, but admitted to probate. This was before the 7 Will. 4 and 1 Vict., c. 26:—Held, that such codicil could not be looked at by the Court in the construction of the will, so far as it affected the real estate. *Louis* v. *Louis*, 10 L. T., N. S., 825.

III. CODICIL INEFFECTUAL BY MATTERS ALIUNDE.

7. An act inconsistent with will, though, by some accident independent of will, it fails of effect, is a revocation. *Exp. Ilchester* (*Earl*), 7 Ves. 370.

An express revocation, if only subservient to another purpose for which it is incompetent, shall not revoke. *Id.* 379.

Will may be revoked by an instrument not attested as would be required to give it effect. Any disposition that would, by the instrument, have completely put an end to that will, shall have that effect. The instrument becomes ineffectual by accident or circumstances *dehors* the will. *Id.* 374.

Where the act is valid for the whole purpose, but, by disability of person to take, or some matter *dehors* or subsequent to the will, it is ineffectual, it is a revocation. *Id.* 373.

Disposition, so made by will as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted, and it is evident that testator did not intend revocation for any other purpose than to give it effect, if the second instrument cannot have effect of disposition, it shall not be a revocation. Cited *id.* 372.

8. Devise of lands to A, and afterwards the devisor devised the same lands to B., a papist; both devises are void; for though the last is void as a will, yet it is good as a revocation. *Roper* v. *Constable*, 8 Vin. Abr. 141, note to pl. 2; 2 Eq. Abr. 771, pl. 8.

9. A former will of land is cancelled, the testator supposing a later will by him made of the same land to the same effect was good. If that proves not to be duly executed, equity will set up the former will. *Onions* v *Tyrer*, 2 Vern. 743; Gilb. Eq. Rep. 130; 1 P. W. 343.

10. A codicil revoked valid bequests in a will, and bequeathed the property to a fund which was being raised for the purpose of buying land for a charity:—Held, that although the gift by the codicil failed, the revocation nevertheless took effect. *Onions* v. *Tyrer* (1 P. W. 343) distinguished. *Tupper* v. *Tupper*, 1 Kay & J. 665; 1 Jur., N. S., 917.

Testator by his will gave 850*l.* in legacies to different charitable institutions. By a codicil he revoked the before-mentioned legacies, and in lieu thereof gave to the treasurer of another charitable institution 1,000*l.* for the extension fund of such house of charity:—Held, that the house of charity being incapacitated under 9 Geo. 2, c. 36, from taking this gift for the extension fund, which involved the purchase of land and building thereon, the gifts to the charities mentioned in the will were absolutely revoked. S. C. 3 W. R. 616.

11. A testator having a power by will to charge hereditaments with 7,000*l.*, to be divided amongst his children in such shares as he should by will appoint, and in default amongst them equally, by his will charged the hereditaments with the 7,000*l.*, and directed that 4,000*l.*, part thereof, should be paid to his younger son, and the remaining 3,000*l.* to his three daughters equally. By a codicil he revoked the appointment or charge of 7,000*l.* made by his will, and charged the same hereditaments with the payment of 7,000*l.* to the younger son alone:—Held, that though the appointment made by the codicil was invalid, the revocation nevertheless took effect. *Quinn* v. *Butler*, 6 L. R., Eq, 225.

11. The Wills Act (7 Will. 4 and 1 Vict., c. 26, s. 20) does not alter the law as to the revocation of wills, except by requiring that the instrument of revocation shall be executed in the same manner as a will. *Baker* v. *Story*, 23 W. R. 147; 31 L. T., N. S., 631.

A husband made a will, devising his real estate to his wife absolutely; afterwards he executed another will giving his real estate to trustees upon trust after his wife's death for the Bristol General Hospital, and he devised to his trustees all the residue of his real estate, and "the proceeds which by any law to the contrary might not by that will pass to the hospital, fully relying upon my trustees to carry out my wishes and desires. The gift

to the hospital was void, and the trustees claimed to take the real estate beneficially under the ultimate gift. The Court held that they did not take beneficially. The question then arose as to whether the first will was revoked by the second:—Held, that the first will was revoked by the devises in the second, notwithstanding that these devises were invalid. *Ib.*

Loss or Destruction] 1. The testator made a will, in 1807, of his realty and personalty, in favour of his wife for life, remainder to his daughter C. absolutely, having other daughters, but no son. After the will he had other children, and, by a codicil in 1824, reciting that in his will he had given his property to his brother D. R., on certain trusts, and had given a certain freehold for the benefit of his eldest son, he revoked that gift, and everything else in the will, and gave his freehold and other property to his wife and brother, upon the trusts declared in his will of the freehold given to the son, and gave a copyhold to his second son in the same manner as the freehold was given by the will to the eldest son, and in all other respects confirmed his will. The only will found was that of 1807. The Court, holding that the first will became operative by the loss of the second, refused to declare an intestacy. *Rainier* v. *Rainier*, 1 Jur. 754.

2. A. made a will in 1858, which he subsequently destroyed. After its destruction, he made a will containing a disposition of his property different from that contained in his former will, and dated January 1859. These wills were prepared by different solicitors. In February 1859 he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of the will of 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to the provisions of that will. The testator afterwards destroyed the codicil of February 1859 with the intention of setting up the will of 1859, and died without making any further or other testamentary disposition:—Held, that he died intestate. *Newton* v. *Newton*, 12 Ir. Ch. R. 118.

IV. REVIVING REVOKED WILL.

3. Like as with statutes, the revoking a will which has revoked a former one revives the first. *Harwood* v. *Goodright*, Lofft. 576.

4. The execution of a second will is a revocation of the first, and cancelling the second afterwards does not set up the first again. *Exp. Hellier*, 3 Atk. 798. But see 1 Ves. J. 495.

5. All codicils are part of the will; therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie* v. *Macdoual*, 4 Ves. 610.

6. By the addition of a codicil everything is set up in the will not altered by the codicil; and though the codicil has no date, yet if it appear by evidence to have been executed subsequently to an act which might amount to a revocation, it will operate as a republication. *Carte* v. *Carte*, Ridgw. 210; Ambl. 28; 3 Atk. 174.

7. A former will of land is cancelled, the testator supposing a later will by him made of the same land to the same effect was good. If that proves not to be duly executed, equity will set up the former will. *Onions* v. *Tyrer*, 2 Vern. 743; Pre. Ch. 459; Gilb. Eq. Rep. 130; 1 P. W. 343.

V. REVOCATION OF EARLIER WILL OR CODICIL. EFFECT ON INTERMEDIATE WILL OR CODICIL.

8. A codicil revoking a will does not necessarily revoke a prior codicil. *Farrer* v. *St. Catharine's College, Cambridge*, 16 L. R., Eq., 19; 42 L. J., Ch., 809; 21 W. R. 643; 28 L. T., N. S., 800.

A testator made a will and two codicils, by none of which he gave anything to St. Catharine's College, and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his will he had bequeathed 1,000*l.* to St. Catharine's College, he confirmed the bequest, but in all other respects he revoked his will; and he gave to St. Catharine's College (in addition to the bequest of 1,000*l.*) 5,000*l.*, and appointed executors of his will and codicil:—Held, that the last codicil revoked the will of the testator, but not the codicils of prior date. *Ib.*

VI. CONFIRMATION OF EARLIER WILL OR CODICIL. EFFECT ON INTERMEDIATE WILL OR CODICIL.

9. Two inconsistent wills; a codicil referring to the first by date, as the last will, cancels the intermediate will, and evidence of mistake cannot be admitted. *Crosbie* v. *Macdoual*, 4 Ves. 616.

10. By will dated 16th May 1831 a leasehold estate was bequeathed to trustees, upon trust to pay out of the rent an annuity of 60*l.* to A. In October 1831 the testator assigned the same estate, together with other leasehold and freehold property, upon trusts of a marriage settlement, and a power was reserved to appoint out of the leaseholds an annuity not exceeding 60*l.* to A. By a subsequent codicil the will was expressly confirmed:—Held, that the annuity was adeemed and not restored by the codicil. *Cowper* v. *Mantell*, 4 W. R. 500; 2 Jur., N. S., 745; 22 Beav. 223.

11. An aunt by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised after-purchased property to the trustees of her will and confirmed her will:—Held, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone. *Green* v. *Trube*, 9 L. R., Ch. D., 231; 47 L. J., Ch., 783; 27 W. R. 39; 38 L. T., N. S., 914.

A prior codicil, operative in itself, is not revoked by a subsequent codicil which refers to the will by its date and confirms it without

mentioning the prior codicil; but a prior codicil, inoperative in itself, will not be set up by such a subsequent codicil. *Ib.*

1. A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children. By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding, "In all other respects I confirm my said will." By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will. He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded, "In all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoke a legacy to my daughter Mary":—Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shown with sufficient clearness to enable the Court to reject that devise. *Follett* v. *Pettman*, 23 L. R., Ch. D., 337; 52 L. J., Ch., 521; 48 L. T. 865; 31 W. R. 779

VII. BY EXPRESSION, "THIS IS MY LAST WILL."

2. A testator being entitled to a reversion in fee in copyhold property, which he had not surrendered to the use of his will, and being also entitled to certain freeholds in fee simple in possession, made a will in 1804, by which he affected to devise these copyholds and all other his freehold, leasehold, and copyhold estates, to his wife for life, with remainder to his three younger children, Thomas, John, and Eliza. In 1807 he made another will, commencing with the words, "This is the last will and testament of me," etc., and thereby, after reciting that on his death his eldest son, Edward, would become entitled to all his freehold estates, the testator gave all his real and personal estates to his wife for life, and after her death all his "property" and effects to all his children, except Edward, equally, share and share alike. The testator died in 1807, leaving his said four children, and also two others born since the date of the former will. In 1851 the reversion of the copyholds fell into possession:—Held, that, as there was freehold property upon which the general devise in the second will could operate, there was no ground for deciding that it revoked the intended devise of the copyholds by the former will:—Held, further, that it was impossible to consider the intention to devise the copyholds expressed in the first will to be a reason for supplying a surrender to the uses of the testator's will generally, and thus to make the general devise in the second will operate to pass the copyholds, by revoking the former will, except so far as it expressed that intention, because the intention expressed by the first will was to give all the copyholds to three only of the five objects to whom the general devise in the second will was made, and therefore that intention could not apply to the second will. *Freeman* v. *Freeman*, 1 Kay 479; 2 Eq. Rep. 522. Affirmed 23 L. J., Ch., 838; 5 De G. M. & G. 704; 2 W. R. 658.

3. When a later will does not expressly revoke an earlier one, and the two may stand together in several important matters, it lies on the party impugning the earlier will to prove the intention of the testator to revoke it by the later; and, in deciding such a question, conjecture or slight probabilities are not sufficient, and the words, "this is my last will," are not entitled to any weight whatever. *Leslie* v. *Leslie*, 6 Ir. R., Eq., 332.

4. A testamentary paper relating to real estate alone, commencing, "This is the last will and testament of me, relating to all my real estate whatsoever":—Held, totally to revoke a prior will. *Plenty* v. *West*, 16 Beav. 173; 17 Jur. 9; 22 L. J., Ch., 185.

VIII. ERRONEOUS RECITAL.

5. Testator, by codicil, revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.* given by the will; as to the effect of the codicil, *quære*. *Carrington* (*Lord*) v. *Payne*, 5 Ves. 405.

6. Testator gave the interest of 2,000*l.* to G. S., and at his death to his children; and after making some other gifts, "the sum of 1,000*l.* to G. S. in addition to 1,000*l.* before mentioned":—Held, that the gift of 2,000*l.* was not cut down by the subsequent gift, and that the limitations affecting the first gift were not carried on to the subsequent gift, which was to G. S. absolutely. *Mann* v. *Fuller*, 2 W. R. 510; 1 Kay 624; 23 L. J., Ch., 543; 2 Eq. Rep. 1085.

7. A testatrix by her will gives a legacy of 500*l.* to be invested, and the annual produce paid to E. H. for life; and after her death to J. H. absolutely. The testatrix then makes five codicils, by some of which she gave several legacies of the same amount to the same persons as she had previously given by other codicils anterior in date, expressing, in other instances of legacies given, that those legacies were in addition to those already given, but not using the words, "in addition to," where she gives the same sums to the same persons as before in a former codicil. E. H. dies before the testatrix, who, after the death of E. H., by a codicil to her will, declares that she revokes the legacy of 100*l.* given to J. H. Evidence is adduced to show that the testatrix intended to cancel two of the codicils, supported by the fact that she calls her fourth codicil her third codicil, and also that she promised to settle 400*l.* on J. H. The will and all the codicils are proved, notwithstanding such evidence; and on the questions, first, whether the legacies given twice over were, in the second instance, substitutionary or cumulative; and whether the revocation as to the legacy called 100*l.* revoked the legacy of 500*l.* given to J. H.:—Held, that the codicils being all admitted to probate, the legacies given twice over were

cumulative and not substitutionary, and that the revocation of the legacy of 100*l.* meant to revoke the legacy of 500*l.* to the extent of 100*l.* only, and therefore J. H. was entitled to 400*l.* *Thurnall* v. *Rayner*, 4 W. R. 401.

1. A testator gave by will 3,000*l.* upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had by his will given the 3,000*l.* to A. for life, with remainder to her children; and afterwards to B. for life, with remainder to his children; and revoked the will as to 2,000*l.*, part of the 3,000*l.*, from and after the devise to A. and her children, and instead of giving the 2,000*l.* to B. and his children, bequeathed the same to C.:—Held, that the erroneous recital in the codicil, that the 3,000*l.* was given to B. for life, did not amount to a gift of an estate in the 1,000*l.*, which remained unrevoked. *Re Smith*, 2 John. & H. 594.

By the will the testator had also given 2,000*l.* to B. for life, with a gift over on insolvency:—Held, that if the codicil had been read as an implied gift of 1,000*l.* to B. for life, the gift over on insolvency would have attached to the 1,000*l.* as well as to the 2,000*l.* *Ib.*

2. A father left a legacy of 1,000*l.* to each of his two sons, H. and L., and his residuary estate between his two daughters. He subsequently executed a codicil, "not being satisfied with the conduct of my eldest son, I hereby bequeath to him 300*l.*, instead of 500*l.*, which I have bequeathed to my other children":—Held, that the codicil was inoperative, and that H. was entitled to 1,000*l.* only. *Armit* v. *Hipkins*, 28 L. T., N. S., 222; 21 W. R. 575.

3. The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. *Re Margitson, Haggard* v. *Haggard*, 46 L. T. 807; 30 W. R. 920. Affirmed 48 L. T. 172; 31 W. R. 257.

A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Ib.*

4. A testatrix, after giving certain legacies to the children of her deceased nephews and niece, gave the residue of her estate in equal moieties to two other nephews. By a codicil, after reciting that she bequeathed to her two nephews one-fifth of her estate, and had given the residue equally between the children of her deceased nephews and niece, she gave certain directions concerning the share of any of the said children who should not apply for it within a year:—Held, that the recital in the codicil was merely an erroneous reference to the will, and did not cut down the original residuary gift to the nephews, nor give the children of the deceased nephews and niece any greater interest than that which they took under the will. *Scarlett* v. *Thurlow*, 21 W. R. 728; 28 L. T., N. S., 583.

See also L. VIII. *post.*

IX. ERRONEOUS ASSUMPTION OF FACT.

5. Where a devise in a will is clear, it is incumbent on those who contend that it has been revoked by a codicil to show that the intention to revoke is equally clear and free from doubt with the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought to stand. *Barclay* v. *Maskelyne*, 1 John. 124; 4 Jur., N. S., 1293; 28 L. J., Ch., 115.

A bequest of specific chattels by will is revoked by a bequest *simpliciter* of the chattels by a codicil to another; but where the latter bequest is not made, but is prefaced by a recital showing that it was founded on a misconception of the true effect of the will, the same result will not necessarily follow. *Ib.*

Thus, where a will bequeathing specific chattels to A. (who was not personally known to the testator) was followed by a codicil reciting (erroneously) that by the will they were bequeathed to B. (who was uncle to A., and a personal friend of the testator), revoking that bequest on the ground that B. was lately dead, and testator's connection with his family thereby almost null, and bequeathing the same chattels to another family:—Held, that the bequest in the will was not revoked by the codicil. *Ib.*

The circumstance, that it might reasonably be doubted whether, if the real effect of the will had been present to the testator's mind, he would not still have disposed of the property differently:—Held, not to affect this conclusion. *Ib.*

6. M., by will in 1734, before the Mortmain Act, devised particular lands and his personal estates to be laid out in land to charitable uses. By codicil, in 1736, after the Act, M. declared, that if by the Mortmain Act his estates could not pass to those uses, he then devised them to B. By a second codicil in 1737, testator, reciting that he was advised his devise of the land to the charity was void, bequeathed his personal estate to the charity, and the real to B. Testator died in February 1738. On a case stated to King's Bench, the judges certified that the estates were well devised to B. by the second codicil, and Lord Chancellor decreed the same to him accordingly. *Att.-Gen.* v. *Lloyd*, 3 Atk. 551; 1 Ves. 32.

1. Testatrix, by codicil, gave to A. the legacy given by her will to the children of B., "as I know not whether any of them are alive, and if they are well provided for, though they are living." B. is entitled; the construction being that, if they are living, they are well provided for. *Att.-Gen.* v. *Ward*, 3 Ves. 327.

2. Testator by his will gave legacies to A. and B., describing them as grandchildren of C., and their residence in A. By a codicil he revoked these legacies, giving as a reason that legatees were dead. The fact not being true, they were held entitled upon proof of identity. *Campbell* v. *French*, 3 Ves. 321.

3. A testator bequeathed the residue of his personal estate to his daughter, on trust for her maintenance and support until she attained twenty-one, or married with the consent of his trustees under that age, and, upon her attaining such age or her marriage, for her separate use, with remainder to her children; and, in case of her death without issue, then over. The testator afterwards declared by a codicil, that in consequence of a nervous debility his daughter was unfit for the control of herself, and his will was that she should not marry, and in case of her marriage or death he gave the property he had bequeathed to her over to the same legatees in remainder:—Held, that the limitation over by the codicil, being in general restraint of marriage, was void as to the life interest of the daughter; that the Court would not inquire into the fact of whether the testator was mistaken or not, with reference to his daughter's health or capacity, *quære*. *Morley* v. *Rennoldson*, 2 Hare 570; 12 L. J., N. S., Ch., 372; 7 Jur. 938.

4. A testator having by his will given 4,000*l.* to certain charitable institutions, made a codicil as follows: "Presuming and believing that the rental of my estate will produce 16,000*l.* a year, I give those institutions 4,000*l.* more." The income of the estate, however, was at his death much less than 16,000*l.* a year:—Held, that the testator's reason for the gift of the second 4,000*l.* being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this 4,000*l.* failed. *Thomas* v. *Howell*, 43 L. J., Ch., 511.

See also L. VIII. *post.*

X. LIMITATIONS OR TRUSTS. WHETHER WHOLLY OR PARTIALLY REVOKED.

5. Where a codicil contains an unbroken set of limitations not reconcilable with those in the will and exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will. *Daly* v. *Daly*, 2 J. & L. 752. S. C., on re-hearing, 8 Ir. Eq. R. 508.

Testator devised lands to the use of H. for life without impeachment of waste, remainder to trustees during his life to preserve, etc., remainder after his decease to trustees for a term of 500 years, upon trust to raise portions for his younger children, remainder to his first and other sons in tail male, with several remainders over. By a codicil to his will the testator revoked any bequest or devise to H. by any former will or codicil, and he devised the same lands to H. during his life, subject to an annuity which he had by deed charged thereon, remainder to M. during his life to preserve, etc., remainder to the first and other sons of H. in tail, remainder to M. D. in fee; and he directed that the codicil should be taken as part of his will. *Semble*, that the devise of the term of 500 years and the trusts thereof are revoked by the codicil. *Ib.*

6. Case of revocation of will by codicil. *Fry* v. *Prentice*, 9 Jur. 894.

7. A legacy is given to M., with a contingent limitation over to N. in the event of M. dying without children. The legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached. The legacy is not merely adeemed as to M., but also extinguished as to N. *Twining* v. *Powell*, 2 Colly. 262.

8. A testator, by his will, gave the income of shares in a bank to E., a married woman, for life, provided she were a widow at the time of his death, or should become such afterwards, but during her widowhood only; and gave the income during the coverture of E. to P. He also gave P. 800*l.*, in case E. should become a widow, in lieu of the income of the shares. By a codicil the testator revoked the gift of this income, and gave a portion of the income to E. for life, whether she were a widow at the time of his death or not, or should become such afterwards or not. At the time of the testator's death E. was under coverture:—Held, that P. was not entitled to the 800*l.* at the death of the testator, and would become entitled only in the event of E. becoming a widow. *Morrison* v. *Morrison*, 2 Y. & Coll. C. C. 652; 13 L. J., N. S., Ch., 68; 8 Jur. 304.

9. Devise and bequest of real and personal estate to a person for life, with limitations over. By a codicil reciting the devise and bequest, and also the limitations over, the devises and bequests were revoked, "so far as related to the tenant for life;" but "estates," both real and personal, out of which the interest of the tenant for life was carved, were directed to sink into the residue:—Held, that this was a revocation of the interest of the tenant for life only. *Ives* v. *Ives*, 4 Y. & Coll. 34; 4 Jur. 265.

10. A testatrix having, by her will, devised two different properties among her nephews successively for life, remainder to their issue in strict settlement, making A. the head of one set of the limitations, and B. of the other, by a codicil reciting that she had made devises to A. and B. respectively, and that she wished to make them change places as to the properties so devised, revoked "the said bequests by my will made to the said A. and B. respectively," and left and bequeathed "the property and provision by my said will devised to the said A. to B., his heirs, executors, administrators, and assigns," and in like manner "as to A. and his heirs, etc.," with respect to the property devised by the will to B.:—Held, that the codicil revoked all the limitations in the will subsequently to A. and B.'s estates respectively, and vested the respective properties in A. and B. absolutely. *Murray* v. *Johnston*, 2 Con. & L. 101; 3 Dr. & War. 143.

11. A. by his will devised certain lands to B.

and his heirs, in trust for the use of his son R. for life, remainder to be to preserve contingent remainders, remainder to the first and other sons of R. in tail male, with remainders over. A., by a codicil, reciting that by his will he had devised these lands to R. and his heirs on the trust therein mentioned, proceeded thus: "I do hereby revoke that part of my will whereby I devised the said lands unto my son R.; and I hereby devise, etc, the said lands unto my sons W. and R. and to the survivors of them, and the heirs of such survivor, upon certain trusts thereafter mentioned, and to and for no other use, etc., whatever; and I do hereby ratify and confirm my said will in all its parts, save so far as it has been revoked and altered by this present codicil, which is to be taken as part of my said will." The trusts of the codicil did not exhaust the fee, and were such as might be satisfied during the life of R.:—Held, that the life estate of R. alone was completely revoked, and that, subject to the new trusts, the remainder to his sons in tail was unaffected by the codicil. *Fitzmaurice* v. *Sadlier*, 12 Ir. Eq. R. 544. Reversing on this point, 12 Ir. Eq. R. 136. And see S. C. 9 Ir. Eq. R. 595.

The rules limiting the extent of revocations effected by codicils considered. *Ib.*

1. Testatrix by will bequeathed 3,000*l.* in trust for C. for life, for her separate use, and, after her death, for her children; and in case there should be no such children, in trust for P. By a codicil, stating that C. had been largely provided for from other sources, the testatrix deducted the sum of 2,900*l.* from the legacy of 3,000*l.*, and revoked so much of the legacy accordingly, leaving C. 100*l.* only as a remembrance of her affection:—Held, that the legacy of 3,000*l.* was revoked *in toto*, and that in lieu of it the legacy of 100*l.* was given for the absolute benefit of C., and that P. took no interest either in the 100*l.* or any part of the 3,000*l.* Effect of conflicting dispositions in a will and in a codicil of the same residuary personal estate. *Sanford* v. *Sanford*, 1 De G. & Sm. 67; 11 Jur. 322.

2. A testator gave the income of his property to F. and two other persons successively for life, and on the death of the survivor he gave all his property to the eldest son then living of W., his executors, administrators, and assigns. W. had three sons, of whom W. W. was the eldest. The testator by a codicil revoked so much of his will as related to W. W., and left F., on the death of the tenants for life, in the full enjoyment of all his property:—Held, that the gift to F. in the codicil enlarged his life estate into absolute ownership, and being inconsistent with the gift to the eldest son of W., revoked it, whether the revocation of the gift to W. W. operated as a revocation of the gift to the "eldest son of W.," or not. *Wells* v. *Wells*, 17 Beav. 490; 17 Jur. 1020; 23 L. J., Ch., 691; 2 W. R. 6.

3. Testator, by his will, devised his messuages, tenements, etc., called P., to J. L., for life, with remainders to his first and other sons in tail; and he devised his messuages, tenements, and lands, known by the name of C., to J. P., for life, with remainder to his first and other sons in tail; and, in subsequent parts of his will, he mentioned the estate as his P. and C. estate. By a codicil, after reciting that he had given the P. estate to J. L., he revoked the said P. estate, and gave it to J. P.; and, after further reciting that he had given the said C. estate in his will to J. P., he revoked the said bequest, and gave the said C. estate to J. L.:—Held, that the limitations in the will of the two estates were revoked, and that J. P. took P. in fee; and J. L., C. in fee. *Phillips* v. *Allen*, 7 Sim. 446.

4. The testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support, until she attained twenty-one, or married with the consent of his trustees under that age, and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and, in case of her death, without issue, he bequeathed the same to certain legatees in remainder. The testator afterwards declared by a codicil, that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was that she should not marry; and in case of her marriage or death, he gave the property he had bequeathed to her over to the same legatees in remainder. The limitation over by the codicil, being void as to the life interest of the daughter, as being in general restraint of marriage, *quære*, whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil. *Morley* v. *Rennoldson*, 2 Hare 570; 12 L. J., N. S., Ch., 372; 7 Jur. 938.

5. A testator gave the dividends of a sum of stock to his son A., and after his death he gave the capital to A.'s children on their attaining twenty-one. And after giving other legacies in similar terms to his other sons and daughters, he gave the dividends of his residuary personal estate, after his wife's death, to his seven children, "or such of them as should be entitled thereto," during their several and respective lives, to be divided between them in the proportions which the yearly dividends thereinbefore specifically bequeathed to them respectively bore to one another; and after the deceases of the said children, he gave the capital between the children of all his seven children equally on their attaining twenty-one. By a codicil, the testator, after reciting the gift of the dividends to his son A., revoked "the said legacy," and gave him the dividends of a similar sum:—Held, first, that the codicil revoked only the life interest given to A., and that his children were entitled to the larger legacy under the terms of the original will. Secondly, that the difference of interest of these legacies during A.'s life, and the difference of the interest of the shares of the residue, which was reduced in like proportion, fell into the income of the residue. Thirdly, that in the case of children of the testator dying either before or after the widow, the surviving children were entitled to the income of the shares of the deceased children until the death of the last survivor. *Alt* v. *Gregory*, 4 W. R. 436; 2 Jur., N. S., 577; 8 De G. M. & G. 221; 3 W. R. 630.

6. A testator gave to his eight nephews and nieces, naming them, provided that if any of them should die in his lifetime without leaving children; or, as to the nephews, should survive him and die under twenty-one, without leaving children; or, as to the nieces, should survive

him and die under twenty-one, without having been married, the share of each of them so dying, as well original as accruing, should go to the survivor and survivors, other and others. The testator revoked the trust created as regarded two of his nephews, A. and B. A. had attained twenty-one, survived the testator, and was living. B. attained twenty-one and died, living the testator:—Held, that the limitations over of their shares were revoked, and that they went to the heir-at-law and next of kin. *Boulcott* v. *Boulcott*, 2 Drew. 25; 18 Jur. 231; 23 L. J., Ch., 57; 2 W. R. 52; 2 Eq. Rep. 457.

Gift to an executor of 100*l.*; gift by a codicil of 500*l.* in substitution thereof, then that gift revoked; the prior gift of the 100*l.* is not set up again. *Ib.*

1. A testatrix gave her residuary personal estate to trustees in trust as to one-fourth for her granddaughter A., and as to the remaining three-fourths in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered, so that instead of her granddaughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. and the children "now born or hereafter to be born" of her daughter B. The will directed the trustees to hold the residuary personal estate in the proportions above mentioned on certain trusts in favour of A. and the children of B., with certain limitations over:—Held, that the codicil merely altered the proportions and did not affect the trusts and limitations. *Armitage* v. *Ashton*, 20 L. T., N. S., 102.

2. Power given by will and codicil to sell to certain persons at a fixed price, revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts, and subject thereto upon the limitations of the will. *Bridges* v. *Rice*, 1 Jac. & Walk. 74.

Whether power in a will to sell several estates to certain persons at a fixed price, is entirely revoked by a codicil devising one of the estates to different uses, *quære*. *Ib.*

3. A testator gave to each of his daughters a legacy of 1,500*l.*, and also gave a legacy of 6,500*l.* upon trusts to each of them and her children, and in the event of any of the daughters dying without issue, or, having children, they should die without attaining a vested interest, he directed that the 6,500*l.* legacy of each of such last-mentioned daughters should go over to the other daughters and their children, in equal shares *per stirpes*, their respective shares to be held upon the same trusts for them and their respective children as were declared concerning their original legacies of 6,500*l.* Afterwards, on the marriage of E., one of his daughters, he settled on her by deed 8,000*l.* By a codicil reciting the gift of the two sets of legacies and the advance of the 8,000*l.*, and that the testator intended it to be in satisfaction of the two legacies of 1,500*l.* and 6,500*l.* bequeathed to or for her benefit as aforesaid, he revoked the legacies of 1,500*l.* and 6,500*l.*, in and by his will given and bequeathed "to or for the benefit" of his daughter A., "and otherwise as in the will" was mentioned:—Held (reversing 3 Jur., N. S., 151; 5 W. R. 329), that the codicil revoked only the original legacies of 6,500*l.* and 1,500*l.* to E. and her children, and not their contingent interest under the gift over of the other 6,500*l.* legacies. *Agnew* v. *Pope*, 1 De G. & J. 49; 3 Jur., N. S., 625; 5 W. R. 512.

Held, also, that though the trusts of the accruing shares in favour of E. and her children were declared only by reference to the trusts of their original legacy, the revocation of the original legacy did not invalidate the declaration of the trusts of the accruing shares. *Ib.*

4. A., by will, bequeathed his ready money, and money out at interest at his decease, to trustees, upon trust to pay thereout legacies, and in the next place to pay, distribute, and divide all the remainder unto and between his nephews and nieces; but directed that in case of the death of any of his nephews or nieces before receiving their shares, then the share or shares of him, her, or them so dying should be paid to the survivors. By a codicil he gave to his wife all his real and personal estate and effects which he should be possessed of or entitled to at time of his decease, to hold the same during her life:—Held, that the bequest in the codicil did not include the ready money, etc., mentioned in the will. *Re Arrowsmith*, 6 Jur., N. S., 1231; 29 L. J., Ch., 774; 8 W. R. 555. S. C. on appeal 7 Jur., N. S., 9; 30 L. J., Ch., 148; 9 W. R. 258; 2 De G. F. & G. 474.

5. A testatrix having by her will blended the proceeds of her real and personal estate into one fund, and having made a charge not exceeding 5,000*l.* on such mixed fund in favour of A., subsequently by codicil devises her real estate to A. in fee simple, freed and discharged from all her debts, liabilities, and engagements, and also from any charges created by her said will, if any. On the question whether the exoneration of the real estate devised to A. by the codicil threw the burthen of the whole charge of 5,000*l.* upon the residuary personal estate:—Held, that it did. *Tatlock* v. *Jenkins*, 2 Kay 654; 23 L. J., Ch., 767; 18 Jur. 891.

XI. PERSONALTY SETTLED ON TRUSTS OF REAL ESTATE. MODIFICATION OF USES OF THE REALTY.

6. Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts, and subject thereto to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land to be settled to the same uses, etc. A codicil, revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of limitations to his heirs, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise, and therefore extending to the estates to be purchased with the personal estate. *Carrington* (*Lord*) v. *Payne*, 5 Ves. 404.

7. Testator devised real estate to A. in tail mail, remainder over, and gave a sum of money in trust to be laid out in land to be settled to the same uses; by codicil he devised the same real estate to B. and his heirs, and gave everything that he had given by his will to A., in

as ample a manner to B.: B. is tenant in fee of the real estate, and is entitled to have the money paid to him. *Younge* v. *Combe*, 4 Ves. 101.

1. A testator devised his freehold estates to certain uses. The will contained a name and arms clause and powers of leasing and sale and exchange. He then devised his copyhold and leasehold estates upon trusts to correspond with the uses declared of the freeholds. By a codicil to his will he varied the uses declared concerning the freeholds, but made no mention of the copyholds and leaseholds. He directed that the codicil should be taken as a part of and added to his will. All the circumstances of the case rendered it exceedingly inconvenient that the copyholds and leaseholds should devolve in a different way from the freeholds:—Held, that the trusts of the copyholds and leaseholds declared by the will were not revoked by the codicil, and that the copyholds and leaseholds passed according to the trusts declared by the will, and the freeholds according to the uses declared by the codicil. *Martineau* v. *Briggs*, 45 L. J., Ch., 674.

Held, that though it was in the highest degree probable that the testator intended the copyholds and leaseholds to go with the freeholds, and it was productive of great inconvenience that they should not do so, yet, as there were no words in the codicil to give effect to such intention, the Court could not supply them, and the copyholds and leaseholds must go as originally declared by the will. S. C. 33 L. T., N. S., 283; 23 W. R. 899.

2. A testator devised his freehold estates to certain uses, and provided that any person becoming entitled thereto should take and use his name and arms. He then devised his copyhold estates (upon which stood his principal mansion house) and his leasehold estates to trustees, to be held by them upon trusts, as far as the nature of the several estates would allow, to correspond with the uses before declared as to his freehold estates. Subsequently, by a codicil, which he stated was to be taken as part of, and added to, his will, he altered the uses declared in his will as to his freehold estates, and declared that the proviso respecting the use of his name and arms should follow the new limitations. No mention was made in the codicil of the copyhold and leasehold estates:—Held, that though it was probable, from the circumstances, that he intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still as there were no words therein which affected it, the Court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will. *Langdale* v. *Briggs*, *Exp. Bacon*, 28 L. T. 467; 21 W. R. 620.

3. A testator devised freeholds in Dorsetshire upon certain trusts, and bequeathed 3,000*l.* to his trustees to purchase lands in Dorsetshire to be held upon the same trusts. By a codicil he revoked the devise of his freeholds, and declared other trusts, without alluding to the 3,000*l.*:—Held, that there was no implied revocation of the bequest of 3,000*l.*, which would pass under the will as if no codicil had been made. *Bridges* v. *Strachan*, 8 L. R., Ch. D., 558; 26 W. R. 691; 38 L. T., N. S., 502.

XII. GIFT OF RESIDUE BY BOTH WILL AND CODICIL.

4. The gift of a residue which is *totidem verbis* the same in the first and fourth codicils, makes it manifest that the testator intended to substitute one in place of the other. *St. Albans* (*Duke*) v. *Beauclerk*, 2 Atk. 636. And see 1 Bro. C. C. 392.

5. A testator by his will gave the residue of his personal estate to his wife for her life, and after her decease to Sir C. E. D., absolutely; he subsequently, by a codicil which did not affect the gift of the residue, altered his will in some respects, and confirmed it in every other. Next day he made a second codicil, by which he gave some pecuniary and specific legacies, and concluded thus: "All the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, C. P. Y., and to Sir C. E. D., their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them":—Held, that the above clause of the second codicil was a revocation of the gift by the will of the residue to Sir C. E. D., and that he was accordingly only entitled to an equal share thereof with C. P. Y. *Hardwicke* (*Earl*) v. *Douglas*, 7 Cl. & F. 795; West 555. Reversing S. C. *nom. Douglas* v. *Leake*, 5 L. J., N. S., Ch., 25.

6. A testator bequeathed all the residue of the estate and effects, which at his death he should have power to dispose of, to trustees in trust for the separate use of a married woman for her life, with a general power of appointment over the capital of the fund, and a limitation (in default of appointment), in trust for such persons of her blood and kindred as would be entitled, under the Statute of Distributions, to her personal estate, if she had died unmarried. By a codicil he bequeathed an annuity and gave all his property, in houses or in the funds, or of any other sort, not disposed of by his will, and which had accumulated since the making thereof, in trust for the married woman and three other legatees, equally to be divided amongst them. There was, at the testator's death, no description of property not disposed of by his will or accumulated since:—Held, that the beneficial title to the testator's property was not affected by the codicil, unless in the event of the married woman's death without having fully exercised her power, and without leaving any person of her blood and kindred living at her death. *Lee* v. *Delane*, 4 De G. & Sm. 1; 14 Jur. 861.

7. A testatrix gave to A. for life the interest of 300*l.*, or thereabouts, invested by her in the General Steam Navigation Company, and the interest of 200*l.*: and after A.'s death she gave the "said principal sum of 500*l.*" to A.'s children; and she directed that in case of her personal estate proving insufficient for the payment of her legacies such deficiency should be made up out of her real estate by sale or mortgage. By a codicil, she gave "all her personal estate" to B.:—Held, that the whole personal estate passed by the codicil; that

the legacy of 300*l.* was specific, and was revoked by the codicil, and that the legacy of 200*l.* was not revoked, but remained charged on the real estate. *Kermode* v. *Macdonald*, 3 L. R., Ch., 584; 37 L. J., Ch., 879; 19 L. T., N. S., 179; 17 W. R. 4. Affirming 1 L. R., Eq., 457; 35 L. J., Ch., 358; 14 W. R. 415.

1. Testator bequeaths as follows:—"As to all that my leasehold house in L. and all my household goods and furniture there and at S., and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, etc., I give and bequeath the same to A." By a codicil he revokes the bequest "of the residue" to A, and gives "the residue of his said personal estate" to B.; the gift of the general residue only, and not of the articles enumerated, is revoked by this codicil. *Clarke* v. *Butler*, 1 Meriv. 304.

2. Effect of conflicting dispositions in a will and in a codicil of the same residuary personal estate. *Sanford* v. *Sanford*, 1 De G. & Sm. 67; 11 Jur. 322.

3. Testator, by will, distributed 7,300*l.* stock amongst several legatees, except 200*l.* surplus of the stock, which he directed to be applied in defraying any necessary expenses. By a codicil, dated two years after the will, at which time there was, by reason of certain erasures made in his will, a much larger surplus than 200*l.* stock, he left "the surplus of his money in funds," to be appropriated as his executors might think proper among the several legatees. By a subsequent codicil, dated a few days after the former, the testator, after bequeathing certain snuff-boxes, etc., and stating that there appeared "a surplus remaining after the legacies aforesaid were paid," begged his executor to distribute the same among the children of his son W. There was property of inconsiderable amount besides stock, to which the residuary bequest contained in the last codicil might be applied:—Held, that that bequest did not operate as a revocation of the bequest of the surplus of the funds contained in the second codicil. *Inglefield* v. *Coghlan*, 2 Colly. 247.

4. A testator directed his trustees and executors to pay his debts and funeral and testamentary expenses out of his personal estate, and if that should be insufficient, he charged them on his real estate; and he bequeathed all the rest and residue of his personal estate to his daughters. By a codicil, after making alterations in the dispositions of his real estate, he proceeded: "As to all moneys that may be left after my decease, I give and bequeath the same" upon the trusts therein mentioned:—Held, that the gift in the codicil was only a gift of the money which was in the testator's hands at his death; and that, subject to this exception, the residuary gift in the will remained in force. *Williams* v. *Williams*, 8 L. R., Ch. D., 789; 47 L. J., Ch., 857; 27 W. R. 100; 39 L. T., N. S., 180.

See also XIII. II. *post.*

XIII. REVOCATION. WHETHER OF ESTATE OR OFFICE.

5. Testator gave the residue of his personal estate to his niece, and appointed her executrix. By a codicil he appointed A. and B. his residuary legatees and executors:—Held, that though power to prove the will and codicil was reserved to the niece, the gift of the residue to her was wholly revoked. *Evans* v. *Evans*, 17 Sim. 107; 14 Jur. 383.

6. A testator devised real estates to two trustees. By a codicil he appointed another person to be a trustee and executor of his will, in the place of one of the two trustees whom he did not wish to act as executor, in consequence of his being an interested party in the disposal of his estate:—Held, that the codicil was a revocation of the devise to the displaced trustees, as well as of the office. *Re Hough's Will*, 4 De G. & Sm. 371; 15 Jur. 943; 20 L. J., Ch., 422.

7. A testator, having bequeathed 2,000*l.* to G., and appointed him executor and trustee, made a codicil whereby he revoked his appointment as executor and trustee, and nominated T. in his stead, and directed that the will, and a codicil previously executed, should be received and construed "as if the name of T. had been inserted in the place and stead of that of G.":—Held, that the legacies were not revoked, it appearing on the construction of the will and codicil that they were not gifts to G. *virtute officii*. *Re Bunbury*, 10 Ir. R., Eq., 408.

8. A legacy given to the testator's trustees and executors as a mark of his respect for them:—Held, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the newly appointed trustees and executors in similar language. *Burgess* v. *Burgess*, 1 Colly. 367; 8 Jur. 660.

9. A devise of lands to trustees, who are afterwards changed by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word "heirs" is made use of in the codicil. *Acherley* v. *Vernon*, 3 Bro. P. C. 85; 9 Mod. 68; 1 P. W. 783; Com. 381; 2 Eq. Abr. 209.

10. Testator, by his will, directed that his trade should be carried on by his daughter and others, as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the funds, and the funds held in trust as to one moiety for the benefit of the daughter and her children, and as to the other moiety for the benefit of the children of his brother. By a codicil the testator revoked that part of his will which empowered his trustees to sell his effects, and instead thereof he authorised his daughter to take possession of all furniture, stock in trade, and every description of property found on his the testator's premises, to be disposed of at her discretion:—Held, that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will. *Newman* v. *Lade*, 1 Y. & Coll. C. C. 680.

11. A testator devised all his real property to his youngest son and his heirs, but if he should die unmarried, then to his sisters and their heirs. By a codicil, he declared that he left in trust to his executors the whole of the property of every description which he had willed to his youngest son:—Held, that the beneficial disposition made by the will was not revoked, but

that the executors took subject to the trusts thereby declared. *Froggatt* v. *Wardell*, 3 De G. & Sm. 685; 14 Jur. 1101.

1. Testator gave the residue of his estate to two trustees in trust, out of the produce, to invest 4,000*l.* in the funds, in trust for his granddaughter for her life, and after her death for her children, and on failure of children he directed that the capital should fall into the residue. By a codicil reciting that he had, by his will, given to the two trustees, in trust, for his granddaughter 4,000*l.* 5 per cents standing in his name, and that he was desirous that such trust should be executed by three persons, he appointed another person to be a co-trustee and guardian of his granddaughter, jointly with the two named in his will, and he directed that his said trustees should transfer the said stock to his granddaughter free from all deductions:—Held, that the testator did not intend to give 4,000*l.* stock to his granddaughter absolutely, but merely that the trusts declared by his will of the 4,000*l.* should be performed by three persons instead of two. *Barry* v. *Crundall*, 7 Sim. 430; 4 L. J., N. S., Ch., 264.

V. REVOCATION OF ONE OF SEVERAL OFFICES.

2. On a devise to three upon certain trusts, and giving the guardianship to the trustees and his wife, who were to maintain, etc., out of the trust property, the testator afterwards, by codicil reciting their appointment as executors and trustees of his will, revoked the appointment of two, and substituted two others to act as trustees and executors with the others:—Held, that it did not revoke the original appointment of the two so removed to act as guardians. *Re Park*, 14 Sim. 89; 13 L. J., N. S., Ch., 369; 8 Jur. 372.

3. A testator appointed his wife sole executrix, and he made her and A. trustees. By a codicil he revoked the appointment of his wife as an executrix, on the ground that "the duties were too arduous for a lady," and he appointed A., B., and C. "executors in trust of his will." By another codicil he referred to his having revoked the executorship, and to having appointed A., B., and C. executors:—Held, that the revocation was confined to the office of executrix only. *Graham* v. *Graham*, 16 Beav. 550; 17 Jur. 569; 22 L. J., Ch., 937.

4. A testatrix by her will appointed A. and B. executors and trustees thereof. By a codicil, she revoked the appointment of A. as executor, and appointed C. executor, and gave to C. "all the powers and authorities to enable him to carry out the trusts of her will as were given by the will to A." The testatrix thereby also declared her intention to be, that the codicil should only "affect the appointment of A. as executor of her will":—Held, that B. and C. were executors, and A., B., and C. trustees of the will. *Worley* v. *Worley*, 18 Beav. 58; 2 W. R. 216.

5. The testator appointed A., B., and C. his executors and trustees, and devised and bequeathed to them his real and personal estate in trust. By a codicil, he desired that A., named in his will as "executor," be no longer such, and he nominated D. to succeed him; but he made no alteration in the devise:—Held, that A. still remained a trustee of the will. *Cartwright* v. *Shepheard*, 17 Beav. 301.

The testator appointed A., B., and C. to be trustees and executors. He revoked the appointment of C. as executor and trustee by his first codicil. By a second codicil he revoked the appointment of B. and C. as executors, but ratified his will, except as altered thereby:—Held, that the first codicil was not revoked, and that C. was not a trustee. *Ib.*

6. The testator appointed his widow and two other persons guardians of his children. By a codicil, he "left their care, charge, and education" to his widow:—Held, that the appointment by the will of guardians was not revoked by the codicil. *Hare* v. *Hare*, 5 Beav. 629; 12 L. J., N. S., Ch., 344; 7 Jur. 336.

XV. REVOCATION OF GIFT TO A JOINT TENANT.

7. Devise of residue to A. and B. Codicil revokes every legacy, thing, and part as to A.; B. shall take the whole. *Humphrey* v. *Tayleur*, Ambl. 138.

If an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. *Ib.*

Residue to two executors in nature of joint tenancy; will revoked by codicil as to one: other takes whole. S. C. *nom. Humphrey* v. *Taylor*, Dick. 161.

XVI. LEGACIES CHARGED ON REAL ESTATE.

1. *Legacies given by a Valid Codicil*, 7614.
2. *Effect of Expressions "Herein" and "Thereinafter,"* 7616.
3. *Effect of Unattested Codicil*, 7616.
4. *Effect of Revocation of Devise of Lands Charged*, 7618.
5. *As to Charge of Legacies Generally.* See Legacy, VII.

1. Legacies given by a Valid Codicil.

8. One gives legacies by his will, and other legacies by his codicil, and the lands are charged with the legacies in the will only, and the personal estate is not sufficient to pay all the legacies, the legacies in the will shall be charged on the land, and the legacies by codicil on the personal estate. *Masters* v. *Masters*, 1 P. W. 422.

Real estate is by will charged with the payment of the legacies "above mentioned;" this will not extend to the legacies in the codicil. *Secus*, if the land were charged with the payment of the legacies generally. S. C. 1 P. W. 423.

9. Testator declaring his debts should come out of the real estate and the personal, gave the real to trustees charged with some charitable legacies, and one to each trustee. By codicil he removed one trustee, and revoked his legacy; appointing another with the same legacy. He revoked all the charitable legacies; and gave a less legacy to one of the charities mentioned before, and other new charitable

legacies, without specifying any fund; all held to be charged on the real estate, and, therefore, void as to the charitable legacies. *Leacroft* v. *Maynard*, 1 Ves. J. 279; 2 Bro. C. C. 233.

1. A gift of a share of moneys to arise by sale of real estates was revoked by a codicil, and 2,000*l.* given in lieu thereof. The latter was held to be payable out of the general personal estate. *Buxton* v. *Buxton*, C. P. C 97.

2. A testator directed 2,000*l.* to be invested in the funds, and the dividends to be paid to his widow during her life, and gave or confirmed to her two annuities. By codicil, he charged these on his real estates: and by a second codicil he directed to be paid to his widow, during her life, such yearly sum as, together with the interest of the 2,000*l.*, and the annuities, should amount to the annual sum of 1,200*l.*:—Held, that the testator's intention was, that his widow should have 1,200*l.* a year out of his real estates, subject only to a deduction of so much as the interest of the 2,000*l.* should amount to; and that she had a claim on the real estates for the whole annuity so long as that 2,000*l.* should not produce any income. *Devaynes* v. *Noble*, 8 L. J., N. S, Ch., 256; 3 Jur. 550. And see S.C. 2 Jur. 1082.

3. A testator gave all his personal and leasehold estate to trustees, upon trust, to sell and dispose of the same, and convert the whole into money, and, out of the money to arise by such sale, disposition, and conversion, to pay his debts and the legacies given by his will, or which he might give by any codicil thereto. He afterwards made a codicil, by which he gave to the same trustees 2,000*l.* out of his personal estate, upon trust to distribute and pay the same for charitable purposes. This legacy was held not to be charged on the leasehold estate. *Wilson* v. *Thomas*, 3 Myl. & K. 579; 3 L. J., N. S, Ch., 144.

4. A testator, by his will, dated in 1828, attested by three witnesses, gave to his son an annuity or rent-charge of 20*l.*, charged on his real and personal estate. In 1831 he made a codicil, expressly referring to his will, attested by two witnesses only, by which he revoked the annuity of 20*l.*, and gave to the wife of his said son an annuity or clear yearly rent-charge of 70*l.* for her separate use, with powers of entry and distress over his real estate, if in arrear; and he ratified and confirmed his will in all other respects. In the same year he made another codicil, attested by three witnesses, and thereby, after reciting that he had executed his last will and testament, and also a codicil thereto, he declared the same to be a second codicil to his will, and, after making various alterations in the disposition of his property, ratified and confirmed his will:—Held, that the annuity of 70*l.* was well charged by the first codicil, to which effect was given by the second codicil, upon the real estate. *Aaron* v. *Aaron*, 3 De G. & Sm. 475; 14 Jur. 125.

5. Gift of "an annuity or clear rent charge" of 40*l.*, in a codicil, held to charge all the estates devised by the will. *Exp. M'Dowal*, 5 Jur., N. S., 553.

6. A testatrix, by her will, after giving various legacies, directed that in case her personal estate should be insufficient for the payment of the legacies in full, they should be charged upon her real estate. By her codicil she gave other legacies, and confirmed her will:—Held, that the legacies given by the codicil were a charge upon the real estate. *Williams* v. *Hughes*, 24 Beav. 474; 4 Jur, N. S., 42; 27 L. J., Ch., 218.

7. A testator by will gives his moiety of an estate called H. to his sister and her children, and subsequently by a codicil, which purports to give them the whole of that estate if he shall possess it at his death, charges it with a sum of money to legatees; at the date of the will and codicil he was owner of only one moiety of H., but before his death he acquired the other; although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 1 Russ. & M. 169.

8. A codicil directed that legacies given by the will should be paid in proportion, and according to the deficiencies in the testator's real and personal estate:—Held, that they became chargeable upon the real estate. *Rich* v. *Whitfield*, 14 W. R. 907.

9. A testator gave sums of money as legacies to his three daughters, and charged them on his realty if his personalty should be insufficient. By a subsequent will, proved as a codicil, he gave, subject to two new legacies, all his personal estate to the daughters:—Held, that the legacies were not revoked by the codicil, but were payable out of the personalty, and if that were insufficient, out of the realty. *Leese* v. *Knight*, 12 W. R. 1097; 11 L. T., N. S, 134.

10. The trusts of a will were, in part, to provide an annuity of 1*l.* a week to each of the testator's sons, charged on the devised property. By a codicil reciting these trusts, he charged the property by the codicil with 1*l.* per week to each of his two sons:—Held, that this was not a cumulative legacy, but merely a reference to the old gift; and that it was charged primarily on the seven cottages, and as a subsidiary security on that which passed by the codicil. *Hincheliffe* v. *Hincheliffe*, 2 Dr. & Sm. 96; 5 L. T., N. S., 660.

11. A testator residing in Ireland, who was possessed of real and personal property, made his will in June 1836, by which he devised freehold estates to trustees for a term of ninety-nine years, to pay an annuity to his wife, and another annuity to one of his sons for life; the estate, after the death of his son, to go to the sons of that son in tail mail. He gave other lands, some freehold, some leasehold, to other sons; he created annuities and gave legacies; directed the different properties devised and bequeathed to fall, in certain events, into his residuary estate; and at the end of his will directed that "in case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and encumber the same with the payment thereof." In a codicil he said, "I charge and encumber all my estates, of every description, both real and personal, with the following legacies;" and he gave to these legatees a power to distrain on any part of his estates or property, of

every description, for the arrears of the interest due on the annuities given by the codicil:—Held, that the legacies were not charged on the specifically devised estates. *Conron* v. *Conron*, 7 H. L. Ca. 168.

1. A testatrix, by will, gave to G. an interest in certain chattels, and gave her residuary real and personal estate to trustees, in trust out of her personal estate to pay her debts, funeral and testamentary expenses, and a legacy of 10*l.* to H.; and out of the rents and profits of the real estate, to pay such of the debts, funeral and testamentary expenses as her personal estate should be insufficient to pay; and subject thereto, should stand possessed of the entire residue of realty and personalty in trust for the testatrix's three grandchildren. By a codicil, the testatrix directed that the trustees or trustee acting under her will should pay to H. 40*l.*, "in addition to the legacy of 10*l.* above mentioned, and to G. 100*l.* a year for life, in addition to the bequests above mentioned":—Held, that the direction in the codicil to the trustees to pay the legacy and annuity *primâ facie* made them a charge upon whatever funds the trustees had in their hands, and therefore charged them on the real estate in aid of the personalty, and that this was not rebutted by their being given "in addition" to bequests not charged on the realty. *Gallemore* v. *Gill*, 2 Jur., N. S., 1178; 2 Sm. & G. 158; 18 Jur. 480; 23 L. J., Ch., 604; 4 W. R. 773.

2. Effect of Expressions "Herein" and "Thereinafter."

2. Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts and the legacies thereinafter given. The testator afterwards gave legacies by codicils, one of which was duly attested:—Held, that only the legacies in the will were payable out of the real estate. *Strong* v. *Ingram*, 6 Sim. 197.

3. Trust of a term by will to pay the several legacies thereby given, and also the several other legacies hereinafter bequeathed. The subsequent part of the will, reciting that the legacies given by the will to the testator's daughters were not an adequate provision, gave each of them a further legacy, in addition to the said legacies given them respectively by the will. The legacies by the codicil are not charged upon the real estate. *Bonner* v. *Bonner*, 13 Ves. 379.

4. The will of a testator directed all his debts, funeral and testamentary expenses, and legacies thereby given, to be paid as soon as conveniently might be after his decease, and then followed, "and I charge my debts and legacies on my real and personal estate":—Held, that the charge on real estates extended to a legacy given by codicil in trust for A. for life, and that such construction was not cut down by his directing the stocks to be appropriated for payment of it to return and become part of the residue of his personal estate. *Rooke* v. *Worrall*, 11 Sim. 216.

5. A testatrix, by her will, gave all her real and personal property to trustees, whom she had appointed executors, upon trust thereout, in the first place to pay her debts, and in the next place to pay the legacies which she should give by any codicil. The testatrix, by a codicil, devised to her sister an estate, called "The Tradeswill Estate," "for her life; at her death, to be sold for the payment of legacies;" and thereby also gave to various parties legacies amounting in the whole to above 50,000*l.* The testatrix's personal estate proving insufficient for the payment of her debts and legacies:—Held, that the testatrix had not, by her codicil, made the Tradeswill estate the primary fund for the payment of legacies, but that the sole effect of the direction in the codicil to sell at the death of her sister was to exempt her sister's life estate from the payment of legacies; and that, with that exception, the real estate was an auxiliary fund for the payment of legacies. *Whieldon* v. *Spode*, 21 L. J., N. S., Ch., 913; 16 Jur. 281.

6. A testator, having bequeathed pecuniary legacies, some of them to charities, gave the residue of his real and personal estate to trustees to sell and thereout to pay his debts and the legacies therein mentioned, and further directed the charitable bequests to be paid, and that the proceeds of such part of his estate as the law did not permit to be given to charities should be first applied in payment of such of the legacies herein mentioned as were not given to charities. He directed that no charitable bequest should be legally payable till six months after his decease. By a codicil he gave other charitable legacies, and the residue of his property among charitable legatees:—Held, that the words "herein mentioned" included the legacies given by the will and codicil, taken together. *Jauncey* v. *Att.-Gen.*, 3 Giff. 308; 8 Jur., N. S., 6; 10 W. R. 129; 5 L. T., N. S., 374.

Held, secondly, that, having regard to the distinction made in the will between property capable of being bequeathed for charitable purposes, and property not so applicable, the word "property" in the codicil signified such property as was legally applicable to the purpose of the legacy. *Ib.*

7. M., being indebted in 25*l.*, the balance of a larger sum, to a female, E., directed by his will all his just debts and legacies thereinbefore mentioned to be paid. Afterwards E. married, and then M., by codicil, gave E. a legacy of 100*l.*:—Held, that the charge in the will of legacies "thereinbefore" mentioned could not be extended to the legacy given by a codicil, and that the legacy was to be taken in satisfaction of the debt. *Edmunds* v. *Lowe*, 3 Kay & J. 318; 3 Jur., N. S., 508; 26 L. J., Ch., 432; 5 W. R. 444.

3. Effect of Unattested Codicil.

8. Testator, by his will, gave an annuity, payable out of his freehold, copyhold, and personal estate, and by a codicil, not duly attested, revoked the annuity:—Held, that this was a subsisting charge upon the freeholds. *Mortimer* v. *West*, 2 Sim. 274.

9. A testator by a will duly attested gave all his real and personal estate to trustees to convert into money and pay his debts, and then to appropriate and take out of his said trust-moneys 1,000*l.*, which he gave to the plaintiff. By a codicil not properly attested so as to

pass real estate, he revoked the legacy:—Held, that on this will the testator had made his real and personal estate a common fund for payment of this legacy, that the revocation was inoperative as regarded the real estate, and that the plaintiff was entitled in the proportion which the real estate bore to the personal. *Stocker* v. *Harbin*, 3 Beav. 479.

1. B. devised an estate to A. for life, with remainder in tail male, and by an unattested codicil directed certain weekly allowances to be paid by whomsoever inherited the estate. To a bill against the tenant in tail for payment of one of the weekly allowances, a general demurrer was held good. *Middlebrook* v. *Bromley*, 9 Jur., N. S., 614; 11 W. R. 712; 2 N. R. 224.

2. A testator made a will and codicil; the former was attested so as to pass real estate, but the latter was not. By his will he bequeathed a legacy of 3,000*l.*, and charged it on his real, "in aid of his personal estate." And he devised his real and personal estate to trustees, charged with his legacies thereout, by mortgage, sale, or other disposition, to pay the legacy of 3,000*l.* By the codicil he reduced the legacy to 2,000*l.*:—Held, that the codicil, though not properly attested, effected the reduction. *Coverdale* v. *Lewis*, 30 Beav. 409; 8 Jur., N. S., 351; 10 W. R. 307.

3. When a sum of money is given originally out of land, a will with that charge must be equally executed with the same solemnity, because it is considered as part of the land. *Brudenell* v. *Boughton*, 2 Atk. 272.

When a first will charges real estate with legacies, and a second gives general pecuniary ones, though not executed in form, yet the later legacies will be equally a charge upon the land. *Id.* 274.

The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged on lands; they must be revoked in the same manner. *Ib.*

4. Where real estate is charged with legacies generally by will duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge* v. *Ingram*, 2 Ves. J. 665. And see *Hannis* v. *Packer*, Ambl. 556.

Testator, by will duly attested, gave an annuity to his daughter, charged on his real estate in aid of his personal; by codicil not attested he gave his real and personal estate to his mother for life; during her life the personal estate is discharged from the annuity, but it remains a charge on the real. *Id.* 652.

5. Legacy given by an unattested codicil is within a general charge, in the will, of debts and legacies to be given by codicil, on the real estate, though the will gives no legacies. An annuity is a legacy for this purpose. *Swift* v. *Leach*, 1 Jur. 507.

6. Devise and bequest of all the testator's real and personal estate in Grenada, to pay all such annuities, legacies, or bequests as he should give or bequeath to be paid out of or charged upon his real or personal estate in Grenada, by his will, or any codicil, whether witnessed or not. A charge by an unattested codicil is void, this being not a charge by the will of legacies, but a reservation by a will, executed according to the statute, of a power to charge by an unattested paper. As to the objection that the real estate was not charged as a subsidiary fund to the general personal estate, *quære*. *Rose* v. *Cunynghame*, 12 Ves. 29.

7. A testator directed his real and personal estate to be sold, and the moneys arising from the sale to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will. He afterwards gave an annuity to his wife by an unattested codicil:—Held, that the annuity was well charged on the real estate. *Swift* v. *Nash*, 2 Keen 20; 6 L. J., N. S., Ch., 363; 1 Jur. 557.

8. Testator having, by will duly executed, charged upon his real estate the legacies thereby given, afterwards gave legacies by several unattested codicils, and finally executed a codicil duly executed and attested, varying the appointment of trustees and executors, and revoking some legacies given to them by some of the codicils:—Held, that the legacies given by unattested codicils were not charged upon the estate. *Radburn* v. *Jervis*, 3 Beav. 450.

9. If a testator, by will properly attested, charge real estate with legacies he shall after give by codicil, a legacy by codicil not attested is good. *Inchiquin* v. *French*, Ambl. 41; Ridgw. 230; 1 Cox 1.

10. Where a testamentary instrument, incomplete as a will, appears, on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the Spiritual Court; but where a former will makes a charge of legacies generally on land, and a subsequent will, giving legacies, is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter: otherwise where the charge is made of particular legacies. *Jackson* v. *Jackson*, 2 Cox 35.

11. A codicil does not revoke or alter a will to a greater extent than was intended. A testator, by his will, gave certain legacies, exclusively charged on real estate. By a codicil, after reciting so much of the will as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given gave smaller ones. The object of the codicil being only to alter the amount of the legacies:—Held, that it could not extend to charge the personal estate, and not being attested by three witnesses, could not alter the legacies charged on the real estate. *Kirke* v. *Kirke*, 4 Russ. 435; 6 L. J., Ch., 143.

12. A testator gave his freeholds and copyholds upon trust for his son, a lunatic, absolutely; and, in case he should not recover, upon trust for sale, the proceeds to be held upon trusts to pay certain legacies without any gift of the residue. By an unattested codicil he gave other legacies in the like event, and made three persons his residuary legatees:—Held, that, although the unattested codicil did not affect the freeholds, the legacies thereby given were a charge on the copyholds; and that the residuary legatees therein named were also entitled to the proceeds of the sale of the copyholds. *Wildes* v. *Davies*, 1 Sm. & G. 475; 22 L. J., Ch., 495 1 W. R. 253.

4 Effect of Revocation of Devise of Lands Charged.

1. Where a testatrix devised real estate to A., charged with certain annuities and legacies, and by a codicil revoked the devise of the lands to A., and devised them to B., and "confirmed her will in every other respect":—Held, that the lands were charged in the hands of B. *Young* v. *Hassard*, 1 Dr. & War. 638.

A testatrix, by her will, devised the lands of D. to trustees to the use of her son Y. for life, with remainder to his sons in tail. She then bequeathed a number of annuities to different members of her family, and among the rest an annuity of 100*l.* to H.; and she directed that these annuities should be paid without any deduction, and charged them "on the lands so devised to the use of my son Y.;" and on the residue of certain other lands which she directed to be sold. The testatrix subsequently made a codicil to her will, in which the following clause occurred: "And whereas I did, by my said will, give the lands of D. to the use of my son Y. as therein, now I do hereby revoke so much of my said will as gives said lands of D. to my said son Y., and I direct the trustees shall stand seised of the said last-mentioned lands to the use of my daughter H. (the annuitant) for her life, in addition to what I have left her by my said will":—Held, that the testatrix merely meant to substitute one devisee for the other, and did not intend to discharge the lands of D. from contributing to the payment of the annuities, with which, by the will, they were charged. *Ib.*

A codicil is never held to revoke a will further than is necessary to give effect to the intentions of the testator. *Ib.*

2. As long as the fund itself exists upon which a legacy is charged, though it devolve either upon the heir or the executor, yet they take it, subject to the charge. *Hills* v. *Worley*, 2 Atk. 605.

3. A testator bequeathed one moiety of his personal estate to pay certain legacies, and then to pay the residue of such moiety to J. J., and in the event of the death of J. J., living H., then over; provided if J. J. left a widow, to pay to her 200*l.*, part of the moneys so given to J. J. By a codicil the testator revoked the gift of the moiety to J. J.:—Held, that the 200*l.* legacy to his widow was revoked by the revocation of the gift of the moneys out of which it was to be paid. *Grice* v. *Funnell*, 1 Sm. & G. 130.

4. A testator devised an estate, X., and other estates to A., charged with annuities, and an estate, Y., and his residuary, real, and personal estate to B., subject to the payment of his debts, funeral expenses, and legacies. He afterwards revoked so much of the second devise as included Y., and devised it, subject to the same annuities and in the same manner as the estate X.:—Held, that the charge of debts, etc., on Y. was revoked. *Ravens* v. *Taylor*, 4 Beav. 425.

XVII. WHERE SEVERAL CONFLICTING WILLS.

5. If will be made, and afterwards another will without cancelling the former, and either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed will go according to the limitations in that will. *Phipps* v. *Anglesey*, 7 Bro. P. C. 445.

If there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law of uncertainty, and will let in the heir-at-law, unless such wills are explained by some subsequent act of the testator, so as to reconcile such inconsistency. *Ib.*

If two wills appear, and the limitations in both are consistent, and they have both been confirmed by various codicils, the wills and codicils may be taken together as one testamentary disposition, and such construction made as that the limitations in both wills shall take place, to the disherison of the heir-at-law. *Ib*

6. On construction of two wills, second held to be in substitution of first. *Hemming* v. *Gurrey*, 2 Sim. & S. 311.

7. A testator left three testamentary papers. The first disposed of the whole of his property. The second disposed of part only, and began with the words, "This is my last will and testament." The third, of the same date, and written on the same sheet of paper as the second, appointed executors in these terms: "Of this my will I appoint the said W. W. and C. S. executor and executrix":—Held, that, although there were no express words of revocation, and the deceased had disposed of part only of his property, the first will was revoked. *Plenty* v. *West*, 9 Jur. 458; 1 Robert. 264.

8. Prior wills of real estate held to be revoked by a subsequent will, although the latter contained no express clause of revocation, and the result of the decision was a partial intestacy. *Plenty* v. *West*, 17 Jur. 9; 22 L. J., Ch., 185; 1 W. R. 3; 16 Beav. 173.

A testator left four testamentary instruments, duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate, this Court, on the certificate of the Common Pleas, decided that, as to the real estate, the last instrument alone constituted the last will. *Ib.*

A testamentary paper relating to real estate alone, commencing, "This is the last will and testament of me, relating to all my real estate whatsoever":—Held, totally to revoke a prior will. *Ib.*

9. A testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of 5*l.*, but appointed no executors:—Held, that the second will operated as a revocation of the first will, and was alone entitled to probate. *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; 6 Jur. 355.

XVIII. WHERE SEVERAL CONFLICTING WILLS OR CODICILS.

10. Testator bequeathed a year's wages and

150*l.* to his servant, J. F. By a codicil he revoked those bequests, and gave J. F. an annuity in lieu of them. By a subsequent codicil he revoked every gift in his will bequeathed to J. F., his late butler, both the one year's wages and the further pecuniary legacy of 150*l.*:—Held, that the annuity given by the prior codicil was not revoked *Pratt* v. *Pratt*, 14 Sim. 129; 8 Jur. 507.

1. A testator in his lifetime by bond secured to H. C. C. an annuity of 300*l.* for life, payable on the usual quarter days, etc., and by his will confirmed it, and bequeathed a further annuity of 200*l.* payable in the same manner, it being his intention that she should receive an annuity of 500*l.* instead of 300*l.* By a codicil the testator directed his trustees to raise 500*l.* a year, and pay the same to H. C. C. during her life by quarterly payments:—Held, that the second annuity was not cumulative. *Radburn* v. *Jervis*, 3 Beav. 450.

A testator appointed A. B. and C. D. trustees and executors of his will. By a codicil he bequeathed to each of the trustees named in his will the sum of 5,000*l.*, on condition that he accepted the trusts thereof. By a subsequent codicil he revoked all that part of his will which related to C. D., and requested E. F. "to undertake and fulfil the same purposes and intentions, and on the same conditions for the effecting of which he had appointed the said C. D. By a subsequent codicil he revoked the appointment of A. B and C. D. as trustees and executors, and all legacies to them, and he nominated E. F. executor and trustee thereof:—Held, that E. F. was entitled to the legacy of 5,000*l.* *Ib.*

2. Testator gave 4,000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue. By codicil reciting this bequest, and that he is desirous of increasing the same to 5,000*l.*, he revoked the gift of 4,000*l.*, and gave 5,000*l.* upon the same trust, etc. By a second codicil reciting the former, and that he is desirous of further increasing to 6,000*l.*, he revokes the gift of 5,000*l*, and gives in lieu thereof 6,000*l.* upon the same trusts. This is not a revocation, but substitution in each instance, and the 6,000*l.* is therefore exempt from legacy duty. *Cooper* v. *Day*, 3 Meriv. 154.

3. Construction of a will and several very inaccurate codicils upon a disposition of the personal estate; as to the interest, whether absolute or for life; as to the extent, whether general or specific and exempt from debts. *Coxe* v. *Basset*, 3 Ves. 155.

4. Testatrix, by her will, gave legacies of 200*l.* each to the seven children of J. B, and also other interests. By a first codicil she revoked the legacies of 200*l.* to the children of J. B., and all other gifts to them by the will, and in lieu thereof gave legacies of 200*l.* each to Samuel and four other of the children by name. She made a second codicil, simply "cancelling all legacies left on her will to the children of J. B." By a third codicil she revoked "the legacy of 200*l.* given by a previous codicil" to Samuel:—Held, that the other four legacies given by the first codicil were not revoked. *Bunny* v. *Bunny*, 3 Beav. 109; 9 L. J., N. S., Ch., 335; 4 Jur. 716.

5. Testator, by his will, gave all his property to his wife absolutely. By a subsequent incomplete testamentary paper he gave all his property to his wife and two other persons, in trust, to sell and pay the interest of the proceeds to his wife for her life, and after her decease to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper, the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons:—Held, that the three papers formed together the testator's will; that the bequest to the wife, in the first paper, was not revoked, except so far as was necessary to provide for the legacies and annuities; and that the legacies given by the second and third papers were single, and not cumulative. *Brine* v. *Ferrier*, 7 Sim. 549; 1 Myl. & C. 338.

6. Testator by his will devised the lands of K., held for a term of years, to H. and J Ryan, and the longest liver of them. He afterwards executed two codicils on the same day. In the first he did not mention K. by name; but after directing two bonds to be given to his eldest son, "to create a fund to pay the rent of their lands of K.," he relinquished "a settlement made to J. Ryan, of an interest concern on this occasion, and desired that the entire interest and property arising out of this farm, after the demise and extinction of the present lease, be converted into one fund." By the other codicil he gave certain property to pay the head-rent of K.:—Held, that the bequest of K. to J. Ryan was not revoked by the codicils. *O'Shea* v. *Howley*, 1 J. & L. 391; 7 Ir. Eq. R. 56.

7. Testator, by his will, gave 500*l.* to A. and 1,000*l.* to B., to be paid within twelve calendar months after his wife's death. By a codicil of the same date he reduced those legacies to 300*l.* and 500*l.* respectively. Afterwards he formally re-published his will. By a second codicil, after reciting the bequest in his will of 500*l.* to A, he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that by his will he had given R. 3,000*l.*, he reduced that legacy to 2,000*l.*, and then directed that the 300*l.* given to A., as well as the 1,000*l.* given to B., should not be paid till twelve months after the death of his wife:—Held, taking all the instruments together, that B. was entitled to a legacy of 1,000*l.* *Grand* v. *Reeve*, 11 Sim. 66

8. A testator, by his will, gave the residue of his personal estate to A., B., and C., to be equally divided between them. By a codicil he gave A. the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A. all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil he revoked the bequest made to B. by his will:—Held, that the gift to A. by the first codicil was a general one, and that the words, "property, goods, and articles," were not to be confined to

articles *ejusdem generis* with clothes; and that consequently A. was entitled to two-thirds and C. to one-third of the residue. *Ercrall* v. *Browne*, 22 L. J., Ch., 376; 1 Sm. & G. 368.

1. A testator bequeathed to A. and B. 500*l.* stock apiece; he then gave his "particular residue," consisting of the residue of all his moneys and securities for money, but without including any portion which could not be bequeathed for charitable purposes, to trustees, upon charitable trusts; and he bequeathed his general residuary personal estate, including therein his particular residuary estate, if the trusts thereof should fail, to A. and B. By his first, second, and third codicils he gave other stock and a sum of money to A. By his fourth codicil he revoked all the moneys bequeathed to A. and B., in whatever will or codicil such legacies might have been bequeathed, and in lieu gave stock to be divided between them:—Held, that the fourth codicil revoked the gifts of stock and money made by the will and preceding codicils to A. and B. respectively, but did not revoke the gift of the general residue contained in the will. *Barclay* v. *Maskelyne*, 5 Jur., N. S., 12.

2. Testator by his will gave real estate, with various limitations, and also stock to his wife for life or widowhood, and after her death to the person who should be entitled to his residuary real estate, either as tenant for life, or in tail male. By his first codicil he gave his residuary estate to his widow. By the fourth codicil he revoked the dispositions made of his real and personal estate; and instead he gave his real and personal estate to his daughter; remainder as to the same to his grandson and his heirs in strict entail, as in his will directed, but he was not to take possession till he should attain thirty-one, and, on failure of issue of his grandson, he ordered that his estate and effects should go and descend as by his will directed:—Held, that gift of the residuary property by the first codicil was not revoked by the fourth codicil, that the funded property did not fall into the residue, but was given for life to the daughter, remainder in strict settlement to the grandson for life, remainder to his eldest son. *Patch* v. *Graves*, 3 Drew. 348.

XIX. BY GIFT "IN LIEU OF" GIFT BY WILL.

3. Testator directed his trustees to invest such a sum as would produce 40*l.* a year, and to pay the same to his daughter, and after her death to transfer the fund to his residuary legatees; and he gave 100*l.* to his daughter absolutely. By a codicil he revoked the sum of 1,200*l.* given to his daughter for her life, and gave her 500*l.* in lieu thereof:—Held, that as the 40*l.* a year was the only sum given to the daughter for life, it was revoked by the codicil. *Pilcher* v. *Hole*, 7 Sim. 208; 4 L. J., N.S., Ch., 50.

4. Testator gave 4,000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue. By codicil reciting this bequest, and that he is desirous of increasing the same to 5,000*l.*, he revoked the gift of 4,000*l.*, and gave 5,000*l.* upon the same trust, etc. By a second codicil reciting the former, and that he is desirous of further increasing to 6,000*l.*, he revokes the gift of 5,000*l.*, and gives in lieu thereof 6,000*l.* upon the same trusts. This is not a revocation, but substitution in each instance, and the 6,000*l.* is therefore exempt from legacy duty. *Cooper* v. *Day* 3 Meriv. 154.

5. A testatrix, by her will, bequeathed money to trustees, upon trust, to accumulate for a period exceeding what the law allow and to pay and divide the principal sum, interest, and accumulations unto and amongst a certain class, with a power of advancement in favour of sons. By a codicil, after reciting that she had, by her will, bequeathed this sum upon trust to accumulate, and to pay and divide the same sum, and all accumulations thereof, in manner therein mentioned, she directed, that in lieu of the accumulation and disposition made thereof, by her will, the trustees should accumulate for twenty-one years after her decease, and should stand possessed of the principal money, interest, and accumulations upon trust for such of the class as should be then living. The codicil did not repeat the power of advancement, but concluded by confirming the will in every particular in which the same was not thereby altered:—Held, that the power of advancement was a valid and subsisting power, and was not revoked by the codicil. *Hill* v. *Walker*, 4 Kay & J. 166.

6. A testator bequeathed to A., B., C., and D., the sons and daughters of X., 500*l.* apiece. By a codicil he bequeathed 2,000*l.* to be divided between A., B., and C. By a further codicil he revoked and cancelled all the moneys bequeathed "to the sons and daughters of X.," in whatever will or codicil such sums might theretofore have been bequeathed, and, "in lieu thereof," he bequeathed 10,000*l.* "to the sons and daughters of X., to wit, A, B. and C.," to be divided equally between them:—Held, that the second codicil did not revoke the gift of 500*l.* made to D. by the will. *Barclay* v. *Maskelyne*, 5 Jur., N. S., 12.

XX. REVOCATION BY CODICIL IN OTHER CASES.

7. Devise to the children of A.:—Held, not to be revoked by an expression in a codicil, that they were not intended to take any beneficial interest under the will or codicil. *Cleoburey* v. *Beckett*, 14 Beav. 583.

A testator devised his real estate to his brother William for life, with remainder to his first and other sons in tail, with remainders over; and he bequeathed his residuary personal estate between his nephews and nieces. By a codicil he revoked his will, so far only as it was altered by the codicil, and he gave to his nephews and nieces, except (as he said) his brother William's children, "who are not intended to take any beneficial interest under this will or this codicil," 1,000*l.* each:—Held, that the devise to the children of William was not revoked. *Ib.*

8. Bequest, by codicil, that dividends only of legacies which had been bequeathed by will should not be paid to legatees, and that

the legacies should not be paid to them, leaving the principal not further disposed of, is equivalent to gift of the *corpus*, and is a gift of the principal. *Richards* v. *Richards*, 9 Price 219.

1. R., being in possession of mines and iron-works, under leases of unequal duration, by will bequeathed 25,000*l.* to B., "as a capital for him to become partner with my executors of one-fourth share in the trade of all those works so long as the lease endures," with a devise to H. and his wife of residue of his estates, real and personal. By codicil testator gave to W. three-eighths of concern of iron works: "the partnership will stand at my death, W. three-eighths, H. three-eighths, B two-eighths." After R's death, W, H, and B. carried on works for two years, selling iron manufactured not only from the produce of the mines, but from other sources:—Held, that codicil revoked residuary clause in favour of H.'s wife as to the trade, and that concern was a partnership in trade. *Crawshay* v. *Maule*, 1 Swan. 495; 1 Wils. 181.

2. A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate; by a codicil he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes which were expressed in the will as to the residuary personal estate. *Francis* v. *Collier*, 4 Russ. 331.

3. A testator, by his will, gave 3,000*l.* to his brother B. for life, with remainder, as to 1,000*l.*, to his wife for life; remainder, as to the whole, to his children. He then gave 6,000*l.* to his sister S. for life, with remainder to her husband for life, remainder to her children; and, after bequeathing 10*l.* a year to each of his two maid-servants for their lives, he gave all his real estate, and the residue of his personal estate, to his sister H. absolutely. By a testamentary paper, described as a codicil to his will, he left his brother B. an equal share of his effects with his sister, to have the interest for his life, with remainder to his children, subject to a life interest in 1,000*l.* to his wife, if living at his death; and his sister S. was to have an equal share with his sister H. By a subsequent testamentary paper, also described as a codicil, he left his two maid-servants 10*l.* a year each for their lives, and nominated a person to act as trustee with the executors named in the will:—Held, upon the effect of all the testamentary papers taken together, that the will, though modified, was not wholly revoked by the first codicil. *Cookson* v. *Hancock*, 2 Myl. & C. 606; 6 L. J., N. S., Ch., 56. Affirming 1 Keen 817; 5 L. J., N. S., Ch., 245.

4. Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity, and, directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate in case of a deficiency, and, directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease to the use of her two daughters for life, in such parts, shares, and proportions as she would approve, with remainder to their respective issue, and cross-remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate, the will is not revoked, but is re-published by the codicil, and the two nieces are entitled to all the real estates, and to those directed to be purchased as tenants in common in fee. *Meggison* v *Moore*, 2 Ves. J. 630.

5. Several legacies given to R. J. by name, and a bequest to E. I. and S. C, for their lives, and to the survivor of them, and after the decease of the survivor, equally among all the children of E. I. and S. C. living at that time, to be vested at twenty-one, or on death before leaving issue. Codicil revoking all the legacies, bequests, and benefits, in and by the will given to R. J. therein named, in lieu whereof the testator gave to R. J. 1,000*l.* 2 per cents. R. J. was the only issue of E. J. and S. C.:—Held, that the gift to him as such issue was revoked by the codicil. *Cotterell* v. *Sanderson*, 1 Jur. 474.

6. A will, devising estates for life without impeachment of waste, not revoked by codicil directing the trustees to let, until tenant for life married, such leases under restrictions, one of which was, that the lessees should not be unimpeachable of waste. *Lushington* v. *Boldero*, Coop 216.

7. A testator directed that his trustees should stand possessed of all his freehold and copyhold estates, out of the rents and profits, but not by way of mortgage or sale, to discharge the mortgages and incumbrances affecting the same, and by a codicil directed that his trustees should out of such rents and profits (after the death of his wife) lay apart 5,000*l.* yearly, to form, with the interest, an accumulating sum for the purpose of discharging such mortgages:—Held, that the direction in the codicil was not a revocation of the direction in the will; and therefore that the trustees during the life of the wife should appropriate the whole of the rents and profits in discharging the mortgages. *Lovat* (*Lord*) v. *Leeds* (*Duchess*), 2 Dr. & Sm. 62. Affirmed 7 L. T., N. S., 36.

8. Testator drew two cheques on his banker in favour of two of his servants, and delivered them to the servants, with directions to present them after his death. About a year afterwards he made a testamentary instrument, by which, after giving legacies to different persons, and an annuity to each of the two servants, he bequeathed the residue of his personal estate to A. B., and revoked any former will or codicil by him made, and declared that instrument to be his last will. Three paper writings were admitted to probate as constituting together the testator's last will:—Held, that though the Court of Chancery was bound to consider

the amounts of the cheques as legacies, they were revoked by the subsequent instrument. *Walsh* v. *Gladstone*, 13 Sim. 261. Affirmed 1 Ph. 294; 13 L. J., N. S., Ch., 52; 7 Jur. 1143.

1. A testator, by his will, gave his real estates to his wife for life, and, after her death, he directed them to be sold, and one moiety of the proceeds to be paid to his wife's relations as she should appoint, and, in default of appointment, to her next of kin, and the other moiety to his own next of kin. By a codicil he expressed his will that his real estate should be sold at any time, either before or after his wife's death; the interest of the share bequeathed to his own relations after his wife's death to be paid to her, and the other moiety devised by his will to be paid to his wife for her own use:—Held, that the power of appointment given by the will was revoked by the codicil, and that the wife took an absolute interest in one moiety of the proceeds of the testator's real estate. *Ankers* v. *Sandford*, 4 Jur. 817.

2. Testator, by a will made since the statute 1 Vict., c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L., M., N., O., and P.; in a subsequent part of his will he bequeathed to H. one-half of the legacy named to each of the other legatees, that is to say, one-half what his brother M. ought to receive. By a codicil the testator declared as follows: "I revoke all that part written in my former will which leaves a legacy to H., written in my will on the thirty-second and thirty-third lines":—Held, that by force of this revocation the will was to be read as if the gift to H. were not in it; consequently, that such revocation inured to the benefit of the other devisees and legatees. *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

3. A will reciting that the testator was entitled to a remainder in fee, expectant on the death of his wife, he devised the same, after the death of his wife, to his son W. for life, and after his decease to the child or children of W.; and for default of such issue to his own heirs. By a codicil he retracted the devise to W., and gave to his wife and grandchildren (issue of his son J.) what he originally allotted to W.:—Held, that the remainder in fee passed by the codicil to the wife and grandchildren. *Madden* v. *Kirwan*, 7 Ir. Eq. R. 570.

Semble, the gift in the will to the children of W. was revoked by the codicil. *Ib.*

4. A testatrix having a son and two daughters, gave 6,000*l.* 3 per cent. stock to her son for life, remainder as to one moiety of it to eldest male child living at her decease, and as to the other moiety to his other children. She also gave 6,000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children, and she further gave a sum of bank stock to her three children, in equal shares during their lives, and the share of each was at his or her death to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of those two stocks should be settled upon them for their lives and afterwards upon their children:—Held, that by the operation of the codicil the moiety of 3,000*l.* 3 per cent. stock which by the will was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to her children; that as to all the other bequests the attempt to extend the limitations to great-grandchildren was ineffectual, and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 1 Russ. & M. 209; Taml. 347; 8 L. J., Ch., 88.

5. Testator gave 4,000*l.* to his grand-daughter and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil he directed that his grand-daughter should have only the interest of 2,000*l.* for her maintenance, until she attained twenty-three, and that the interest of the other 2,000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her, for life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The grand-daughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy:—Held, that the gift in the will was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. *Bell* v. *Jackson*, 1 Sim., N. S., 547.

6. A testator devised his freeholds to A. for life, with divers remainders over, under which limitations C. would have been entitled to the first vested estate tail. He gave copyholds and leaseholds to trustees, upon trusts to correspond with the uses of the freeholds. By a codicil he altered some of the limitations of the freeholds subsequent to A.'s life estate, so as to take away C.'s interest, but did not mention copyholds or leaseholds:—Held, by Turner, L.J., that the Court would not, during the life of A., decide whether the codicil affected the copyholds and leaseholds so as to take away C.'s interest therein. *Langdale (Lady)* v. *Briggs*, 2 Jur., N. S., 982; 26 L. J., Ch., 27.

7. By a will specific and pecuniary legacies were given to several legatees by name, and the testator gave all the residue of his personal estate to all the before-mentioned pecuniary legatees, with certain exceptions, to be divided between them in proportion to their pecuniary legacies. By a codicil, after reciting the death of one of the pecuniary legatees, the testator bequeathed the legacy given to her by the will to B.:—Held, that there was an intestacy as to the share of the residue given by the will to the deceased legatee. *Re Gibson*, 31 L. J., Ch., 231; 2 John. & H. 656.

8. Bequest of residue to the children of A., the children of B., to C., to the children of D., and to E., in equal shares. Revocation by codicil of the gifts to C. and to the children of A., with a declaration that they should not be residuary legatees:—Held, that the gift of residue was to the residuary legatees as a class, notwithstanding that some of the individuals to take were named; and that the effect of the will and codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked. *Clark* v. *Phillips*, 17 Jur. 886.

1. A testator gave to trustees for the benefit of his wife, "as concerning my mansion-house, land, and premises called O, now in my occupation, to permit her to reside in and occupy the same so long as she shall think proper," with conditions as to residence, and from and after her decease to his son for his own absolute use. By a codicil he recited that "he had pulled down the mansion-house, offices, and buildings, called O., and was erecting another mansion-house, and he directed that his trustees should hold the new mansion-house on the like trusts as by his will were expressed and declared of and concerning his mansion called O, and in all other respects he confirmed his will:—Held, that the codicil was, *pro tanto*, a revocation of the will, and the gift over of the estate at O. to his son took effect on the testator's death. *Poore* v. *Wright*, 3 L. T., N. S., 773.

2. A testator, by a will made in 1832, devised his real estate to A. By a codicil he said, "I acknowledge B. to be my next of kin and heir-at-law of all my personal property":—Held, that the codicil revoked the devise to A., and B. took the estate absolutely. *Parker* v. *Nickson*, 9 Jur., N. S., 451; 11 W. R. 533; 7 L. T., N. S., 813.

The word "acknowledge" was sufficient to indicate an intention that the person named should be recognised as filling that character, which would entitle him by law to the whole of the real estate. *Ib.*

3. After a trifling specific bequest a testator gave his residuary, real, and personal estate for the benefit of his grand-daughter and her children. By a codicil, which he directed to be annexed to and taken as part of his will, he, in consideration of the faithful services of his servant R., gave and bequeathed to him the whole of his estate and all his household goods and furniture, linen, china, watches, and all other his personal property and effects, free from legacy duty; and confirmed his will in all other particulars.—Held, that the devise in the will of the real estate was not revoked by the codicil. *Molyneux* v. *Rowe*, 8 De G. M. & G. 368.

4. A testator, by will, bequeathed the sum of 6,000*l.* to trustees upon trust to pay the income to his widow for life, for the maintenance of herself and two infant children, and, after her death, he gave the *corpus* to the children on their attaining twenty-one. One of the children having died in the testator's lifetime, he made a codicil to his will, by which, after reciting the gift of 6,000*l.* to have been intended as a provision for his widow, and to enable her to support the infants, he revoked "the said legacy," and bequeathed to his trustees the sum of 4,000*l.*, the income of which he directed to be paid to his wife for the support of herself and the surviving infant child:—Held, that the revocation by the codicil of the 6,000*l.* given by the will was confined to the income of the widow, and that the gift of the *corpus* of the 6,000*l.* was not affected by the codicil. *Stocks* v. *Hammond*, 2 N. R. 307.

The will also contained a power to the executors to make a specific appropriation of any investments of the testator to the extent of 6,000*l.* for the purpose of answering the annuity given to the widow. The codicil which substituted the 4,000*l.* for the 6,000*l.* did not repeat or contain any reference to this power:—Held, that the power must be deemed to be revoked, and that consequently the widow was not entitled to have the income of bank shares of the value of 6,000*l.* belonging to the testator at the time of his death, and yielding a large rate of interest, specifically appropriated for her benefit. *Ib.*

5. A testator gave real and personal estate to trustees to pay the rents and dividends and interest to his father and mother for their lives in succession, and then to E. D. and her issue equally, after the determination of the previous estates; with remainder, in default of such issue, or if they died under twenty-one, as to one-half part of the realty, and residue of the personalty, amongst the sons and daughters of his uncle L. living at the testator's death, and the issue of such as were then dead. And as to the remaining half of the rents and dividends and interest to his aunt for life, remainder to her daughter E. for life, and after the death of the survivor to the children of E. then living, and the issue of such as were dead, with benefit of survivorship. By a codicil the testator revoked the ultimate distribution of the residue directed by the will, and instead of dividing it into two parts, gave it to all his cousins equally, E. taking as one. The testator's uncle had seven children, and five predeceased the testator:—Held, that the codicil was a revocation of the shares, not the manner in which they were given; and that the property was divisible into fifths—two to the surviving children of L., and the others to E, and the issue of the deceased children of L. *Leicestor* v. *Wood*, 15 W. R. 308.

6. A testator, having bequeathed legacies to his daughters, and annuities by way of maintenance to them and to one of his sons, to whom he also devised real estate, made a codicil, by which he purported to appoint amongst them, in full discharge of all claims which they could have upon his estate or assets, a sum of money which under his marriage settlement he had power to appoint amongst his younger children:—Held, that, irrespectively of the validity or effect of the codicil as an appointment, it did not operate to revoke the prior gifts in the will. *M'Dermot* v. *O'Conor*, 10 Ir. R., Eq., 352.

7. A testator devised to his sister nine houses absolutely. He then bequeathed 4,000*l.* to trustees, upon trust, by a proper deed and declaration of trust, to provide stipends and annuities for aged persons, with a direction that such deed should contain rules for the management of the institution, and for regulating the age and conditions upon which persons should be admitted thereto; and he begged to point out to his sister, but not intending to impose any obligation whatever upon her, that the houses which he had devised to her might be converted into eligible almshouses for the recipients of his bounty. He made a codicil, confirming his will in all respects, except such parts thereof "as relate to the building of almshouses, which part I hereby revoke, and desire that my executors may be released from carrying out the same, and the stipends and annuities connected therewith":—Held, that the bequest of the 4,000*l.* was revoked by the codicil. *Baldwin*

v. *Baldwin*, 2 Jur., N. S., 773; 22 Beav. 419; 26 L. J., Ch., 121.

1. A testator, by will, gave B. 80*l.* per annum, long annuities, to 1860, and a deferred annuity "of 80*l*, from Christmas 1859" By a codicil, which did not mention B.'s name, he said, "I direct that my executors make my long annuities of 80*l*., instead of 80*l*. be only 30*l*. per annum, and a reversionary annuity purchased on her life, 30*l*., as I have lately expended money on her account":—Held, that B. was referred to, and that she was entitled to 30*l*. a year. *Ellis* v. *Bartrum*, 25 Beav 107.

2. A testator gave seven cottages specifically described, together with other property, also specifically described. By a codicil he recited the gift by the will, referring in terms to the property described, other than the seven cottages; he then revoked the gift of the property described in the recital, and gave the property "included in the hereinbefore-mentioned devise" in a different manner and upon other trusts:—Held, that the gift of the seven cottages was not revoked, but they passed under the devise, upon the trusts named in the devise. *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & Sm. 96; 5 L. T., N. S., 660.

3. A testator bequeathed 12,000*l.* among his younger children, and his household furniture and live and dead stock to such of his daughters who should attain twenty-one; and other portions of his property, real and personal, to his children, and the residue of his property to his daughters. He made a codicil to his will, commencing thus: "Codicil to my will of the, etc. Four of my children having died since the execution of the will, I alter the disposition of my property as follows":—He bequeathed 4,000*l.* each to his three surviving daughters; and in case of one dying unmarried, her portion to go to the survivors; but in the event of more than one dying unmarried, her portion to go among his sons, as he was of opinion that the sum of 6,000*l.* was a sufficient portion for any girl; and he bequeathed to his two surviving sons the remainder of his property in equal proportions, of whatever kind it might consist at the time of his death. He gave certain directions as to the management of mills which he held in partnership, devised his property over in the event of his sons dying without issue, and appointed executors of the codicil, as of "his last will and testament"—Held, that the bequest of the household furniture, etc., in the will was not revoked by the codicil. *Pilsworth* v. *Mosse*, 14 Ir. Ch. R. 163.

4. A testator directed his trustees to stand possessed of a sum of money upon trusts in favour of his son and his son's wife and children, with a power to the son, on failure of issue, to appoint the fund by will or codicil. He also gave the trustees a discretionary power to give the fund to his son, discharged of all the trusts. By a codicil he revoked the power given to the son, and directed that after the son's death, and on the failure of issue, the fund should go to the son's wife for life, and after her death form part of the testator's residuary estate:—Held, that the discretionary power given by the will to the trustees was not revoked by the codicil. *Butler* v. *Greenwood*, 22 Beav. 303.

5. A., after giving legacies to charities and individuals, directed that the residue of moneys to arise by sale and conversion of his real and personal estate, after payment of debts and the legacies "herein" mentioned, should be divided between certain charities, and that such part of his estate as charities could not take, should be first applied in payment of "legacies herein mentioned," not given to charities. By a codicil he revoked the residuary bequest, and varied the amounts of charitable legacies, and after payment of funeral expenses, and legacies he might subsequently make, gave the residue of his property to charities.—Held, on the construction of will and codicil as one instrument, that the direction in the will extended to the codicil, and that "property" must be cut down to "pure personalty." *Jauncey* v. *Att.-Gen.*, 10 W. R. 129; 5 L. T., N S., 374; 3 Giff. 308; 8 Jur., N. S., 6.

6. Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one, for that son, and, in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased, and by codicil declared that he intended to erase the direction to sell only; he then gave all his estates to the son of D. who should first attain twenty-one, and change his name to E. D., at death of testator, had a son who was still an infant, and afterwards had another son:—Held, the codicil revoked the devise of the S. and H. estates, and also the devise of the residues of his estates to the trustees, and that D.'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will, and those he afterwards purchased, and consequently was entitled to the rents during his infancy. *Duffield* v. *Elwes*, 2 Sim. & S. 544; 4 L. J., Ch., 189. See this case on appeal, 3 Bli., N. S., 260.

7. A bequest of all the property that the testator might die possessed of:—Held, from expressions in a codicil of even date, to pass only a part of the testator's property. *Att.-Gen.* v. *Wiltshere*, 15 Sim. 37; 11 Jur. 792.

8. Testator devises to A. all his dividends on his South Sea annuities, and afterwards by codicil gives to C. an annuity for life, payable out of his South Sea annuities:—Held, not to be a revocation *in toto*, but both devises may stand consistently together. *Stone* v. *Evans*, 2 Atk. 86.

9. A testatrix, by her will, desired that all her fortune should be divided between R. N. and A. K. By a codicil, after stating that A. K. was dead, she expressed her desire that her fortune should be divided between R. N. and T. K., adding these words: "For the use of their children, and when they come of age to have settled upon them, share and share alike." R. N. died after the testatrix, never having had any children:—Held, that the absolute gift of the moiety to him was not revoked; it was only limited to the extent that a beneficial interest was given to his children which afterwards failed. *Norman* v. *Kynaston*, 9 W. R. 50; 30 L. J., Ch., 189; 29 Beav. 96. Affirmed 7 Jur., N. S., 129; 9 W. R. 259; 3 L. T., N. S., 826; 3 De G. F. & J., 29.

10. By a will, a testator bequeathed stock to

his grand-daughters absolutely. By a codicil he revoked the bequest, and directed his trustees to hold the stock for his grand-daughters for life, with remainder to their issue:—Held, that this was a total revocation of the first gift, and the issue having failed, that the stock fell into the residue. *Nevill* v. *Boddam*, 28 Beav. 554.

XXI. OPERATION OF CODICIL ON WILL IN OTHER CASES.

1. A testator, by his will, devised his residuary real estates to trustees, in trust for certain tenants for life, with remainder to D. F. for life, with remainder in trust for the sons of D. F., as tenants in common in tail male, with cross remainders and remainder over; and he directed his residuary personal estates to be laid out in the purchase of land, to be settled to the same uses. By a testamentary paper of the same date as the will, and headed, "Memorandum, alias, directions to my executors," he directed, as to his residuary personal estate, that his executors should apply for an estate of an uncle of the testator, as an investment, "for the use and behoof of D. F.," and if not attainable, to inquire if any part of a certain other estate was to be disposed of. Neither of the specified properties could be obtained on fair terms, as an investment:—Held, that D. F. did not take any further interest under the codicil than under the will, and that the testator thereby either meant to express merely a recommendation to his trustees, as to the mode of laying out his residuary personalty, or expressed no intention on which the Court could act. *Fitch* v. *Friend*, 2 De G. & Sm. 405.

2. Children, by implication, held entitled to partake in a substituted legacy, given to the parent alone: an interest having been given in the legacy for which the second was substituted. *Cookson* v. *Hancock*, 1 Keen 817.

A testator, by his will, gave 3,000*l.* to his brother B. for his life, with remainder to his wife for her life, remainder to his children; and he gave 6,000*l.* to his sister S. for her life, with remainder to her husband for his life, remainder to her children; and, after giving 10*l.* a year to each of his said servants, for their lives, he gave his real estate, and the residue of his personal estate and effects, to his sister H. By a codicil, described as a codicil to his will, he left his brother B. an equal share of his effects with his sisters, to have the interest for his life, with limitations after his decease, for the benefit of his wife and children; and his sister S. was to have an equal share with his sister H. By a second codicil he left to his two maid-servants 10*l.* a year each for their lives. The testator's sister S. survived her husband, and died, leaving two children:—Held, that S. was entitled, under the first codicil, to one-third share of the testator's personal estate, subject to the limitations declared by the testator with respect to the legacy of 6,000*l.* which had been given by the will. S. C. 2 Myl. & C. 606; 6 L. J., N. S., Ch., 56. Affirming 1 Keen 817; 5 L. J., N. S., Ch., 245.

3. Where the will bequeathed the residue proportionally amongst the legatees, legatees under a codicil were held not to be entitled to share in the residue. *Hall* v. *Severne*, 9 Sim. 515.

4. Testator, by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title, on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth* v. *Smith*, 6 Sim 161.

5. Testator, by codicil, gave legacies of 500*l.* each to A., B., C., and D., who, from other parts of the codicil, and from the will, appeared to be the grandchildren of his brother Henry. He added, "Item, I direct my executors to pay out of my personal estate the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to them on his or her attaining the age of twenty-one." At the date of the codicil, and at the testator's death, there were to his knowledge living several grandchildren of his brothers, besides A., B., C., and D., and various children of the brothers of the testator, and the testator was survived by one at least of his brothers:—Held, that A., B., C., and D. were not entitled to double legacies. *Early* v. *Benbow*, 2 Colly. 342; 15 L. J., Ch., 169; 10 Jur. 169.

6. By a marriage settlement a sum of 4,000*l.* was to go after the decease of husband and wife, and the husband's father, and subject to the father's power of appointment, to the children of the marriage equally, and the real estates of the wife were charged with a sum of 8,000*l.*, which was to be divided among the children in such shares and manners as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7,900*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage with their father's consent; she likewise created a further charge, in order that such younger child's share of the 8,000*l.* might be augmented to 5,000*l.*, and by the same instrument she, in exercise of a power of appointment which she had under the will of C., appointed C.'s residuary property to the first and other sons of the marriage successively who should attain twenty-one, and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that if no son of the marriage should live to attain twenty-one, or be married, each of

her daughters should be entitled to have for fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the 4,000*l.*, and under their mother's appointment to the residuary property of C.:—Held, that they were entitled to receive 10,000*l.* exclusive of and in addition to their shares of the 4,000*l.*, and of the residuary property of C. *Whyte* v. *Kearney*, 3 Russ. 208; 6 L. J., Ch., 22.

1. Codicil ratifying the will does not set up an adeemed legacy. *Monck* v. *Monck* (*Lord*), 1 Ball & B. 298.

2. A father left and bequeathed his fee-simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left and bequeathed houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any bequest in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors; by a codicil reciting the death of his youngest son J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for his son T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, 7 Ir. R., Eq., 68.

Held, secondly, that under the codicil the eldest son, R., took an estate tail in B. *Ib.*

3. Where testator, by will, devised to daughters as tenants in common his residue, and afterwards made a codicil expressly for a particular purpose, but thereby also re-devised the residue to daughters, omitting the words of severance, the codicil was construed by will, and they took as tenants in common. *Mathews* v. *Bowman*, 3 Anstr. 727.

4. Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate, in case of a deficiency, and, directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Megyison* v. *Moore*, 2 Ves. J. 630.

5. A testatrix, having a son and two daughters, gave 3,000*l.* 3 per cent. stock to her son for life, remainder, as to one moiety of it, to his eldest male child living at her decease, and as to the other moiety to his other children. She also gave 6,000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children, and she further gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was at his or her death to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives, and afterwards upon their children:—Held, that by the operation of the codicil the moiety of 3,000*l* 3 per cent. stock, which by the will was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children; that as to all the other bequests the attempt to extend the limitations to great-grandchildren was ineffectual; and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 1 Russ. & M. 209; Taml. 347; 8 L. J., Ch., 88.

6. A testator, possessed of lands in England and Upper Canada, by his will, made in England, gave the whole to a stranger and his nephew, in trust to pay certain legacies, and to pay the residue between his six brothers and sisters, and appointed them executors and trustees of his will. By a codicil, made in Canada, the testator gave his property in Canada to two persons resident there, upon trust to sell, and, after payment of his debts in Canada, to remit any surplus to his nephew, to whom he gave the rest of his estate in the said province or in Great Britain or elsewhere, not otherwise given by that codicil or his will; and he revoked every clause in his will variant from that codicil:—Held, that the nephew was entitled to the surplus produce of the Canadian property absolutely, and not as trustee for the purpose expressed in the will. *Schofield* v. *Cahuac*, 4 De G. & Sm. 583; 15 Jur. 1069; 2 Eq. Rep. 885.

1. Testatrix, by her will, appointed 3,000*l.* thus: 1,000*l.* upon trusts for her daughter F. for life, for her separate use, and then for her husband and children; two other sums of 1,000*l.* each upon like trusts for her daughters N. and P. and their respective husbands and children by reference to the former trusts, except that the life interests of N. and P. were not for their separate use. By codicil, reciting the appointments by the will and the payment to N. of 1,000*l.*, the testatrix directed thus: "1,000*l.* so left to my said daughter N. by said will must be considered cancelled and discharged. And as the mortgages, securities, moneys, or debts, my property which I left by my said will or intended to pay my daughters F. and P., may not remain situated, vested, or of the same value, I will and direct that the sum of 1,000*l.* be paid to my said daughter F. and 1,000*l.* to my daughter P.":—Held, that the 1,000*l.* directed by the codicil to be paid to F. must be settled according to the directions in the will. *Fenton* v. *Farington*, 2 Jur., N. S., 1120.

2. A married woman appointed and devised "all the manors and hereditaments which she had power to appoint or devise." After her husband's death she confirmed the will by a codicil:—Held, that her property not included in the power did not pass. *Du Hourmelin* v. *Sheldon*, 2 W. R. 639; 19 Beav. 234.

3. W. H., by will, gave certain property (the G. estate) as his son S. H. should appoint, and in default of appointment amongst the children of S. H. equally. W. H. died in 1827. S. H., by will in 1826, devised and bequeathed all the estate and effects on which he had any power to dispose or appoint upon trusts for his children. After the death of W. S., S. H. made a codicil in 1829, whereby he confirmed his will. S. H. made other codicils, the effect of his wills and codicils being to disturb the equal distribution under W. H.'s will. No express reference was ever made by S. H. to the power in the will of W. H.:—Held, that the power in W. H.'s will was never exercised by S. H., and that the G. estate passed to the children of S. H. under W. H.'s will. *Hope* v. *Hope*, 2 W. R. 674; 18 Jur. 823.

4. Devise in fee and bequest of personal estate to A., and in case of his death under twenty-one, without leaving issue, to B. Codicil affirming the will in all respects, except by directing that A. should not be entitled till twenty-five. A. dying between the ages of twenty-one and twenty-five without issue, B. has no title. *Scott* v. *Chamberlaine*, 3 Ves. 302.

5. Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereinafter named; she desires her executors to look upon all memorandums, etc., in her own hand as parts or a codicil to her will, and bequeaths by will her residue to the children of her sisters, E., J., etc. By a codicil she gives legacies to some other nephews and nieces:—Held, that the children of E. J., etc., the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both. *Fuller* v. *Hooper*, 2 Ves. 242.

VII. General Canons of Construction.

I. CITING AUTHORITIES.

6. The Court deprecates the citation of authorities in cases of wills unless to lay down some general principle or to explain some technical expression. *Waring* v. *Currey*, 22 W. R. 150.

7. Where there is a clear decision of a court of law upon the construction of a will, and no precise authority on the other side, a court of equity will not decide contrary to the decision at law. *Robinson* v. *Wood*, 4 Jur., N. S., 625.

II. WHOLE OF INSTRUMENT TO BE CONSIDERED.

8. For the purpose of collecting the intention, every part of the will must be considered. *Gittins* v. *Steele*, 1 Swan. 28.

9. Some effect must be given to every part of a will. *Collet* v. *Lawrence*, 1 Ves. J. 268.

10. A will cannot be construed by adverting to a single clause; everything bearing on the subject must be taken together. *Crone* v. *Odell*, 1 Ball & B. 456, 480. Affirmed 3 Dow 61.

Particular intent clashing with the general intent in a will must give way. *Ib.*

11. Every word in construction of will is to have effect, if not inconsistent with general intention, which is to control. If two parts are inconsistent, the latter prevails. If a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine* v. *Constantine*, 6 Ves. 100.

12. Every word of a will must have a meaning imputed to it, if capable of it without a violation of the general intent, or any other provision in the will. *Reeves* v. *Brymer*, 4 Ves. 698.

13. The Court may expound the words in a will, but cannot strike them out. *Southcot* v. *Wilson*, 3 Atk. 233.

14. In construing wills, the leading rule is, that the intent of the testator should be observed, and no part of a will to which a meaning or operation can be given shall be rejected. *Reeves* v. *Newenham*, 2 Ridgw. P. C. 36.

15. A testator bequeathed the residue to three trustees and their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees, and substituted that of his daughter. A facsimile probate was granted:—Held, that a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the Court itself the province of a court of probate. Held, moreover, that the several parts of the will were

not inconsistent, and might well be read together. *Shea* v. *Boschetti*, 18 Beav. 321; 18 Jur. 614; 23 L. J., Ch., 652; 2 W. R. 281; 2 Eq. Rep. 608.

III. LEGAL AND TECHNICAL WORDS.

1. Words in a will must be taken in their legal sense, unless by the context or by express words they clearly appear to be intended otherwise. *Synge* v. *Hales*, 2 Ball & B. 506.

The construction of a legal devise must be the same in a court of law or equity. *Id.* 507.

2. Where a testator expresses himself in ambiguous terms respecting the disposition of his property, the legal operation of the word he uses must be adopted. *Stubbs* v. *Roth*, 2 Ball & B. 553.

3. Rule of construction that the words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appear that he intended to use them in a different sense. *Winslow* v. *Tighie*, 2 Ball & B. 204.

4. Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if, upon the whole instrument, it appears that he meant to use them in a different sense. *Read* v. *Backhouse*, 2 Russ. & M. 546.

5. Whether a general intent, or a particular intent, expressed in a will is to prevail, must depend on the context of the whole will, in construing which words of a technical kind are not necessarily to receive a technical meaning. *Jenkins* v. *Hughes*, 8 H. L. Ca. 571; 6 Jur, N. S., 1043.

6. In order to determine the meaning of a will, a court of construction must read the language of the testator in the sense which he himself appears to have attached to the expressions that he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator by his will excluded beyond all doubt such construction. *Towns* v. *Wentworth*, 11 Moo. P. C. 526.

When the main purposes and intentions of a testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified, and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which no words in the will expressly devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which, in its opinion, the testator has on the whole will sufficiently declared. *Ib.*

7. It is not desirable to multiply words having the same technical meaning, by introducing one which never had such a meaning, where another already exists with that technical meaning already appropriated to it. *Massy* v. *Rowen*, 4 L. R., H. L., 288.

IV. RECURRING WORDS CONSTRUED TO HAVE THE SAME MEANING.

8. It is a canon of construction that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it unless it violates the sense. *Rhodes* v. *Rhodes*, 27 Beav. 413.

9. It is a well-settled rule of construction never to put a different construction upon the same word when it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

10. The same word recurring in any instrument should, if possible, be construed to have the same meaning. *Foster* v. *Wybrants*, 11 Ir. R., Eq., 40.

See also XXVI. VIII. *post.*

V. UNAMBIGUOUS WORDS CONSTRUED LITERALLY.

11. Rule of construction is not to make any intendment contrary to plain and usual sense of words, unless from other parts of will plainly appearing not intended to have that extensive operation. *Exp. Ilchester (Earl)*, 7 Ves. 368.

12. Implication in a will cannot prevail, unless necessary. *Upton* v. *Ferrers*, 5 Ves. 801.

13. The literal and technical force of words in a will to be counteracted by rational implication. *Vauchamp* v. *Bell*, 6 Madd. 343.

14. In construction of residuary clause, question is not what the testator had in contemplation when it was made, but what the words he used according to their ordinary signification will embrace, unless qualified by other expressions in the will. *Bland* v. *Lamb*, 5 Madd. 412.

15. It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will an indication of what the testator meant by those words, which, by themselves, appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

16. The plain first meaning of a testator's words is to be followed, unless they give rise to some incongruity. *Nockolds* v. *Locke*, 2 Jur., N. S., 1064.

17. The primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary, and a technical meaning. *Young* v. *Robertson*, 4 Macq. H. L. Ca. 314, 325.

18. Primarily, the words of a will are to be considered. They convey the intention of the testator's wishes; but the meaning to be

attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. *Dossee* v *Mullick*, 6 Moo. Ind. App. 526.

1. Admitting the correctness of the principle of giving to words their natural and grammatical meaning, yet the intention of a testator, gathered from the context, may justify a modification of his words. *Grey* v. *Pearson*, 6 H. L. Ca. 61; 3 Jur., N. S., 823; 26 L. J., Ch., 473.

In constructing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. *Id.* 106.

2. Where the words of a will have a primary and common-sense meaning, they must be taken to have been used in that sense, unless the contrary appears from the context, or from extrinsic circumstances. *Crook* v. *Whitley*, 3 Jur, N. S., 703.

3. In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. *Hall* v. *Warren*, 9 H. L. Ca. 420.

4. The rule that a testator's language ought to be adhered to unless some inconsistency would result from doing so ought not to be departed from on slight grounds, and the Court refused to depart from that rule in a case where there was very strong probability that the testator meant something different from what he had actually said. *Nunn* v. *Hancock*, 16 W. R. 818.

5. Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result. *Bathurst* v. *Errington*, 2 L. R., App. Cas., 698; 46 L. J., Ch., 748; 37 L. T. 338; 25 W. R. 908.

6. A will is to be construed according to the plain meaning and intention of the testator, notwithstanding that the result of so construing it may be to defeat the object which he had in view. *Cunliffe* v. *Brancker*, 46 L. J., Ch., 128; 3 L. R., Ch. D., 393; 35 L. T. 518.

7. Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity. A testator must not be presumed to intend an absurdity; nevertheless, if shown by the context or by the whole will to have so intended, the intention, if not illegal, must be carried out *Rhodes* v. *Rhodes*, 7 L. R., App. Cas, 192; 51 L. J., P. C., 53; 46 L. T. 463; 30 W. R 709

There is no difference between the words which a testator himself uses in drawing up his will and the words which are *bonâ fide* used by one whom he trusts to draw it up for him. The Court in either case must take the words as it finds them, and therefore held that the plaintiff, the natural daughter, was not entitled to have probate amended by omitting the words, "from and after the decease of my said wife without leaving issue of our said marriage," on the ground that the draughtsman introduced them without reason or special directions, and that the effect of the same had not been intelligently appreciated by the testator. *Ib.*

8. The Court, in construing a will, must act on the language which the testator has used according to its ordinary signification, and must not extend the meaning of words without being able to assign any possible limit where to stop. *De Roebeck* v. *Clonewrry* (*Lord*), 5 Ir. R, Eq., 588.

Therefore, when a testator, having accounts in two banks, bequeathed all cash balances which should, at his death, be standing either to his current account or his deposit account with any of his bankers:—Held, that the bequest did not include moneys in the hands of his land agent or his salesmaster, although the testator's account was entered in the salesmaster's ledger; and sometimes got such money as he required in cash or by cheque; sometimes requested cheques to be sent to him; and on a few occasions gave orders for payments to third persons. *Ib.*

9. Where clear words of gift are found in a will, full effect is to be given to them, notwithstanding capricious results may follow. *Wharton* v. *Barker*, 4 Jur, N. S, 553.

10. It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. *Buchanan* v. *Andrew*, 2 L. R., H. L. (Sc.), 286.

VI. AMBIGUOUS WORDS.

11. The meaning of an ambiguous will to be collected from the words and the context, not from the punctuation. *Sanford* v. *Raikes*, 1 Meriv. 651.

Testator having a right to order a thing to be done, expressing in his will that it is to be done, must be understood to speak imperatively, and not merely by way of recital. *Ib.*

12. Where a testator expresses himself in ambiguous terms respecting the disposition of his property, the legal operation of the word he uses must be adopted. *Stubbs* v. *Roth*, 2 Ball. & B. 553.

13. Words that are doubtful and afford implication only are not to be attended to where testator has expressed himself in legal words. *Bagshaw* v. *Spencer*, 2 Atk. 575.

14. It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other

hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect if you can, from the other parts of the will, an indication of what the testator meant by those words, which, by themselves, appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

1. In case of doubtful words of a will, an heir is to be favoured: not where the will is plain. *Fallland* v. *Bertie*, 2 Vern. 340; 12 Mod. 182: 2 Freem 220; 3 Ch. Ca. 129.

2. Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result. *Bathurst* v. *Errington*, 2 L. R., App. Cas., 698; 46 L. J., Ch., 748; 25 W. R. 908; 37 L. T., N. S., 338.

3. Where there are two meanings of a word used in a will, one of which would effectuate and the other defeat a testator's intention, the Court is bound to select that meaning which would carry out the testator's object. *Whicker* v. *Hume*, 4 Jur., N. S., 933; 6 W. R. 813; 7 H. L. Ca. 124; 28 L. J., Ch., 396. And see S. C. 21 L. J., N. S., Ch., 406; 16 Jur. 391; 1 De G. M. & G. 506; 14 Beav. 509.

4. If the language in a will admits of two constructions, according to one of which property will go in a convenient and ordinary course of succession, and, according to the other, in a capricious and inconvenient course, courts of justice may reasonably lean towards the former as being what was probably intended. *Semble. Jenkins* v. *Hughes*, 6 Jur., N. S., 1043; 8 H. L. Ca. 571.

5. Ambiguous words will not control the legal effect of words of limitations. *Gummoe* v. *Howes*, 3 Jur., N. S., 176; 26 L. J., Ch., 323.

6. Before the Court can resort to the context of a will in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import. *Walker* v. *Tipping*, 9 Hare, 800; 16 Jur. 442.

7. In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the Court to make what appears a more reasonable will for the testator. *Gordon* v. *Gordon*, 5 L. R., H. L., 254.

The recurring use of the words, "As to," at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and separate and independent from other limitations. *Ib.*

VII. OTHER CASES.

8. General rules of construction of will. *Noel* v. *Weston*, 2 Ves. & B. 271.

9. Where a testator expresses himself in the present tense, it relates to what is in being at the time of making the will. *Abney* v. *Miller*, Atk. 597. *Semble*, overruled, 2 Bro C. C. 292.

10. Wills in general construed from the making, unless circumstances or the tenor of it show it should be from death of testator, but the intermediate time not regarded. *Lomax* v. *Holmden*, 1 Ves. 295.

11. Construction of a will, as supposing the testator to contemplate the period of his death with reference to the objects who are to take under his will, and to look beyond that period with reference to the event on which his dispositions are to take effect. *Re Rye's Settlement*, 10 Hare 112; 16 Jur. 1128; 22 L. J., Ch., 345.

12. The rules of construction of executory instruments, bearing date before the Wills Act, 7 Will. 4 and 1 Vict., c. 26 (1837), do not differ from those applicable to wills of the same period. *Hughes* v. *Whitby*, 7 Ir. R., Eq., 98.

13 The Court declines to express an abstract opinion on a point of law on the construction of a will when immediate relief is not given. *Hampton* v. *Holman*, 36 L. T., N. S., 287; 25 W. R. 459; 5 L. R., Ch. D., 183.

14. In construing a will, the Court has regard to the period when and the circumstances under which it was framed; and where the will is of ancient date, if there is any ambiguity in the construction, the course of action on the bequest since the will came into operation may be referred to in aid of the construction which has been adopted, on the ground that it is not to be assumed that a continued series of breaches of trust has been committed in the presence of those who are interested in an opposite conclusion. *Att.-Gen.* v. *Sidney Sussex College*, 38 L. J., Ch., 656.

15. In construing a will, plain and distinct words are only to be controlled by words equally plain and distinct. *Goodwin* v. *Finlayson*, 25 Beav. 65.

16. Where upon the careful perusal of an instrument it is impossible not to be satisfied that a strict and ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted. *Key* v. *Key*, 4 De G. M. & G. 73; 17 Jur. 769; 22 L. J., Ch., 641; 1 Eq., Rep., 82.

17. Order of words in wills not considered; if the intent better answered, it is otherwise. *East* v. *Cook*, 2 Ves. 32.

18. Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Stratford* v. *Powell*, 1 Ball & B. 25.

19. Rules for construction of wills; the intention if possible to be collected from the words, not from circumstances *dehors;* upon general principles and established rules, not by conjecture; and without inquiring whether the personal estate sufficient for the debts. The personal estate first liable to the debts, unless the intention is clearly to exempt it, and throw them wholly on the real, for which express words are not necessary. *Bootle* v. *Blundell*, 19 Ves. 521.

20. The testator's intent in a will must be consistent with the rules of law, and in many cases the intent has been restrained, as where attempting a perpetuity, or to prevent a tenant in tail from alienating. *Bagshaw* v. *Spencer*, 2 Atk. 575.

Departing from strict words of a will has produced such uncertainty that it is to be wished they had been left to legal construction. *Id.* 576.

In construing words to make them agree with the intent of the party, a court of equity is more liberal than a court of law. *Id.* 580.

1. In case of a will, the intent shall prevail unless contrary to law, *i.e.*, if the limitations are allowable by law; not that the words must be taken in such signification as the law imposes on them. In a will, words taken in law as of limitation shall be taken as words of purchase if so intended. *Austen* v. *Taylor*, Ambl. 377.

2. The intention of a testator, if clear and consistent with rules of law, is to govern without regard to the grammatical construction, or whether it deserves favour or not. *Thellusson* v. *Woodford*, 4 Ves. 311. Affirmed 11 Ves. 112.

A will is not to be affected on account of the unmeritorious object; only one general rule of construction for courts of law and equity applicable to all wills. However the Court may condemn the object, the intention is to be collected from the whole will; every word is to have effect according to the natural common import; words of art to be construed according to the technical sense, unless upon the whole will plainly not so intended. The Court is bound to carry the rule into effect, if consistent with the rules of law, and if it can see a general intention consistent with the rules of law; but the particular mode is not; though that shall fail, the general intention shall take effect. *Id.* 4 Ves. 329.

"Heir male" in a will may be words of purchase. *Id.* 326.

The intention of the testator is not to be set aside because it cannot take effect to the full extent, but it is to work as far as it can. *Ib.*

In some cases, as for creditors, an intention will be inferred from the purpose beyond what is expressed. *Ib.*

3. Construction for creditors favoured not doing violence to or straining the words. *Noel* v. *Weston*, 2 Ves. & B. 269.

4. The most liberal construction of wills for creditors. *Godolphin* (*Earl*), v. *Penneck*, 2 Ves. 272.

5. Question of intention to be determined by the Court, but not proper for the Master. *Pitt* v. *Camelford* (*Lord*), 1 Ves. J. 83.

6. It is not a good rule in construing a will to consider what power would be, by a particular construction, given to a particular person, by the exercise of which he might be able to defeat what appears to be the general purpose of the will. *Atkinson* v. *Holtby*, 10 H. L. Ca. 313.

7. Fallacy of applying to a case of intestacy words which the testator has applied to the case of testacy. *Robinson* v. *London Hospital* (*Governors*), 10 Hare, 28; 22 L. J., Ch., 754.

8. The circumstance of the testator not having had the legal estate can make no difference in the construction of a devise. *Jervoise* v. *Northumberland* (*Duke*), 1 Jac. & Walk. 573.

9. Where the intention of a party would put the estate in abeyance, such intention is overruled by the rules of law. *Papillon* v. *Voice*, W. Kel. 31.

In case of a will, where the remainder is devised in contingency, the reversion in fee is not in abeyance in the meanwhile, but descends to the heir. *Id.* 511.

10. If the operative part of an instrument is clearly large enough to embrace two classes of objects, its effect is not to be cut down because the previous recital does not refer to both those classes. *Saville* v. *Kinnaird*, 11 Jur., N. S., 195; 13 W. R. 308; 11 L. T., N. S., 687.

11. Except in cases of difficulty, this Court will itself determine questions of construction in the first instance, without seeking the assistance of courts of law. *Wilson* v. *Eden*, 14 Beav. 317.

12. Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is, not to determine it on demurrer, although the inclination of the Court may be in favour of the defendant, but to overrul the demurrer, without prejudice to the defendant's insisting on the same matters by way of answer. *Brownsword* v. *Edwards* (2 Ves. 243). referred to on this point. *Mortimer* v. *Hartley*, 3 De G. & Sm. 316.

13. There is no difference between a direction to trustees to pay and a gift; the testator is equally the donor in both cases. *Nicholls* v. *Judson*, 2 Atk. 301.

14. Bequest in terms importing an intention not to make an immediate disposition may, upon the construction of the whole will, amount to a present bequest. *Lynn* v. *Beaver*, T. & R. 677.

VIII. Admissibility of Parol Evidence.

See also IX. *and* X. *post.*

I. *Reference to Original Will*, 7632.
II. *Will in a Foreign Language*, 7632.
III. *Of Declarations by Testator or Instructions for the Will*, 7632.
IV. *As to Condition of Family or Devisees*, 7633.
V. *As to Condition of Testator's Property*, 7634.
VI. *Of Matters Subsequent to Execution of the Will*, 7636
VII. *To Rebut Presumptions*, 7636.
VIII. *Terms of Art*, 7637.
IX. *Other Cases*, 7637.
X. *As to State of Testator's Property on Execution of Power by Bequest or Devise in General Terms.* See POWER, XI. IV.
XI. *As to whether Executor takes Residue Beneficially.* See EXECUTOR AND ADMINISTRATOR, VIII. II. 4.
XII. *As to Advancement by Parent to Child.* See ADVANCEMENT—PARENT AND CHILD, II.
XIII. *As to Satisfaction of Portions.* See PORTION, XI. VI.
XIV. *As to Satisfaction and Set-off of Legacies.* See LEGACY, V. VII.—VI. VII.
XV. *As to Legacies. Whether Specific, General, or Demonstrative.* See LEGACY, II. VIII.
XVI. *As to Legacies. Whether Cumulative or Substitutional.* See LEGACY, IV. V.
XVII. *As to Election.* See ELECTION.
XVIII. *Gifts to Particular Persons.* See SPECIFIC DIVISIONS *post.*

I. REFERENCE TO ORIGINAL WILL.

1. Original will of personalty examined in order to arrive at the true construction of certain bequests. *Compton* v. *Bloxam*, 2 Colly. 201.

2. The original will of personalty cannot be looked to, to contradict the probate, though it may in some cases to explain it. *Oppenheim* v. *Henry*, 1 W. R. 126.

3. Cases in which the Court will look at an original will of personalty, for the purpose of determining its meaning or construction. *Walker* v. *Tipping*, 9 Hare 802.n.

II. WILL IN A FOREIGN LANGUAGE.

4. A domiciled Englishman made his will in a Spanish colony, in the Spanish language and form, and empowered K., whom he appointed his universal heir, to make his (the testator's) will, making therein the declaration, etc., and other matters which had been and would be communicated to him. The will was admitted to probate:—Held, first, that the will was an English will, and that in construing it the Spanish language was only to be looked to in order to ascertain the equivalent expressions in English; and, secondly, that K. being appointed universal heir, the beneficial interests, after performing the trusts, if any there were, belonged to K., and not to the testator's next of kin. *Reynolds* v. *Kortright*, 18 Beav. 417; 2 W. R. 445; 2 Eq. Rep. 784.

III. OF DECLARATIONS BY TESTATOR OR INSTRUCTIONS FOR THE WILL.

5. To have recourse to the declarations of a testator as operating on his will is considered dangerous, and if he has made different declarations at different times, little reliance can be placed on them. *Dwyer* v. *Lysaght*, 2 Ball. & B. 162.

6. The acts and declarations of a testator at the time of his will, to show what he meant by a particular expression, admissible in evidence. *Blake* v. *Marnell*, 2 Ball. & B. 35. Affirmed 4 Dow 248.

7. There being a devise in a will of all testator's household stuff, as brass, pewter, linen, and woollens, except a trunk, the person who drew the will was examined to prove that the testator directed him to insert all his goods except the trunk, and was allowed to be read. *Pendleton* v. *Grant*, 2 Vern. 517. S. C. better reported, 1 Eq. Ca. Abr. 230, pl. 2.

8. Devise to his nearest poor relations. Parol evidence admitted to show that testator knew he had such in Salop, but no further; not to prove declarations or instructions whom he meant by written words of the will. *Goodinge* v. *Goodinge*, 1 Ves. 231.

9. A Presbyterian, who had three infant daughters bred up that way, and had three brothers Presbyterians, makes his will, appointing his brothers, and also a clergyman of the Church of England, guardians to his three infant daughters, and dies, having sent his eldest daughter to his next brother. The clergyman gets the two other daughters into his custody, and places them at a boarding-school, where they were bred according to the Church of England, and brought his bill to have the eldest daughter placed out with the other daughters. The three brothers, that were Presbyterians, brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up Presbyterians. The Court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land. *Storke* v *Storke*, 3 P. W. 51.

10. Devise of land not to be explained by parol proof touching the declaration of the testator, or the instrument given by testator for the making of his will. Parol proofs shall be admitted to explain a surrender of copyhold land, to show a mistake either in the land or uses. *Towers* v. *Moor*, 2 Vern. 98.

11. Devise of real estate to be sold, and the produce, with the personal estate, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses: the estate was not sold: the wife, having no other real estate, by will with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue, and remainder of her estate and effects of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to at her decease; the power is executed by the residuary clause. Evidence of conversation with the person who drew the will, to show the testatrix had no other real estate, rejected. *Standen* v. *Standen*, 2 Ves J. 589.

12. Where declarations to testator's solicitor, at the time of giving instructions for making a will, admissible in evidence. *Guilleband* v. *Mears*, 7 L. J., Ch., 136.

13. Will is to be construed without regard to the instructions. *Murray* v. *Jones*, and *Fawcett* v. *Jones*, 2 Ves. & B. 318.

14. Where testatrix gave her real and personal estate to plaintiffs for life, remainder to J. in tail, remainder to R. in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient; and, by her will, declared she gave the rest and residue of her personal estate to Lord C.'s three daughters:—Held, that parol evidence of attorney, who drew the bill, that he had express directions to give the personal estate to the three daughters of Lord C., could not be read, though there were some things in the case which might make a judge wish to admit it. *Ulrich* v. *Litchfield*, 2 Atk. 372.

Courts of law and equity admit parol evidence in two cases only,—to ascertain the person, where there are two persons of the same name, or where there has been a mistake in the name; and in resulting trusts, relating to personal estate, as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who shall have it. *Ib.*

Lord H. not satisfied with Lord Cowper's rule of admitting parol evidence in doubtful wills. Mr. Justice Tracy, who assisted Lord Cowper in *Strode* v. *Russel* (2 Vern. 621), was at first of same opinion with him; but, on considera-

tion, was clear the evidence could not be admitted, and his alteration of judgment had weight in the House of Lords. *Ib.*

In *Brown* v. *Selwin* (Ca. *temp.* Talb. 240) Lord H. said he was for admitting it. And even Lord Talbot had a remorse of judgment at the same time he rejected it; but the House of Lords refused it, and affirmed the decree. *Ib.*

1. Evidence as to statements made by a testator when he executed his will was rejected. *M'Clure* v. *Evans*, 29 Beav. 422. And see *Baker* v. *Ker*, 11 L. R., Ir., 8.

2. The declaration of a testator will not be admitted to explain an omission in a will, although evidence of surrounding circumstances will. *Sullivan* v. *Sullivan*, 4 Ir. R., Eq., 457.

3. Testator bequeathed to A. B. the premium of insurance on his life in an insurance office for her immediate expenses. Shortly before the date of the will a bonus had been declared upon the testator's policy of assurance:—Held, that the bonus alone passed under this bequest, a verbal declaration by the testator to A. B. upon the execution of the will to show that he intended her to have both the policy and the bonus being inadmissible in evidence. *Barrow* v. *Methold*, 3 W. R 629.

4. In construing a will, nothing contained in a letter from a solicitor to the testator, written about the time of the execution of the will, is admissible as evidence of the construction of the will. *Wilson* v. *O'Leary*, 7 L. R., Ch., 448; 41 L. J., Ch., 342; 20 W. R. 501; 26 L. T., N. S., 463. Affirming 12 L. R., Eq., 525; 40 L. J., Ch., 709; 25 L. T., N. S., 327; 20 W. R. 28.

Evidence that the testator had in his possession a first codicil at the time he made the second was admitted, so far as it went to prove the position of the testator, but rejected so far as it suggested any motive for his making the second codicil. *Ib.*

Held, also, that a letter written to the testator by his solicitor, advising him to re-copy his first codicil, was inadmissible. *Ib.*

5. At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*, 3 L. R., Ch. D., 738; 45 L. J., Ch., 740; 24 W. R. 1058; 35 L. T., N. S., 52.

6. Bequest to testator's cousin V. B., son of his late uncle P. B. Testator had no cousin of that name, but had a cousin G. V. B., son of an uncle J. B.; and had also a cousin F. B., son of the said uncle P. B.:—Held, evidence of all the circumstances surrounding the testator when he made his will was admissible to explain who he meant to take, but not evidence of instructions given to his solicitor when he made his will. *Bernasconi* v. *Atkinson*, 1 W. R. 152; 17 Jur. 128; 10 Hare 345.

7. A name and description of a legatee were given in a will, which, taken together, could not be applied to any other person; evidence of the state of the family was admitted, and an affidavit of a solicitor who prepared the will was offered to show what had been the cause of the mistake:—Held, that the affidavit was inadmissible. *Drake* v. *Drake*, 8 H. L. Ca. 172; 29 L. J., Ch., 850; 25 Beav. 642; 6 W. R. 791; 4 Jur., N. S., 727.

8. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable, in all its parts, to two persons, or to two things. But evidence of the circumstances, the habits, and the state of his family at the time he made the will, is admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be, with sufficient certainty applied. *Charter* v. *Charter*, 7 L. R., H. L., 364; 43 L. J., P., 73; 2 L. R., P., & M. 315.

See also ADVANCEMENT and SPECIFIC DIVISIONS *post.*

IV. AS TO CONDITION OF FAMILY OR DEVISEES.

9. The construction of will is not to be altered upon inference from testator's knowledge of circumstances of family. *Radcliffe* v. *Buckley*, 10 Ves. 195.

10. A doubtful will construed upon evidence as to the state of the testator's family. *Blundell* v. *Gladstone*, 11 Sim. 467; 1 Ph. 279; 12 L. J., N. S., Ch., 225; 7 Jur. 269; 5 Jur. 481. Affirmed *sub. nom. Camoys* (*Lord*) v. *Blundell*, 1 H. L. Ca. 778.

11. As evidence of friendly intercourse with parties benefited by a doubtful will is admissible in favour of that will, so also is evidence of friendly intercourse with relations not benefited by such will admissible against it, though of very slight weight. *Hitchings* v. *Wood*, 2 Moo. P. C. 355.

12. Parol evidence of collateral circumstances relating to the ages of the devisees, and the situation of the parties, and to their being married or unmarried, is admissible in evidence for the purpose of construing a will. *Lowe* v. *Huntingtower* (*Lord*), 4 Russ. 532.

13. Legacy to a person, dead in the lifetime of the testator, lapsed, although the words are, to M., his executors, administrators, and assigns; and parol evidence inadmissible that the testator knew, at the time of making the will, that the legatee was dead. *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

Evidence offered to prove that testator, who gave legacy to A., his executors, etc., knew A. to be dead, and meant it for his representative, rejected. S. C. *nom. Mabank* v. *Brooks*, Dick. 577.

14. In the construction of wills, the Court looks not only to the terms of the will itself, but to the surrounding circumstances and the state of the parties. *Pasmore* v. *Huggins*, 21 Beav. 103; 25 L. J., Ch., 251.

Upon this principle, where a testator gave the income of a fund to his sister (then sixty-eight years of age and married to a second husband) for life, and after her decease, bequeathed the fund to her children "by her then present or any future husband," and she had children by both her first and second husbands:—Held, that the children by her former marriage were not excluded. *Ib.*

1. In construing a will, the state of testator's family at time of will is to be attended to. *Crone* v. *Odell*, 1 Ball & B. 449. Affirmed 3 Dow 68; 1 Bli. N. S. 594.

In construing will, the intention of testator, and not the technical import of words, is to be regarded. *Ib.*

2. For the purpose of construing a will, the Court must be informed of the circumstances surrounding the testator when making his will, such as his family status and the nature of his property. Extraneous evidence of these matters is therefore admissible. *Webber* v. *Stanley*, 16 C. B., N. S., 698; 10 Jur, N. S., 657; 33 L. J., C. P., 217; 12 W. R. 833; 10 L. T., N. S., 417

3. In construing a will the Court may, for the purpose of identifying the person or thing intended as the object or subject of the testator's bounty, inquire into every material fact, and all the extrinsic circumstances which were known to the testator, relating as well to the person who claims or the thing claimed as to the testator's family and affairs. But the Court may not admit any direct extrinsic evidence of the testator's intention, unless there are more than one person or thing equally answering the description he has used. *Charter* v. *Charter*, 7 L. R., H. L., 364; 43 L. J, P, 73.

When the object of a testator's bounty is not correctly named, or is described by a name which is only in part correct, then, if there is enough in the will, when read with the knowledge of surrounding circumstances, to show who it was that the testator intended to benefit, so that, if the incorrect or partially correct description by name were expunged, the gift would not be void for uncertainty, the indications of intention discoverable in the rest of the will are to prevail over those which arise from the use of the inaccurate or only partially correct description by name. *Ib.*

4. Evidence of reputation is not admissible in expounding a will, to prove a person's age. *Colclough* v. *Smith*, 10 L. T., N. S., 918.

5. Legacy to A., if in the testator's service at the time of his decease: parol evidence admitted to show that, though she had quitted his house, she continued and was by him considered as in his service, and upon that evidence the legacy was established. *Herbert* v. *Reid*, 16 Ves. 481.

6. Parol evidence admitted to prove which heir was intended, viz., whether the heir of the mother's mother's side, or the heir of the mother's father's side. *Harris* v. *Lincoln (Bishop)*, 2 P. W. 136.

7. Parol evidence is admissible to explain the sense in which the word "nephew" is employed in a will. *Grant* v. *Grant*, 22 L. T., N. S., 233; 18 W. R. 576; 5 L. R., C. P., 727. Discussed in *Re Parker*, *Bentham* v. *Wilson*, 17 L. R., Ch. D., 262; 50 L. J., Ch., 689; 44 L. T. 886; 29 W. R. 856.

8. A testator bequeathed a legacy to his niece E. A great-great-niece, E. J., held to answer the description, and to be entitled to the legacy. Parol evidence not admissible to show the circumstances under which the bequest was contained in the will, and that the testator could not have intended to designate his great-great-niece. *Stringer* v. *Gardiner*, 5 Jur., N. S., 260; 28 L. J., Ch., 758; 4 De G. & J. 468.

9. A testatrix made the following bequest: "To the three children of B. 500*l.* each." At the date of the will and at her death there were nine children of B. Evidence was tendered to the effect that, at the time when B. had three children, the testatrix had made a will containing the same bequest; that when B. had six children she had made another will containing the same bequest; that when B. had nine children she had made another will containing the same bequest (the will in question being the fourth will); and that she at all four times knew the numbers of B.'s children:—Held, that on the assumption that this evidence was admissible (but without deciding that point), each of the nine children was entitled to a legacy of 500*l.* *Daniell* v. *Daniell*, 18 L. J., N. S., Ch., 157; 13 Jur. 164; 3 De G. & Sm. 37.

10. A testator bequeathed his residuary personal estate upon trust to pay and divide the same equally to and amongst his nine grandchildren, that is to say, the three children of his daughter Jane, the three children of his daughter Elizabeth, the two children of his son Joseph, and the child of his daughter Harriet. At the date of the will Joseph had four children, two by a former and the other two by his present wife. Evidence was tendered to show that the testator had declared an intention of benefiting the two children of Joseph by his first marriage, and a declaration by him that he knew nothing about Joseph's other children:—Held, that the evidence tendered was not admissible to construe the will, and that all Joseph's children were entitled equally with the several other grandchildren. *Matthews* v. *Foulshaw*, 12 W. R. 1141; 11 L. T., N. S, 82; 4 N. R. 500.

Gift to Particular Persons and Blanks and Mistake.] See X. and other SPECIFIC DIVISIONS, *post.*

V. AS TO CONDITION OF TESTATOR'S PROPERTY.

11. The state of testator's property cannot be resorted to as a criterion to explain the will. *Kellett* v. *Kellett*, 1 Ball. & B. 542. Affirmed 3 Dow 248.

12 Parol evidence admitted to show the state of testator's property when he made his will. *Hyde* v. *Price*, C. P. C. 193.

13. The Court ought not to consider the circumstances of the testator to determine his intention as to personal estate; whether as to real, *quære*. *Inchiquin* v. *French*, Ambl. 40; Ridgw. 230; 1 Cox I.

14. Statement of property written by testator, and his books of accounts, admitted as evidence that he considered as his property, and meant

to dispose of, property not strictly, though in some sense, his: viz., mortgages and leases, the property of wife under will, by which he was executor with her before her marriage. *Druce* v. *Denison*, 6 Ves. 385.

1. A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his handwriting. Parol evidence of declarations in conversation was produced for the same purpose; but the Court appeared to rely on the evidence in writing. *Eden* v. *Smyth*, 5 Ves. 341.

2. Held, that a court of equity, in a suit to enforce the trusts of the will, might receive parol evidence to show what the testator had been accustomed to consider to be an estate called the Ashford Hall estate. *Ricketts* v. *Turquand*, 1 H. L. Ca. 473, varying the judgment below.

3. Testator gave the residue of his estate to the poor of the parish of K. com. L., but that parish was in com. N. It was set up by the next-of-kin, that testator did not imagine his residuum would exceed 10*l*., and had so declared; whereas it amounted to near 1,000*l*. The Court thought that parol evidence should be admitted, to help out the description of the parish, but not as to the quantity of the thing given. *Brown* v. *Langley*, 2 Barnard. 118.

4. Testatrix gave 800*l*. stock in long annuities to A.; the same to B.; 200*l*. long annuities to C., the interest thereof to accumulate. An inquiry admitted into the state of her property, to show she meant such sums of money, not annuities of this amount. *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472.

5. Extrinsic evidence admitted, not to construe a will, but to show with reference to what it was made. *Bengough* v. *Walker*, 15 Ves. 514.

6. Will not to be construed by something *dehors;* as by the state of the property where no latent ambiguity. *Page* v. *Leapingwell*, 18 Ves. 466.

Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the will. *Ib.*

7. Court will not take into consideration the amount of the property, nor the number of objects, for the purpose of construing will, except in case of a specific disposition. *Sibley* v. *Perry*, 7 Ves. 522.

8. The testator having a power over 3,000*l*., originally the property of his wife, gave several legacies, and then, after the death of his wife, the residue to the defendant: his estate was not sufficient to pay the legacies, yet held that the will was not an execution of the power, the same not being referred to, nor anything by which an intention appeared in testator to execute it. Evidence to show the testator's own estate was insufficient for the purposes of his will without the 3,000*l*., rejected. *Andrews* v. *Emmot*, 2 Bro. C. C. 297.

9. Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the Court to place itself in the situation of the testator, but it is inadmissible to prove either his motives or intentions. *Martin* v. *Drinkwater*, 2 Beav. 215; 9 L. J., N. S., Ch., 247.

10. A testator gives to some persons annuities of 500*l*. long annuities, and to several others, legacies of 500*l*. long annuities, on one of which he directs interest to be paid at 5*l*. per cent. Evidence of the amount of his property admissible to explain the meaning of the latter bequests: and his property being insufficient to pay them in long annuities:—Held, that sums of money to be raised out of his long annuities were intended. *Colpoys* v. *Colpoys*, Jac. 451.

11. Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had taken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that the legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible. *Clementson* v. *Gandy*, 1 Keen 309; 5 L. J., N. S, Ch, 260.

12. Extrinsic evidence explanatory of a will, in order to raise a case of election, is not admissible. *Dummer* v. *Pitcher*, Coop. *temp.* Brough. 257; 2 Myl. & K. 262.

13. Where there is a *primâ facie* gift, specific evidence of the state of the property at the date of the will is admissible. *Innes* v. *Sayer*, 3 Macn. & G. 606; 21 L. J, N. S., Ch., 190; 16 Jur. 21. Affirming 7 Hare 377; 18 L. J., N. S., Ch., 274; 13 Jur. 402.

14. Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will. *Jones* v. *Curry*, 1 Swan. 66; 1 Wils. 24.

15. A legacy of "100*l* long annuities stock":—Held, upon the context of the will, and the evidence of the state of the funded property, to be pecuniary and not specific. *Att.-Gen.* v. *Grote*, 2 Russ. & M. 699. Affirming 3 Meriv. 316.

16. Legacy of 100*l*. out of my reduced bank annuities held pecuniary, the Court leaning against holding a legacy specific, unless clearly intended; the Court would not take into consideration evidence of the value of the stock at the date of the codicil, by which the legacy was given, nor an erasure of a legacy to the same person by the will, but decided upon the words of the codicil. *Kirby* v. *Potter*, 4 Ves. 748.

17. A testatrix by a codicil gave to A. and M. "50*l*. each of bank long annuities now standing in my name." At the date of the codicil, and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted, and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be

specific but pecuniary. *Boys* v. *Williams*, 2 Russ. & M. 689. Reversing 3 Sim. 563.

1. When the meaning of a will is doubtful, the Court may resort to evidence of the state of the testator's property, but where the words are plain no such intrinsic aid can be resorted to. *Hensman* v. *Fryer*, 3 L. R., Ch., 420 ; 37 L. J., Ch., 97 ; 17 L. T., N. S., 394.

2. A testator bequeathed a legacy to A. "in full satisfaction of all claims he may have upon me." The testator was indebted to the executor of B., who held B.'s residuary estate on trust for the wife of A. Parol evidence to show that the testator regarded the debt as belonging to A.'s wife, or to A. in her right:—Held, not admissible. *Parmiter* v. *Parmiter*, 1 John. & H 135 ; 8 W. R. 578. Affirmed 3 L. T., N. S., 799.

3. J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B. from his banker. A. B. having received moneys for him from time to time, and with his knowledge paid them to his own bankers, as his own moneys ; but J. B. had no concern with A. B.'s bankers, nor did they know that he was interested in the moneys paid by A. B. J. B. bequeaths all his money in the hands of any banker:—Held, that his balance at his own banker's, and also his share of A. B.'s balance, will pass, and that evidence is admissible to show that he so intended. *Heming* v. *Whittam*, 2 Sim. 493 ; 1 L. J., N. S., Ch., 94.

4. A testatrix was the owner of four debentures of the Spanish government, each of which had impressed upon it the words "Capital 1,000*l*.," and purported to secure to the holder 50*l*. per annum in perpetuity, but redeemable on payment of "55*l*. per cent. on the nominal amount." By her will she bequeathed thus :—"The sum of 2,000*l*. Spanish bonds or coupons now belonging to me, and all dividends which shall be due to me thereon at the time of my decease : "—"Held, that two only of the debentures passed, and that parol evidence of declarations of the testatrix as to her intention was inadmissible. *Horwood* v. *Griffith*, 4 De G. M. & G. 700 ; 23 L. J., Ch., 465.

Held, also, *semble*, that where there is a specific bequest, parol evidence is admissible to show what property there is answering to the description of it ; but that, if on that evidence it appears that there was property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property. *Ib.*

5. A testator devised all his real estates (except the hereditaments thereinafter particularly devised), including all estates vested in him upon trust, or by way of mortgage, to trustees upon certain trusts ; in a subsequent part of his will he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A. called respectively S. and M., both of which were in the possession of T. H., but at different rents. On a question being raised which of these two farms the testator intended to give to T. R.:—It was sufficiently established by the evidence, that during the lives of the testator and his father the proceeds of the farm S. had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose:—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M. was the one devised to T. R. *Blundell* v. *Gladstone*, 3 Macn. & G. 692. Reversing 14 Sim. 83 ; 8 Jur. 301

6. Extrinsic evidence is more readily admitted to explain an ambiguity in the subject than in the object of the gift. *Rowlatt* v. *Easton*, 2 N. R. 262 ; 11 W. R. 767.

Descriptive Gift of Real Estate.] See XXXVIII. xxx. *and* XXXI, *post.*

VI. OF MATTERS SUBSEQUENT TO EXECUTION OF THE WILL.

7. Will not to be construed by subsequent circumstances. *Moygridge* v. *Thackwell*, 1 Ves. J. 475 ; 3 Bro. C. C. 517. Affirmed 13 Ves. 416.

8. Will, if extrinsic evidence could be admitted, not to be construed by matters posterior to its execution. *Welby* v. *Welby*, 2 Ves. & B. 192.

9. Inconvenient consequences, not in the contemplation of the testator at the time of making his will, not sufficient to authorise a variation or interpolation in the terms of a bequest ; where those terms are in themselves clear and intelligible. *Smith* v. *Streatfield*, 1 Meriv. 358.

VII. TO REBUT PRESUMPTIONS.

10. Primary principle is, that evidence is not admissible to contradict a written will ; but, in some cases, Court will raise a presumption against it, and then admit evidence to repel the presumption. *Hurst* v. *Beach*, 5 Madd. 360.

11. Parol evidence is not admissible to contradict an express declaration in will ; but if there be no express declaration, and only circumstances which afford inference or presumption, there parol evidence is admissible to answer that inference or presumption. *Gladding* v. *Yapp*, 5 Madd. 59.

12. A subsequent marriage and the birth of a child revokes a will. *Quære*, as to the propriety of admitting evidence against the presumption. *Gibbons* v. *Gaunt*, 4 Ves. 848.

13. Although parol evidence is admissible to rebut a presumption of law against the words of a will, yet where the presumption arises from a rule of construction of words simply *quâ* words, no parol evidence can be admitted. *Barrs* v. *Fewkes*, 34 L. J., Ch., 522 ; 11 Jur., N. S., 669 ; 13 W. R. 987 ; 12 L. T., N. S., 727 ; 6 N. R. 355.

Therefore, under a gift of residuary real and personal estate to a person appointed executor, "to enable him to carry into effect the purposes of this my will," the Court refused to admit extrinsic evidence to show that the executor was entitled beneficially, and was not a trustee merely for the heir of the surplus real estate, the heir being entitled by construction, and not by implication of law. *Ib.*

Docksey v. *Docksey* (3 Bro. P. C. 39), and *Mallabar* v. *Mallabar* (Cas. t. Talb. 78), explained. *Ib.*

See also ADVANCEMENT—EXECUTOR AND ADMINISTRATOR—LEGACY—PARENT AND CHILD—PORTION.

VIII. TERMS OF ART.

1. A statuary bequeathed articles used in his business, by their technical names, some of which were very obscurely written. Reference directed to ascertain what was meant, the Master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechy*, 3 Sim. 24; 9 L. J., Ch., 200. Reversed 2 Russ. & M. 624.

2. A testator bequeathed certain legacies, using letters to designate the amount, viz., "the sum of i. x. x." Parol evidence admitted to show that the testator used those letters as private trade marks, and to prove the amounts which they represented. *Kell* v. *Charman*, 4 W. R. 787; 23 Beav. 195.

3. A testator devised "forty-five acres of the lands of Dromquin, known as the house division," to A., and "fifty acres of the same lands" to B.:—Held, that extrinsic evidence was not admissible to show that he meant Irish and not statute acres. *O'Donnell* v. *O'Donnell*, 1 L. R., Ir., 284.

By the statutory definition contained in 5 Geo. 4, c. 74, s. 2, the word "acre" has received a legal signification which must be attributed to that word, whether used in a will or other voluntary instrument, or in a contract. *Ib.*

IX. OTHER CASES.

4. Parol evidence cannot be admitted to explain the written words of a will. *Stratton* v. *Payne*, 3 Bro. P. C. 103.

5. Parol evidence not admissible to show the intention of the testator against the construction upon the face of the will. *Cambridge* v. *Rous*, 8 Ves. 22.

6. Parol evidence admitted to explain a will, where doubtful: not to contradict. As, on a legacy to the four children of B., and afterwards another to the children of B.; B. having then two children by the first husband, four by a second; admitted to show the first legacy was restrained to the last four children; not so of the other legacy. *Hampshire* v. *Peirce*, 2 Ves. 216.

7. In construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful, in order to enable the Court to make what appears a more reasonable will for the testator. *Gordon* v. *Gordon*, 5 L. R., H. L., 254.

8. Evidence not admissible that devisor did not mean what he had expressed, but admissible to show that a particular expression was not his will. *Powell* v. *Mouchett*, and *Lichfield* v. *Mouchett*, 6 Madd. 216.

9. The general doctrine of the admissibility of parol evidence to explain a testator's intention, and the cases of *Hurst* v. *Beach* (3 Madd. 351), *Booker* v. *Allen* (2 Russ. & M. 270), *Weall* v. *Rice* (2 Russ. & M. 251, 263), and *Lloyd* v. *Harvey* (2 Russ. & M. 310), considered. *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

10. Parol evidence is inadmissible for the purpose of explaining the testator's intention, even against the heir at law. *Irvine* v. *Sullivan*, 8 L. R., Eq., 673; 38 L. J., Ch., 635; 17 W. R. 1083.

11. A clause which the law will not allow to operate may be used to explain the intentions of a testator. *Martin* v. *Martin*, 12 Jur., N. S., 889; 35 L. J., Ch., 281; 14 L. T., N. S., 129.

12. Parol evidence may be read in support of legal operation of will. *Lake* v. *Lake*, Dick. 236.

13. Where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words. *Popham* v. *Banfield*, 1 Salk. 236. But see as to this report of this case, 1 Ves. 26. See S. C. *nom. Popham* v. *Bamfield*, 1 P. W. 54.

Parol evidence is only admitted to support legal rights against an equitable claim. *Id.* 41.

14. In trying the meaning of phrases in a will all circumstances may be looked at in which the Court might have been called to determine the meaning of the same phrases applied to a different state of circumstances. *Radnor (Earl)* v. *Shafto*, 11 Ves. 457.

15. This Court will not add a legacy to a will upon parol proof, though it concerns personal estate only. *Whitton* v. *Russell*, 1 Atk. 448.

16. A testator made a voluntary settlement of some real estates. He afterwards, by his will, devised other real estates to nearly the same uses:—Held, that the deed could not be referred to for the purpose of construing the will. *Randall* v. *Daniel*, 24 Beav. 193.

17. Among the testatrix's papers some writings were found, made after the passing of the Wills Act, but not attested as thereby required:—Held, that these could not be looked at for the purpose of ascertaining what her intentions were. *Briggs* v. *Penny*, 3 De G. & Sm. 525; 13 Jur. 905; and see S. C. 3 Macn. & G. 546.

18. A pedigree made by a testator's direction, and found among his papers, not admitted to explain a will, equivocal but not unintelligible. *Crosley* v. *Clare*, 3 Swan. 322. n. See S. C. *nom. Crossly* v. *Clare*, Ambl. 397.

19. No papers, letters, etc., can be taken notice of, to influence construction of will. *Bertie* v. *Falkland*, 1 Salk. 232.

20. Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and to ascertain the subject of the devise. Different from the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it. *Sandford* v. *Raikes*, 1 Meriv. 653.

Testator contracts for the purchase of a house, and afterwards, by a codicil to his will, gives to A., his executor, the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down. This amounts to a direction that the purchase money for the house shall be so provided for: and evidence was admitted to show what was the order given by the testator, with reference to the cutting of timber. *Id.* 646.

21. A testator, having devised his estates in a particular way, directed that a different disposition of them should take place, in case certain contingent property and effects in expectancy should fall in and become vested interests to his children. The children being entitled to no contingent interests at the date

of the will, the Court refused to admit evidence offered for the purpose of showing that the testator referred to expectation from particular individuals which had been afterwards realised, as being in effect to add to the will, and not to explain it. *King* v. *Badeley*, 3 Myl. & K. 417; 3 L. J., N. S., Ch., 206.

1. A will was attested by two marksmen: below their names two other persons signed the document with the word "witness" alone against their names. There was contradictory evidence as to the object for which these two persons assigned:—Held, that looking at the document only, the two latter persons must be taken to be witnesses to the will, and that a legacy given to the wife of one of such witnesses was void. *Quære*, whether evidence was admissible to explain the object of their signing. *Wigan* v. *Rowland*, 1 Eq. Rep. 213; 11 Hare 157; 17 Jur. 910; 1 W. R. 383.

2. At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:—Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*, 3 L. R., Ch. D., 738; 45 L. J., Ch., 740; 24 W. R. 1058; 35 L. T., N. S., 52.

3. Testator, by codicil in 1796, reciting that he had devised his real estate by his last will, dated 25th November 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors. Bill was by devisees of the real estate, under another will, 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound, if not in law, in honour, and did not mean to revoke the will of 1756, and revive that of 1752; and praying that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid. Upon an issue directed, the will of 1752 was established, evidence of mistake being rejected. On further directions, the plaintiffs relied on the agreement, and offered evidence in support of it. Bill was dismissed, Lord Chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that upon the evidence the agreement was uncertain and unfair, and therefore not to be executed. *Walpole* (*Lord*) v. *Orford* (*Lord*), 3 Ves. 402.

4. Parol evidence admissible to fortify the presumption of a legacy being adeemed. *Monck* v. *Monck* (*Lord*), 1 Ball. & B. 298.

5. Legacy of interest then due on mortgage. After making will, testator survives eleven years, and receives interest on mortgage. Evidence admissible to prove interest was received as accruing since the making of will, and not on account of what was due before; therefore, legacy was held adeemed. *Graves* v. *Hughes*, 4 Madd. 381.

6. A testatrix was possessed of original shares in a company fully paid up, and of the same number of shares not fully paid up, which had been issued one for every original share. She bequeathed specifically certain of her shares in the company. Evidence is not to be admitted to show that the testatrix intended by each specifically bequeathed share a double share, consisting of one of each class. *Millard* v. *Bailey*, 1 L. R., Eq., 378; 35 L. J., Ch., 312; 13 L. T., N. S., 751.

IX. Erasures and Interlineations.

7. A., by will duly executed, devises a copyhold estate to his wife, and on the day of his death orders his nephew to obliterate some devises, but nothing as to the copyhold, and then caused a memorandum to be written that he approved of the will as obliterated, but does not republish it, and orders his nephew to carry it to one to write it fair, and, before it is done, he becomes delirious:—Held, to be a good will, and that the copyhold passed. *Burkitt* v. *Burkitt*, 2 Vern. 498.

8. How the spiritual courts proceed when there are erasures in a will, and the executrix submits to have the will proved as though no such erasures had been therein. *Parker* v. *Ash*, 1 Vern. 256.

9. A testator gave his residuary estate in certain portions between his two granddaughters and his four grandsons. He afterwards drew a line through the material parts of the bequest, and by a marginal note stated, that one grandson being dead, and the other three being provided for, he intended to bequeath 1,000*l.* to each of his grandsons, and the residue between his two granddaughters:—Held, that the first bequest was cancelled, and that the granddaughters were entitled to the whole fund, subject to the three legacies of 1,000*l.* *Re Ravenscroft*, 18 L. J., N. S., Ch., 501.

10. Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will:—Held, that the erasure in pencil raised no presumption of revocation, and that without other explanation it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis* v. *Grover*, 5 Hare 39; 15 L. J., N. S., Ch., 99; 10 Jur. 280.

11. A testator directed his executors to pay an annuity to his sister, A. B., the wife of C., for her separate use, or to such persons as the said A. B. should appoint, the receipt of the said A. B. to be a sufficient discharge, and he gave the residue of his estate among his brother E. and his sisters F. G. and A. B., the wife of the said C. He subsequently drew his pen through the name of his sister A. B. in the first, third, and fourth places where she was mentioned, leaving her description as the wife of C. still remaining, except in the third place, where there was no description:—Held, that the bequest to her was not revoked. *Martins* v. *Gardiner*, 8 Sim. 73; 5 L. J., N. S., Ch., 305.

1. Testator gives a moiety of the residue to such lying-in hospital as his executor should appoint. He afterwards strikes out the executor's name, and dies without appointing any other executor. This is not a revocation of the legacy, but the Court will appoint. *White* v. *White*, 1 Bro. C. C. 12.

2. A testator, who died in 1821, struck the name of one of the devisees out of his will, and interlined the names of two other persons above the erasure; but those alterations were not noticed in the attestation clause, nor was there anything to show, or from which it could be inferred, that they made before the will was executed:—Held, that they did not affect the devise. *Simmons* v. *Rudall*, 1 Sim., N. S., 115; 15 Jur. 162.

3. The effect of interlineations considered. *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. R. 332.

4. A testator having, by his will, directed his executors to transfer 500*l*., part of his residuary estate, to N, and made a specific disposition of the other parts, and afterwards drawn a pen through the name of N., and by a codicil declared that he rased her name out of his will with his own hand, the 500*l*. belongs, as undisposed of, to his next of kin. The costs of ascertaining the right of that sum were paid thereout, in exemption of the general residue. *Skrymsher* v. *Northcote*, 1 Swan. 566; 1 Wils. 248.

5. Rejection of a repugnancy by interlineation. *Boon* v. *Cornforth*, 2 Ves. 277.

6. A testator bequeathed certain property, after the death of his wife, as follows: "To our three children, Henry and James, now residing with me, our sons, and the before-named Anne, our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words, but they were still quite legible. The testator subsequently re-acknowledged the will in presence of three witnesses:—Held, that the previous words of description, "our three children," were sufficient to entitle Anne to take, even if the obliteration were complete, which it was not. *Boyd* v. *Martin*, 2 Dr. & Wal. 353.

7. Testator gave legacies of 4,000*l*., charged exclusively on real estate. He struck out the 4,000*l*. with his pen, and inserted 3,000*l*. in pencil; and by an unattested codicil, which was a nullity, as the legacies were exclusively charged on real estate, expressly altered the amount of the legacies from 4,000*l*. to 3,000*l*.:—Held, that the legatees were entitled to the legacies of 4,000*l*. *Kirke* v. *Kirke*, 4 Russ. 435; 6 L. J., Ch., 143.

Obliterations and interlineations by the testator in his will, coupled with an ineffectual codicil, do not amount to a revocation, but are a substitution, which failing, the original disposition stands good. *Ib.*

8. Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the Court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Utterson* v. *Utterson*, Coop. 60; 3 Ves. & B. 122.

9. Any alterations, though in a will made before the 1 Vict., c. 26, must, by section 21, in order to take effect as dispositions of the property, be attested in the manner pointed out by the Act; and where there were obliterations of part, and such alterations made with a view of substituting the new provisions, it was:—Held, that, the intention of the testator being only to revoke conditionally, the will should be admitted to probate as it stood before the alteration. *Brooke* v. *Kent*, 3 Moo. P. C. 334.

10. Will of realty, date prior to the 1st January 1838, and bearing upon the face of it certain obliterations which were favourable to the claim of the heir-at-law of the testatrix, established against the heir, without the obliterations, the evidence leading to the conclusion that the obliterations were not made previously to the execution of the will, or under circumstances rendering them valid within the provisions of the 6th section of the Statute of Frauds, and the heir not desiring an issue. *Wynn* v. *Heveningham*, 1 Colly. 630.

11. Where there are alterations on the face of a will, there is no presumption of law that they were made at any particular time; but the rule applicable to such cases is, that those who propound a doubtful instrument must make the doubt clear. *Williams* v. *Ashton*, 1 John. & H. 115.

Therefore, where a testatrix told the witnesses to her will, at the time of attestation, that she had made alterations in her will, but did not allow them to see what the alterations were:—Held, that, in the absence of any means to determine what alterations were made before execution, the Court could not give effect to any of them. *Ib.*

12. The will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of execution, the attesting witnesses could not depose to:—Held, by the Judicial Committee of the Privy Council, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that such alterations and erasures were made after the execution of the will and probate of the will granted in its original form. *Cooper* v. *Bockett*, 4 Moo. P. C. 149; 10 Jur. 931.

13. By the Statute of Wills (1 Vict., c. 26, s. 21) obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin or otherwise by the signature of the testator, and the attestation of witnesses. *Greville* v. *Tylee*, 7 Moo. P. C. 320.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. *Ib.*

In the absence of proof that certain words in a will, written with a different pen and in different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will, consisting of the inserted words which constituted a reversionary disposition, pronounced against. *Ib.*

The case of *Cooper* v. *Bockett* (4 Moo. P. C. 419) considered and approved. *Ib.*

1. The Ecclesiastical Court granted probate of a will of personalty, with cross lines drawn in ink over the bequests of certain legacies — Held, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will. *Gann* v. *Gregory*, 3 De G. M. & G. 777; 18 Jur. 1063; 2 Eq. Rep. 484; 2 W. R. 484.

In the absence of direct evidence, the Court will presume that obliterations and alterations in a will have been made subsequently to its execution, and uphold the gifts which occur in the part so obliterated or altered. S. C. 1 Eq. Rep. 112; 1 W. R. 320; 17 Jur. 520.

2. A testator bequeathed the residue to three trustees and their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees, and substituted that of his daughter. A facsimile probate was granted.—Held, that though there was a revocation of the estate and interest given to the trustees, there was no revocation of the subsequent part of the will which declared the trusts, and, consequently, that the daughter took an estate for life only:—Held, also, that a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the Court itself the province of a court of probate:—Held, moreover, that the several parts of the will were not inconsistent, and might well be read together. *Shea* v. *Boschetti*, 18 Beav. 321; 18 Jur. 614; 23 L. J., Ch., 652; 2 W. R. 281; 2 Eq. Rep. 608.

Where a bequest is made to A., in trust for B., the striking out of the gift to A. does not revoke the beneficial gift to B. S. C. 18 Beav. 327; 18 Jur. 614; 23 L. J., Ch., 652.

3. T., after giving specific legacies, gives the whole income of his property to his wife for life; as to the principal, one-half of my "Consols and Indian stock to my" son absolutely, and the other half in trust for the children of his daughter at twenty-one, with a gift of the residue to his son. The words between the inverted commas were struck through, and probate was granted of the will in blank as to them; and upon the question whether the children of the daughter were excluded or not:—Held, that they were, and that the son took everything, subject to the wife's life estate. *Taylor* v. *Richardson*, 2 W. R. 29; 2 Drew. 16; 23 L. J., Ch., 9; 2 Eq. Rep. 332.

4. Where a testator omits something, and supplies it by a mere pencil interlineation, which is not admitted to probate, the Court cannot receive it, but must, if possible, supply the omission from the will itself; and can receive no evidence *dehors* the will, except as to the condition of the testator and his family at the time of execution. *Edmunds* v. *Waugh*, 6 W. R. 589.

A pencil memorandum, if regarded as a codicil, and therefore a part of the will, is receivable by the Court. *Ib.*

5. In construing a will of personal estate, the Court, notwithstanding an objection by counsel that the probate copy alone could be looked at, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate. *Manning* v *Purcell*, 7 De G. M. & G. 55.

6. If a will is revoked by cancellation for the purpose of giving effect to different dispositions, such revocation is ineffectual if the substituted dispositions are not effective. The rule of the English law, following that of the civil law, is this.—*Tunc prius testamentum rumpitur cum posterius perfectum est.* *Ibbott* v. *Bell*, 34 Beav. 395.

A will was partially revoked by erasures, and was afterwards re-published:—Held, that the revocation was final, and not deliberative. *Ib.*

7. J. E. made a will, in which he devised his house, lands, and tenements to his mother, "Elizabeth E., her heirs and assigns, for ever;" he afterwards struck his pen through the words, "her heirs and assigns for ever":—Held, that this was, under the 6th section of the Statute of Frauds (29 Car. 2, c. 3), a valid revocation, by obliteration, of a clause in his will; the mother took only an estate for life. *Swinton* v. *Bailey*, 4 L. R., App. Cas., 70; 48 L. J., Ch., 57; 27 W. R. 293; 39 L. T. 581. Affirming 1 L. R., Exch. Ds., 110; 45 L. J., Exch., 427; 35 L. T. 133; 24 W. R. 561. Reversing 45 L. J., Exch., 5; 33 L. T. 695; 24 W. R. 188.

The 6th section of the statute was satisfied by this act of obliteration of the words in question, which amounted to an actual revocation, and not a mere alteration. *Ib.*

The word "clause" in the first portion of the section may properly be read "part." *Ib.*

Per Lord Penzance:—"Devise" in the statute means a disposition of lands, in writing, and when the statute says the testator may revoke any "clause thereof," it means any intelligible portion of the devise, whether the effect is to increase the beneficial interest of the taker, or the reverse. *Ib.*

8. Although, when alterations are apparent on the face of a will, it cannot be presumed that they were made before execution, and they cannot be admitted to probate without some affirmative evidence that they were in fact so made, yet a court or jury trying this question of fact is not confined to any particular species of evidence, but may act upon any evidence which, having regard to all the circumstances, reasonably leads the judgment to the conclusion that the alterations were made before execution. *Moore* v. *Moore*, 6 Ir. R., Eq., 166.

A lawyer's holograph will settled property on his younger grandson Stephen for life, remainder to his first and other sons in tail male, then to his elder grandson Richard, remainder, etc. The word "Richard" was interlined, and "Stephen" struck out in the first, and *vice versâ* in the second case. These alterations were in the handwriting of, and initialed by, the testator, who had previously

expressed his intention of settling the property on his grandsons in priority of birth, who also knew their names, and there was no reason why the younger should be preferred. There having been a subsequent opportunity for correcting the mistake before execution, and the appearance of the will and alterations raising the presumption, confirmed by the opinion of two experts, of contemporaneous writing, probate was decreed with such alterations. *Ib.*

1. A testator, by his will dated in 1834, devised and bequeathed real, copyhold, and personal estate upon certain trusts. Certain of the words in the declaration of trusts were interlineated. Probate was granted of the will by the Consistory Court of C. A question being raised, whether, with regard to the real estate, the interlineation was made before or after the execution of the will, it was:—Held, having regard to the granting of the probate by the Consistory Court, that it was made before the execution of the will. *Re Cruttenden, Davey* v. *Lansdell*, 45 L. T. 465; 30 W. R. 57.

Revocation by Cancellation.] See V. II. *ante.*

X. Mistake or Misdescription.

I. *In General*, 7641.
II. *Amounts and Figures*, 7642.
III. *Blanks*, 7642.
IV. *In Number of a Class*, 7643.
V. *Relief in Equity in Cases of Mistake in General.* See MISTAKE.
VI. *In Descriptive Gift.* See XXXVIII. *post.*
VII. *In Description of Persons.* See XXXI. I. *post.*
VIII. *Revocation. Mistake in Recital or Assumption of Fact.* See VI. VIII. and IX. *ante.*
IX. *Implication. Gift by Mistake in Recital.* See LVIII. *post.*
X. *Effect on Election.* See ELECTION.

I. IN GENERAL.

2. A court of equity will not supply words in a will unless there be palpably *error scribentis. Molesworth* v. *Molesworth*, 1 Cox 75.

3. Testator's mistake not rectified, because nothing to show what would have been the intention, if no mistake. *Smith* v. *Maitland*, 1 Ves. J. 362.

4. Evidence of mistake not admissible to affect the construction of a will. *Shergold* v. *Boone*, 13 Ves. 376.

5. Mistake in deed may be corrected in equity, but not a mistake in a will. *Powell* v. *Mouchett*, and *Lichfield* v. *Mouchett*, 6 Madd. 216.

6. Parol evidence will not be admitted to show that a bequest in a former will had been inadvertently allowed to remain in a second will. *Stringer* v. *Gardiner*, 5 Jur., N. S., 260; 28 L. J., Ch., 758.

7. Mistakes in wills shall not be supposed, if any construction that is agreeable to reason can be made out. *Purse* v. *Snaplin*, 1 Atk. 415.

In our law particular legatees are always preferred to the residuary legatees. *Secus*, in the Roman law. *Id.* 418.

8. A will cannot be varied upon the ground of mistake, unless the alleged mistake is clearly inconsistent with the intention upon the whole will. *Mellish* v. *Mellish*, 4 Ves. 45. *Philips* v. *Chamberlaine*, 4 Ves. 51.

9. Testator gave 100*l.* in trust to pay the interest to A. till her daughter, B., should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother, A.:—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

10. Testator devised all the residue of his estates, as well copyhold as freehold, the copyhold part thereof having been previously surrendered to the use of his will upon several trusts in favour of his wife and children; the only trust for his eldest son and heir was an annuity of 300*l.* for life, remainder to his wife and children. The testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity while abroad. *Rumbold* v. *Rumbold*, 3 Ves. 65.

11. A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property (erroneously describing it as a freehold), to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—Held, that the fact of the testatrix having left the estates to A. and B. respectively, in the mistaken supposition that both estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume the testatrix would have apportioned her bounty differently if the mistake had not occurred. *Westcott* v. *Cullyford*, 3 Hare 265; 13 L. J., N. S., Ch., 136; 8 Jur. 166.

12. A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of 800*l.*, and a further annuity of 100*l.* in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and his said daughters, and in educating the daughters. After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood 600*l.* a year, and after her future marriage 200*l.* a year. And if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of 150*l.*, to commence after all his said four daughters should have attained

twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by 3,000*l*. There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one:—Held, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible. *Re Bywater, Bywater* v. *Clarke*, 18 L. R., Ch. D., 17; 30 W. R. 94.

II. AMOUNTS AND FIGURES.

1. Though a debt devised amounts to a less sum than is stated in the will, yet the wrong description and falling short will not defeat the legacy, but shall be applied as far as it goes in the same manner as if there had been the whole sum mentioned in the will. *Att.-Gen.* v. *Pyle*, 1 Atk. 435.

2. Mistake in the computation of a legacy rectified according to the intention, though contrary to the words. *Milner* v. *Milner*, 1 Ves. 106.

3. Mistake in a will and codicil, as to the amount of a fund out of which younger children were to be provided for, rectified on the evident intent of the testator. *Brackenbury* v. *Brackenbury*, 2 Eden 275; Ambl. 474.

4. A testator bequeathed "an annuity of 21*l*. per annum, which I purchased from J. G." The testator never had an annuity of that amount, but he had purchased from J. G. for 300*l*. an annuity of 46*l*. per annum, and had insured the life of J. G. at an annual premium of 25*l*., and had made an entry in his books of "300*l*., lent to J. G. at 7 per cent., 21*l*.; 25*l*. premium on policy of assurance, 300*l*.":—Held, that the whole annuity of 46*l*. passed to the legatee. *Purchase* v. *Shallis*, 2 H. & Tw. 354; 19 L. J., N. S., Ch., 518; 14 Jur. 403.

5. Devise of estates to A., upon condition that A. should release, in favour of her brother B., all A.'s interest in 1,000*l*., "charged upon certain estates, limited by the marriage settlement" of the father and mother of A. and B. The sum of 2,000*l*. was comprehended in the settlement, and A. took an interest in it, but it was not charged on any estate:—Held, nevertheless, that it was the sum referred to in the will. *Howard* v. *Conway*, 1 Colly. 87; 13 L. J., N. S., Ch., 192; 8 Jur. 237.

6. Testator possessed of 5,000*l*. 3 per cent. consols, bequeathed 2,000*l*. thereof to trustees, in trust, as to 1,000*l*. to A., and as to 2,000*l*. to B.:—Held, that testator meant to give trustees 3,000*l*. in trust, bequest to them of the 2,000*l*. 3 per cent. being mentioned only once, and legacy of 2,000*l*. to B. being mentioned twice. *Alford* v. *Green*, 5 Madd. 92.

7. A will contained a bequest of 1,000*l*. on trusts, and of 5,000*l*. on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l*., and the said two sums of 1,000*l*.:—Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l*. in the bequest in which no sum was named. *Edmunds* v. *Waugh*, 4 Drew. 275.

8. A testator gave to each of his three brothers and six sisters a legacy of 500*l*., and other legacies to other relations of his, which, with the preceding legacies to his brothers and sisters, amounted to 6,100*l*. He then gave "the remainder of his property to his wife absolutely, except 4,100*l*., of which she was only to have the use during her life, and which he wished to be divided among his relations to whom he had left legacies in the fore part of his will, in proportion to the legacies left above, which would just make their legacies double the first bequest":—Held, that although there had been a mistake by the testator in computing the amount of the legacies given by him in the former part of his will, there was no such evidence of a clear intention on his part to double the amount of the preceding legacies as would justify the Court in holding that the words "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." *Thompson* v. *Whitelock*, 5 Jur., N. S., 991; 28 L. J., Ch., 793; 4 De G. & J. 490; 7 W. R. 625.

9. A testator bequeathed 500*l*. to his widow, and by a codicil he bequeathed her "a further sum, not exceeding 300*l*., making altogether a legacy of 1,000*l*., given to her by my will and this codicil":—Held, that there was a mere miscalculation, and that, under the codicil, the widow was only entitled to 300*l*. *Morgan* v. *Middlemiss*, 35 Beav. 278.

See also XII. v. *post*.

III. BLANKS.

10. Where testator gave to Bread Street Ward 200*l*. according to Mr. ——'s will, parol evidence was not allowed to explain testator's intention where there was a blank only. *Baylis* v. *Att.-Gen.*, 2 Atk. 239.

11. Where there is no devisee named, this is an absolute omission, and cannot be supplied by parol evidence. *Castledon* v. *Turner*, 3 Atk. 258.

12. Legacy to —— P., the son of —— P.; upon the evidence, the plaintiff, the only claimant, was declared entitled. *Price* v. *Page*, 4 Ves. 679.

13. Gift, by will, of pictures to Lady —— absolutely void, and shall not go to the Master, nor be supported by parol evidence. *Hunt* v. *Hort*, 3 Bro. C. C. 311.

14. Residue to six grandchildren, the name of one repeated, that of another omitted, all of them shall take. *Garth* v. *Meyrick*, 1 Bro. C. C. 30.

15. A gift to all the children of the testatrix, "with the exception of one, viz. ——," established as a gift to the class, not affected by the incomplete exception. *Illingworth* v.

Cooke, 9 Hare 37; 20 L. J., N. S., Ch., 512; 15 Jur. 572.

1. Bequest to all and every the sons and daughters of A., including —— who —— the —— illegitimate —— of A.:—Held, that the illegitimate children of A. could not take. *Mason* v. *Bateson*, 26 Beav. 404; 28 L. J., Ch., 391; 5 Jur. N. S., 400.

2. Devise and bequest of real and personal estate in trust for all the testator's nephews and nieces, the sons and daughters of his sister R., including ——, who —— the —— illegitimate —— of R., equally as tenants in common, is a good devise to the legitimate sons and daughters of R., exclusive of R's illegitimate children. *Gill* v. *Bagshaw*, 2 L. R., Eq., 746; 35 L. J., Ch, 842; 14 W. R. 1012.

3. Persons named in a will blank identified from external circumstances. *Re Greyson*, 10 Jur., N. S, 696.

Where a testator devised real estate to A., B., and C., also his nephews and nieces D., E., and F., also "—— Cort and —— Cort"; and A., B., and C. were nephews and nieces, and the only persons of the name of Cort known to the testator were his brother-in-law and a nephew and a niece:—Held, that the nephew and niece were the persons intended by the testator. S. C. 4 N. R. 222; 2 Hem. & M. 504.

4. A testator gave to his wife the income of his property in the funds, East India stock, or elsewhere, for her life. The principal of all such funds and stock and property he bequeathed and devised as follows: he bequeathed "one half of my [here there was a blank] son, Montague James, to be under his own control, and the other moiety in trust for the children of my daughter Fanny." He made his son executor and residuary legatee:—Held, that no construction could be put on the blanks, and the son, as residuary legatee, took the whole. *Taylor* v. *Richardson*, 2 Drew. 16.

5. Bequest "unto each of my four nieces ——, the daughters of my deceased brother Joseph, the sum of 500*l*." There were five daughters of Joseph, who all survived the testator:—Held, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of 500*l*. *McKechnie* v. *Vaughan*, 15 L. R., Eq., 289; 28 L. T., N. S., 263; 21 W. R. 399.

6. A testator purported to give a legacy, but left the sum blank. A little further on the sum of "30*l*." occurred casually in the middle of a direction to the executors to sell the testator's furniture, etc.:—Held, that a legacy of 30*l*. was given. *Hibbert* v. *Hibbert*, 42 L. J., Ch., 383.

7. S. B. gave and bequeathed unto A: and B. a sum of stock, in trust to pay the dividends unto S. D. for life; and, after her decease, "in trust to assign and transfer the same unto —— Davis, daughter of S. D., to and for her own use and benefit." At the date of the will, and at the death of the testatrix, S. D. had three daughters, the plaintiff being the eldest. S. D. died in 1842. Upon the evidence produced, and not rebutted, that the plaintiff was the only daughter of S. D. the testatrix ever knew or heard of:—Held, that the plaintiff was the person described as "—— Davis," and therefore entitled to the legacy. *Phillips* v. *Barker*, 17 Jur. 1146; 1 Sm. & G. 583; 2 W. R. 110; 2 Eq. Rep. 795.

Parol evidence as to facts and circumstances within the knowledge of the testatrix at the time of making her will was admitted to explain a patent ambiguity, and to make the description of a person perfect. *Ib.*

8. Testator directed his executors to pay an annuity to his sister ——, the wife of Francis Betley, or to such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said E. Betley, and the receipt of the said —— to be a sufficient discharge. The testator, after executing his will, drew his pen through his sister's name in those places where blanks are left:—Held, that the bequest was not revoked. *Martins* v. *Gardiner*, 8 Sim. 73; 5 L. J., N. S., Ch., 305.

9. W. bequeathed to trustees stock and moneys, in trust, after life interest, to be divided in equal shares as follows: "Unto and amongst my nephews and nieces, John Parker and Nanny Parker, ——, or to such of them as shall be living at the time of the decease of all of them," the tenants for life. The words "Nanny Parker" were written in pencil, and were followed by a long blank. The will was proved, and the words "Nanny Parker" were in the probate. The testator had, at the time of his death, including John Parker and Nanny Parker, fourteen nephews and nieces. It being uncertain what bequest the testator meant to make:—Held, that the next of kin were entitled to the fund. *Greig* v. *Martin*, 5 Jur., N. S., 329.

10. The wife made a will bequeathing the sum of £10 00 (*sic*):—Held, that 1,000*l*. only passed by it, and contemporaneous evidence of a declaration by the testatrix as to what she had left rejected. *Baker* v. *Ker*, 11 L. R., Ir., 3.

IV. IN NUMBER OF A CLASS.

11. Gift by will of a specific sum among the six children of A. A. had six children at the time; one more was born after the testator's will, but before the codicils: she shall not take a share with the six born before. *Sherer* v. *Bishop*, 4 Bro. C. C. 55.

12. Bequest to the two servants that should live with testatrix at her death; she had three at that time, and all of them were held entitled. *Sleech* v. *Thorington*, 2 Ves. 560.

13. Testator bequeathed 500*l*. to each of the daughters of C., if both or either of them should survive D. At the date of the will, and the death of the testator, C. had three daughters, all of whom survived D.: the three daughters are entitled to 500*l*. each. *Scott* v. *Fenoulhett*, 1 Cox. 79.

14. Legacy to the three children of A., the sum of 600*l*. each; four children, all born before the date of the will, entitled to 600*l*. each. *Garvey* v. *Hibbert*, 19 Ves. 125.

15. A., by will, gave to the two daughters of S. the sum of 10*l*. each. B. by will gave 82*l*. short annuities, in trust to pay the same to and between the two daughters of S. in equal shares and proportions; and if either of them should die before the expiration of the term for which the annuities were to run, then to

pay the whole to the survivor; but if both should die before that time, then the same was to fall into the residue of the personal estate. At the times when both these wills were made, S. had three daughters. Under the first will the three daughters shall take 10*l.* each; and, under the second, the three shall take the short annuities equally, with survivorship amongst them all. *Stebbing* v. *Walkey*, 1 Cox 250; 2 Bro. C. C. 85.

1. The testator gave the residue "amongst his seven children, A, B, C., D., E., and F.," naming only six. The seven children shall all share equally. *Humphreys* v. *Humphreys*, 2 Cox 185.

2. Bequest of 800*l.* to the four eldest children of the testatrix's cousin A. B., and 200*l.* to the three remaining children of her uncle, A. B. The testatrix had a cousin and uncle of that name; the cousin had seven children, and the uncle one, but he had three remaining grandchildren, one other having died:—Held, that the three younger children of the cousin were entitled to the 200*l.* *Bristow* v. *Bristow*, 5 Beav. 289.

3. The testator bequeathed an annuity to his niece, during the lives of herself and her five daughters, and the survivors and survivor of them, and, after the death of the niece, the annuity was to be paid to her said daughters, and the survivors and survivor of them. The testator's niece had five sons, and only one daughter, at the date of the will and at the death of the testator:—Held, that this only daughter was entitled to the annuity. *Selsey* (*Lord*) v. *Lake* (*Lord*), 1 Beav. 146; 8 L. J., N. S., Ch., 233.

4. A testator bequeathed "to the two sons and the daughter of A. B, 50*l.* each." At the date of the will, and the death of the testator, A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50*l* *Harrison* v. *Harrison*, 1 Russ. & M. 72; Taml. 273.

5. Legacy of 100*l.* to the three sisters of A.; A. had four sisters. The Court will reject the word "three" and give the 100*l.* to the four. A release by one of the sisters to the other three does not aid their claim to the legacy under the will. *Lee* v. *Pain*, 4 Hare 249.

6. Bequest of 100*l.* each to the two children of the testator's nephews, A. and B. A. had three children, and B. two children:—Held, that the five children, who were living at the date of the will and at the death of the testator, were entitled under the bequest to 100*l.* apiece. *Morrison* v. *Martin*, 5 Hare 507.

7. Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children; under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox 213.

8. A testator directs the residue of his property to be divided into eight equal shares, and disposed of "as follows among the children of B.;" he then gives two shares to each of the two daughters, and one share to each of the three sons of B., making together only seven shares:—Held, that the whole residue is divisible amongst the children of B, in seven parts, each daughter taking two of those seventh parts, and each son one. *Berkeley* v. *Palling*, 1 Russ. 496; 4 L. J., Ch., 226.

9. Three sons and a daughter, the only children of A. B. who were living at the date of the will, and at the death of the testator:—Held, entitled to legacies bequeathed to the four sons of A. B. *Lane* v. *Green*, 15 Jur 763.

10. A testator bequeathed certain property, after the death of his wife, as follows: "to our three children, Henry and James, now residing with me, our sons, and the before-named Anne, our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words, but they were still quite legible. The testator subsequently re-acknowledged the will in presence of three witnesses.—Held, that the previous words of description, "our three children," were sufficient to entitle Anne to take, even if the obliteration were complete, which it was not. *Boyd* v. *Martin*, 2 Dr. & Wal. 355.

11. A testator bequeathed a fund equally amongst his nine grandchildren, the three children of A., the three children of B., the two children of C, and the child of D. C, at the date of the will, had four children, two by each marriage. It was proved that the testator took an interest in the children of the first marriage, and had declared an intention of benefiting them alone:—Held, that this evidence was inadmissible; that all C.'s children were entitled; and that the fund was, therefore, divisible in elevenths. *Mathews* v. *Foulsham*, 4 N. R. 500; 12 W. R. 1141; 11 L. T., N. S., 82.

12. Under a bequest as follows: "I give to the two grandchildren of A. 19*l.* 19*s.* each. They live near B." A. had three grandchildren, of whom two only lived near B.:—Held, that the third grandchild was not entitled. *Wrightson* v. *Calvert*, 1 John. & H. 250.

The principle on which an erroneous statement of the number of a class is rejected is to avoid uncertainty, and does not apply where a will affords the means of determining which of the class are pointed at. *Ib.*

13. A testator bequeathed 100*l.* apiece to the four sons of A. H. by a former husband. She had four children by such former husband, but one of them was a daughter:—Held, that the daughter took a legacy of 100*l.* *Lane* v. *Green*, 4 De G. & Sm. 239; 15 Jur. 763.

14. A legacy to a class not definitively fixed will be carried into effect so far as the objects can be ascertained, but blanks in a will cannot be filled up, though the testator apparently contemplated an extension of the class. *Mason* v. *Bateson*, 28 L. J., Ch., 391; 5 Jur., N. S., 400; 26 Beav. 404.

15. A testatrix, in 1831, made a will, bequeathing as follows: "To the three children of my niece, F. W., the sum of 500*l.* each." At the date of this will, F. W. had three children only, as the testatrix knew. F. W. subsequently had six other children, of the birth of each of whom the testatrix was informed. The testatrix, in 1836, 1842, and 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words:—Held, that

the bequest in the will of 1844 must be read as if the word "three" had been omitted, or had been the word "nine." *Daniell* v. *Daniell*, 3 De G. & Sm. 337; 18 L. J., N. S., Ch., 157; 13 Jur. 164.

1. A testator, having given to each of his six children a freehold estate, made a second devise to two of the children, and then gave, devised, and bequeathed all the residue of his real and personal estate unto his said four children, naming three only:—Held, that all the four children (other than the two) were entitled. *Eddels* v. *Johnson*, 1 Giff. 22; 4 Jur., N. S., 255; 27 L. J., Ch., 302; 6 W. R. 401; 1 L. T., N. S., 35.

2. A testator bequeathed a legacy to two sons and a daughter, naming them; and the residue of his estate unto the four children of his deceased son Henry. The testator never had more than the four children, who were named; and his son Henry was still living. Henry had five children, all of whom were born at the date of the will, and known to the testator:—Held, that the five children of Henry were entitled to the residuary estate. *Lee* v. *Lee*, 10 Jur., N. S., 1041.

3. Gift by will of stock to trustees, for "my four nephews and niece, namely, A., B., C, and D." The testator had four nephews and one niece, but he named three nephews only, and the niece:—Held, that the fourth nephew was not entitled to share in the fund. *Glanville* v. *Glanville*, 9 Jur., N. S., 1189; 12 W. R. 93; 9 L. T., N. S., 470; 33 L. J., Ch., 317; 3 N. R. 58; 33 Beav. 302.

4. Bequest, in 1829, of 40*l.* a year to each of the seven children now living of J. S. Y. He had nine children then living:—Held, that they all took. *Yeats* v. *Yeats*, 16 Beav. 170.

5. Gift of 250*l.* to each of the two children of S. He had three children:—Held, that the three children were each entitled to 250*l.* *Spencer* v. *Ward*, 9 L. R., Eq., 507; 18 W. R. 858; 22 L. T., N. S., 702.

The executors, in ignorance that there were three children, paid the eldest, who was of age, her legacy, and set apart 250*l.* for the second, and also paid all the debts and other legacies, and paid over the residue to the residuary legatee. On a bill by the two younger children against the executors and residuary legatee, the Court declared them entitled, and ordered the legacies and the costs, including those of the executors, to be paid by the residuary legatee. *Ib.*

6. A bequest of 10*l.* and furniture was made to each of the three children of W. and E. B. They had four children:—Held, that each of the four was entitled to 10*l.* and a share of the furniture. *Perkins* or *Parkins* v. *Fladgate*, *Re Bassett*, 41 L. J., Ch., 681; 14 L. R., Eq., 54; 20 W. R. 589.

7. A will contained the following bequest:—"I bequeath to each of my four nieces . . . the daughters of my deceased brother Joseph Vaughan, the sum of 500*l.*" At the date of the will there were five daughters of Joseph Vaughan living, all of whom survived the testator, by two of whom a bill was filed, praying for a declaration that each of the testator's five nieces was entitled to a legacy of 500*l.*:—Held, that the testator was ignorant of the state of the family, or that he intended at some future time to exercise a choice, and that the former was the more probable. And the word "four" must, therefore, be rejected as *falsa demonstratio*. *McKechnie* v. *Vaughan*, 21 W. R. 399; 15 L. R., Eq, 289; 28 L. T. 263.

8 In the case of a testamentary gift to children, describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled, unless it can be inferred who are the particular children intended, in which case the Court holds those children entitled to the exclusion of the others When a testator in a bequest to a class describes the class as consisting of a number which is found to differ from the number actually existing at the date of the will, the presumption that the testator intended to benefit the whole class is liable to be rebutted by evidence. *Newman* v. *Piercey*, 4 L. R., Ch. D., 41; 46 L. J, Ch., 36; 25 W. R. 37; 35 L. T., N. S., 461.

A testatrix, by will made in 1873, bequeathed "to each of the three children of Mrs. W., widow of W. W, one hundred pounds" W. W., brother of the testatrix, died in 1857, leaving a widow and three children, of whom one died in 1870, and two survived. Mrs. W. married again in 1858, and had six children by that marriage living at the date of the will. The evidence showed that the testatrix knew of the second marriage, and that there were children of that marriage, but that she did not know their number: also that she had not seen Mrs. W. for six years before the date of her will:—Held, that the two children by W. W. were alone entitled, and not the children of the second marriage. *Ib.*

9. A husband directed that after the death of his wife his trustees should pay and divide 1,000*l.* equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living:—Held, that the sum was to be divided equally amongst them *Carthew* v. *Enraght*, 20 W. R. 743; 26 L. T. 834.

10. Gift to each of the three children of testatrix's niece. At the date of the will the niece had three children living, and a fourth child *en ventre sa mere* at the time:—Held, the gift was to the three children only who were born at the date of the will. *Re Emery*, *Jones* v. *Emery*, 3 L. R., Ch. D., 300.

XI. Changing, Transposing, or Supplying Words.

I. CHANGING WORDS. IN GENERAL.

1. Notwithstanding all the parties are volunteers under a will, it is not necessary that the words must be taken as they are, but in many cases they may be varied. *Bagshaw* v. *Spencer*, 2 Atk. 577.

Where the Court is obliged to depart from the words of a will, it should rather be to support than to frustrate the intention of the testator. *Ib.*

2. Devise of all real and personal estate "in trust," "by" "B., C., D.," etc., must be construed by the subsequent acts to be done by them, and amounted here to a devise "to" them. *Bullock* v. *Stones*, 2 Ves. 521.

3. In the construction of wills, the Court will consider the intention of the testator, the state of the parties provided for, and, to remove inconsistencies, will read the word "future" as "former." *Pasmore* v. *Huggins*, 21 Beav. 103; 25 L. J., Ch., 251.

4. The words "the said fourth schedule," in a will:—Held, to mean "the said fifth schedule," upon a consideration of all the provisions of the will and of the state of testator's property and family when the will was made, although the actual words involved no contradiction nor repugnancy to the other provisions of the will, except by making in one instance insufficient provision for the charges thereby created, having regard to the value of the property, and by making capricious and improbable dispositions, at variance with what appeared to be the general intention. *Hart* v. *Tulk*, 2 De G. M. & G. 300; 22 L. J., Ch., 649.

5. Though real and personal estates are joined in the same devise, yet the same words may be taken in a different sense with regard to the different estates, to support the intention of the party, *ut res magis valeat quam pereat*. *Sheffield* v. *Orrery* (*Lord*), 3 Atk. 288. And see *Forth* v. *Chapman*, 1 P. W. 663.

6. Testator gave to his daughter M. 1,000*l*., and the residue of his property to the child with whom his wife was then pregnant; and in case said child should not be born alive, or not arrive at the age of maturity, he directed the property allotted to it to be given to his daughter M.; and, in case M. should die before marriage, then her portion to the child with whom his wife was pregnant; and in case they both died without arriving at the age of maturity, then over to the third persons. The posthumous child was born alive, and M., who survived, died before sixteen, and both unmarried:—Held, that in this case maturity meant marriage, and that the gift over took effect. *Bergin* v. *Woodlock*, Ll. & G. *temp.* Sugd. 140.

7. A testatrix bequeathed all her property, real and personal, to her son; and in the event of his receiving 450*l*., or thereabouts, to which she considered herself entitled, she requested that he would add to that sum 50*l*., to make up 400*l*., which she left to her granddaughter. The testatrix received the 450*l*. in her lifetime:—Held, that the legacy, as to the 450*l*., was not specific or demonstrative, but conditional on the son receiving 450*l*., and that the granddaughter was not entitled to be paid that sum out of the general assets of the testatrix. *Taylor* v. *Creagh*, 8 Ir. Ch. R. 281.

Held, also, that 400*l*. should be read "300*l*." by construction. *Ib.*

8. Testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child:—Held, that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. *Woodstock* v. *Shillito*, 6 Sim. 416.

9. The word "hereinafter" construed "herein." *Bengough* v. *Eldridge*, 1 Sim 173.

10. Direction in a will that "all such and every such sums of money which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting" should be brought into hotchpot:—Held, that a subsequent unattested statement in the testator's handwriting was admissible in evidence of advances; the Court construing "which" as meaning "as," and the clause "as will appear, etc.," as mere words of reference forming no part of the identification of the subject. *Whateley* v. *Spooner*, 3 Kay & J. 542.

11. The Court may expound the words in a will, but cannot strike them out. *Southcot* v. *Wilson*, 3 Atk. 233.

12. In construing the autograph will of an illiterate man, the meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out. *Hall* v. *Warren*, 9 H. L. Ca. 420.

13. A testatrix, in 1831, made a will bequeathing as follows:—"To the three children of my niece, F. W, the sum of 500*l*. each." At the date of this will, F. W. had three children only, as the testatrix knew. F. W. subsequently had six other children, of the birth of each of whom the testatrix was informed. The testatrix, in 1836, 1842, and 1844, made three new wills, successively revoking the former, in each of which the bequest was repeated in the same words:—Held, that the bequest in the will of 1844 must be read as if the word "three" had been omitted, or had been the word "nine." *Daniell* v. *Daniell*, 3 De G. & Sm. 337; 18 L. J., N. S., Ch., 157; 13 Jur. 164.

14. A testatrix gave money to the children of her brother B. living at his decease, and gave benefits to other nieces, some married and some not, and afterwards directed that the legacies of such of my nieces as are married shall be to their separate use. One of the daughters of B. was unmarried at her death, but was married at the death of B.:—Held, that the testatrix had used the word "are" in a future sense, and that she intended that such of her nieces as should be married at the time when their legacies and shares became payable should take to their separate use. *Re Bayliss's Trusts*, 17 Sim. 178; 13 Jur. 1090.

15. One name may be substituted for another in the construction of a will, where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. *Dent* v. *Pepys*, 6 Madd. 350.

1. A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as F. should appoint, and in default of such appointment, upon trust, for "my aforesaid nephews and nieces, and their respective lawful issue, and also the issue (if any) of F., and their several and respective heirs and assigns for ever," as tenants in common. No nephews or nieces were mentioned in the will. F. died without appointing:—Held, that there was no gift by implication to the grandchildren and their issue; secondly, that the words, "my aforesaid nephews and nieces" could not be read "my aforesaid grandsons and granddaughters;" thirdly, that the gift to the nephews and nieces was not void for uncertainty, and lastly, that they took in tail. *Campbell* v. *Bouskell*, 27 Beav. 325.

2. Testator gave 100*l.* in trust to pay the interest to A., till her daughter, B., should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother, A.:—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

3. Bequest of 800*l.* to the four eldest children of the testatrix's cousin A. B., and 200*l.* to the three remaining children of her uncle A. B. The testatrix had a cousin and an uncle of that name. The cousin had seven children, and the uncle but one, but he had three remaining grandchildren, one other having died.—Held, that the three younger children of the cousin were entitled to the 200*l.* *Bristow* v. *Bristow*, 5 Beav. 289.

4. Where the testator appointed three parties and their respective assigns his executors, and throughout the will, all acts done were to be theirs and their respective assigns, etc.; one having died, and the survivors having agreed to sell the real estate:—Held, that the word respective might, in order to carry into effect the intention of the testator, be rejected, and the survivors might convey and give a valid receipt for the purchase money. *Jones* v. *Price*, 11 Sim. 557; 10 L. J., N. S., Ch., 195; 5 Jur. 719.

5. A testator gave to each of his three brothers and six sisters a legacy of 500*l.*, and other legacies to other relations of his, which, with the preceding legacies to his brothers and sisters, amounted to 6,100*l.* He then gave "the remainder of his property to his wife absolutely, except 4,100*l.*, of which she was only to have the use during her life, and which he wished to be divided among his relations to whom he had left legacies in the fore part of his will, in proportion to the legacies left above, which would just make their legacies double the first bequest":—Held, that although there had been a mistake by the testator in computing the amount of the legacies given by him in the former part of his will, there was no such evidence of a clear intention on his part to double the amount of the preceding legacies as would justify the Court in holding that the words "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." *Thompson* v. *Whitelock*, 5 Jur., N. S., 991; 28 L. J., Ch., 793; 4 De G. & J. 490; 7 W. R. 625.

As to Mistake Generally.] See X. *ante.*

See also XIII. *post.*

II. CHANGING WORDS. CONSTRUCTION OF "AND" AS EQUIVALENT TO "OR."

1. In General.

6. Whether the instrument in which the word occurs is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intentions of the party by whom the word is used. *White* v. *Supple*, 2 Dr. & War. 471; 1 Con. & L. 525.

7. "And" is construed "or" where one member of the compound sentence is included in the other, and would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously vested gift. *Day* v. *Day*, 1 Kay 703; 18 Jur. 1013; 2 W. R. 700.

8. If the Court can give a possible sense to the words used by a testator, it will not transpose the words actually used by him so as to give to his will a more natural and probable intention. Observations upon the case of *Brown* v. *Walker* (2 L. J., Ch., 82); and remarks as to the words "or" and "and." *Key* v. *Key*, 1 Jur., N. S., 372.

9. The construction of the word "and" as "or" is only admissible when the context of a will makes it evident, or at all events furnishes very strong grounds for presuming, that it was so intended. *Coates* v. *Hart*, 3 De G. J. & S. 504. And see S. C. 32 Beav. 349.

10. "And" construed "or" for the purposes of the construction of a will. *Hetherington* v. *Oakman*, 2 Y. & Coll. C. C. 299; 7 Jur. 570.

11. In a residuary clause, "and" read "or," to effectuate the plain intention of the testatrix. *Stubbs* v. *Sargon*, 2 Keen 255; 6 L. J., N. S., Ch., 254. Affirmed 3 Myl. & C. 507; 7 L. J., N. S., Ch., 93; 2 Jur. 150.

12. The word "and" construed "or," in order to give effect to the obvious meaning. *Maynard* v. *Wright*, 26 Beav. 285.

A testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which the accumulations to be paid to the testator's sons and daughters, or such of them as should be living at the respective periods of division; and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parents' share to be vested interests in the same respectively, at the age of twenty-one, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children. And from and after the expiration of the term of twenty-one years he devised the same premises unto such of his grandchildren, and their issue, as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common:—Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Ib.*

On the construction of a will:—Held, that the word "and" could not be read disjunctively as "or." *Seccombe* v. *Edwards*, 28 Beav. 440; 6 Jur., N. S., 642; 8 W. R. 595.

1. The words "and also" may so far disunite two clauses of a sentence, as to give a different construction to the same words. *May* v. *Wood*, 3 Bro. C. C. 472.

2. A testator bequeathed a sum of money to his wife for life, and after her decease for A., M., and W., or such of them as shall be then living, and shall attain twenty-one or marry; and there was a power to the trustees to advance to A., M., and W., "not exceeding the share of each of them, my said three children." A., M., and W. all survived the testator, and attained twenty-one; but A. died in the lifetime of the tenant for life:—Held, that she took nothing under the above gift, the Court declining to construe "and" as equivalent to "or." *Malden* v. *Maine*, 2 Jur., N. S., 206.

3. Construction of a will; "and" construed "or." *Jackson* v. *Jackson*, 1 Ves. 217.

4. Power to testator's widow to appoint to children if they conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation:—Held, she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried. *Davidson* v. *Rook*, 22 Beav. 206.

5. Gift equally to his three children and their heirs as tenants in common, and to the survivor of them and the heirs of such survivors, when they should attain their ages of twenty-one or marriage, etc.: "and" construed "or." *Hawes* v. *Hawes*, 1 Ves. 13.

6. A testator (tenant for life under a settlement of the B. H. estate, and other lands, remainder to his first and other sons in tail male, with several limitations over), by his will, gave certain specific things, to be enjoyed by the person or persons who, for the time being, should be entitled to the freehold "or" inheritance of the family estate at Stapleton, as and in the nature of heirlooms. He gave his furniture, plate, etc., to his brother A. He directed a sum of 1000*l*, secured to him on the B. H. estate and other estates, to sink into the freehold "and" inheritance of the said estates, that the same might merge them, and the rents, and arrears of rent, with timber felled and other annual profits due to him at the time of his decease from the B. H. estate, unto the person or persons who should be entitled to the freehold "and" inheritance of the same estate in possession on his decease. He gave his residue to his two brothers, B. and C., and he appointed his brother A. his sole executor. B. died in the testator's lifetime:—Held, that in the gift of the rents, etc., the word "and" must be read "or"; and that they passed to A., although he was entitled only to the freehold. *Stapleton* v. *Stapleton*, 2 Sim., N. S., 212; 21 L. J., N. S., Ch., 434.

7. Power of appointment by a father not well executed, being contrary to the intention as collected from a reasonable construction of the recital of the deed which created the power: "and" construed "or." *Burleigh* v. *Pearson*, 1 Ves. 281.

8. A power of sale and of exchange was given to trustees of a settlement, at the request of the person for the time being "seised of the freehold and inheritance of the manors".—Held, that reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life who (subject to intervening limitations) had the ultimate remainder in fee. *Malmesbury (Earl)* v. *Malmesbury (Countess)*; *Phillipson* v. *Turner*, 31 Beav. 407.

Held, also, that the word "and" could not be read disjunctively as "or." *Ib.*

2. Gift Over on Death, Unmarried, and some other Event.

9. Limitation over upon the death of a person unmarried and without issue, unmarried, in its usual sense, meaning never having been married: "and" was construed "or," to afford a reasonable construction. *Maberly* v. *Strode*, 3 Ves. 450.

Words of a survivorship, added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. *Id.* 451.

10. Bequest to testator's three children, to be equally divided between them, share and share alike; but in case of the death of any, without being married and having children, the share of such child so dying to be divided between the surviving children; and so if one only should survive. One having been married, and having had a child, her share vested: "and" construed "or," to give effect to all the words. *Bell* v. *Phyn*, 7 Ves. 453, 458.

11. Testator gave legacies to his three children, payable after the death of his executrix, and directed that if any of the children should die unmarried and without issue, before the death of the executrix, the legacy should go to the surviving children. One of the daughters married, but died without issue in the lifetime of the executrix. The legacy survived to the other children. *Hepworth* v. *Taylor*, 1 Cox 112.

12. Gift over, in case A. should die "before marriage and leave no issue":—Held, to take effect only on the happening of both events. *Seccombe* v. *Edwards*, 28 Beav. 440; 6 Jur., N. S., 642; 8 W. R. 595.

13. Gift of a legacy upon trust for A., a son of the testator, for life, remainder to any wife he might marry, for life, remainder to his children absolutely, with a gift over, "in case he should die unmarried and without issue, to B., C., and D., or such of them as should be living at his decease absolutely." A. died a widower, and without having had any children. B., C., and D. all died in A.'s lifetime:—Held, that "and" would not, without absolute necessity, be read "or." *Re Sanders*, 1 L. R., Eq., 675; 12 Jur., N. S., 351; 14 W. R. 576.

Held, that the interests of B., C., and D., though depending on a contingency, were transmissible, and that their representatives were entitled to their shares. *Ib.*

14 A settlement contained a gift over of the children's shares of accumulations arising from the settled property in the event of all the children but one "dying unmarried and

without issue." If there were more children than one, the children's shares were to be as the husband and wife, or the survivor of them, should appoint; and in default of appointment, in equal shares, and to vest at twenty-one or marriage. There were fourteen children of the marriage. Two of them married, four died infants and unmarried, and all the surviving children but one had attained twenty-one. The wife died. The father appointed a share to the plaintiff, one of his sons, who had attained twenty-one:—Held, that the words "dying unmarried" meant dying without having been ever married. *Heywood* v. *Heywood*, 3 L. T., N. S., 429; 29 Beav. 9; 7 Jur., N. S., 228; 30 L. J., Ch., 155.

Held, also, that the plaintiff's share was vested, and that he was entitled to a transfer of it to him. *Ib.*

1. A testator gave his trustees all his residuary estate for his two daughters in equal shares, subject as thereinafter mentioned. He declared that the shares of his children should be vested interests in them at the age of twenty-four or marriage with consent. The trustees were to pay the dividends to his daughters during their lives without anticipation. Each daughter was to have power to dispose of her share by will on attaining twenty-four. In case of the death of a daughter intestate her share was to go to the other. The trustees were to apply the dividends of the share of a daughter whose interest had not become vested for her maintenance, etc. The testator then declared that in case his daughters should both die under twenty-four and unmarried as aforesaid, then he gave the whole of his residuary estate equally amongst his brothers and sisters. One of the daughters died an infant, and without having been married. The other attained twenty-one and married, but had not attained twenty-four:—Held, that the gift over could not any longer by possibility take effect, the Court refusing to change "and" into "or" or to give "unmarried" any other than its primary sense of never having been married. *Gonne* v. *Cook*, 15 W. R. 576.

Construction of the word "Unmarried."] See XXXI. VI. *post.*

3. Gifts over in other Cases.

Devise to trustees in fee, if B. attains twenty-one, or has issue, to B. and heirs of his body; but if B. dies before twenty-one, and without issue, over; B. attains twenty-one, and dies without issue; an estate tail vested in B. at twenty-one, on having issue, and the limitation over, a remainder which takes place on failure of issue of B. *Brownsword* v. *Edwards*, 2 Ves. 245. This case may be considered as upset by *Doe* v. *Jessop*, 12 East 288. See *Malcolm* v. *Taylor*, 2 Russ. & M. 416, where Lord Brougham says the reading of "or" for "and" is rarely sanctioned. *Id.* 446.

2. A testator devised to trustees his estates at H. and S., subject to annuities, etc., upon trust for R. and the heirs of his body; but in case he should die under the age of twenty-one, and without issue, then the estate at H. should be in trust for A. and the heirs of her body; but in case she should die under the age of twenty-one, and without issue, the last-mentioned premises should be upon such and the same trusts as thereinafter declared concerning his (the testator's) estate at S.; and the testator directed that if R. should die under the age of twenty-one, and without issue, then that his trustees should stand seised of the estate at S. for the benefit of the testator's son R. for his life, and after his decease for the benefit of his daughter-in-law M. during her life; and subject thereto the estate at S. should be in trust for D., R. W. D., and E. D., in equal shares, as tenants in common. R. and A. both attained twenty-one, but died without issue:—Held, that R. took absolutely on attaining twenty-one, and that such a limitation over would not take effect unless the double contingency happened, that he died both under twenty-one and without issue; that to read it otherwise would be to reject the words "under the age of twenty-one" entirely, and thereby withhold the natural ordinary meaning from the testator's words. *Doe* v. *Jessop* (12 East 288) and *Brownsword* v. *Edwards* (2 Ves. 242) discussed and commented upon. *Grey* v. *Pearson*, 6 H. L. Ca. 61; 3 Jur., N. S., 823; 26 L. J., Ch., 473; 5 W. R. 454. See S. C. *nom. Pearson* v. *Rutter*, 3 De G. M. & G. 398.

3. One devises, if his son die before twenty-one, or without issue, that the land shall go to J.: the son dies before twenty-one, but leaves issue. J. shall have the land. *Jenning* v. *Hellier*, cited 2 Vern. 377.

4. Bequest to A. for life, then to his eldest son, but in case A. should die under age and without issue then to B.:—Held, that "and" was not to be read as "or," and that A. having attained twenty-one, a son of his then living had acquired an indefeasible interest. *Malcolm* v. *Malcolm*, 21 Beav. 225.

5. A testator gave to each of four persons, when and as they respectively attained twenty-one, one-fourth of his residue for life, and in case either of them "should happen to die under the age of twenty-one years, and without leaving lawful issue," then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one and died without issue:—Held, that her share was undisposed of, the Court being of opinion that "and" could not be read "or." *Coates* v. *Hart*, 32 Beav. 349.

A testator directed his residuary estate to be invested, and when and as A., B., C., and D. severally attained their respective ages of twenty-one, he gave to each of them severally the interest of one-fourth of the invested residue for their lives, and in case either of them should die under twenty-one, and without leaving lawful issue, then he gave the interest to which such deceased legatee was entitled to the survivors or survivor of them for her, his, and their several and respective lives; and from and after the decease of either of these four legatees leaving lawful issue her or him surviving, the testator bequeathed the principal to the interest whereof such deceased legatee had been entitled in her or his lifetime amongst

such issue; and he also gave to such issue the share and interest of the principal to the interest whereof their deceased parent would have been entitled in case he or she had lived to survive any other of the four legatees who should afterwards die without issue. And in case all the four legatees should die without either of them leaving lawful issue, he gave the whole of his residuary estate over. A. died in the testator's lifetime a minor and without having been married. B. survived the testator, attained majority, married, and died without having had a child:—Held, that C. and D. were entitled by force of the will to the entire income of the residue for their joint lives as from the death of B., and that there was no intestacy as to such income. S. C. *nom. Coates* v. *Hart, Borrett* v. *Hart*, 3 De G. J. & S. 504.

1. A testator devises leaseholds upon trust for his son T. D., and all his (the testator's) children, by his then wife, who should be living at his decease, as tenants in common; but if T. D. should die under twenty-one, and without leaving issue, and if the testator should have no other children by his then wife, living at his decease, who should attain twenty-one, then upon trust for J. C. D. for life, and after his decease for his children in equal shares; and if J. C. D. should die under twenty-one, and without leaving issue living at his decease, then upon certain trusts over. T. D. dies under twenty-one, and without issue: afterwards J. C. D. dies, having attained twenty-one, but not leaving issue:—Held, that, there being a balance of intention upon the words of the will, the Court will not change "and" into "or"; and, therefore, that the ultimate limitations over did not take effect. *Browne* v. *Walker*, 2 L. J., Ch., 82.

2. A testator bequeathed personalty for his wife for life, and after her death to be divided between his brothers and sisters; and he declared, that in case any or either of his brothers or sisters should die in his lifetime, and before they should have received any benefit from the bequest, then the share of him or her so dying should go over. The Court refused to change the word "and" into "or," but held the second clause of the declaration to be explanatory of the first. *Re Kirkbride*, 2 L. R., Eq., 400; 14 W. R. 728; 15 L. T., N. S., 51.

3. A testator, by will made in 1850, directed that all his real and personal estate (after payment of his funeral and testamentary expenses) should, at the time his youngest child had attained twenty-one, be valued, and divided into three equal parts, "one part to be for my wife, one part for my daughter Mary Ann, and one part to my daughter Maria;" and after his wife's decease he directed that her share should be divided between them equally; and then the will proceeded: "And provided that either of my two children named should die before a division of the property shall have been made as above described, and having no surviving issue, then the part of the deceased shall be given to her surviving sister; but if either of them shall die, and leave surviving issue, then the part of her so dying shall be equally divided amongst her surviving children, in equal shares." By a codicil to his will, without date, he provided as follows: "Should both my children die in their minority, and leave no issue, then in such case, and in such case only, I give to my wife the whole of my property for her life, or so long as she shall remain my widow, and at my wife's decease or marriage, which shall first happen," there was a gift over. One of the daughters attained twenty-one, and died without leaving issue, and the other died under that age, also without leaving issue:—Held (affirming 4 Kay & J. 709), that the gift over had failed. *Maddison* v. *Chapman*, 5 Jur., N. S., 277; 28 L. J., Ch., 450.

4. Testator, after giving legacies to nephews and nieces, provided that in case any or either of them died in the lifetime of his wife and his brother without leaving lawful issue, the legacy given to such nephew or niece should lapse and be absolutely void:—Held, that "and" could not be read as "or" in the disjunctive, and that the period in which the limitation over was to take effect was the joint lives of the testator's wife and brother. *Day* v. *Day*, 2 W. R. 700; 1 Kay 703; 18 Jur. 1013.

5. A gift over in case A. dies in the lifetime of the testator's wife and without issue will fail, if A. survives the wife, though he dies without issue. *Reed* v. *Brathwaite*, 40 L. J., Ch., 355.

6. Bequest in trust for A. for life if he should not marry H. B., and after such forfeiture should have taken place, and after the decease of A. (except as aforesaid), and A.'s children by any other woman than H. B. A. married H. B.:—Held, that he was entitled to the income. *W*—— v. *B*——, 11 Beav. 621.

7. A testator bequeathed his residuary real and personal estate to trustees for his nephew, C., for life, and after his decease, "providing he shall leave any child or children him surviving, upon trust for such persons, and for such ends and purposes as my nephew shall by his will direct or appoint, give, devise, or bequeath the same; but if my nephew shall die without leaving any child or children him surviving, and shall not previous to his decease make any such appointment, gift, or bequest as aforesaid, then upon trust for other persons. C., by will appointed, or assumed to appoint, the whole real and personal estate mentioned in his uncle's will to trustees, upon the trusts declared respecting his own residuary estate. Upon the decease of C., without leaving any child or children surviving:—Held (following *Seccombe* v. *Edwards*, 28 Beav. 440), that the word "and" could not be read as "or"; but that as the nephew had died without leaving a child, no power had arisen, and therefore no appointment had been made, and consequently that the gift over took effect in favour of the persons named in the uncle's will. *Barker* v. *Young*, 10 Jur., N. S., 163; 33 L. J., Ch., 279; 12 W. R. 659; 33 Beav. 353; 3 N. R. 350.

III. CHANGING WORDS. CONSTRUCTION OF "OR" AS EQUIVALENT TO "AND."

1. In General.

1. In what case the disjunctive "or" shall be taken to mean the conjunctive "and." *Walsh* v. *Patterson*, 9 Mod. 444.

2. Difference between this and changing "or" into "and." *Key* v. *Key*, 1 Jur., N. S., 372. See also *Pawson* v. *Pawson*, 19 Beav. 116; 23 L. J., Ch., 954.

3. The word "or" in a will may be read "and" to give effect to the manifest intention, and where the literal reading would be unjust and repugnant to the intention and object of the testator. *Maude* v. *Maude*, 22 Beav. 290.

4. Whether the instrument in which the word occurs is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intention of the party by whom the word is used. *White* v. *Supple*, 2 Dr. & War. 471; 1 Con. & L. 525.

5. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied, either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge* v. *Groombridge*, 6 Sim. 171.

2. Gift to A. or his Children.

6. Devise of a trust to all his daughters or their children, living at the testator's son's death; some of the daughters were living at the son's death, and had children, and others of the daughters were dead, leaving children:—Decreed, all the children, as well of the living daughters as of the dead, should take. *Richardson* v. *Spraag*, 1 P. W. 434.

7. A testator bequeathed his residue to his three sons in trust, to be divided between his three sons and his daughter, and he directed his daughter's share to be kept in the hands of his sons, for her "or" her children's sole use, free from the control of her husband. The daughter survived:—Held, that she took absolutely. *Whitcher* v. *Penley*, 9 Beav. 477.

8. Bequest to two persons or their children:—Held, to give children an interest by way of substitution only, not concurrent. *Crooke* v. *De Vandes*, 9 Ves. 197.

9. Bequest to "my son William or his children":—Held, that the son who survived was absolutely entitled, and that the children could only take by substitution, in case of the death of their parent. *Penley* v. *Penley*, 12 Beav. 547.

10. Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children; under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox 213.

11. A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, such share to revert to the residuary legatee; each of the nephews and nieces who survive the testator takes his or her legacy of stock absolutely. *Montagu* v. *Nucella*, 1 Russ. 165.

The same testator appoints as a residuary legatee E. P. M., his child or children; in case of his death, without any such, the residuary interest to vest in the other five nephews and nieces then alive, share and share alike, and as before to each of their respective child or children, and in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors: E. P. M., having survived the testator, takes the residue absolutely. *Ib.*

12. A testator, by his will, gave 1,000*l.* to his sister for her "or" for her children's sole use and benefit for ever. By a codicil to his will he recited that he was desirous of making further bequests in relation to his sister and her family, and then gave, amongst other benefits, a further sum of 1,000*l.* to his trustees to pay the dividends to his sister for life, and then for her children:—Held, that the word "or" was to be taken disjunctively, and that the 1,000*l.* bequeathed by the will was given absolutely to the testator's sister, but not for her separate use. *Chipchase* v. *Simpson*, 16 Sim. 485; 18 L. J., N. S., Ch., 145; 13 Jur. 90.

13. Bequest to A. of an annuity for her life, and after her death the annuity or the value unto B. and C. or their children, share and share alike. B. and C. survived A.:—Held, that their children took no interest in the annuity. *Sparks* v. *Restall*, 24 Beav. 218.

14. Devise of real estate to A. for life, subject to payment of 2,000*l.* apiece to B., C., and D., or to their respective lawful issue, twelve months after the death of the testator, and devise of the same estate in remainder on the death of A. to his children, as he should appoint, charged with a further sum of 3,000*l.* apiece to B. and D., or to their respective lawful issue; B., C., and D. survived the testator; B. died without issue in the lifetime of A.; and C. and D. died in the lifetime of A., leaving issue:—Held, that the legacies to B., C., and D. vested in the legatees, subject to be divested in favour of their children, in case of their death, leaving children, and therefore that B. took both the legacies absolutely, and C. and D. took the legacies of 2,000*l.* each absolutely, and the children of C. and D. took the legacies of 3,000*l.* by substitution for their parents. *Salisbury* v. *Petty*, 3 Hare 86; 7 Jur. 1011.

15. Bequest to a class equally, with a sub-

stituted gift, as to the shares of any who predeceased the testator, to his "children or remoter issue," *per stirpes* of "their parents' or grandparents'" shares:—Held, that the grandchildren could not claim a share, by substitution, in competition with children, but that the children alone were entitled, to the exclusion of grandchildren. *Amson* v. *Harris*, 19 Beav. 210.

1. A testator gave his real and personal estate to his wife for life, and then to be divided equally between his four children, "or their child or children, share and share alike." But in case any of his children should die without leaving any child or children, then his, her, or their share or shares to be divided between "the survivor or survivors of him, her, or them, or his, her, or their child or children, share and share alike".—Held, that the gift to the grandchildren was substitutionary; and upon the death of one of the children, unmarried, in the lifetime of the widow, the surviving children took as tenants in common. *Blundell* v. *Chapman*, 10 Jur., N. S., 332; 33 L. J., Ch., 660; 12 W. R. 540; 10 L. T., N. S., 152; 34 Beav. 648.

2. A gift to the children or grandchildren of A.:—Held, substitutional, so that all the children being *in esse* the children only were entitled to the trust funds. *Margitson* v. *Hall*, 10 Jur., N. S., 89; 12 W. R. 334; 9 L. T., N. S., 755.

A testator gave 1,600*l.* unto and amongst such one or more of the children "or" grandchildren of his daughter A. as should be living at her death, equally to be divided among them, share and share alike. The testator's brother afterwards made a voluntary increase in the above provision by a bond in favour of all and every the child and children "or" grandchildren of A. that should be living at her decease, in such shares and proportions as she should by will appoint; with a proviso that each and every the children "and" grandchildren of A. that should be living at her decease, should be entitled under such will to receive a share at least equal to the amount of the share to which he or she would have been entitled under the will of the testator. A., by will, appointed to her four daughters (three of whom were married, and the fourth of whom married before her death), who were her only children, in equal shares; and in the event of the death of any one of her married daughters, her share to be divided between the children of such daughter. At her death all four were living, and three had issue living:—Held, that the word "or" in the will must be construed strictly as excluding the grandchildren of A., and that the four daughters took absolutely in equal shares. *Ib.*

3. A father devised lands to his daughter in fee, and by codicil he ordered that the lands given by his will to his daughter should be not so given, but to all her children, or legal issue, to be divided amongst them in equal shares, after the death of his daughter and her husband. She had ten children, one of whom died in the lifetime of the testator, and three, who survived him, died in her lifetime:—Held, that the children of the daughter who were living at the death of the testator, and those who were born afterwards, took vested interests in fee, to the exclusion of grandchildren and great-grandchildren. *Holland* v. *Wood*, 11 L. R., Eq., 91.

3. Gift to A. or his Heirs or Heirs of his Body.

4. On appeal, devise of land on contingency to R. or "his heirs." R., before the contingency happens, conveys "all his right, title, claim, and demand" therein by deed to his younger son and his heirs as a provision, and dies. The contingency happening, R.'s heir cannot claim this against his father's act. "Or" construed "and." *Wright* v. *Wright*, 1 Ves. 409.

5. Testator, by a will made since the statute 1 Vict., c. 26, after directing payment of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M., N., O., and P., or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin; M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other; M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; secondly, that M's share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and"; thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

6. A testater devised one-fifth share of his freeholds to each of his five children in fee. He then bequeathed personal estate to them, share and share alike, and he said, "Should either of my children die without issue, I give and bequeath such share and shares amongst my surviving children equally," and should either depart this life, leaving children or child, then that child "to inherit his parent's share," and if more than one, "the share" to be equally divided amongst their "heirs" and assigns:—Held, that the gift over referred to the last antecedent, the personalty, and did not affect the realty. *Adshead* v. *Willets*, 29 Beav. 358; 9 W. R. 405.

7. A testator devised all his manors "to my son for his natural life, and at his decease" to trustees, "their heirs and assigns, in trust to preserve" (this devise in trust was repeated whenever necessary), "for the son or sons, daughter or daughters, the males taking first of my said son till they attain the age of

twenty-one years, or the days of their marriage, and no farther; the elder son to inherit before the younger, but the daughters to take equally and in common as joint heiresses." He empowered his son to give "any part, or even the whole, of these estates" to any or either of his sons, but not to his daughters, "as my said son may, from their conduct to him, their father, think deserving of preference." But if the eldest grandson should turn out ill, the testator left him an annuity of 200*l.* chargeable on his landed property, "and to the eldest son of such undeserving grandson, I leave and bequeath my landed property, estates," etc. "I will, therefore, that the before-mentioned estates should in such instance descend to my son's grandson, but still subject to any entail of the same which my son may make." If the son died without issue, the trustees were to preserve the estates for the testator's four daughters during their lives, free from the control, etc., "the estates being equally divided between them or their heirs;" and he gave the "estates and property to them through the said trustees," etc, whom he empowered to raise 10,000*l.* for the daughters, chargeable on all his estate:—Held, that the son took only an estate for life; that the trustees took an estate in fee in remainder expectant on the determination of the life estate of the son, and that on the son's death without issue the estates went over to the daughters as tenants in common in tail. No gift in the will was void for uncertainty or remoteness. *Watkins* v. *Frederick*, 11 H. L. Ca. 358.

1. "And" must be construed "or" where it is necessary to put a reasonable construction on the will. As where the interest with the principal of the residue of a testator's estate was directed to be settled on his daughter "or" the heirs of her body, as the executors shall think fit; the word "or" shall be construed "and," for the executors are not empowered to give it from the daughter to the grandchildren. *Read* v. *Snell*, 2 Atk. 643.

Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Id.* 646.

"Leaving" is a participle of the present tense, and relates to the time of the daughter's dying. *Ib.*

No weight has been laid on the want of the words "for life," when the intention of the testator has otherwise appeared, especially in the case of a trust executory, for then a court of equity is bound to see a settlement made agreeably to the intention of the testator. *Id.* 648.

2. Bequest of 40*l.* per annum to A. for life, and after her decease to B., or his heirs:—Held, that "or" must be construed disjunctively, and that therefore B. did not take an absolute interest in the annuity. *Girdlestone* v. *Doe*, 2 Sim. 225.

Heirs when Construed Next of Kin.] See XXXIII. *post.*

Gift to A. or his Assigns.] See XVI. *post.*

4. Gift to A. or his Issue.

3. Testator gave in trust to his brother E. the remainder of his property of whatsoever kind, to assist him to bring up, educate, and provide for the children of his late brother J., whom he named "When my youngest nephew attains his age of twenty-one years, it is my will that all my property be equally divided amongst my nephews or their lawful issue, share and share alike; the division, however, is not to take place, although my youngest nephew have attained the age of twenty-one years, until the decease of my wife, my sister J., and my brother E.:—Held, that the interests of the nephews were not contingent on their living until the youngest of them should attain twenty-one, but vested on the testator's death; and that the word "or" was to be construed conjunctively, and consequently that the nephews took estates tail in their shares of the testator's real property, and absolute interests in their shares of his personal property. *Parkin* v. *Knight*, 15 Sim. 83; 15 L. J., N. S., Ch., 209; 10 Jur. 23.

4. The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement; and after his youngest child should have attained twenty-one years, he directed his executors to divide any surplus in their hands every three years during his wife's life or widowhood, and, after her death or marriage, every year equally amongst his children or their heirs, instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that at the end of the said fifty years, his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held, that the Court could not read "or" as "and" where the purpose was manifestly substitution of objects, and not succession; that the word "heirs" must be construed "issue," and not "children"; and that it was not a ground for departing from such meaning that the consequence of adhering to it would be to render the will void for remoteness. *Speakman* v. *Speakman*, 8 Hare 180.

5. A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary, but a substantive, gift to the issue. *Attwood* v. *Alford*, 2 L. R., Eq., 479; 14 W. R. 956.

6. Gift to such of the children of A., B., and C. as should be living at the testatrix's death, or the issue of such of them as should be married, in equal shares. The word "or" construed to mean "and," and the children and grandchildren held to be equally entitled. *Horridge* v. *Ferguson*, Jac. 583.

7. Bequest to a class of objects with a proviso expressive of the testator's intention that "the children or remoter issue" of any of the class who should die in the lifetime of the testator should stand in their parents, or

grandparents' place, and take *per stirpes* the share which their parents or grandparents would have taken:—Held, that where one of the class had died in the lifetime of the testator, leaving children and grandchildren, the children were alone entitled to the parents' share. *Amson* v. *Harris*, 19 Beav. 210.

1. Legacy to A. or her issue:—Held, all descendants of A. entitled *per capita*. *Davenport* v. *Hanbury*, 3 Ves. 257.

5. Gift to A. for Life, Remainder to a Class or their Heirs, Issue, etc.

2. Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided among his children living at that period or their heirs, and one-third to be invested for the benefit of his wife; and after her decease he bequeathed such third to his children then living and to their heirs:—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children, "or to their heirs," but that the word "or" must be read "and"; and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan* v. *Reynolds*, 9 Hare 796.

3. A testator gave his residuary estate to trustees upon trust to pay the income thereof to all his brothers and sisters living at the time of his decease equally during their lives, and from and after the decease of the survivor of them to pay the principal unto, between, and amongst all the lawful issue of his said brothers and sisters who should attain twenty-one, etc., or unto, between, and amongst the issue (if any) of such of them as should be then deceased, so that such [each?] class of issue, whether in the first or second degree, should take only as amongst themselves the share or shares to which his, her, or their deceased parent or parents would have been entitled if living:—Held, first, that the children of the brothers and sisters took *per stirpes*. Secondly, that the word "or" must be read as "and," and that therefore a son of one of the testator's brothers (who survived the testator) having died in the testator's lifetime, leaving children living at the time of distribution, these children took their grandfather's share. *Shand* v. *Kidd*, 19 Beav. 310.

4. Stock was bequeathed in trust for testator's brother and the brother's wife, for their lives successively, and after their decease in trust to be divided equally amongst the testator's nephews and nieces, children of the brother then living, or their legal personal representatives:—Held, that the representatives of nephews and nieces, dying in the lifetime of the surviving tenant for life, took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces. *King* v. *Cleaveland*, 4 De G. & J. 477; 26 Beav. 166; 28 L. J., Ch, 76, 835; 4 Jur, N. S., 702.

5. A husband, who died in 1854, gave all his property to his wife for life, and after giving pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue after his mother's death, and to his heirs; and in case his son should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C, who died, in 1869, a bachelor and intestate:—Held, a gift on the death of C. without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead. *Burt* v. *Hellyar*, 14 L. R., Eq., 160; 41 L. J., Ch, 430; 26 L. T. 833.

6. A testator directed that certain stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her. *Re Phelps*, 7 L. R., Eq, 151; 19 L. T, N. S, 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death. *Ib.*

7. A testatrix by her will, dated in 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid," between her five sisters, *nominatim*, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will, who died a spinster:—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wing-*

field, 9 L. R., Ch. D, 658; 47 L. J., Ch., 768; 39 L. T. 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained, as regarded brothers and sisters who predeceased the testatrix at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

6. Power to Appoint to A or B. Implied Gift to A. and B. in Default of Appointment.

1. Testator bequeathed a leasehold estate after an estate for life to his nephew A., and the heirs male of his body, lawfully begotten, and in default of such heirs to one of the sons of his nephew B., as A. shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it; or to the children of his nephew C, if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children; *quære*, as to the former. *Brown* v. *Higgs*, 4 Ves. 708. Affirmed 5 Ves. 495; 8 Ves. 561.

2. Bequest to executors in trust, that they shall pay, etc, unto and amongst the testator's two brothers and his sisters, or their children, in such shares, etc, as the trustees, or the major part of them, or the survivor, his executors, etc., shall think fit. All the children living at the death of the testator held entitled with the parents, *per capita*, the Court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

3. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and on her decease, I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment:—Held, that the children of T. F. were entitled to the fund, to the exclusion of their issue. *Jones* v. *Torin*, 6 Sim. 255.

4. Testator gave all his property to his mother for life, and directed that at her decease it should be divided amongst his three sisters, or their children, in such proportions as she should appoint. The mother and one of the sisters died in the testator's lifetime; the deceased sister left no issue, but one of those that survived had children:—Held, that "or" must be read "and," and that, under the circumstances of the case, the property must be considered as given to the three sisters and their children in equal shares. *Penny* v. *Turner*, 15 Sim. 368; 10 Jur. 768; 2 Ph. 493; 17 L. J., N. S., Ch., 133.

5. Bequest to trustees for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of the testator's children, or their issue, as the trustees should think fit, for the interest and good of the testator's family; with no gift in default of appointment. No appointment having been made, and the tenant for life having survived the donees of the power, and died childless:—Held, that children and remoter issue took in equal shares *per capita*, and that the period for ascertaining the class was the death of the tenant for life. *Re White*, Johns. 656.

6. Power to appoint amongst testator's present or future grandchildren, or their respective issues, does not authorise the donee to exclude the children of a deceased grandchild, who were living at the donee's death. *Garthwaite* v. *Robinson*, 2 Sim. 43.

7. A testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed." And, after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that, in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned; that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate, "amongst my nephews and nieces, or their children, either all to one of them, or to as many of them as my surviving child shall think proper":—Held, that a trust was created in favour of the testator's nephews and nieces, and their children, subject to a power of selection and distribution in his surviving child. *Burrough* v. *Philcox*, 5 Myl. & Cr. 72; 5 Jur. 453.

8. Where a fund is given to A. to be applied for the benefit of B. or C., as A. shall think fit, and A. does not make any appointment, the bequest is void for uncertainty. *Salusbury* v. *Denton*, 3 Jur., N. S., 740.

9. A mother bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my daughter shall by deed or will appoint":—Held, that the daughter's power was exclusive, and not distributive merely. *Re Veale*, 4 L. R., Ch. D., 61; 35 L. T. 612; 25 W. R. 122. Affirmed 5 L. R., Ch. D., 622; 46 L. J., Ch., 799; 36 L. T. 634.

7. Gifts Over.

10. Bequest to J. A., for life, remainder to his eldest son for life, and to remain entailed on the eldest son of J. A., and his posterity for ever. But in case of the death or want of issue of J. A. to M. (a brother of J. A.), and his descendants as above mentioned from one generation to another for ever. J. A. survived the testator and died a bachelor:—Held, that the bequest over to M. and his descendants was void for remoteness. *Monkhouse* v. *Monkhouse*, 3 Sim. 119.

11. The word "or" construed "and." *Nichols* v. *Tolley*, 2 Vern. 389.

12. A testatrix, after bequeathing certain legacies, directed, that if these legatees should be dead at the time of her decease, or should not be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her decease, then the legacies given to such of the legatees as should be dead, or should

neglect to claim within the time aforesaid, should sink into the residue:—Held, that one of the legatees who did not claim her legacy within the time limited by the will, had no right thereto after that time, although she lived at a distance from the residence of the testatrix, and had not previously heard of the bequest in her favour, or of the testatrix's decease. *Hawkes* v. *Baldwin*, 9 Sim. 355; 7 L. J., N. S., Ch, 297; 2 Jur. 698.

1. A *disjunctive*, at the end of a period, shall not make all the precedent sentences so, if the intention appears against it. *Framlingham* v. *Brand*, 3 Atk. 391.

2. Testator bequeathed 5,000*l.* to A. if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over:—Held, that the 5,000*l.* vested, absolutely, in A. on his attaining twenty-one. *Mytton* v. *Boodle*, 6 Sim. 457.

3. A testator, after certain legacies, devised as follows:—"In case my daughter should have no lawful issue, after her death I will that my property that shall be remaining do return to my relations, viz., to my nephew J. 100*l.*; likewise I leave, in case my daughter has no issue, to my nephew S. and my niece A. 80*l.* each; the remainder of my personalty I leave to my daughter's disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brothers, equally between them; but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs":—Held, that the word "or" should be read "and," and that the daughter, on attaining twenty-one, took an estate in fee-simple. *Johnson* v. *Simcox*, 31 L. J., Exch., 38; 9 W. R. 895; 4 L. T., N. S., 836. Affirming 6 H. & N. 6.

4. A. B. devised to his son J. M. an estate in fee, and willed that he should have possession of the property on his attaining twenty-one. By a codicil, the testator "willed that if his son J. M. should die without issue, or before he should attain the age of twenty-one, then the estate which he had devised to him should go over to his son W. M. and his heirs." J. M. attained twenty-one years of age, and contracted to sell the estate:—Held, that the word "or" must be read "and"; and that in the event which had happened, of J. M. having attained twenty-one years of age, he took an indefeasible estate in fee-simple. *Morris* v. *Morris*, 17 Jur. 966; 1 W. R. 377; 1 Eq. Rep. 167; 17 Beav. 198.

5. A testator, W., devised his real estates to trustees, upon trust, to receive the rents, and, on his son John arriving at the age of twenty-five years, to let him into possession, but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W. name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property, after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth, to and for the benefit of the plaintiffs. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years; Ann survived her, and died at the age of nineteen years, unmarried; and John, the last survivor, died, aged thirty years, leaving children, who all died unmarried, and without issue. John, by his will, devised part of the father's real estate to the defendants:—Held, first, that the devisees of John, the son, took no estate in the hereditaments of W., the father, devised by his will; and, secondly, that the plaintiffs took the estates in the hereditaments of W., the father, and in such manner as given to them by the will of W. the father. *Mortimer* v. *Hartley*, 3 De G. & Sm. 316.

6. Devise to A. for life, when he attains thirty-one, and after his death to his eldest son in fee. In case A. should not live to that age "or" not have any son, then in trust for B. for life, on attaining thirty-one, and after his death to his eldest son in fee, and in case of failure, to the eldest son of the testator's daughter in fee. A. attained thirty-one, and died without having had issue:—Held, that "or" could not be read "and," and that the eldest son of the daughter took the estate. *Cooke* v. *Mirehouse*, 34 Beav. 27.

7. A testator devised real estate to his children and their heirs as tenants in common, with a gift over to the survivors "in the event of any of them dying before having heirs of their body, 'or' making a particular disposition" of his share:—Held, that "or" must be read "and," and that the children took in fee, but that the gift over in the event of making no disposition was repugnant and void. *Greated* v. *Greated*, 26 Beav. 621; 5 Jur., N. S., 434; 28 L. J., Ch., 756.

8. Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, and to raise and pay to each of his children 2,000*l.* on their attaining twenty-one, and to accumulate the surplus income of the trust property, during the life of his wife, and, after her death, to sell the property, and divide the proceeds among his children on their attaining twenty-one, and in case all his children should die in the lifetime of his wife, or under twenty-one, and without leaving issue, then, after his wife's death, to sell the trust property and divide the proceeds amongst certain other persons:—Held, that "or" ought to be read as "and," and that the children, having attained twenty-one, were absolutely entitled to the property, though their mother was living. *Miles* v. *Dyer*, 8 Sim. 330; 5 Sim. 435.

9. Bequest of residuary personal estate in trust for testator's wife for life, and on her death to pay, etc., to his son A., on his attaining twenty-one; but if he should depart this life before the wife, "or" before attaining twenty-one, then in trust for the defendant. Maintenance to and a power to advance A. were also given. A. attained twenty-one, but died in the wife's lifetime:—Held, that "or" was to be read "and," and that the son took an absolute vested interest on attaining twenty-one. *Bentley* v. *Meech*, 25 Beav. 197.

10. One devises several parcels of land to his several children in tail, and if any of them die before twenty-one or unmarried, such child's

part to go to the surviving children; if any of the children die unmarried, though above the age of twenty-one, his share shall go to the surviving child, but such survivor shall have such share for life only; what goes over on one child's death shall not go over again a second time. *Woodworth* v. *Glassbrook*, 2 Vern. 388.

1. A testator gave a fund to A. absolutely, but that only the interest should be paid to her for her separate use for life, and after her death the property should go to her children, and in the event of her not intermarrying, nor having children, the property to be at her disposal by will or otherwise. A. being a widow, sixty-four years of age, and never having had any children, filed a bill for the transfer of the fund:—Held, that she was entitled to it. *Mackenzie* v. *King*, 17 L. J., N. S., Ch, 448; 12 Jur. 787.

2. A testator gave a share of his estate to L., subject to the condition that L. should receive for professional services 150*l.* in some one year, and the executors were to invest the principal, and pay L. the interest; "and in the event of his death, he being at the time unmarried, or not leaving legal issue, or not having fulfilled the above condition," then there was a gift over. L. never fulfilled the condition, but died leaving lawful issue:—Held, that his representatives took the share. *Law* v. *Thorp*, 1 Jur., N. S, 1082.

3. Gift over if A. died under thirty-one or unmarried. Word "or" construed as if it were "and," where requisite to give effect to intent of testator. *Grant* v. *Dyer*, 2 Dow 73, 87.

4. A testator gave a share of his residuary real and personal estate to his daughter, her heirs, executors, administrators, and assigns, to be paid at twenty-one or on the day of her marriage, provided it should take place with the consent of his widow. There was a gift over in case of death "without having attained twenty-one years or being so married as aforesaid." The word "or" construed "and." *Collett* v. *Collett*, 35 Beav. 312, 315; 12 Jur., N. S., 180; 14 W. R. 446; 14 L. T., N. S., 94.

5. Residuary bequest for A. and B., in trust till they come of age, or marry, the interest to be received in the meantime and paid to them, but if one of them die before marriage, or twenty-one, then to survivor and children; if both die, leaving no issue, then I give them power to leave it by will as they think proper. One legatee married, and the other attained twenty-one:—Held, that both acquired vested interest. *Thackeray* v. *Hampson*, 2 Sim. & S. 214. S. C. *nom. Thackeray* v. *Dorrien*, 3 L. J., Ch., 89.

6. A testator by his will gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—Held, that the legacies vested respectively on the happening of either alternative, and were not contingent on the happening of both alternatives, namely, marrying with consent, and attaining twenty-five. *Thompson* v. *Teulon*, 22 L. J., Ch., 243; 1 W. R. 12, 97; 9 Hare (App.) xlix.

7. Devise to the use of my son "if he shall attain the age of twenty-three years, or shall be married with consent of the trustees for the time being of my will, which shall first happen, and to his heirs and assigns absolutely for ever":—Held, that the word "or" might be construed "and," and that the son took an estate tail or in fee (but a case sent for the opinion of C. P.). *Grimshaw* v. *Pickup*, 9 Sim. 591; 3 Jur. 286.

8. A testator devised and bequeathed his interest in his freehold and chattel property to his grandson, C.; "but in case my grandson should happen to die before he attains the age of twenty-one, or married," then over:—Held, that "or" should be read "and," and that C. had acquired an absolute estate, having attained twenty-one, though he had not been married. *Re Clegg*, 14 Ir. Ch. R. 70.

9. A testator bequeathed a sum of money to his two daughters, share and share alike, to be paid to them by his executors in twelve months after their respective marriages, with the consent of his executors; and he directed that his daughters should be paid a yearly sum, less than the interest of their shares, until their respective marriages; and that from their respective marriages, each of them should be paid the full legal interest; the remainder of the interests on their fortunes to go to his son until their respective marriages; and in case his daughters, or either of them, should die before twenty-one or day of marriage, her share of the sum bequeathed to her should go to his son; and in case both should die, the entirety of the sum to go to his son:—*Semble*, the legacies to the daughters did not vest till marriage. *Re Cantillon*, 16 Ir. Ch. R. 301.

Held, that "or" should be read "and," and therefore that the legacies did not go over to the son on the death of the daughters unmarried, but were undisposed of by the will, and divisible among the testator's next of kin. *Ib.*

10. Gift of an annuity, "after the death of my mother, 'or' the second marriage, death, or forfeiture of my wife." The mother predeceased the testator:—Held, that the annuity was payable from the testator's death, and that "or" could not be read "and." *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

11. Bequest to A., her executors, etc., provided that, in case she shall die under twenty-one, or without having any husband living, it shall go over:—Held, vested at twenty-one, upon intention, the word "or" being construed "and." *Weddell* v. *Mundy*, 6 Ves. 341.

12. A father bequeathed his residuary estate in trust for all his children in equal shares as tenants in common, as to sons absolutely, and to daughters in the manner thereinafter specified, and the will contained a clause of accruer in the event of sons dying under twenty-one, and daughters dying under that age or without having been married. And the father directed that the share or shares of any daughter should be held in trust for such daughter for her separate use for life, and after her death for a surviving husband for his life, and after the

death of such daughter and her husband, for the benefit of the children of such daughter. The testator left five children, all of whom attained twenty-one. A daughter died without having been married:—Held, that she took one-fifth of the residuary estate absolutely. *Carter* v. *Smith*, 25 L. T., N. S., 555.

1. Testator gave a sum of money to trustees, in trust only and for the use and benefit of his daughter, and which he desired might be paid to her, and to be settled on her during her life, in case of her marriage, or, in case she did not marry, then the interest of the money, being vested in Government securities, to be paid to her, and in the event of her not marrying or dying then the money to go to his nephews. The daughter married, and shortly afterwards died without issue:—Held, that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. *Hawkins* v *Hawkins*, 7 Sim. 173.

2. The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother":—Held, that "or" should be read "and," and that the son took an absolute interest in the house. *Green* v. *Harvey*, 1 Hare 428; 11 L. J., N. S., Ch., 290; 6 Jur. 704.

3. Legacy to be paid on marriage with consent, and given over in case of death before twenty-five "or" such marriage with consent.—Held, that the legacy was only intended to go over, in the event of death before twenty-five "and" such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop *temp.* Brough. 73.

IV. TRANSPOSING WORDS.

4. The Court will not, save in the last resource, transpose the words in a will. Therefore, when a possible but remote and improbable sense could be attributed to the testator in the will as it stood, the Court refused to transpose the order of the words, in order to give effect to a much more natural and probable intention. *Brown* v. *Walker*, (22 L. J., Ch., 82) commented on. *Key* v. *Key*, 1 Jur., N. S., 372.

5. Courts of law and of equity will equally transpose words in instruments to make the limitation intelligible, and attain the party's clear intent, but never to defeat the instruments given, or let in more than expressed. *Marlborough* (*Duke*) v. *Godolphin* (*Lord*), 2 Ves. 74.

6. Order of words in wills not considered; if the intent better answered, it is otherwise. *East* v. *Cook*, 2 Ves. 32.

7. The words of a clause in a will are not to be added to, nor transposed, if they are susceptible of a reasonable construction as they stand. Amongst several gifts of sums of 300*l.* each to the grand-nephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests, as follows: "Joseph Walker, 300*l.* annuity for life: Martha, 300*l.* an annuity for life":—Held, that Joseph and Martha were each entitled to annuities of 300*l.* for life. *Walker* v. *Tipping*, 9 Hare 800; 16 Jur 442.

8. It is a common rule of construction, that if the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at the other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will, an indication of what the testator meant by those words which by themselves appear to be ambiguous. *Wilson* v. *Eden*, 11 Beav. 289.

Where the words of a will are capable of a construction which will give effect to every word, it is not within the competency of the Court to alter their collocation. S. C. 12 Beav. 454.

V. SUPPLYING WORDS.

9. When the testator expresses his intention incorrectly, the Court will effect it by supplying proper words. *Dodson* v. *Hay*, 3 Bro. C. C. 404. And see *Gordon* v. *Gordon*, 5 L. R., H. L., 254.

10. The Court may supply words in a will, where the context shows, by a necessary implication, what are the words omitted, and unless they are supplied there would be an intestacy. *Hope* v. *Potter*, 3 Kay & J. 206; 5 W. R. 389.

So where there is a gift by will, and then a gift over, not commensurate with the original gift, the Court will curtail the general words of the gift over, by supplying words of reference; as where the first gift is to A.'s children and the gift over is in default of issue of A. The Court will read the gift over as though it were in default of "such" issue. *Ib.*

But where there was a devise of a particular property to the testator's daughter, A., her heirs and assigns, and if she should die under the age of twenty-five years, "without having left any child or children," over, and subsequently, a devise of other real estate to trustees in fee, in trust for A., for her separate use; and after her death, in trust to convey the same "unto and equally amongst such children of A., as tenants in common, the rents and profits in the meantime to be applied for their maintenance; and in case A. should die without leaving any child or children, or leaving such child or children, all should die under twenty-one," over:—Held, that the Court could not, after "such children of A.," supply the words, "as should attain twenty-one," but was at liberty, as against the testator's heir, to construe the word "such," as relating to all the children of A., as they had been mentioned in the previous limitation. *Ib.*

11. In construing a will words may be supplied, changed, and transposed, whenever the context requires it. *Abbott* v. *Middleton*, 21 Beav. 143; 1 Jur., N. S., 1126; 25 L. J., Ch., 113; 4 W. R. 69. Affirmed *sub nom. Ricketts* v. *Carpenter*, *Abbot* or *Abbott* v. *Middleton*, 5 Jur., N. S., 717; 28 L. J., Ch., 110; 33 L. T. 66; 7 H. L. Ca. 68.

Bequest to testator's widow for life, and on her decease to his son for life, and on his demise the principal to become the property of

any children he might leave. Then followed a gift over, in case the son died before his mother (omitting the words "without leaving children"). The son predeceased both his father and mother, leaving an only child, who survived them:—Held, that such child was entitled to the principal sum after the grandmother's death; and that to effectuate the intention of the testator, the words "without leaving any child" must be implied, after the word "dying" *Ib.*

1. Two bequests were made to the same person in successive sentences, and in the latter the words "for life" were added — Held, that the limitation applied to the second gift only, and that the legatee took the first absolutely. *Goner* v *Towers*, 26 Beav. 81.

2 Testatrix gave the residue of her personal estate to twelve persons, or such of them as should be living at her decease; she then directed her real estate to be sold at a certain time, and gave the produce to the same twelve persons and three others, or such of them as should be then living; she then added a proviso, that the share or proportion of S., one of the twelve legatees, should be settled to her separate use for life:—Held, upon the construction of the whole will, that the proviso applied as well to S.'s share in the residue of the personalty as to her share in the produce of the realty. *Cockrill* v. *Pitchforth*, 1 Colly. 626, 9 Jur 223

3. Devise to A., so long as she remains unmarried, and, after her decease or marriage, in trust to sell and divide the proceeds between "B, C, and A., if living":—Held, that the words "if living" applied to A. only. *Re Bellamy's Trust*, 1 N. R. 191

4. On construing an appointment of stock in these words: "Unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares and proportions"; it was held, that the qualification of living at the death of his wife attached only to the nephews and nieces, the last antecedent. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. The legatees took *per capita*. *Baker* v. *Baker*, 6 Hare 269; 11 Jur. 585.

5. Bequest of residue, the interest to be paid to C. and J. equally for their lives, and "at their death" the principal to be divided between the children of C. and J.:—Held, that the words "at their death" meant "at their respective deaths," and that, on the death of C., the moiety to the interest of which C. had been entitled became divisible among his children. *Wills* v. *Wills*, 20 L. R., Eq., 342; 44 L. J., Ch., 582; 23 W. R. 784.

6. Residuary bequest "to all the children of my brother R. and my sister M., to be equally divided amongst them." This brother and sister were placed in exactly the same position in other parts of the will. The Court, therefore, preferred to introduce the word "of" rather than the word "to" before the words "my sister," and held accordingly, that the children of M., and not M. herself, took equally with the children of R. *Mason* v. *Baker*, 2 Kay & J. 567.

7. A testator, after giving specific legacies to his "brother D., his sister M., the widow of his late brother J. C., and the eight children of D. J.," gave the residue of his estate upon trust for the "said D. M. and J. C. and the eight children of the said D. J. in equal shares as tenants in common":—Held, that the words "the widow of" could not be inserted before J. C. in the gift of the residue, although the testator had noticed the fact of J. C.'s death in the preceding bequest. *Clarke* v. *Clemmans*, 36 L. J, Ch., 171: 15 W. R. 250.

8. Where a will gave to A. an estate for life, with remainder to the first son of the body of A. lawfully begotten, severally and successively, in tail male, the words "and other sons" were introduced, in order to prevent the words "severally and successively" from being struck out of the will; and A. took an estate tail by implication. *Parker* v. *Tootal*, 11 H. L. Ca. 143: 11 Jur., N. S., 185.

9. Testatrix, being obliged to secure an annuity to A. for life, purchased an annuity on the life of B., and insured the latter life, and by her will, reciting that on the death of B. the amount of the policy would be recovered to her estate, directed that in the event of B. dying before A., the executors should provide for A.'s annuity out of her estate, but in the event of A. dying before B., she gave the purchased annuity to C., he paying the premium, and on the death of B. she gave the amount of the policy to C.; B. died in the lifetime of A.:—Held, that C. was not entitled to the policy. *Leckie* v. *Hogben*, 7 Beav. 502.

10 A testator devised his real estate to his three daughters equally in remainder, and he provided that "if any of them should die and leave issue, then such issue should succeed to the mother's share in that his will." He afterwards gave the residue of his estate and effects to the same daughters and to his two sons in possession:—Held, that the issue of the daughters took no interest in the daughters' share in the residue. *Tibbs* v. *Elliott*, 34 Beav. 424.

11. A testator seised of houses and lands for lives, renewable for ever, and of no other real estate, devised to trustees all his freehold messuages, lands, tenements, and hereditaments, whatsoever and wheresover, upon certain trusts, viz., to permit and suffer his daughter during her life to receive an annuity of 100*l.*, to be issuing and payable out of all and every other his freehold estate or estates situate (here the houses and lands above named were mentioned), to her separate use, and without power to alien or mortgage it, and after her decease the annuity was to stand to the heirs of her body lawfully issuing, in such shares as she should by will appoint, and in default of appointment, then to her said children share and share alike. And the testator directed that 50*l.* per annum should be applied in the maintenance of his daughter until she attained twenty-one or married, and that upon either of those events, the trustees were to assign the annuity of 100*l.* and all interest and dividends due thereon, and all securities wherein the same should be placed out or invested, to her, for her own sole use and benefit absolutely for ever, with the usual powers of distress and entry upon the devised premises, and every or any part thereof. After

a bequest of certain plate and household furniture to his daughter, and of a small annuity to another person, the will contained this clause: "And in further trust, that in case my said daughter shall happen to die before she attain twenty-one and unmarried, I give, devise, and bequeath said annuity of 100*l.*, and all and every other my freehold estates wheresoever, as aforesaid, unto my brother E. C. for and during the term of his natural life; and from and immediately after his decease, unto and to the use of his right heirs for ever, in such manner as by his last will he should direct, limit, and appoint;" and the testator bequeathed all his personal estate, subject to his debts, to E. C. The testator's daughter survived him, and attained twenty-one. Upon a petition presented under the eleventh section of the Court of Chancery Regulation Act, on behalf of the children and devisees of E. C., who died almost immediately after his brother the testator, the Court was of opinion, that upon the context of the will the words of contingency "in case my daughter should happen to die before she attain twenty-one, or marriage," must be confined to the annuity of 100*l.*, and that accordingly E. C. and his children took estates, to the exclusion of the testator's daughter, in the freehold property of the testator immediately upon his death; but the case was sent for the opinion of a court of law *Campbell* v. *Campbell*, 1 Ir. Ch. R. 503.

1. A testator devised his freehold estates to certain uses. The will contained a name and arms clause and powers of leasing and sale and exchange. He then devised his copyhold and leasehold estates upon trusts to correspond with the uses declared of the freeholds. By a codicil to his will he varied the uses declared concerning the freeholds, but made no mention of the copyholds and leaseholds. He directed that the codicil should be taken as a part of and added to his will. All the circumstances of the case rendered it exceedingly inconvenient that the copyholds and leaseholds should devolve in a different way from the freeholds:—Held, that the trusts of the copyholds and leaseholds declared by the will were not revoked by the codicil, and that the copyholds and leaseholds passed according to the trusts declared by the will, and the freeholds according to the uses declared by the codicil. *Martineau* v. *Briggs*, 45 L. J., Ch., 674.

Held, that though it was in the highest degree probable that the testator intended the copyholds and leaseholds to go with the freeholds, and it was productive of great inconvenience that they should not do so, yet, as there were no words in the codicil to give effect to such intention, the Court could not supply them, and the copyholds and leaseholds must go as originally declared by the will. S. C. 33 L. T., N. S., 283; 23 W. R. 899.

2. A husband directed his trustees to convert his property and invest the proceeds, then went on: "And I declare that the trustees or trustee may vary the stocks, funds, shares and securities at their or his discretion, and shall pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares." He then empowered the trustees, after the death of his wife or previously by her direction, to raise any sums not exceeding half the expectant share of any child for his or her advancement, and to apply the income of each child's expectant share for maintenance after the death of his wife; and if no child, being a son, should attain twenty-one, or, being a daughter, attain that age or marry, the fund was given over after the death of the widow:—Held, that the widow took a beneficial interest for life in the fund. *Greenwood* v. *Greenwood*, 5 L. R., Ch. D., 954; 26 W. R. 5; 37 L. T., N. S., 305; 47 L. J., Ch., 298.

3. A testator devised his freehold estates to certain uses, and provided that any person becoming entitled thereto should take and use his name and arms. He then devised his copyhold estates (upon which stood his principal mansion house) and his leasehold estates to trustees, to be held by them upon trusts as far as the nature of the several estates would allow, to correspond with the uses before declared as to his freehold estates. Subsequently, by a codicil, which he stated was to be taken as part of, and added to, his will, he altered the uses declared in his will as to his freehold estates, and declared that the proviso respecting the use of his name and arms should follow the new limitations. No mention was made in the codicil of the copyhold and leasehold estates:—Held, that though it was probable, from the circumstances, that he intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still as there were no words therein which affected it, the Court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will. *Langdale* v. *Briggs*, *Exp. Bacon*, 21 W. R. 620; 28 L. T., N. S., 467.

4. When it appeared beyond doubt from the general scope of a will that there had been an unintentional omission of words carrying over the share of the testator's estate in which one of his daughters took a life interest to her children, the Court supplied the omission. *Redfern* v. *Hall*, 25 W. R. 902.

A father, having two sons and five daughters by his will directed the residue of his real and personal estates to be divided, as a mixed fund, into sevenths, and bequeathed one-seventh to one son, and another to the other son. He then bequeathed the remaining five-sevenths upon trust during the respective lives of his daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, to invest and pay the income into the proper and respective hands of his daughters (again naming them) in equal shares for their separate use. He then, from and after the death of Elizabeth, gave one-fifth of the fund to the children of Elizabeth; from and after the death of Sarah, another fifth to the children of Sarah; from and after the death of Eliza, another fifth to the children (not of Eliza, but) of Mary; and from and after the death of Hannah, another fifth to the children of Hannah. He further gave directions until the part or share of the trust moneys of the issue of any of his said

daughters should become payable, to apply the same by way of maintenance. The Court, holding that a clause giving to the children of Eliza an interest in one-fifth of the trust fund similar to that which was given to the children of the other four daughters, and giving the children of Mary a like interest on the death not of Eliza but of Mary, had been accidentally omitted, declared that the will must be read as if it contained the omitted clause. S. C. *nom. Re Redfern, Redfern* v. *Bryning*, 6 L. R., Ch. D., 133; 37 L. T., N. S., 241: 47 L. J., Ch., 17.

1. A. devises to B. and C., his wife's children, as he called them (not owning them to be his), ten shillings apiece and no more; and gave the children that he owned considerable legacies. B. and C. shall come in for a share of the undisposed surplus, for the words of exclusion must be taken strictly. *Vachell* v. *Jefferey*s, Pre. Ch. 170.

2. Upon a will devising lands to be conveyed and settled to the use of the devisor's eldest son for his life, remainder to his second, third, fourth, fifth, and all and every other the son and sons of the body of L. lawfully to be begotten, severally and successively and in remainder, one after another, as they and every one of them should be in seniority of age and priority of birth, and the heirs male of their bodies respectively:—Held, upon the words and context of the will, making provision inconsistent with the intention that a first son of L. should be excluded, such first son took an estate in tail male. *Langston* v. *Langston*, 8 Bli. N. S. 167; 2 Cl. & F. 194.

Words of Contingency. Whether extending to a Series of Limitations.] See LVIII. VII. *post*, VESTED, CONTINGENT, AND FUTURE INTERESTS. III. II. 3—VI.

Distribution whether for Per stirpes or Per capita.] See XXXIII. *post.*

Gifts by Reference. Whether liable to same Incidents as Original Gifts.] See XLIX. IV. *post.*

XII. Uncertainty.

See also X. *ante*—XXXI. 1 *post*—XXXVII. XXX. to XXXII. *post*—XLVIII. *post*—CHARITY, IV.

I. *In General*, 7661.
II. *As to Object* (*Persons or Limitations*), 7662.
III. *As to Object* (*Parol Evidence*), 7664.
IV. *As to Subject* (*Property*), 7664.
V. *As to Figures and Amounts bequeathed*, 7666
VI. *Gift over of Undisposed-of Interests in Personal Estate.* See XLVII. *post.*
VII. *In Creation of Trusts.* See XLV. IV. *post.*

I. IN GENERAL.

3. A Court never construes a devise void unless it is so absolutely dark that they cannot find out the testator's meaning. *Minshull* v. *Minshull*, 1 Atk. 412.

4. Every word in construction of will is to have effect, if not inconsistent with general intention, which is to control. If two parts are inconsistent, the latter prevails. If a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine* v. *Constantine*, 6 Ves. 100.

5. To make a will void for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator; but it must be incapable of any clear meaning. *Mason* v. *Robinson*, 2 Sim. & S. 295.

6. Under an extremely obscurely worded will, the real estate was held to have descended, and the personal estate to be applied, as if the testator had died intestate. *Jackson* v. *Craig*, 20 L. J., N. S., Ch.. 204; 15 Jur. 811.

7. Order in which property devolved under the limitations in an ungrammatical will to the issue male and female of persons to whom estates for life were given. *Peyton* v. *Hughes*, 7 Jur. 311.

8. Testator, having by will given the residue to his wife, made a codicil, by which, instead of the general residue, "he gave to her 10,000*l*., to be invested in the names of trustees, the interest to be paid to her for life, and then to his daughter, and his house, furniture, plate, wines, etc., at K. R., in short, the whole of his property at his decease, except carriages and horses and his gold repeater; and it was his further wish that she might continue in either house (but not to change) and have the use of the same for life, wines, spirits, included":—Held, that the codicil, except so far as it cut down the residuary gift to the wife to 10,000*l*., was void for uncertainty. *Baker* v. *Newton*, 2 Beav. 112; 8 L. J., N. S., Ch., 306; 3 Jur. 649.

9. "I also appoint and desire, in this my last will and testament, that my son W. T., to be my executor and residuary legatee, do jointly with my daughter J. L.":—Held, to be a gift of the residue to W. T. alone. *Langley* v. *Thomas*, 5 W. R. 219; 6 De G. M. & G. 645; 3 Jur., N. S., 345.

10. D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300*l*. to a daughter, and five shillings a week to his son J. D., bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate and appoint my son, R. D.," sole executor; but the testator omitted to say to whom he bequeathed the remainder:—Held, that he had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate. *Driver* v. *Driver*, 43 L. J., Ch., 279.

11. The Court will not adopt an intestacy for uncertainty except in the last resort. *Bernasconi* v. *Atkinson*, 10 Hare 345; 17 Jur. 128; 1 W. R. 152.

12. A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school, now or hereafter to be built." The testatrix did not in fact owe the money to A. and B.:—

Held, whether there was a valid debt or not on the promissory note to A. and B. was a question of law; but if there was no debt, it was good as a legacy. *Longstaff* v. *Rennison*, 1 Drew. 28; 16 Jur. 559; 21 L. J., Ch., 622.

1. By his will, a testator said he proposed to bequeath his residue by a codicil, or otherwise to allow the same to go to his next of kin, according to statute for the distribution of the estate of intestates. He made no codicil:—Held, that he died intestate as to the residue, and that his widow took her share thereof. *Ash* v. *Ash*, 33 Beav. 187; 12 W. R. 189; 10 Jur., N. S., 142; 9 L. T., N. S., 673.

II. AS TO OBJECT (PERSONS OR LIMITATIONS).

2. Devise to the descendants of S., now living in or about S., or hereafter living anywhere else:—Held, good. *Crossley* v. *Clare*, Ambl. 397.

3. Devise in trust for a son of the testator's nephew, A., at the age of twenty-four; if he have no son, to A., son of the testator's great-nephew, B.; but if neither have a son, then to a son of the testator's great-niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the male heir by him; is an executory trust in tail for an only son of A. *in ventre* at the testator's death, and not void for uncertainty, nor too remote. *Blackburne* v. *Stables*, 2 Ves. & B. 367.

4. Bequest to A. or B. void for uncertainty; if discretionary in C., it is good. *Longmore* v. *Broom*, 7 Ves. 128.

5. A testator, who had long resided in India, gave a legacy "to J. P., who resided at A. when I left England, or to his heirs, executors, administrators, or assigns." J. P. died in the testator's lifetime:—Held, that the bequest was void for uncertainty. *Waite* v. *Templer*, 2 Sim. 524.

6. The testatrix gave certain freehold and leasehold premises to trustees, in trust, after the decease of M. I., to dispose of and divide the same unto and amongst her partners, who should be in co-partnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit:—Held, that this was a good devise to the persons to whom it was ascertained that the testator had disposed of her business in her lifetime. *Stubbs* v. *Sargon*, 2 Keen 255; 6 L. J., N. S., Ch., 254. Affirmed 3 Myl. & C. 507; 7 L. J., N. S., Ch., 95; 2 Jur. 150.

7. R. by deed conveyed several sums of money, secured by mortgages, amounting to 60,000*l.*, to trustees in trust, to be laid out in the purchase of lands to the use of himself for life, remainder as to sums to the amount of 23,000*l.* to his wife for life, remainder to his son R. for life, with several remainders over, remainder to J. in fee; and as to sums amounting to 23,000*l.* to R. for life, with several intermediate remainders, remainder to J. in fee; and as to one particular mortgage of 8,500*l.* and some leasehold estates to secure annuities, the surplus to R. with power of revocation. By his will he gave the leasehold estates and the mortgage of 8,500*l.*, together with another mortgage of 6,700*l.*, in trust to secure the annuities, the surplus, interest, or rents of the lands purchased to be paid to R. for life, and to be settled in the same manner as his other estates: first, these mortgages are to be considered as real estate; secondly, it being uncertain which of the limitations they were to follow, they are disposed of and passed to R. as heir-at-law, and from him to his general devisee, E, who having died intestate as to the real estate, they go to the heir-at-law, D. *Leslie* v. *Devonshire* (*Duke*), 2 Bro. C. C. 189.

8 Testator directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge* v. *Groombridge*, 6 Sim. 171.

9. A testator devised a freehold estate to A. for life, and after his death he devised the same to be equally divided into four parts, between one child of A., one child of B, one child of C., and one child of D, for them to receive the rents, and divide the money between them; and it was his desire that his estate should never be sold out of the family; and, provided A., B., C., and D. should never have any lawful children, the testator's desire was that their parts should go to their next of kin. At the time of making the will, and of the death of the testator, B. only had a child, namely, a daughter; but after the testator's death B. had a son: at the death of A. there were children, both sons and daughters, of A., C., and D.:—Held, that the gift to "one child" was not void for uncertainty. *Powell* v. *Davies*, 1 Beav. 532; 3 Jur. 389.

10. A testator devised certain estates in remainder to "a son of my nephew J. W., his heirs and assigns." J. W. had three sons, the two elder of whom died infants and unmarried:—Held, that the eldest son of J. W. took an estate in fee simple in remainder in the estates. *Ashburner* v. *Wilson*, 19 L. J., N. S., Ch., 330; 14 Jur. 497.

11. Gift to "my grandchildren, and their issue, as shall stand, in respect to me, in equal degree of consanguinity":—Held, not void for uncertainty, the sentence being read in the alternative. *Maynard* v. *Wright*, 26 Beav. 285.

12. A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K. T. C., and L. K. W., as already proposed," *i.e.*, as the context showed, as a family house for the use of two separate families, is void for uncertainty, and as denoting an intention to create a perpetuity. *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R. P. C. 381.

13. A husband devised and bequeathed all

his property, consisting of premises held in fee, and leaseholds for years, together with other personal property, to his wife, "on the condition that my wife shall retire immediately after my death into a convent of her own choice." There was no gift over:—Held, that this was a condition subsequent, and void for uncertainty. *Duddy* v. *Gresham*, 2 L. R., Ir., 442. Reversing 2 L. R., Ir., 1; 39 L. T. 48.

1. A testator devised freehold lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends, and be their property. With the exception of a few nominal legacies, he bequeathed to his wife all his personal and chattel property absolutely, and appointed her sole residuary legatee:—Held, upon the construction of the will, that the words "my friends" were capable of meaning the testator's kindred who would have taken his interest in the lands but for the interposed devise to his wife; that the devise over, on the death or marriage of the wife, was not void for uncertainty; and that upon her death the testator's heir-at-law became entitled under the devise. *Coogan* v. *Hayden*, 4 L. R., Ir., 585.

2. Bequest of share of residue to K. and G., "but in case K. shall die before he shall actually have received the whole of his share and without leaving issue living at his decease, then, and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to G." K. died unmarried, without having received any share of the residue:—Held, that the gift over was not void for uncertainty, but took effect. *Johnson* v. *Crook*, 12 L. R., Ch. D., 639; 48 L. J., Ch., 777; 41 L. T. 400; 28 W. R. 12.

3. A testator devised his estate to trustees to pay the rents to his widow during her life, and after her decease to his four children equally; and after the decease of any of his children leaving issue, then he gave to such issue the share of his or her parent in the rents until the decease of his last surviving child, when he directed that his estate should be sold and the proceeds divided amongst the issue of his children equally; the children of each of his sons and daughters to receive one-fourth part. And in case any of his children should die without leaving issue, then he gave the share of such of them unto the survivors or survivor of them, and the issue of such of them as should have died leaving issue. Two of the children died unmarried, and it was contended on behalf of the issue of the last surviving child, that there was an intestacy as to these two shares:—Held, that there was no intestacy. *Re Booth*, 10 L. T., N. S., 327.

4. A testator (passing over his heir-at-law, the son of his deceased elder brother) gave 1,000*l.* to the testator's father for life, and after his death to be continued to the testator's younger brother, and proceeded thus: "and after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family":—Held, that the ultimate limitation was void for uncertainty. *Thomason* v. *Moses*, 5 Beav. 77; 6 Jur. 403. And see *Horsfield* v. *Ashton*, 1 W. R. 259; 2 Jur., N. S., 193.

5. A testator bequeathed leaseholds in Church Street, having sixty years unexpired, and as to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, and in default to R. He bequeathed to trustees other leaseholds upon trust, to accumulate the rents until the leases of the Church Street property "should become nearly expired," and then to apply such part thereof as should be necessary in the renewal of the Church Street property "for the benefit of the respective persons to whom he had before by his will given the same," and the residue, after answering the purpose aforesaid, he gave to his residuary legatees. The testator died before the Thellusson Act came into operation:—Held, that the trust for accumulation and renewal was void for remoteness and uncertainty. *Curtis* v. *Lukin*, 5 Beav. 147; 11 L. J., N. S., Ch., 380; 6 Jur. 721.

6. Testator gave his bank stock to trustees, in trust for F. B. for life, and his funded property to the same trustees, in trust for W. R. E. for life, and after his death, in trust for his issue; and he directed the trustees, after the decease of F. B., to pay the dividends of his bank stock to W. R. E. for life, and after his decease to apply the dividends and capital for the benefit of the children or child of W. R. E, in such manner as he had directed respecting his funded property; and should W. R. E. die without issue, male or female, of his body lawfully begotten, then he directed the trustees to apply his funded property and bank stock for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books, and furniture, to W. R. E.:—Held, that the ultimate trust of the funded property and bank stock was not too remote, but was void for uncertainty, and that the residuary clause was general. *Ellis* v. *Selby*, 7 Sim. 352; 4 L. J., N. S., Ch., 69. Affirmed 1 Myl. & C. 286; L. J., N. S., Ch., 214.

7. A testator directed a general accumulation of his real and personal estates during the lives of his three sons, grandsons, and the issue of such grandsons who should be living at his death; and that his personal estate should be laid out in the purchase of real estates, and that his trustees should stand seised thereof, and of all other his real estate, upon trust, during the lives aforesaid, to receive the rents and profits, and from time to time "to lay out and invest the money to arise from such rents and profits in such purchases as he had thereinbefore directed to be made with his personal estate, and should from time to time collect and receive, and lay out and invest, the rents and profits" of such real estate "in the manner thereinbefore directed with respect to the rents and profits of the hereditaments originally purchased." He also directed that the trustees should from time to time cut down such timber as should be upon the lands devised and directed to be purchased as should be fit to be cut down, and should sell and dispose of the same, and should lay out and invest the money arising by such sales in such purchases as thereinbefore directed to be made with regard to his personal

estate, and the rents and profits of his real estate. And he further empowered his trustees, "until a convenient purchase or convenient purchases could be made, to permit such part of his personal estate as was then invested in the funds, or consisted of securities for money, to remain in such funds or upon such securities, and to invest or place out the money to arise from such part of his personal estate as should not at his decease consist of money, and from the rents and profits of the hereditaments to be purchased, or from the sale of the timber, in the Government funds or real security, and from time to time to sell and call in the same, and again invest the same as his trustees should think proper, until a convenient purchase could be found, or until a sufficient sum should be accumulated to make a proper purchase." And after the death of the survivor of the persons during whose lives the accumulations were to be made, the testator directed a partition to be made by his trustees of his estates, and the whole thereof to be divided into three lots of equal value, or as near thereto as possible, and that the premises contained in one of such allotments should be conveyed to the use of "the eldest male lineal descendant then living" of each of his three sons, with remainders over:—Held, that the devise was not void for uncertainty. *Thellusson* v. *Robarts; Hare* v. *Robarts*, 5 Jur., N. S., 1031; 7 W. R. 563. S. C. *nom. Thellusson* v. *Rendlesham* (*Lord*), 28 L. J., Ch., 948; 7 H. L. Ca. 429.

Held, also, that the question of uncertainty had not been disposed of in any previous decision upon this the Thellusson will. *Ib.*

1. A testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children: and after the expiration of any of the leases, he directed his trustees to convey to his daughter and her children one or more of the five freehold houses of equal annual value, or as near as could be, to the expired leasehold:—Held, that the decree was neither invalid for remoteness nor uncertainty. *Wood* v. *Drew*, 33 Beav. 610.

2. A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament, that my son to be my executor and residuary legatee do jointly with my daughter, my executrix, who is to act independent of her husband, and be guardian to the children":— Held, that the son alone was entitled to the residue. *Langley* v. *Thomas*, 6 De G. M. & G. 645; 3 Jur., N. S., 345; 5 W. R. 219.

III. AS TO OBJECT (PAROL EVIDENCE).

3. Parol evidence admitted to ascertain the person the testator intended should take a legacy. *Hodgson* v. *Hitch*, Pre. Ch. 229.

4. Parol evidence may be received in case of uncertain description of a person in a will. *Edge* v. *Salisbury*, Ambl. 71; 1 Ves. 230.

5. Collateral proof may be allowed to make certain a person or thing described in a will. *Caldicot* v. *Hodgson*, 2 Vern. 593.

6. Devise to "Mr. N., kinsman of Mr. E. N., if the House of Lords will allow his right to be Lord Viscount N.; but if their lordships do not confirm the title to him, then over," good. The devisor having in his mind the notion of an individual, the Court will search for the person that conforms to the description given. And as to the condition, devise to one who is suing for a certain estate in case he fails in that suit, and if he succeeds over, has been held good. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

IV. AS TO SUBJECT (PROPERTY).

7. Testamentary papers in this form: "I leave and bequeath to all my grandchildren, and share and share alike;" and, "further, I appoint F. H. and F. E. my trustees for all my grandchildren and nieces." are void for uncertainty, and pass no interest in the real estate. *Mohun* v. *Mohun*, 1 Swan. 201; 1 Wils. 151.

8. One bequeaths to her grandchild A. some of her best linen; this void for the uncertainty, yet the Court recommended it to the executor to give some of the best linen to the legatee A. Bequest of such of the best linen as the executor should think fit, or as the legatee should choose, had been held good. *Peck* v. *Halsey*, 2 P. W. 389.

9. A request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty. *Jubber* v. *Jubber*, 9 Sim. 503.

10. A direction to build "a suitable, durable, and handsome monument":—Held, not void for uncertainty in the amount that might be required for the purpose. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., N. S., Ch., 40.

11. One devises to two of his sisters 400*l.* apiece, and to his third sister what his executors should think fit. The Court decreed the third sister should have 400*l.* also, and be made equal to her two other sisters, if the estate would hold out. *Wareham* v. *Brown*, 2 Vern. 153.

12. A statuary bequeathed articles used in his business by their technical names, some of which were very obscurely written. Reference directed to ascertain what was meant, the Master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechy*, 3 Sim. 24; 9 L. J., Ch., 200. Reversed 2 Russ. & M. 624.

13. Where 300*l.* or 400*l.* per annum is directed to be purchased, the Court will take it in the largest sense, and construe it to be 400*l.* per annum. *Seale* v. *Seale*, 1 P. W. 290; Pre. Ch. 421; Gilb. Eq. Rep. 105.

14. Testatrix gave to each of the in-brothers and in-sisters for the time being resident in the several hospitals of and in the vicinity of Canterbury whose yearly income should not exceed 25*l.* augmentation or yearly increase of 5*l.* for ever:—Held, that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest was not specified by the testatrix and could not be determined. *Flint* v. *Warren*, 15 Sim. 626; 16 L. J., N. S., Ch., 441; 11 Jur. 665.

15. Testator first gave all his property to

trustees upon certain trusts, and secondly directed that the trustees, from the commencement of the fifth year from the date of his decease, should set apart annually 10 per cent. upon the gross income of his estate to be invested as additional capital in some good and valid medium of profit or interest, in order that the new income derived from that might go to increase the benefits intended by the former. He then proceeded to dispose of the remaining income:—Held, that no partial intestacy was created by the direction as to the 10 per cent, but that the dispositions of the bulk of his property were to be treated as if it did not exist. *Thompson* v. *Thompson*, 1 Colly. 398; 8 Jur. 839.

1. A testator made a bequest in the following words: "I give to my executors the sum of 1,000*l*., upon trust to be invested in the funds of the Bank of England, during the lives of the survivor or survivors of them, for the widows of J. S. and T. D, to be divided between them, share and share alike." The testator appointed two executors of his will. One of the widows died in the testator's lifetime; the other widow survived the testator, and received the interest of the 1,000*l*. during her life:—Held, upon the death of the surviving widow, that the bequest was void for uncertainty, and belonged therefore to the residuary legatee. *Hoffman* v. *Hankey*, 3 Myl. & K. 376.

2. Testator devised all his real estates (except the hereditaments thereinafter particularly devised) to trustees on certain trusts. In a subsequent part of his will he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., both of which were in the possession of T. H., but at different rents, and known by different names. There being no evidence to show with certainty which of the two farms the testator meant to devise to T. R., the Court held the exception to be inoperative, and that both the farms passed by the general devise to the trustees. *Blundell* v. *Gladstone*, 14 Sim. 83; 8 Jur. 301. Reversed 3 Macn. & G. 692.

3. A testator gave to each of his four daughters a house and garden in the village of R., if they should feel inclined to reside there, and directed the house or houses to be built at the expense of his executors. A house was built:—Held, that the clause was not void for uncertainty, and if there had been uncertainty, the executors had determined it by building the house. *Edwards* v. *Jones*, 14 W. R. 815; 35 Beav. 474.

4. A testator directed his trustees to invest his residuary estate, and suffer the interest to accumulate until the principal together with the accumulation of interest should amount to "3,000*l*. or thereabouts," and then to place out the same at interest, and pay the interest equally among certain legatees, in equal shares, during their lives and the life of the survivor; and in case any of them should die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would if living have been entitled; and immediately after the decease of the survivor of the legatees specifically named, then upon trust to pay the 3,000*l*. or thereabouts equally among the lawful issue of the legatees to whom the testator gave the same; but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled:—Held, that the gift was not void on the ground of the uncertainty arising from the words, "or thereabouts." *Oddie* v. *Brown*, 4 De G. & J. 179; 5 Jur., N. S., 635; 28 L. J., Ch., 542. Reversing 4 Jur., N. S., 605; 6 W. R. 531.

5. A., having a cotton manufactory and other property situate at H. and W., and a freehold estate at B. unconnected with his manufactory, by his will gave to trustees all his freehold estates at B., and all his freehold and leasehold property at H. and W., and all his real and personal estate and effects, upon trust to carry on the manufactory, for which purpose he authorised them to retain as much ready money as a capital in the business as by them might be considered necessary; and he directed that at the end of every twelve months, provided his daughters L. and E. were living, the profits, if any, and the surplus income from the H. and W. estates, after paying annuities charged thereon, and retaining a sufficient capital to carry on the manufactory, should be equally divided between his two daughters L. and E.; but if the trustees were not inclined to carry on the business, they were to let the premises, and the reserved capital was to be equally divided between L. and E., and also the surplus rents of H. and W. The testator then gave estate B. to his daughter E. for life, remainder to her issue, share and share alike, remainder to L. for life, remainder to her issue; and if L. should die without issue, and E. should leave issue, such issue was to have the whole of the estates in B., H., and W., and all other his real and personal estate and effects; and if both L. and E. should die without leaving issue, "then the whole of the rents, profits, and interests of all my estates, real and personal, situate in B., W., and H., to be paid to R. H." The trustees carried on the manufactory, retaining a very large sum for capital. L. and E. both died without leaving issue:—Held, affirming the decision of Wood, V.-Ch., that the daughters took absolutely all the testator's personal estate not retained by the trustees for capital; but that what was so retained was to be considered as annexed to, or as passing with, the H. and W. estates to R. H. *Horsfield* v. *Ashton*, 2 Jur., N. S., 193; 1 W. R. 259.

Turner, L. J., dubitante as to whether R. H. was to take the capital retained for carrying on the trade. *Ib.*

6. Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease during her life, and he directed that at her decease one moiety of such stock "subject to, and after deducting such premium or sum of money as should be necessary for the renewal of the Crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such in his lifetime," should go to his five children. In a subsequent part of the will he gave to his son G. all his leasehold houses, which he purchased of Sir H. T., to hold to his said son and his executors, etc., for the then existing term or terms therein, and "all benefit of renewal aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting

unrenewed:—Held, that there was a gift to the son out of the consols of a sum of money sufficient to effect the renewal of the lease. *Richards* v. *Richards*, 2 Y. & Coll. C. C. 419; 12 L. J., N. S., Ch., 460; 7 Jur. 715. Affirmed 13 L. J., N. S., Ch., 344.

1. Where testator devised all his houses at S. to trustees, to convey to his daughter M. such one as she might choose, and to convey all the others to his daughter C., and M. died in his lifetime:—Held, that the gift in favour of C. had failed. *Boyce* v. *Boyce*, 16 Sim. 476.

2. A testatrix gave such of her jewels as should at her death be deposited in her jewel-box at Rundell and Bridge's to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B.; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at Rundell and Bridge's, nor was there any written paper designating who were to take the jewels: the intended gift of the jewels wholly fails. *Jerningham* v *Herbert*, 4 Russ. 388; Taml. 103.

3. Gift of the residue of a fund after the application of an undefined amount to a void charity is void for uncertainty. *Att.-Gen.* v. *Hinxman*, 2 Jac. & Walk. 277

V. AS TO FIGURES AND AMOUNTS BEQUEATHED.

4. Upon a question as to the amount of a legacy from a doubt as to a figure, an issue was directed instead of a reference to the Master. *Norman* v. *Morrell*, 4 Ves. 769.

5. A legacy given thus, "£1 0.0.," which stood between two other legacies for 100*l.* each, the dots between the figures being smeared as if for the purpose of obliteration:—Held, to be a legacy for 100*l.* *Manchee* v. *Kay*, 3 Giff. 545.

6. The wife made a will bequeathing the sum of £10 00 (sic):—Held, that 1,000*l.* only passed by it, and contemporaneous evidence of a declaration by the testatrix as to what she had left rejected. *Baker* v. *Ker*, 11 L. R., Ir., 3.

See also X. II. *ante.*

XIII. Inconsistency and Repugnancy.

I. IN GENERAL.

7. The rule of construction of wills is, that if the general intention can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake; not otherwise, and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims* v. *Doughty*, 5 Ves. 243.

8. If the meaning of a will is ascertained, reasoning from supposed cases will not induce the Court to make a different construction; but can only lead to a conclusion that the testator did not see all the consequences; but the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, are attended to with a view to ascertaining the meaning. *Leigh* v. *Leigh*, 15 Ves. 103.

9. Repugnant words in a will may be rejected or transposed. In this case the Court rejected a repugnancy by interlineation. *Boon* v. *Cornforth*, 2 Ves. 277.

10. Every word in the construction of a will is to have effect, if not inconsistent with the general intention, which is to control. If two parts are inconsistent the latter prevails. *Constantine* v. *Constantine*, 6 Ves. 100.

11. Where literal force of expressions differs in a will, rule is to seek the intent of testator in a consistent and rational purpose, rather than in a purpose irrational and inconsistent. *Jenkins* v. *Hervies*, 4 Madd. 67.

12. Inconsistent expressions corrected. *Tillard* v. *Smith*, 1 Jur. 331.

13. Of two inconsistent dispositions in a will, both being intelligible, whether occurring in the same sentence or in different sentences, the last is to prevail unless a contrary intention can be safely inferred from the context. Discussion as to the amount of internal evidence which will justify such an inference. *Morrall* v. *Sutton*, 1 Ph. 533; 14 L. J., N. S., Ch., 266; 9 Jur. 637 And see S. C. 4 Beav. 478; 5 *id.* 100 And see *Crone* v. *O'Dell*, 1 Ball & B. 449.

14. Where the words of a will are so inconsistent that they cannot be reconciled, the Court must reject those that are the least consistent with the testator's intent; and the same words in the same will, though in a different clause, ought to have the same sense; and, therefore, where the testator intended survivorship among his children in the personal, he must mean it in the real estate also. *Haws* v. *Haws*, 3 Atk. 524; 1 Ves 13; 1 Wils. C. B. 165.

15. General words controlled, in order to make the whole will consistent. *Whitmore* v. *Trelawney*, 6 Ves. 129.

16. Upon the construction of a will:—Held, that the effect of general words of charge at the commencement was not cut down by subsequent words. *Jones* v. *Williams*, 1 Colly. 156; 8 Jur. 373.

17. When a certain time is appointed for the payment of a legacy, and afterwards a contingent clause is added touching the same legacy, all the words of the will must stand together, which can never be, unless the contingency happen within the period of time appointed for the payment of the legacy. *Colhoun* v. *Thompson*, Beat. 248.

18. A testator directed his debts to be paid out of his personal estate, and in a subsequent

clause, out of a mixed fund composed of realty and personalty:—Held, on the context, that the latter direction prevailed. *Hopkinson* v. *Ellis*, 10 Beav. 169; 16 L. J., N. S., Ch, 59.

1. Direction that particular legacies to children shall be paid at particular time, is not altered by direction subsequent, that all legacies should be paid at another time. *Adams* v. *Clarke*, 9 Mod. 154.

2. There were two inconsistent clauses in a will. By the former, the surplus rents of the testator's real estates, after maintenance of the person entitled to the possession until twenty-five, were added to the residue of the personal estate. By the latter, the surplus rents, after maintenance of such person until twenty-one (provided his attaining twenty-one happened within the legal limit of time), were settled upon the same trusts as the realty. Testator then, by a codicil, reciting the former clause, directed that the person entitled to the possession of the estate should be let into the receipt of the rents and profits at twenty-one:—Held, that as the codicil merely affected the surplus rents between the ages of twenty-one and twenty-five, and as, in other respects, the latter of the two clauses in the will was more probably consistent with the testator's intentions, the latter clause should prevail against the former, notwithstanding the express recognition of the former clause by the codicil. *Shapperdson* v. *Tower*, 1 Y. & Coll. C. C. 441; 6 Jur. 658.

The rule of law in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject, is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative. *Ib.*

3. The clear expression of a bequest after the death of the tenant for life, to the children then living, held not to be controlled by other general expressions in the will, so as to vest any interest in one dying before the tenant for life. *La Roche* v. *Davies*, 3 Y. & Coll. 612. n.

4. In this case an absolute term of ninety-nine years, limited to C., amongst other limitations of a real estate under a will, was, with reference to the true construction of the several parts of the will, considered not as an absolute term, but as determinable on the death of C. *Coryton* v. *Helyar*, 2 Cox 340; cited Burr. 923, 1631.

5. L., in 1803, devised her freehold estates to the use of her grandson for his life, with remainder to the use of his children as therein mentioned, and, in default of such issue, to the use of her four granddaughters (naming them), their heirs and assigns for ever, as tenants in common and not as joint tenants. The testatrix also bequeathed her leaseholds to trustees, after the death of her grandson, and in default of issue as above mentioned, upon trust for her four granddaughters and their issue equally, in such manner, shares, and proportions as she had thereinbefore directed respecting her freehold estate:—Held, that the gift of the leaseholds was absolute to the four persons mentioned, the words "and their issue" being inconsistent with the general intention apparent in the bequest of leaseholds. *Buckingham* v. *Sellick*, 26 L. T., N. S, 764.

On the death, therefore, of the grandson in 1869, without leaving any issue, the representatives of the four legatees (all of whom were then dead) were entitled absolutely to the leaseholds. *Ib.*

6. Where a legacy is given on condition, it must be strictly and literally performed; but where a bequest was made to A., on condition that he conveyed his estate to B. and C., in such shares as shall be determined by "——":—Held, that the gift was not rendered ineffectual by reason of the blank. *Robinson* v. *Wheelwright*, 21 Beav 214.

7. Testator devised his real estates to the children of his sister, then or thereafter to be born, who should live to attain twenty-one, and the issue of such of them as should die under that age, leaving issue living at their decease, and their heirs And if no child of his sister should attain twenty-one, *or dying without leaving issue*, or dying under that age, should not leave such issue, or such issue dying under age as aforesaid, then over. The testator's sister had one child who attained twenty-one, and afterwards died without issue:—Held, that the child took an absolute estate in fee on attaining twenty-one. The words in italics were interlined in the original will, probably by mistake, and were rejected by the Vice-Chancellor. *Lunn* v. *Osborne*, 7 Sim. 56.

8. Testatrix gave her real and personal estate to plaintiffs for life; remainder to J. A. in tail; remainder to R. A. in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient, and by her will declared she gave all the rest and residue of her personal estate to L. C.'s three daughters:—Held, that the testatrix's charging real estate with the legacies if the personal is not sufficient, shows her intention in one event to revoke the devise of personal; and there being an alteration of her intention before she finishes her will, the construction is she has altered her will throughout, and plaintiffs are not entitled to any part of the personal estate, but residue belongs to three daughters of L. C. *Ulrich* v. *Litchfield*, 2 Atk. 372.

Where the same thing is given in a will to two different persons, Lord Coke said, "the latter words shall revoke the former;" but in the case of *Paramour* v. *Yardley* (Plowd. 539) it was held they shall take as joint tenants; but Lord Hardwicke said he rather inclined to Lord Coke's opinion. *Ib.* And see *Ridout* v. *Pain*, 3 Atk. 492.

So where a man gives a horse to A. in the first part of his will, and in the latter part he gave the same horse to B, it was held a revocation, and Swinburne, pt. 7, c. 1, is mistaken in point of law, in saying they should take as joint tenants. *Ib.*

9. A. devises an estate for life to his wife; and in the latter part creates a trust term, to take place from the day of his death, for payment of debts in such manner as the wife should direct. Declared that the term, though subsequent, shall take place of the wife's estate for life, and that the last words do not give the wife the power of exempting her life estate, but only the power of raising it by the most convenient method, by mortgage or otherwise. *Ridout* v. *Dowding*, 1 Atk. 419.

1. A testator bequeathed the interest of all moneys invested in loan societies, as well as all other property, to his wife for life. He then directed all his debts to be got in and invested in Government securities for the benefit of his wife for her life, and after her decease he gave various legacies to his grandchildren; and as to the remaining part of his estate, he directed the same to be put out at interest for the benefit of his wife, during her life, and all moneys were to be kept in the Bank of England. The testator afterwards directed that all moneys belonging to him in the friendly societies, when received, should belong to his wife for her own use absolutely.—Held, that the last clause in the will must control the first, and that the testator's wife was entitled to the money in the friendly societies absolutely, and not merely for life:—Held, also, that the trustees were not bound to convert the money in the societies immediately for the purpose of investment in Government securities. *Marks* v. *Solomon*, 18 L. J., N. S., Ch., 234. Reversed 2 H. & Tw. 323; 19 L. J., N. S., Ch., 555, the wife being held to take only a life estate.

2. A testator bequeathed the residue to three trustees and their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees, and substituted that of his daughter. A facsimile probate was granted:—Held, that though there was a revocation of the estate and interest given to the trustees, there was no revocation of the subsequent part of the will which declared the trusts, and, consequently, that the daughter took an estate for life only.—Held, also, that a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the Court itself the province of a court of probate:—Held, moreover, that the several parts of the will were not inconsistent, and might well be read together. *Shea* v. *Boschetti*, 18 Beav. 321; 18 Jur. 614; 23 L. J., Ch., 652; 2 W. R. 281; 2 Eq. Rep. 608.

3. A *videlicet* shall be rejected, if repugnant; not if it can be reconciled and made restrictive. *Wilson* v. *Mount*, 3 Ves. 194.

4. Annuity, part out of general assets, part specific, upon intention out of funds, some of which were perpetual, others temporary, to be divided equally between A., B., and C., and their heirs or the survivor of them, "in order as they are now mentioned":—Held, that the annuity was limited only with reference to the temporary funds, with an absolute power of disposition; and that, A. dying in life of testatrix, her share goes to B. and C. equally, the concluding words "in order," etc., being rejected as repugnant. *Smith* v. *Pybus*, 9 Ves. 566.

5. In construing a will, if two passages in it are directly opposed to each other, the latter will prevail; but where there is a mere inconsistency, the Court will endeavour to discover, from the whole, the real meaning of the testator, and, if possible, reconcile all its parts. *Brocklebank* v. *Johnson*, 20 Beav. 205.

6. A testator, after leaving all he possessed to his wife for life, and after giving at her death part of his property to one of his sons, gave, without any reference to his wife's death, a large specific portion of his property to trustees "for the support of another son, his wife and children, and for their education and starting in life, and at the death of their parents to be equally divided amongst those then living":—Held, that the widow took a life interest in the specific property given to the trustees. *Conquest* v. *Conquest*, 16 W. R. 453.

7. When there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect. *Kerr* v. *Clinton* (*Baroness*), 8 L. R., Eq., 462; 17 W. R. 980.

A testator having real estates subject to mortgages, for which he was not personally liable, devised his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons:—Held, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate. *Ib.*

8. A testator gave various specific portions of personal estate to his wife for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "And effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had, or might thereafter have, by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever," for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will:—Held, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled to the exclusion of representatives of deceased children. *Wiggins* v. *Wiggins*, 2 Sim. N. S. 226; 21 L. J., Ch., 742.

9. *Semble*, though the events in which a gift over is expressed to take effect do not correspond with those in which the previous estate will fail, the intention is generally only to give the estate over in the event of the previous limitation not taking effect, and the Court will so construe a gift. *Hillersdon* v. *Lowe*, 2 Hare 355; 12 L. J., N. S., Ch., 321; 7 Jur. 482.

The testator gave his real and personal estate in trust to his nephew John for life, and, after his death, to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there was no such son of John, to two other nephews of the testator and their sons successively; and in case none of them, the said three nephews, should have a son who

should survive the survivor of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters:—Held, that the words of devise over to the fourth nephew took effect only in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one, a different construction being repugnant to specific directions as well as to the general scheme of the will; and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Ib.*

1. Where there are two repugnant devises, what construction shall be put on the will. *Davies* v. *Preece*, Romilly's Notes of Cases, 147.

2. A direction to divide residuary estate into as many shares as the testator should have children living "at the death or second marriage of his wife, which should first happen," or then dead leaving issue, was followed by immediate absolute gifts of two shares and contingent gifts of other shares:—Held, that the words fixing the time of distribution were inconsistent with the intention of the testator gathered from the whole will, and must be disregarded; and that all the shares vested at the testator's death. *Smith* v. *Carpenter*, 25 W. R. 824.

3. A testator gave to his wife, so long as she should continue his widow and until all his four daughters by his former wife should attain twenty-one or die under twenty-one, an annuity of 800*l.*, and a further annuity of 100*l.* in respect of each of such daughters who should for the time being be under twenty-one, such annuities to be employed by her in maintaining herself and his said daughters, and in educating the daughters. After all his four daughters had attained twenty-one or died, he bequeathed to his wife during widowhood 600*l.* a year, and after her future marriage 200*l.* a year. And if he should have any children by his then wife, he bequeathed to his wife in respect of each of such children who should for the time being be under twenty-one a further annuity of 150*l.*, to commence after all his said four daughters should have attained twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. He gave his residuary estate among such of his children by both wives as being sons should attain twenty-one, or being daughters attain that age or marry, in equal shares, subject to a provision for making the share of each child by the second wife exceed the share of a child by the former wife by 3,000*l.* There was the usual clause of maintenance, subject to a proviso that the power of giving maintenance should not be exercised as to any child while the annuity bequeathed to his wife in respect of such child was payable, unless the trustees thought the annuity insufficient. At the testator's death several of the daughters by the first wife were under twenty-one:—Held, by Jessel, M. R., that the annuities of 150*l.* became payable from the testator's death, and were not postponed till all the daughters by the first wife had attained twenty-one or died, on the ground that, having regard to the scope of the will, the former of the two inconsistent clauses was to be rejected rather than the latter, independently of the rule that of two inconsistent clauses in a will the latter is to be preferred. But held, on appeal, that this was not a case of two inconsistent gifts, but of a gift of something to arise at a future time, with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it *Re Bywater*, *Bywater* v. *Clarke*, 18 L. R., Ch. D, 17; 30 W. R. 94.

Held, that evidence that the latter of the two clauses was left in the will by mistake, and contrary to the testator's express instructions, was not admissible. *Ib.*

4. A clear gift to surviving children will not be extended so as to include deceased children, on account of a slight ambiguity, not amounting to an inconsistency in the bequest. *Re Crosse's Will*, 1 N. R. 419; 9 Jur., N. S., 429; 32 L. J., Ch., 344; 11 W. R. 396; 8 L. T., N. S. 299.

5. A. bequeaths 1,000*l.* to such children as his daughter should leave at her death; B., her husband, receives it, and by his will, reciting that A. had promised to give it rather differently, but that he, B., was, nevertheless, desirous to make good A.'s intent and will, bequeaths it equally between his sons C. and D.; D. alone survives his mother:—Held, that C.'s representatives were not entitled, and that A.'s will would have prevailed even if B. had intended to make a variation. *East* v. *Cook*, 2 Ves. 30.

6. A testator directed his trustees to sell and convert his property, and "to pay the moneys and the investment for the time being, representing the same, to my wife during her life upon trust for all my children" at twenty-one or marriage. He also provided that, "after the death of my wife, or previously thereto, if she shall so direct in writing," the trustees should have powers of advancement and maintenance, and that if he had no child who attained twenty-one or married, "then from and after the death of my wife, and such default or failure of children," he gave the money over:—Held, that the widow took a beneficial interest in the fund for her life. *Greenwood* v. *Greenwood*, 47 L. J., Ch., 298; 5 L. R., Ch. D., 954; 26 W. R. 5; 37 L. T., N. S., 305.

7. A devise to A., B., and C. in fee, as tenants in common, "and in the event of any of them dying before having heirs of their body, or making a particular disposition of his or her property," then over:—Held, that "or" was to be read "and," and that the gift over was void for repugnancy. *Greated* v. *Greated*, 5 Jur., N. S., 454; 28 L. J., Ch., 756; 26 Beav. 621.

A. and B. having died in the lifetime of the testator, their shares held to have lapsed, and fallen into the residue. *Ib.*

8. A will contained a gift to children and the issue of deceased children, in language which clearly did not vest it in any till the youngest child should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares, expressed with much obscurity, and partially inconsistent with the language of the gift:—

Held, that it must be rejected, and the clear gift must take effect. *Bickford* v. *Chalker*, 2 Drew. 327; 2 W. R. 502.

II. TWO RESIDUARY GIFTS IN THE SAME INSTRUMENT

1. A testator, possessed of considerable real and personal estate, primarily charged the real estate with the payment of certain annuities to his wife, his two daughters, and his son, and desired that his trustees should, during the lives of his wife and daughters, accumulate the rents of his real estate for the purposes of his will, and on their deaths devised those estates over. He also bequeathed a sum of 3,000*l.* 3½ per cent. stock to the trustees upon trust, out of the interest and dividends, to pay an annuity of 105*l.* to his youngest daughter for her life, and upon trust as to the principal, in case she married with the consent of the trustees, for her issue; but if she married without such consent, then as to 1,000*l.* upon trust as she should appoint; and as to the remaining 2,000*l.*, that it should form part of the testator's estate, to be applied as he should direct. The testator also directed that in case the annuities given to his wife and daughters and son should be unpaid for four months after due, the trustees should, "out of the accumulation of the moneys in their possession, exclusive of the sum of 3,000*l.* so left to his youngest daughter, and which he directed should be left untouched for the purposes of his will, pay and assist in discharging the annuities so in arrear, and should, out of the moneys which should next come to their possession, replace the sums" so advanced. And he directed that the trustees should, after first paying those annuities, and the several legacies charged upon one of his real estates, invest the rents of that estate in Government stock, and pay thereout to his grandchildren living at his death 300*l.* each, and any deficiency in those legacies he desired should be made good out of his other real estates. And all his other property, of what nature soever, including a policy of insurance, he devised and bequeathed to his trustees to invest for the purposes of his will. And as to the proceeds of that policy, and the remainder of his personal property invested, or to be invested, as well as the overplus of his income not thereby disposed of, excepting the sum of 3,000*l.* left as above to his youngest daughter, and excepting such parts of his personal property as might be necessary to be applied in payment of the annuities and legacies bequeathed by him, he directed that it should remain invested during the lives of his wife and daughters, and until his grandchildren should attain twenty-one or marriage, and be paid to those grandchildren in equal shares at twenty-one or marriage, with interest at 5 per cent., to commence from one year after his death. Then came a clause directing that any surplus which should remain after satisfying the several purposes of the will should be applied by the trustees in payment, or assisting in payment, of a sum of 5,000*l.*, charged by settlement on one of his real estates for the younger children of his late son J.; and in case such surplus should be more than sufficient to discharge that sum, then the surplus to be paid to such younger children in equal shares on attaining twenty-one or marriage; subject, however, to the payment and discharge of all and every the sums and charges thereinbefore charged and created on said general fund by the will —Held, that the annuity of 105*l.* given to the testator's youngest daughter was not reduced by the stat. 7 & 8 Vict., c. 5, which lowered the rate of interest upon 3½ per cent. Government stock to 3¼ per cent.; and that the trustees should make up any deficiency arising in the dividends of the sum of 3,000*l.* out of the accumulated fund; held, also, that the residuary bequest to the grandchildren generally of the testator was inconsistent with the residuary bequest to the younger children of his son J., and, therefore, that the latter bequest must prevail. *Fitzpatrick* v. *Knaresborough*, 13 Ir. Eq. R. 338.

2. A., after many pecuniary and other specific bequests, proceeded, "The remainder of my property I leave to my sister S.;" then, after a few legacies, "I appoint my two sisters, S. and O. my executrixes and residuary legatees of this my last will":—Held, that the gift of the remainder of her property to S. was not revoked, and that the appointment of S. and O. residuary legatees, only gave them any legacies which had lapsed. *Re Jessop*, 11 Ir. Ch. R. 424.

3. A testator bequeathed his residue in trust for his sisters and their issue, and he afterwards, by the same instrument, appointed his wife "his residuary legatee":—Held, that the latter clause did not revoke the former. *Davis* v. *Bennet*, 30 Beav. 226.

4. A residuary bequest following upon a gift of the remainder of an estate does not operate to defeat the gift of the remainder, the word "residue" meaning anything or nothing, as the event may prove. *Kilvington* v. *Parker*, 21 W. R. 121.

When, therefore, a testator gave the remainder of his property to three legatees after satisfying certain legacies and annuities, and made his son legatee of the residue, the respective amounts answering the annuities for the lives of the annuitants went to the legatees in remainder, and not to the residuary legatee upon the deaths of the several annuitants. *Ib.*

5. A testator, after directing the payment of his debts and giving certain specific legacies, as to the rest, residue, and remainder of his real and personal estate, devised and bequeathed the same to trustees upon trust to pay a certain pecuniary legacy, and as to the remainder of his real and personal estate upon trust for conversion, and after making an elaborate disposition of his property in favour of his sons and daughters and his granddaughter, the testator, as to all the rest, residue, and remainder of his real and personal estate, gave, devised, and bequeathed the same to all his sons and daughters and his granddaughter, or the survivors of them, their heirs and assigns, share and share alike, as tenants in common:—Held, that the gift of the residue contained in the last clause of the will did not operate to extinguish the previous disposition made by the testator, but to dispose of such interest as was left undisposed of by the previous disposition. *Kilving-*

ton v. *Parker* (21 W. R. 121) followed. *Bristow* v. *Masefield*, 52 L. J., Ch., 27; 31 W. R. 88.

Effect of Gift of Residue by both Codicil and Will.] See VI. XII. *ante*.

III. INTERESTS, WHETHER ABSOLUTE OR FOR LIFE.

1. Where leaseholds were bequeathed to three for life, subject to certain annuities, and after the death of the three, "to A. B. if then living, her executors, administrators, and assigns, subject to the said annuities during her life," and in the event of her death living either of the three, the property was given to her issue: the Court held, with some hesitation, that A. B. took only for life. *Morrall* v. *Sutton*, 4 Beav. 478; 5 Beav. 100. And see S. C. 1 Ph. 533; 14 L. J., N. S., Ch., 266.

2. A. bequeathed to his wife all his property whatsoever and wheresoever of which he should be possessed at the time of his death, and "as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy," to trustees, to permit his wife to have the use and enjoyment of all such parts as should yield income during her life, with a gift over to his children:—Held, that the bequests were not inconsistent, and that the wife was entitled to a life interest in the whole of the estate. *Hare* v. *Westropp*, 2 W. R. 689; 4 L. T., N. S., 578.

3. A testator having given a life estate in remainder expectant upon a prior life estate to R., by a codicil made twenty-five years afterwards, devised all his estates and property of every description to B., which latter clause would, taken by itself, have carried the estate devised by the will to R.:—Held, that R. was entitled to the life estate devised to him by the will. *Robertson* v. *Powell*, 10 Jur., N. S., 442; 12 W. R. 623.

4. Bequest of 140*l*. to A., the interest to be paid to her during her life, and, at her death, to be paid to her children, followed by the appointment of a trustee and by a direction (not limited to her life) to pay her the interest:—Held, that A. took a life interest only, and not an absolute interest, subject to the gift to her children. *Re Graham*, 33 Beav. 470.

5. A testator gave to G. an annuity of 400*l*. to be paid to him by the trustees of the will during his life, by equal half-yearly payments in every year, and directed a competent part of his property to be set apart to answer the annuity; and after the decease of G., he gave "the principal moneys so set apart, and also such part of the annuity as might then remain unapplied as aforesaid," to S., and made S. his residuary legatee. At the time of the will (though it did not appear on the will) G. was *non compos mentis*, and, though never so found by inquisition, continued in that state till his death. The trustees set apart a fund to answer the annuity, but did not apply the whole of the dividends in his maintenance; and on his death there was in value more than 1,000*l*. accumulated unapplied dividends:—Held, that these accumulations did not pass by the gift in remainder to S., which was repugnant to the gift of the entire annuity to G. in the first instance. *Re Sanderson*, 3 Jur., N. S., 809.

6. In this case an absolute term of ninety-nine years, limited to C., amongst other limitations of real estate under a will, was, with reference to the true construction of the several parts of the will, considered not as an absolute term, but as determinable on the death of C. *Coryton* v. *Helyar*, 2 Cox 340; cited Burr. 923, 63.

7. A husband bequeathed certain specified goods and all other his personal estate to his wife absolutely for her sole and separate use, and after devising his real estate to his wife for life, with divers limitations over, he bequeathed the residue of his personal estate in trust for his children or their issue, and in default for his brothers and sisters and their issue as therein mentioned:—Held, having regard also to the general scope of the will, that the wife took only a life interest in the personal estate. *Re Baysham*, 46 L. J., Ch., 567; 36 L. T., N. S., 749; 25 W. R. 659. Affirming 24 W. R. 875.

XIV. Construction of Particular Words.

See also VII. *ante*.—XXVIII.—XXXI.—XLIII.—XLV. *post*, and other SPECIFIC SUBDIVISIONS—SETTLEMENT, X. II.

Accumulation.] 8. A testator having appointed trustees for the purpose of carrying on his trade of a bleacher, directed them to pay the profits of his business into a bank for accumulation and investment, until his daughters and their issue could have along with the other sums he had directed to be invested on their behalf 5,000*l*. each for their portions. He afterwards directed that any money which might be paid into the bank on account of such portions should be for the equal benefit of his daughters and their issue, and the interest should be equally divided amongst his daughters:—Held, that the testator used the word accumulation as meaning not the addition of income to the capital, but the constant addition of fresh amounts from the profits *de anno in annum* arising from the business. *Pilkington* v. *Myers*, 8 L. T., N. S., 720.

In addition.] 9. Whether the words "in addition," in any case, add to the effect of a bequest without those words. *Lee* v. *Pain*, 4 Hare 218.

The argument on the omission of the words "in addition" answered by referring to the words "in substitution." *Id.* 221.

Aforesaid, As before, and other Referential Expressions.] See XLIX. *post*.

Along with.] 10. "Along with other sums" construed to mean "in addition to those sums," not "including those sums." *Pilkington* v. *Myers*, 8 L. T., N. S., 720.

And, Or.] See XI. II. AND III. *ante*.

As to.] 1. The recurring use of the words "as to" at the commencement of several devises is not necessarily an indication of the commencement of a devise complete in itself, and separate and independent from other limitations. *Gordon* v. *Gordon*, 5 L. R., H. L., 254.

Begotten.] See XXXII. III. *and* IV. *post.*

Bequeathed.] 2. The word "bequeathed" (though not in itself a technical word) is primarily applicable only to property passing under a testamentary disposition. The testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867 she specifically appointed such funds, and then proceeded as follows: "I constitute and appoint E. M. my residuary legatee to any property which has been bequeathed to me and which is not mentioned in this will." The father of the testatrix, by his will in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, and accordingly transferred it to the trustees of her marriage settlement — Held, that this sum of stock did not pass to E. M. under the residuary gift contained in the will of the testatrix. *Re Armstrong, Marescaux* v. *Armstrong*, 49 L. J., Ch., 53; 42 L. T. 823.

Born.] See XXXII. III. *and* IV. *post.*

"Dying."] 3. The word "dying" held not to import futurity in regard to the date of the will, or death of the testatrix, but a contrary interpretation was given to the expression "shall die." *Coulthurst* v. *Carter*, 15 Beav. 421; 16 Jur. 532; 21 L. J., Ch., 555.

Ejusdem generis.] See XL. I. 5. *post.*

Elder, Eldest.] See YOUNGER CHILDREN.

Become entitled.] 4. These words mean *primâ facie* "entitled in possession, and have the beneficial enjoyment of the estate." *Chorley* v. *Loveland*, 9 L. T., N. S., 596; 33 Beav. 189; 12 W. R. 187.

See also LX. *post*—YOUNGER CHILDREN, VIII.

Equally, Equal shares] See XLIV. V. *and* XI. *post.*

Et cætera.] See XL. I. 5(*b*) *post.*

Hereinafter.] See VI. XVI. 2 *ante.*

If.] See VESTED, CONTINGENT, AND FUTURE INTERESTS.

In the first place.] 5. The words in a will in trust "in the first place" are merely words of method and order, and do not imply priority of payment. *Nash* v. *Dillon*, 1 Moll. 236.

Imprimis.] See LEGACY, VII.

Inherit.] 6. Construed in the sense of succession by descent. *East* v. *Twyford*, 9 Hare 729.

Item.] 7. W. devised his lands to his wife for life, and after her decease to D., his wife's niece, and then said: "Item, I give the use of 500*l.* stock for her natural life, but after her decease I give the 500*l.* among my wife's brothers and sisters":—Held, the wife, and not the niece, is entitled to the 500*l.* stock for life, for it is not necessary the word "item" should be construed as independent of the preceding clause, and the wife is the person the testator naturally meant by the word "her," and is also the person the testator was principally taking care of. *Castledon* v. *Turner*, 3 Atk. 257. *Tomkins* v. *Tomkins*, cited 2 Ves. 564. *Sleech* v. *Thorington*, 2 Ves. 564. *Stebbing* v. *Walkey*, 2 Bro. C. C. 85.

8. A testator, after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S. S. and his heirs":—Held, that S. S. was entitled to the fund for payment of the annuity, as well as the house and furniture. *Oldman* v. *Slater*, 3 Sim. 84.

See also LEGACY, VII.

Legacy.] 9. The word "legacy," *primâ facie*, has reference to personal estate only, unless the context clearly shows that the testator intended to apply it to real estate. *Windus* v. *Windus*, 6 De G. M. & G. 549; 3 Jur., N. S., 1101; 26 L. J., Ch., 185.

Likewise.] 10. A devise commencing with the word "likewise":—Held, to be subject to the contingency mentioned in the preceding gifts of the same estate. *Paylor* v. *Pegg*, 24 Beav. 105.

Now.] See XXXIX. V. 2 *post.*

Or, And.] See XI. II. & III. *ante.*

Precatory Words.] See XLV. IV. *post.*

Premises] 11. The word "premises," where it is not used in its primary meaning of "præmissa," is equivalent to appurtenances. *Read* v. *Read*, 15 W. R. 165.

Provided always.] 12. The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations. *Martelli* v. *Holloway*, 5 L. R., H. L., 532; 42 L. J., Ch., 26.

Residue.] 13. A residuary bequest following upon a gift of the remainder of an estate does not operate to defeat the gift of the remainder, the word "residue" meaning anything or nothing, as the event may prove. *Kilvington* v. *Parker*, 21 W. R. 121.

14. "Residue" is not a "legacy" in the ordinary sense of the term, though a person taking it is a residuary legatee. *Ward* v. *Grey*, 26 Beav. 485.

15. "Residue" of personal estate that which remains after payment of the testator's debts, funeral and testamentary expenses, and the cost of the administration of his estate, including the costs of an administration suit. *Tyrrhewy* v. *Helyar*, 4 L. R., Ch. D., 53; 46 L. J., Ch., 125.

Residuary legatee.] 1. The term "residuary legatee" is not of an invariable nature; it must be fashioned and moulded by the context of the will. *Singleton* v. *Tomlinson*, 3 L. R., App. Cas., 404; 38 L. T., N. S., 653; 26 W. R. 722.

Respectively.] See XLIV. VI. *post*—VESTED, CONTINGENT, AND FUTURE INTERESTS.

Said.] 2. This word applies to the immediate antecedent. *Re Willomier*, 16 Ir. Ch. R. 389.

A testator directed his household furniture, etc., to be sold, and the produce, with other moneys, to be laid out in stock, the interest to be paid to his wife for her life, and after her death the stock to be sold, and the half of the produce to be paid to C., eldest son of his niece E., and the other half to be divided equally between the children of E. Secondly, he left all stock, etc., of which he should die possessed, to his wife during her life, and after her death he directed the same to be sold, and 3,000*l.* of the produce to be paid to C., and the remainder to be divided equally between all the other children of his niece E, and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one-half to go to C., and the other half to be divided equally between all the other children of his niece E., and he appointed an executor of his property in France; and he directed that his executors should not be liable for any loss which might happen in placing out his property according to the direction of his will, except for wilful neglect; and in case C. should die before he attained twenty-one, he directed that the said property and effects should go to his (the testator's) nearest heirs on his mother's side equally. E., the testator's niece, was his nearest heir both on his father's and mother's side, and his next of kin. C. died under age:—Held, that 'my said property and effects' in the third clause did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to C. *Ib.*

Held, secondly, that it applied to all the property which C. would have taken, and was not confined to the third clause. *Ib.*

3. There is no invariable rule of construction which refers the word "said" to the last antecedent, if it be at variance with the context of the will so to apply it. *Healy* v. *Healy*, 9 Ir. R., Eq., 418.

4. A. gave all his real and personal estate to U. and A., whom he appointed his executors. He then gave a house in B. to the inhabitants for a hospital, with one or two directions relating to the management, and directed that his executors should call a meeting of the inhabitants to appoint a committee and trustees to carry out the same, appointing his godson one of the trustees, and leaving the inhabitants to appoint as many more as they pleased; but in the event of the inhabitants not appointing a committee, or not being willing to carry out the scheme, he gave all his property so given to such asylum to his godson absolutely. The testator appointed the "said trustee or trustees" to be his residuary legatees, and made several gifts of houses to different persons for life, with remainder to his "trustee or trustees," or his "said legatee or legatees," for the asylum. The devises to charity being void *ab initio*, and in 9 Geo. 2, c. 36, the meeting of the inhabitants was never held, nor any committee appointed:—Held, that the gift over to the godson did not comprise the whole of his residuary real and personal estate, but only the house in B. *Hall* v. *Warren*, 7 Jur., N. S., 1089; 10 W. R. 66; 5 L. T., N. S., 190. Reversing 4 Jur., N. S., 653; 28 L. J., Ch., 70; 6 W. R. 847.

See also XLIX. I. *and* III.—LVIII. V. 5 *post.*

Same, Same time, Same manner as.] See XLIX. I. *post.*

Seised.] 5. "Seised," being a purely technical word, can have no other than its technical meaning in a will if no contrary intention is expressed by the testator; and therefore a devise of land of which the testatrix may die seised does not pass land to which she was entitled, but into possession of which she has never entered, and which is at her death in the wrongful possession of strangers. *Leach* v. *Jay*, 9 L. R., Ch. D., 42; 47 L. J., Ch., 876; 39 L. T. 242; 27 W. R. 99.

Shall.] 6. Devise to A. until B. shall attain forty years; B. dies before forty; A.'s estate ceases; *secus*, if the devise to A. be made a fund to pay debts or portions, which cannot be raised until B. shall have attained his age of forty, in which case the word "shall" is taken for "should." *Lomax* v. *Holmeden*. 3 P. W. 176.

Sole.] 7. The word "sole" in a will has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of showing, by implication, that it is not used in the particular instrument in its strict technical sense. *Massy* v. *Rowen*, 3 L. R., H. L., 288.

In a marriage settlement it may, from the circumstances of the case, have a particular and exclusive meaning attached to it. *Ib.*

So specifically.] 8. The proviso in a will is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive. *Giles* v. *Melsom*, 6 L. R., H. L., 24; 42 L. J., Ch., 122; 21 W. R. 417; 28 L. T., N. S., 789. Reversing 6 L. R., C. P., 532; 40 L. J., C. P., 233; 25 L. T. 267; 19 W. R. 1091. Reversing 5 L. R., C. P., 614; 39 L. J., C. P., 325; 22 L. T. 797; 18 W. R. 1141.

A proviso being at the end of all the devises in a will must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. *Ib.*

"*Such.*"] 9. Bequest for benefit of testator's three daughters, and in case either of them should leave issue, then she should appoint her share unto such child or children in such manner and form as she should choose; and in default of any child or children of any of his daughters, then, etc. And in case all his daughters should die without issue, then, etc.:

—Held, that the expression "such child or children" did not refer to the preceding phrase so as to limit the objects to issue left by a daughter, but meant such child, etc., as she should choose. *Harley* v. *Mitford*, 21 Beav. 280.

Such.] See LVII. I. 2 *and* II. 3—LVIII. V. 5 *post*—VESTED, CONTINGENT, AND FUTURE INTERESTS, III. II. 2.

Testament.] 1. This word includes a will, codicils, etc. "Instrument" signifies the will alone. *Fuller* v. *Hooper*, 2 Ves. 242.

Then.] 2. The word "then" used twice in the same sentence in a will construed in the first instance as pointing to the event, and in the second as an adverb of time. *Gill* v. *Barrett*, 29 Beav. 372.

3. The word "then" construed as pointing to the event, and not to the time. *Gundry* v. *Pinniger*, 14 Beav. 94; 20 L. J., N. S., Ch., 635; 15 Jur. 1147. And see S. C. 1 De G. M. & G. 502; 21 L. J., N. S., Ch., 405; 16 Jur. 483.

4. Bequest of personalty to A. for life, remainder to B., and in the event of B., or any heir of his, not being living, then between the brothers of testator equally; the remainder over on the death of B. in the lifetime of A. supported as not too remote against the claim of B.'s personal representative. The Court availing itself of slight expressions to effectuate the intention, the word "then" was construed as an adverb of time, not of contingency. *Baker* v. *Lucas*, 1 Moll. 481.

See also SPECIFIC DIVISIONS.

Then living.] See VESTED, CONTINGENT, AND FUTURE INTERESTS, I. X.

Thereafter.] 5. A married woman, having a power of appointment by will, appoints 4,000*l.* to her husband or such persons as he should by will appoint; and he appoints to his nephews and niece equally at twenty-one or marriage, to be transferred to them within twelve months after the same should happen, without the dividends due thereon, provided neither event happened within such twelve months; and if so, in twelve months next thereafter, with a gift of the residue:—Held, that the intention was that the legatees should not take the first year's dividends, "thereafter" applying to testator's death. *Re Rose's Settlement*, 2 W. R. 629.

Unmarried.] See XI. II. AND III. *ante*—XXVIII. VII. *post*—XXXI. VI. *post.*

Use and Occupation.] See XXXVIII. XXIX. *post.*

Vested.] See LXII. *post*—VESTED, CONTINGENT, AND FUTURE INTERESTS, V.

When.] See VESTED, CONTINGENT, AND FUTURE INTERESTS.

With.] 6. A. gives by a codicil to B., during her natural life, his house in G., with all the household goods found therein at the time of his decease. The word "with" so conjoins the house and goods that the devisee can have no larger interest in the one than in the other. *Lache* v. *Bennett*, 1 Atk. 470.

Younger.] See YOUNGER CHILDREN.

XV. Who may be Devisees.

I. *Devise to Heir. Whether taking by Descent or Purchase*, 7674.
II. *Infant En Ventre Sa Mère*, 7675.
III. *Devise to Attesting Witness.* See II. VIII. 8 *ante.*
IV. *Devise to Aliens.* See FOREIGNER AND FOREIGN LAW, IV. III 1.
V. *Devise to Charity.* See CHARITY.

I. DEVISE TO HEIR WHETHER TAKING BY DESCENT OR PURCHASE.

7. Devise to his son and his heirs, but in case he should die without issue, not having attained twenty-one, then over. He attained twenty-one.—Held, he took by purchase, and not by descent. *Scott* v. *Scott*, Ambl 383; 1 Eden 458.

8. The rule that a man cannot make his right heir a purchaser, is confined to the estate of which he is seised. *Robinson* v. *Knight*, 2 Eden 159.

9. If the same is devised to H. which he would have taken by descent, he is in by descent. *Plunket* v. *Penson*, 2 Atk. 293.

10. Testator devised his real estates to trustees, in trust to pay an annuity, and out of the residue of the rents to maintain S. W. (who was his heir), until he attained twenty-one, and on his attaining twenty-one, to convey the estates to him in fee; but if he died under twenty-one, then to J. S. in fee. S. W. attained twenty-one:—Held, that he took the estates by descent *Wood* v. *Skelton*, 6 Sim. 176; 2 L. J., N. S., Ch., 163.

11. A testator gave his real estate to his wife for life, and after her decease to his granddaughter, the only child of his deceased daughter, her heirs and assigns; but in case she should die under twenty-one without issue, then over:—Held, that the granddaughter, who was the testator's sole heir-at-law, took at the death of the tenant for life, by descent and not by purchase. *Manbridge* v. *Plummer*, 2 Myl. & K. 93; 3 L. J., N. S., Ch., 82.

12. Devise and bequest of leasehold, freehold, and copyhold estates to trustees, their heirs, executors, etc., upon trust to sell and pay debts, etc., and after payment thereof to pay and apply the rents, etc., to A. for life, and after his decease devising and bequeathing to the heir or heirs at law of B., and the heirs, executors, etc., of such heir or heirs to whom the trustees were directed to convey and assign accordingly; co-heiresses of B. being also co-heiresses of the devisor, take not as co-parceners by descent, but as joint tenants by purchase; and, therefore, subject to survivorship. *Swaine* v. *Burton*, 15 Ves. 365.

Heir, being also devisee, takes by purchase, not by descent, if the devised estate is not of the same nature. *Id.* 371.

13. When a testator directs that his estates shall descend as if he died intestate, the heir-at-law takes by his title by descent. *Walcott* v. *Bloomfield*, 2 Con. & L. 577; 4 Dr. & War. 211; 6 Ir. Eq. R. 227.

14. Where lands were devised to the heir, subject to the payment of an annuity:—Held, that notwithstanding he would take by descent,

the devise to him could not be treated as a mere nullity, nor deprive him of any benefit intended by the testator, and as between him and other devisees, the estates devised to him were not to be applied in payment of debts in priority of the estate devised to the latter. *Biederman* v. *Seymour*, 3 Beav. 368; 10 L. J., N. S., Ch., 177.

II. INFANT EN VENTRE SA MÈRE.

1. The law is clear that a devise to an infant *en ventre sa mère* is good, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. *Anon.*, 1 Freem. 293. S. P. *Taylor* v. *Bydall*, *id.* 243.

2. A child *en ventre sa mère* may be vouched, may be an executor, may take under the Statute of Distributions, by devise, under a charge for portions, may have an injunction and a guardian. *Thellusson* v. *Woodford*, 4 Ves. 322. Affirmed 11 Ves. 112.

3. One devises, in case he have no son at the time of his death, to S. The testator dies, leaving his wife *privement enceinte* with a son; this posthumous son is a son living at the testator's death, and S. not entitled. *Burdet* v. *Hopegood*, 1 P. W. 486.

4. Testator devised freehold fee-simple estates to trustees during the life of his son J, upon certain trusts, remainder to his son's children, and their issue, in the same words as in the above devise to his daughter's children, and in default of such issue, to all and every the child and children of his daughter S., etc. (in the same words as before):—Held, that only six of the nine children of S. took under the devise; namely, five who were born, and one who was *en ventre* at the death of J. *Mogg* v. *Mogg*, 1 Meriv. 655.

See also XXXII. v. *post*.—POSTHUMOUS CHILDREN.

XVI. Gifts to Assigns.

5. A gift of a remainder to a person, her heirs and assigns, is a limitation to such uses as she shall appoint; and in default of appointment, to her heirs by way of purchase. *Quested* v. *Michell*, 1 Jur., N. S., 488; 24 L. J., Ch., 722; 3 W. R. 435.

A testator gives all his property to trustees upon trust to pay debts and legacies and to invest the residue in stock, thereout to pay certain annuities; and subject thereto he gives and bequeaths all his said residuary personal estate, and also all his freehold and copyhold messuages, lands, tenements, and hereditaments, and real estate, as to one-sixth to L., his heirs, executors, administrators, and assigns; as to one other sixth to H. daughter of C., in the same words; as to one other sixth in trust for W. C. and his assigns for life, and not by way of anticipation, remainder to his children; as to one other sixth in trust for M. B. wife of W. B. for life, without power of anticipation, upon trust, after payments thereout, for the heirs, executors, administrators, and assigns of M. B.; as to one other sixth in trust for H. W., in the same words; and as to the remaining sixth part thereof in trust during the life of L. M., subject to payments thereout, to pay the clear rents to L. M. and her assigns, not by anticipation, during her life, and from and immediately after her decease upon trust for the heirs, executors, administrators, and assigns of the said L. M. according to the several natures and qualities thereof:—Held, that M. B., H. W., and L. M. took an absolute interest in both the real and personal estate. *Ib.*

6. Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns."—Held, that "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Re Hopkins*, 2 Hem. & M. 411

7. Under a devise of real estate, in trust for the testator's widow for her life, and at her death to sell the property, and divide the proceeds among the testator's five children, by name, "or their heirs or assigns":—Held, that the children took absolutely on the death of the testator. *Re Walton*, 8 De G. M. & G. 173; 2 Jur., N. S., 363; 25 L. J., Ch., 569; 4 W. R. 416.

8. A testator, who had long resided in India, gave a legacy "to T. P., who resided at A. when I left England, or to his heirs, executors, administrators, or assigns." T. P. died in the testator's lifetime:—Held, that the bequest was void for uncertainty. *Waite* v. *Templer*, 2 Sim. 524.

XVII. Gifts to Children.

See also PARENT AND CHILD—PORTION—POWER, XVII.—SETTLEMENT, X. III.

I. *Whether they include Grandchildren*, 7676.
II. *To Grandchildren. Whether they include Great-Grandchildren*, 7677.
III. *Of what Marriage*, 7677.
IV. *Younger Children. Eldest Child. First, Second, or Other Son.* See YOUNGER CHILDREN.
V. *Class of Objects. When Ascertained.* See XXXII. *post.*
VI. *Mistake in Number of a Class of.* See X. IV. *ante.*
VII. *Whether Children take Per stirpes or Per capita.* See XXXIII. *post.*
VIII. *Illegitimate Children.* See XXV. *post.*
IX. *Clauses Substituting Children for their Parents.* See LVIII. *post.*
X. *Limitation over as Referring to having or leaving Children.* See LXIII. *and* LXIV. *post.*
XI. *Gifts to Children of A. and B.* See XXXIII. *post.*
XII. *Child as a Word of Limitation and Gifts to Parents and their Children.* See XVIII. *post.*
XIII. *Children en ventre sa mère and Children to be Born or Begotten.* See XXXII. III., IV. *and* V. *post.*—POSTHUMOUS CHILDREN.
XIV. *Issue Construed Children and vice versâ.* See XXVI. *post.*

I. WHETHER THEY INCLUDE GRANDCHILDREN.

1. Under bequest to children, grandchildren are not entitled, except from necessity; as if the will would otherwise be inoperative; or when by other word, as "issue," it clearly appears that the word "children" was used not in the proper but in the more extensive sense. *Radcliffe* v. *Buckley*, 10 Ves. 195.

2. Grandchildren entitled under the description of children in a will, the intention upon the whole clause being children, or the issue of those who should be dead. *Royle* v. *Hamilton*, 4 Ves. 437.

3. Grandchildren may take under the description of children, if there can be no other construction; not otherwise. *Reeves* v. *Brymer*, 4 Ves. 693.

4. Devise of 1,500*l.* in trust for the children of A, A. has only one child, and several grandchildren, the child only shall take, and not the grandchildren; but if there had been no child of A. living, the grandchildren might have taken. *Crooke* v. *Brookeing*, 2 Vern. 107.

5. Bequest to children, held to extend to grandchildren, there being no children. *Gale* v. *Bennet*, Ambl. 681.

6. Clear words in the operative part of a clause, not controlled by ambiguous words in the introduction. *Oxford (Earl)* v. *Churchill*, 3 Ves. & B. 67.

Where there is a total want of persons properly answering the description, others, who do not so completely answer it, may be let in; grandchildren, for instance, under a liberal construction of the word "children," if there are none; but no such instance, if there are children. *Ib.*

7. Where a testator bequeathed a fund in trust for the children of his late sister A. (the issue of her daughter B excepted), and of his sisters C. and D. *per stirpes*:—Held. that grandchildren of C. were entitled to participate. *Re Crawhall*, 8 De G. M. & G. 480.

8. A testator, having appointed three trustees, and made moderate provisions for his three sons, directed, all the furniture, etc. in his mansion house at B. to be sold, "except such parts thereof as his said trustees should think necessary to be kept for receiving any of them, or of the testator's sons, who should choose to go and spend a little time there occasionally;" and he bequeathed the great bulk of his property upon land to be accumulated, and, at the end of the period of accumulation, to be divided between the eldest male lineal descendants of his three sons respectively. In a subsequent clause a power of appointing new trustees was given under the direction of the Court. A liberal establishment had been maintained at B., at the expense of the estate:—Held, that the privilege of residing occasionally at the mansion house at B., and of enjoying the benefit of the establishment there, was confined to trustees and to the sons of the testator, and could not be extended to a grandson of the testator, nor to an infant great-grandson, who was the person presumptively entitled to a share of the property at the expiration of the period of accumulation: and that this privilege was not confined to the individuals named as trustees in the will, but extended to trustees substituted in the place of those individuals. *Thellusson* v. *Woodford*, 5 Russ. 100.

9. The word "children" in a will containing bequests by a testator to his children *primâ facie* does not include grandchildren, unless the context shows that such was the intention. *Martin* v. *Lee*, 9 W. R. 522; 4 L. T, N. S., 657.

10. Gift by a testator to the children of his late brother John, and in another clause there was a gift to the issue of his said brother. The brother John had only one son, who died in the testator's lifetime, leaving four children:—Held, that these four grandchildren were entitled, there being no children. *Berry* v. *Berry*, 3 Gift. 134; 7 Jur., N. S., 752; 9 W. R. 889; 4 L. T, N S, 635

11. Testatrix bequeathed 1,300*l.* to trustees in trust, as to one-third, for such of the children of A. S, then deceased, as should be living at the testator's death; and, in trust, as to the remaining two-thirds, for the children of S. T. and T. P, living at the same time. S. T. had grandchildren, but no child living either at the date of the will or at the testator's death; but A. S. and T. P. had, each of them, children living at those times —Held, that the grandchildren of S. T. could not claim under the description of children. *Moor* v. *Raisbeck*, 12 Sim. 123.

12. A devise to the children of A. All the children were dead at the date of the will, but there were several grandchildren and great-grandchildren:—Held, that the grandchildren were entitled, to the exclusion of the great-grandchildren. *Fenn* v. *Death*, 2 Jur., N. S., 700; 23 Beav. 73; 4 W. R. 828.

The case of *Moor* v. *Raisbeck* (12 Sim 123) observed upon *Ib.*

13. Where there was a proof that a testatrix was aware of the state of the family.—Held that the word "children" would not include grandchildren. *Loring* v. *Thomas*, 1 Dr. & Sm 497; 7 Jur., N S., 1116; 30 L. J., Ch., 789; 9 W. R 919; 5 L. T., N. S, 269.

14. Gift by will, made in 1805, of a testator's residuary personal estate, upon trusts for investment and accumulation, for the benefit of such child or children as his nephews W. and T., and his niece D., should leave at the time of their deceases, the child or children of each taking one-third; and in case either of them, his said nephews and niece, should die without leaving any children or child, then he directed that such third part should be paid to the children or child of the other or others leaving children or a child, in equal proportions; "and in case all of them, his said nephews and niece, should happen to die without leaving any issue lawfully begotten," then he directed that the whole of the residue of his estate should be paid to the three children of G. in equal shares. W., T., and D. all survived the testator, but W. and T. both died without leaving any issue, while D. died without leaving any child living at her death, but she left grandchildren surviving her:—Held, first, that the words "children" and "child" must be read in their ordinary acceptation, and that they did not mean grandchildren or remoter issue. *Pride* v. *Fooks*, 5 Jur., N. S., 158; 28 L. J., Ch., 81; 3 De G. & J. 275; 1 L. T., N. S., 292. Reversing 4 Jur., N. S., 678.

Held, secondly, that the words "without

leaving any issue" meant an indefinite failure of issue, and therefore that the gift over to the children of G. failed. There was thus an intestacy as to the residue. *Ib.*

See also POWER, XVII. II.

II. TO GRANDCHILDREN WHETHER THEY INCLUDE GREAT GRANDCHILDREN.

1. Construction of a will and settlement, as not comprehending great-grandchildren under the description of children and grandchildren. *Orford (Earl)* v. *Churchill*, 3 Ves & B. 59.

2. Devise to grandchildren, great-grandchildren held under the circumstances to take; but held the devise will not extend to grandchildren by marriage. *Hussey* v. *Dillon*, Ambl. 603. S. C. *nom. Hussey* v. *Berkeley*, 2 Eden 194.

3. The term grandchildren, in a clause of a will devesting legacies in a given event, extended so as to include great-grandchildren who had been previously named *Strutt* v. *Finch*, 7 L. J., Ch., 176

4. Bequest to the children of A. equally. A. and all his children were dead at the date of the will, but there were grandchildren and great-grandchildren of A. living:—Held, that the grandchildren living at the death of the testatrix, to the excluding the great-grandchildren, were entitled. *Fenn* v. *Death*, 23 Beav. 73; 2 Jur., N. S., 700; 4 W. R. 828.

III. OF WHAT MARRIAGE.

5. Bequest of 3,000*l.* of stock to W., the testator's son by a first marriage (his second wife and a son by her being living), the interest to be appropriated to his maintenance, under the direction of trustees, till he attained twenty-four, and of the residue of the testator's personal estate (the interest being given to his wife during her widowhood), after her decease or marriage, "unto any child or children I may have by my wife, to be equally divided between them that attain the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then bequeath to the children of my sister the 3,000*l.* stock:" the son of the second marriage dying in the life of the testator, and there being no other issue of that marriage, W. is entitled to the stock and to the residue. *Hill* v. *Smith*, 1 Swan. 195; 1 Wils. 154.

6. A testator, having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage (by name) "and such other child or children as should be living at the time of his death":—Held, that the children of the first marriage were not included in the residuary gift. *Lovejoy* v. *Crafter*, 35 Beav. 149.

7. A testatrix by a codicil to her will bequeathed 1,500*l.* upon trust "for the child, or, if more than one, for all and every the children of A., whether by her present or any future husband." A., at the death of the testatrix, had a child living by a former husband. She was then married to a second husband, but there had been no children of that marriage:—Held, that the word "whether" was not to be read as exclusive, and that the child by the former husband took the legacy. *Re Pickup*, 30 L. J., Ch, 278; 4 L. T., N. S., 85; 1 John. & H. 389; 9 W. R. 251.

8. After a bequest of residue, except certain settled property in favour of H. and her children, whether by her present or any former husband, testator appointed the settled property to his sister G. H. for life, and the capital to go to her children "whether by her present or any future husband" At the date of the will G. H. had a family by her then present husband, and also two children by a former husband. She was then of the age of sixty-five:—Held, that the two children by the first marriage were entitled to share in the settled property. *Passmore* v. *Huggins*, 4 W. R. 33; 25 L. J., Ch., 251; 19 Jur. 1060; 21 Beav. 103.

9. A. devises several leasehold estates to two trustees in trust if his granddaughter married without their consent to convey the premises to two other trustees in trust for her separate use during her life, and after her death for the use and benefit of her issue. Though she has no children by the first husband, whom she married without the consent of the first trustees, she has only a right for her life, for the issue of any husband are provided for by this settlement. *Champion* v. *Pickax*, 1 Atk. 472.

10. A devise of real estate to all the younger children of the testator's daughter, as tenants in common, with a devise over in case they should all die under twenty-one, or be married without consent, would give a vested interest, subject to be devested in that event, unless a different intent appeared from the subsequent part of the will. The first husband of the daughter was living at the time of making the will, and at the death of the testator, and although it was plain that the testator had not in his contemplation a second marriage of his daughter, yet, the gift over being in case the daughter should leave no issue behind her, the children of the second marriage took equally with the children of the first marriage. *Critchett* v. *Taynton*, 1 Russ. & M. 541; 8 L. J., Ch., 143.

11. Bequest to a married daughter for life, and if she survived her husband and children to transfer it to her; but if she left children, then to her husband, Captain U., for life, with remainder to her children, with a gift over in the event of her dying in the life of her husband without having children. She died, leaving children by Captain U., and by a second marriage:—Held, that the latter were not entitled to participate in the fund. *Stopford* v. *Chaworth*, 8 Beav. 331; 9 Jur. 369.

12. A. B., a widower, settles lands to raise 100*l.* a year for his eldest son, and 100*l.* apiece for his younger children, and afterwards he marries again and has children by his second wife: decreed, the children by the second wife were equally entitled with the other younger children: though the portions of the younger children were by the settlement to be paid according to their seniority, yet, in case of a deficiency, they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in

favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father and afterwards died. *Brathwaite* v. *Brathwaite*, 1 Vern. 334.

1. Testator bequeathed a residuary personal fund to trustees, upon trust to apply the dividends for the maintenance of his children, until the youngest should attain twenty-one, and then to divide the same equally between B., D., E., and F., children by his former wife, and G. and H., children by his present wife, and such other child or children as might be living or as his said wife might be *enceinte* with at his decease. The testator, at his death, left two other children besides those named in his will, viz., A. and C., who were children by his first marriage:—Held, under all the circumstances of the case, that they took no interest in the fund. *Stavers* v. *Barnard*, 2 Y. & Coll. C. C. 539; 7 Jur. 1080.

2. A bequest to all and every the child and children of A., includes every child born before the period of distribution; which in this case was the attainment of twenty-one by the eldest, the marriage of daughter, or death of child under twenty-one, leaving issue. Upon the general rule, a child by subsequent marriage was included, notwithstanding strong implication in favour of children of prior marriage. *Barrington* v. *Tristram*, 6 Ves. 345.

See also POWER, XVII. 1.

XVIII. Child, Son, Daughter, etc., as Words of Limitation.

I. SON, ELDEST SON, AS WORDS OF LIMITATION.

3. Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he should have lawfully begotten; and for default of such issue to W. and his heirs for ever:—Held, that upon the true construction of the will, and to effectuate the manifest general intent of the testator, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180.

4. A. devised all his lands, etc., to his wife, and if it should happen that she should have no son nor daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his heirs for ever, paying to two other brothers 150*l.* within a year after the wife's death. Decreed to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter" must be understood "no issue;" and that she ought not to be restrained from committing waste. *Wyld* v. *Lewis*, 1 Atk. 432.

5. A devised his real estate to his son F., during his life, remainder after his decease to his eldest son that should be then living, remainder over; F. suffered a recovery, and declared the use to himself in fee:—Held, that F. took only an estate for life, and that the recovery was bad: for where a particular estate is expressly given, it shall not be altered by any implication from subsequent words, especially where such implication, if admitted, defeats the general intent of the will. *Foord* v. *Foord*, 3 Bro. P. C. 124.

6. A testator declared his will to be, that his property be inherited by his nephews, C. and T., and the sons of his late brother A. during their lives, and after the decease of C. and T. that the eldest son of C. and the eldest son of T. inherit the said property during their lives, and so on, the eldest son of each of the two families to inherit the same for ever; and that each two of the succeeding inheritors should inherit the said property free from incumbrances:—Held, that C. and T. took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to C. and T. in tail male. *Forsbrook* v. *Forsbrook*, 3 L. R., Ch., 93; 16 W. R. 290. Affirming S. C. *nom. Fosbrook* v. *Fosbrook*, 2 L. R., Eq., 799; 12 Jur., N. S., 285; 14 W. R. 537; 14 L. T., N. S., 282.

7. Devise in trust for A. for life, and after the decease of A., in trust, to permit such one child of A., and the heirs of his or her body, to receive the rents as A. should appoint by deed or will, and in default of appointment to go to his eldest son and the heirs of his body; and in case there should be no son, to and amongst his daughters, and to the heirs of their bodies, share and share alike; and in default of such issue, in trust for B., C., and D. successively for their lives, with similar remainders respectively to them as to A.'s sons and daughters, with remainder over in fee, and a residuary devise to A. A. by will appointed to his eldest son, who died without issue in his lifetime:—Held, first, that A. took an estate tail in remainder, after the estate devised to his eldest son, in default of appointment. *Bell* v. *Bell*, 15 Ir. Ch. R. 517.

Held, secondly, that the words, "in case there shall be no son," did not give an estate by implication to the other sons of A. *Ib.*

8. A devise and bequest of freehold and chattel interest to M. M. for life, and in case he should die unmarried, or without children, to revert for the residue of their different periods to T. H.:—Held, that M. M. took an estate for life only. A bequest of terms for years upon trust to permit S. M. to receive all the rents, issues, and profits, and to dispose of the same as she might think proper, and upon further trust that S. M. should pay, out of the rents, issues, and profits, certain debts and legacies, and that the premises should revert for the residue of their different periods to T. H.:—Held, that S. M. took an estate for life only. *Egan* v. *Morris*, Ll. & G. *temp.* Plunk. 297.

9. Bequest of personal estate to A., "and to his first and other sons after him, in the usual mode of succession":—Held, that A. took for life only. *Sparling* v. *Parker*, 29 Beav. 450.

10. A testator bequeathed moneys, lent on mortgage, to A. for life, with remainder to his "first and other sons." The will also contained devises of fee simple, freehold, and chattel lands to the first and other sons of A. successively:—Held, that the first son of A. took the

whole mortgage money absolutely. *Re Staunton*, 14 Ir. Ch. R. 98.

1. A testator by his will directed the trustees therein appointed to call in a certain sum of money to which he was entitled, and invest the same in the purchase of freehold estates in lands or hereditaments of a clear estate of inheritance, for the use of his son A., for and during his natural life, and after his death to the use of his first and other sons according to seniority of age and priority of birth; and in case A. should happen to die without issue male, then in trust for his second son B., and the heirs male of his body, according to seniority of age and priority of birth; and desired that his sons and the several persons who should be in possession of such estates should have a power to make leases not exceeding three lives or thirty-one years:—Held, that A. was entitled to an estate tail in the lands to be purchased. *Herbert* v. *Blunden*, 1 Dr. & Wal. 78.

2. A testator bequeathed the life use of all his funded property, moneys, and securities for money, to his sons A. and B., share and share alike, for their lives, with power to them to invest it; and after their respective deaths he directed the issues and profits to arise therefrom to go to their respective eldest sons born in wedlock, share and share alike, for and during each of their natural lives and life, and so on to the eldest sons of the eldest sons born in wedlock in succession, share and share alike, on their attaining their respective ages of twenty-one, subject to certain bequests, with cross limitations to A. and B., if they both died without male issue, among their female issue as they should respectively appoint. There was no son of A. born at the testator's death:—Held, to carry out the general intent, that the will must be construed to give the eldest son of A., who was born after the testator's death, an estate tail in real estate, and therefore that he took an absolute interest in his share of the testator's personal property. *Re Cleary*, 16 Ir. Ch. R. 438.

3. Direction that any property might be sold except Glencoe, which was to remain in the family as long as there was a lineal son descendant of before-named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:—Held, that this clause created an estate tail in possession in the eldest named son. *Mannoœ* v. *Greener*, 14 L. R., Eq., 456; 27 L. T., N. S., 408.

4. Bequest of property (moneys to be laid out in land) to L., and afterwards to his eldest lawfully begotten son, etc., remainder to others in succession; with a direction that in case of the decease of an eldest son, in any of the cases, then the property to go to the second son, and so on according to primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons:—Held, upon the language of the whole will, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession; and that L. took an estate for life only. *East* v. *Twyford*, 9 Hare 713.

The fact, that wherever a limitation occurred in the will in favour of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons:—Held, to indicate that the sons were intended to take by particular description, and the grandsons as a class. *Ib.*

The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the Court can be guided in determining upon such intention. *Id.*, 9 Hare 730.

The question is, whether "son" or "sons" be used as *nomen collectivum*; upon which a subsequent limitation in favour of grandsons has an important bearing. *Ib.*

The prohibition against suffering a recovery construed to apply only to such of the devisees as would have power to bar the entail. *Id.* 9 Hare 733.

Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate. S. C. 4 H. L. Ca. 517.

A testator, by a will written on the pages of a small note book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words, "The eldest and other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was with the will admitted to probate. K. was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K.;" and if not, "the property aforesaid set down and particularised in No. 1 to go to M.; if not, to L., and afterwards to his eldest lawfully begotten son, etc." There were similar expressions with regard to N. and O. The card showed that these two letters were intended for the eldest sons of the two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the executors of the will were to invest in the purchase of real estate; and in page 54, L. was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next named in the entail, or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, O. was, as to that, to succeed to K., and the estate there given to O. was expressly a life estate, with remainder to his eldest and other sons in tail male; and it was there also said, "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K., then to M.," and the devise (page 47) was "first to K. and then to M., and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. "After the decease of K., I repeat, I

bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid, as in the case of L., etc., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions":—Held, that reading all the parts of the will together, L. only took a life estate in No. 1, with remainder to his eldest and other sons in tail male.—Held, also, that this was not an executory trust. *Ib.*

1. Under a devise to trustees upon trust to permit A. to receive the rents for his life, and after his decease upon trust to permit his first son and the heirs of his body "to receive the rents for their respective lives, severally and successively in tail male," and in default of such issue over, A. takes an estate in tail male, and not merely a life estate. *Hugo* v. *Williams*, 14 L. R., Eq., 224; 41 L. J., Ch., 661; 26 L. T. 901.

II. CHILDREN AS A WORD OF LIMITATION.

1. Gift of Real Estate to Parent and Children. (Rule in Wild's case.)

2. Devise to M. J. and to all and every the child and children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs as tenants in common:—Held, M. J. took estate for life, with remainder to her children as tenants in common. *Jeffery* v. *Honywood*, 4 Madd. 398.

3. A devise to J. and his children; if he has then children, they take with their father; but if he has none, it is an estate tail. *Cook* v. *Cook*, 2 Vern. 545.

4. On a devise of lands to testator's sisters, M. and L., share and share alike, "and, in case of their demise, their respective shares to be equally divided amongst their children or lawful heirs":—Held, that they took an estate only for life, with remainder to their children in fee as tenants in common, and as to one of them, not married, her share, not being disposed of, would, in the event of her not having any child, descend to the heir-at-law. *Bowen* v. *Scorcroft*, 2 Y. & Coll. 640; 7 L. J., N. S., Exch. Eq., 25.

5. When there is a devise of land to "A. B. and his children," and at the time of the devise he has no child, the word children is *primâ facie* a word of limitation, and the first taker shall have an estate tail; if he has children it is *primâ facie* a word of purchase, and gives a joint estate to him and his children as purchasers. But either of these constructions may be defeated by the plain intention of the testator, to be collected from the whole of the will. *Byng* v. *Byng*, 10 H. L. Ca. 171; 7 Jur., N. S., 1135; 31 L. J., Ch., 470; 10 W. R. 633; 7 L. T., N. S., 1. Affirming S. C. *nom. Webb* v. *Byng*, 26 L. J., Ch., 107; 8 De G. M. & G. 633; 5 W. R. 64; 2 Jur., N. S., 1243; 2 Kay & J. 669; 4 W. R. 657.

A testatrix, in a holograph will, gave "in trust to my executors for my niece, B, and her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, furniture, plate, books, linen, Archbishop Cranmer's portrait by Holbein, India cabinet, striking watch, and my diamond earrings as heirlooms, with my estate." The niece died before the testatrix, leaving several children:—Held, that children was a word of flexible meaning, and that on the whole context of this will it must be read as a word of limitation, so that the eldest son of the niece took an estate tail in the devised property. *Ib.*

Observations on *Wild's case* (6 Co. Rep. 17). *Ib.*

6. Lands held under leases for lives perpetually renewable were devised in 1853 to M. (who did not marry till after the death of the testatrix), and to any child or children she might have, in such shares, etc., as she should appoint; and in default of appointment, among such children equally, if more than one, as tenants in common, "and to their respective heirs and assigns," and if but one, to such one, his or her heirs and assigns, upon sons attaining twenty-one, and daughters twenty-one or marriage; "and in default of any such issue," or, there being such, all should die under age or unmarried as aforesaid, over absolutely. By a codicil the testatrix vested her lands in trustees to preserve the several contingent remainders in my will mentioned," and to procure renewals or fee-farm grants of the premises:—Held, that M. took only an estate for life. *Re Moyles*, 1 L. R., Ir., 155.

7. A testator by a will made in 1823 gave "the whole of my landed property, situate, etc., to my eldest son H. W., and to his children lawfully begotten. In case of his dying without issue male or female I give the same landed property to my second son C. In case of C. dying without children or child lawfully begotten, I give the same landed property to my daughter Harriet and to her child or children lawfully begotten; and, should she have no children, she shall have a power of bequeathing it to whomsoever she pleases. I do hereby give and leave a full discretionary power to each of my children arriving at the possession of this landed property, to dispose of it by their will and testament to one, or to each, of their children, in such manner and in such proportions as to each of them, my children, shall seem meet and right and proper. My reason for this is that as there is a title of baronet in the family the eldest son ought to possess something more than the others, and also that I never wished to encourage disobedient children, therefore I leave the power of punishing or rewarding, as each of them coming into possession of the property, and having children, shall think right." H. W. never had a child,

C. died during the life of his elder brother, but left a daughter. H. W. after entering into possession disentailed the estate, and devised it to his wife's nephew:—Held, that H. W., by virtue of the rule in *Wild's case* (6 Co. Rep. 17) took an estate tail under the will; that the existence of the power did not affect the application of the rule, nor was it affected by the use of the word "children"—in one instance applicable to the sons and daughter of the testator, and in the other instance meaning their sons and daughters. *Seale* v. *Barter* (2 B. & P. 485) approved. *Clifford* v. *Koe*, 5 L R., App. Cas, 447; 43 L. T. 322; 28 W. R. 633.

The rule in *Wild's case* (6 Co. Rep. 17), even if only a rule of construction, is not now to be departed from. *Ib.*

It is consistent with that case that the primary sense of the word "children" is issue of the first generation. That primary sense is displaced when circumstances render the rule in *Wild's case* (6 Co. Rep. 17) applicable, on which the word becomes a word of limitation and not of purchase. *Ib.*

1. The rule in *Wild's case* (6 Co. Rep. 17) is not inflexible, and will not be applied where its application would defeat the manifest intention of the testator as collected from the whole will. *Grieve* v. *Grieve*, 36 L. J., Ch., 932; 4 L R., Eq, 180; 16 L. T., N. S., 201; 15 W. R. 577.

Devise of house to A. and B, and to their children, and if they have not any, to C. and his children, the furniture to go with the house. A. and B. had no children at the date of the will:—Held, that having regard to the terms of the will, and particularly to the direction as to the furniture, to apply the rule in *Wild's case*, and thereby give A. and B. estates tail, would defeat the intention of the testatrix; that in such case it was not imperative to apply the rule; and that A. and B. took the house and furniture for their respective lives, with remainder to the children of each coming into *esse* during such lives. *Ib.*

2 Where there was a devise to R. B. and J. B, as tenants in common, "and in their respective proportions to their children, or according to their wills"; and at the date of the will J. B. had children, but R. B. had none:—Held, not to be a devise of estate tail, or a gift to the children together with their parent, but to be a gift in fee simple to R. B. and J. B. as tenants in common, with a superadded executory devise at the death of each to his children or to his devisees. *Re Buckmaster's Estate*, 47 L. T. 514.

3. A testator bequeathed all his estate (which consisted wholly of personalty, or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children;" and appointed her executrix. He left his wife and six children surviving. The widow proved the will and died. During her lifetime one of the children, a daughter, married and died:—Held, that the children took as joint tenants whether in remainder or otherwise, and *semble*, that the wife took only an estate for life. *Armstrong* v. *Armstrong*, 7 L. R., Eq., 518; 17 W. R. 570; 38 L. J., Ch., 463; 20 L. T., N. S., 776.

Held, also, that the daughter did not, by her marriage, sever the joint tenancy. *Ib.*

2. Gifts of Personalty to Parent and Children.

(*a*) *In General*, 7681.
(*b*) *When Gift to Parent for her Separate Use*, 7683.
(*c*) *Gifts to Parent for benefit of Children. Absolute Interests.* See XLV. *post.*

(a) In General.

4. Bequest of money in the funds to A., in trust for B, an infant, and for such younger son or sons as B. shall have, equally to be divided between them; and, in case there shall be but one younger son, then the whole to him:—Held, that B. took only a life interest, subject to which his younger children took the whole. *Garden* v. *Pulteney*, 2 Eden 323; Ambl. 499.

5. Where testator devised four parts of his personal estate to B., and the children born of her body, and B. had no child at the date of the will, but had one child born afterwards, and B. died in testator's lifetime:—Held, that the legacy was not lapsed, for B. did not take an estate tail but as a joint tenant with the child, and that the child took the whole by survivorship. *Buffar* v *Bradford*, 2 Atk. 220

Children are words of purchase, and not of limitation, except it is to comply with a testator's intention, and it can take effect no other way. *Ib.*

6. Legacies to A. and "to the heirs of his body;" to B., "to be secured to her and the heirs of her body;" to T., and "to her issue," are absolute legacies; but legacies to S., and "to her heirs (say children)," give S. only a life interest. *Crawford* v. *Trotter*, 4 Madd. 361.

7. Testator gave to his daughter and her children 5,000*l*, 3,000*l*. to be paid in one year after his decease, and 2,000*l*. after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The Court declared the 5,000*l*. to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease. *Morse* v. *Morse*, 2 Sim. 485.

8. Held, that under a bequest of 40,000*l*. to Lord H., and his children, to be secured for their benefit, Lord H. took for life with remainder to his children, and not as joint tenant with them. *Vaughan* v. *Headfort* (*Marquis*), 10 Sim. 639; 9 L. J., N. S., Ch., 271; 4 Jur. 649.

9. Bequest of money to be invested in trust to "pay the dividends and premiums to accrue therefrom for the use of the children of my brother H., share and share alike, and after their decease to be continued to their children":—Held, that the children of H. took life estates only, and there being no gift over the grandchildren took the principal sum. *Hyde* v. *Cullen*, 1 Jur. 100.

10. H. devised an estate at L. to M. for life, with remainders over (which failed), with an ultimate remainder to M.'s own right heirs. On the death of H., M. entered into possession, and in 1839 part of the estate was taken by a poor-law union, under the compulsory powers of the 5 & 6 Will. 4, c. 69, and the purchase

money paid into court. M. devised her estates at L. to W. for life, with remainder to her own right heirs, W. being such right heir; and M. then bequeathed the dividends of the fund in court to W. for life, and after bequeathing legacies, and referring to the surplus of her effects and moneys, she, subject to the payment of debts and to the life estate, bequeathed the same to the children of W., as tenants in common, to be paid to them at twenty-one:—Held, that W. had only a life interest in the fund in court, and that on his death his nine children were entitled to it. *Re Horner*, 5 Jur., N. S., 996.

1. Where there is a gift to parents and children, and there are children living at the time, it is a gift to all (*per capita*) as tenants in common. If there be no children living, the parents take for life, with remainder to the children. *Paine* v. *Wagner*, 12 Sim. 184.

2. Bequest of 1,000*l.* to A. S., and the children that may be lawfully begotten of her body: A. S., being unmarried at the death of the testatrix, takes the legacy absolutely. *Read* v. *Willis*, 1 Colly. 86; 8 Jur. 165.

3. On a bequest to the testator's daughter for life, and on her death to his son and his children; the son had no child at the death of the testator, but had children living at the death of the daughter:—Held, that the son was entitled absolutely, and that his children were neither joint tenants nor entitled in remainder after him. *Scott* v. *Scott*, 15 Sim. 47; 14 L. J., N. S., Ch., 439; 9 Jur. 580.

4. A testator, by his will, gave to his niece, E. G., wife of Captain G., the sum of 7,000*l.*, and to her heirs, for her separate use; the sum of 7,000*l.* to be invested in consols, in the names of A. and B, who were appointed trustees of the donation, to receive the interest of the stock, and to be answerable for the stock, for the use of E. G. and her children, and to apply it in the manner most conducive to their interest. E. G. to pay her mother during her life the sum of 40*l.* per annum:—Held, that E. G. was entitled for life, with remainder to her children born at and after the death of the testator. *Ogle* v. *Corthorn*, 14 L. J., N. S., Ch., 337.

5. Testator gave 200*l.* to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces and their children as his wife should by will appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to her nieces. They afterwards died without having had any children:—Held, that the payment was properly made. *Pyne* v. *Franklin*, 5 Sim. 458; 2 L. J., N. S., Ch., 41.

6. Where the will contained a clause, "observing that F. B. and his family are my residuary legatees for all but cash or moneys so called";—Held, that F. B. and his children took the residue as joint-tenants, and that long annuities, Columbian bonds, and a promissory note were not within the exception of cash, etc. *Beales* v. *Crisford*, 13 Sim. 593; 13 L. J., N. S., Ch., 26; 7 Jur. 1076.

7. Held that a bequest of 30*l.* a year to A., together with her children B., C., and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint-tenants, for the life of the longest liver of them. *Wilson* v. *Maddison*, 2 Y. & Coll. C. C. 372; 12 L. J., N. S., Ch., 420; 7 Jur. 572.

8. A testator gave to his wife all his copyhold, freehold, and personal estate for her absolute use for ever and ever, and to her heirs, executors, administrators, and assigns, also all his personal, leasehold, and general possessions to and for her use, and for the use of his children, and authorised her to appropriate any part for her immediate use, and for that of her children:—Held, that the wife and children were joint tenants, with a power to the wife to appropriate the property on the testator's death for a pressing exigency. *Curtis* v. *Graham*, 12 W. R. 993; 10 L. T., N. S., 734.

9. Where a testator gives property to a parent and his children simpliciter, and he has children then in *esse*, the parent and children take together, either jointly or in common; but if there be superadded words importing a settlement, the parent takes for life, with remainder to his children. *Mason* v. *Clarke*, 17 Beav. 126; 1 W. R. 297.

Bequest "to A." (who was *enceinte* at the time) "and her children":—Held, that A. and her children took as joint tenants, and no child having survived the testator, that A. was absolutely entitled to the legacy. *Ib.*

B. H. bequeathed 2,000*l.* consolidated annuities unto M. W., and her children, and directed that the residue of his property should be invested, and the interest thereof paid half-yearly to M. W., for her use and her children, until E. P. H. should be married, and her first child that lived to be one year old. The testator then directed that all the consolidated annuities remaining in his name should be equally divided between M. W. and E. P. H., for their use and their children, share and share alike; and in case E. P. H. should leave no issue, then the remaining consolidated annuities should devolve to M. W.'s children. M. W. had only one child, who died under age in 1790, a few months before the testator. E. P. H. married, and had only one child, who died in 1805, aged seven years. E. P. H. died in 1809, and M. W. died in 1837:—Held, that the personal representative of M. W. was entitled to the 2,000*l.* consolidated annuities, and that the residue of the testator's estate was undisposed of, and belonged to his next of kin. S. C. 17 Jur. 479; 22 L. J., Ch., 956.

10. Bequest to A. "for the benefit of herself and such children" as she had by her then husband or might thereafter have by him:—Held, that A. was entitled to a life interest in the fund to which her children were entitled as joint tenants upon her death. *Jeffery* v. *De Vitre*, 24 Beav. 296.

11. The rule in *Wild's case* (6 Co. Rep. 17) is not applicable to personal estate. *Audsley* v. *Horn*, 1 De G. F. & J. 226; 6 Jur. N. S., 205; 29 L. J., Ch., 201; 8 W. R. 150. Affirming 26 Beav. 195; 28 L. J., Ch., 293; 4 Jur., N. S., 1267.

Personalty was bequeathed to the testator's daughter during her life, and at her death, to her daughter, and to the granddaughter's children, but if they should die without issue then over. The granddaughter was unmarried at the dates of the will and of the testator's death, and had no child till after the death of the testator's daughter:—Held, that the grand-

daughter took a life interest in the subject matter of the bequest, with remainder to her children. *Ib.*

Where both a parent and his children are objects of a bequest of personalty the tendency of modern decisions is to construe the limitations as a gift to the parent for life, with remainder to his children. S. C. 26 Beav. 195.

1. Testator by his will, which was not attested so as to pass real estates, declared that his property, with what she was entitled to, should produce for his wife an annuity of 100*l.*; to each of his two daughters 100*l.* per annum, for "themselves and their children;" and bequeathed the residue of his property to his son W. Subsequently M., one of the daughters, died, and by a codicil the testator directed the 100*l.* per annum, etc., provided for M., to be equally divided between W. and J. L., the other daughter. By a second codicil he directed that, in the event of W.'s death without issue male, then after the decease of his (the testator's) wife and J. L., his remaining property should go over. J. L. had no children at the date of the will, or at the time of the testator's death, nor did she take any other benefit under the will and codicil than those mentioned:—Held, that J. L. took only a life interest in the respective gifts to her. *Semble*, that if it had rested on the will alone she would have taken a perpetual interest in it. *Heron* v. *Stokes*, 3 Dr. & War. 89; 1 Con. & L. 270; 4 Ir. Eq. R. 284. Reversing 3 Ir. Eq. R. 163.

Semble, the rule in *Wild's case* (6 Co. Rep. 17) is inapplicable to bequests of personal estate. *Ib.*

2. Bequests "to A. and her children," expressed in another part of the will as a gift "to A. and her family":—Held, that A. took for life. *Ward* v. *Grey*, 26 Beav. 485; 29 L. J., Ch., 74.

3. Bequest of personal estate to A., "and to his first and other sons after him, in the usual mode of succession":—Held, that A. took for life only. *Sparling* v. *Parker*, 29 Beav. 450.

4. A testator gave all his property for the use and benefit of his wife and children, as his trustees should think proper, during the widowhood of his wife; nevertheless it was his desire, subject to a sum to be set apart for his daughters, that all the rest should be equally divided between his wife and children on their severally attaining the age of twenty-one, and his wife continuing his widow and unmarried. The testator left his wife and nine children:—Held, that the property was divisible into tenths, each of the children being entitled to one-tenth upon their respectively attaining twenty-one, the widow during widowhood receiving the income of the shares of minors, and applying them for their benefit. *Salmon* v. *Tidmarsh*, 5 Jur., N. S., 1380.

5. A father directed that the share of his daughter should accumulate during the life of her husband, and after his death, if there should be any children living, "it should be secured for their benefit and that of their mother;" if no children, that it should go to the daughter absolutely:—Held, that after the death of her husband the daughter was entitled to the income for life, and with remainder to her children. *Combe* v. *Hughes*, 41 L. J., Ch., 693; 14 L. R., Eq., 415; 20 W. R. 793; 27 L. T., N. S., 366.

6. A mother gave 1,400*l.* to trustees in trust to pay the income to M. for life, and the capital to her children (excluding her two eldest sons) who should survive her and attain twenty-one. She also gave 1,500*l.* to each of her two eldest sons, and the residue to M. and such of her children, including the two eldest sons, as should attain twenty-one:—Held, that the wife and children took a life estate in the residue, with remainder to such of her children as should attain twenty-one. *Re Owen*, 12 L. R., Eq., 316; 25 L. T., N. S., 489.

7. A husband gave all his real and personal estate to his wife for the use and benefit of herself and all his children, whether born of his former or of his present wife, and he appointed his wife and three other persons his executors:—Held, that the wife and children took as joint tenants. *Newill* v. *Newill*, 7 L. R., Ch., 253; 41 L. J., Ch., 432; 20 W. R. 308; 26 L. T., N. S., 175. Reversing 12 L. R., Eq., 432; 40 L. J., Ch., 640; 25 L. T., N. S., 21; 19 W. R. 1001.

8. A husband who died in 1853, possessed of chattels real, and leaving a widow and seven children, of whom six were minors, by his will of 1837 bequeathed all his property to her, should she continue unmarried, for the benefit of herself and his family. If she married again, she was to receive 100*l.*, and the remainder of his property was to be divided share and share alike among his children and the survivors of them. He appointed his wife to execute his will according to the real meaning and spirit of what was thus specified, and recommended her to be guided by the advice of the Rev. H. H. in all matters relating to the disposal of his property and the education of the children, and the advancement of their well-being in society:—Held, that the children took no interest in possession, but that the widow took a life interest during widowhood, with a power of appointment, among the children, who, in default of appointment, would take as tenants in common. *Mill* v. *Mill*, 11 Ir. R., Eq., 158. Affirming 9 Ir. R., Eq., 104.

(*b*) *Where Gift to Parent for her Separate Use.*

9. Testator gave 500*l.* "to the sole uses of N., or of her children for ever." N. took an interest for life in the 500*l.*, and it belonged to her children after her death. *Newman* v. *Nightingale*, 1 Cox 341.

10. A testator gave a sum of money in trust for his daughter, a married woman, so as not to be subject to the debts, acts, or control of her husband; and gave an equal sum to a second daughter (also married), "in trust, as aforesaid, for the use of herself and children":—Held, that the second daughter took an estate for her separate use for life, with remainder to her children. *French* v. *French*, 11 Sim. 257.

11. Testator directed that the legacies given by his will to females, married or single, should be for their own benefit and their children, and should never be subject to the control of their respective husbands:—Held,

that the females took for their lives, for their separate use. with remainder to their children. *Bain* v. *Lescher*, 11 Sim. 397.

1. The testator, by his will, gave to his niece E. G., wife of Captain G., the sum of 7,000*l.*, and "to her heirs, for her separate use; this sum of 7,000*l.* to be invested in consols in the names of A. and B., who were appointed trustees of the donation, to receive the interest of the stock, and to be answerable for the stock. for the use of E. G and her children, and to apply it most conducive to their interest; E. G. to pay her mother during her life the sum of 40*l.* per annum":—Held, that E. G. was entitled for life, with remainder to her children born at and after the death of the testator. *Ogle* v. *Corthorn*, 14 L. J., N. S., Ch., 337; 9 Jur. 325.

2. Bequest to a married woman for the benefit of herself and such children as she then had. or might thereafter have by her then husband, free from the control of her husband:—Held, that she took for life, with remainder to such children. *Jeffery* v. *De Vitre*, 24 Beav. 296.

3. A testator, having by her will given a legacy of 5,000*l.* to a married daughter, made a codicil revoking the legacy, and, in lieu thereof, gave 2,500*l.* to her husband, and 2,500*l.* in trust for the daughter and her children, free from all debts or liabilities of her husband:—Held, that the daughter was entitled to the income of 2,500*l.* for her life, with remainder to all her children as to the capital. *Froggatt* v. *Wardell*, 3 De G. & Sm. 685; 14 Jur. 1101.

4. Bequest of the interest of 500*l.* to A. for life, and as to the principal after the death of A.. and as "to all other property belonging to me that I may die seised and possessed of or entitled unto, in trust for the use, benefit, and behoof of" B. and her children, "without the control or intermeddling of her husband, and to be paid in such manner as my trustees shall in their discretion think fit":—Held, that B. took a life interest in all the property, with remainder to all her children born in A.'s lifetime, before and after the death of the testatrix. *Scott* v. *Scott*, 11 Ir. Ch. R. 114.

5. Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge:—Held, that the daughter and her children living at the testator's death were entitled to the residue in joint-tenancy. *De Witte* v. *De Witte*, 11 Sim. 41; 9 L. J., N. S., Ch., 271; 4 Jur. 625.

6. A gift of residue to A., subject to the life interest in B., "for her own benefit and her children, or one only child, if she should have any," creates a joint tenancy between A. and her children, and not a life interest to her with remainder to children. *Fisher* v. *Webster*, 26 L. T., N. S., 765; 14 L. R., Eq., 283; 42 L. J., Ch., 156.

7. A testator directed the trustees of his will to convert and hold the proceeds of his residuary estate upon trust as to one moiety to pay one-fifth to each of four persons respectively, and the remaining one-fifth to the widow of his nephew, "for the sole and separate use of herself and her family by my late nephew," and directed that their, his, or her receipt in writing should be a sufficient discharge for the payments aforesaid: the trustees brought into court the share left to the widow, and she petitioned for payment out of the fund:—Held, that she and her children took as joint tenants, and that she was entitled to only one-fifth of the fund, and to be paid the income of the remaining four-fifths for the maintenance and education of the children. *Re Newsom*, 1 L. R., Ir. 373.

3. When joined with other Words as for ever, in Succession, etc.

8. Devise of a copyhold to trustees and the survivor of them, and the executors and administrators of such survivor for ever, upon trust, out of the rents and profits, to pay certain yearly charges, and the residue to T., for life: and from and after his decease, to pay the residue as aforesaid to T.'s children, and so on for ever; and for want of children lawfully begotten, to the testatrix's daughters:—Held, that T. took an equitable estate tail under this devise. *Trash* v. *Wood*, 4 Myl. & C. 324; 9 L. J., N. S., Ch., 105; 4 Jur. 669.

9. Testator, by his will, directed that the profits of his share of a leasehold colliery should, during the time that the same was worked or workable, be equally divided amongst "his wife and children, and their children after them respectively":—Held, upon the construction of the whole will, that the words "their children after them respectively" were words of limitation. *Snowball* v. *Procter*, 2 Y. & Coll. C. C. 478; 7 Jur. 619.

10. Under a testamentary gift "to my brother B. and to his children in succession":—Held, that B. took an estate tail in the freeholds, and an absolute interest in the leaseholds and general personal estate. *Tyrone* (*Earl*) v. *Waterford* (*Marquis*), 1 De G. F. & J. 613; 6 Jur., N. S., 567; 29 L. J., Ch., 486; 8 W. R. 454.

11. A father gave freehold, copyhold, and leasehold estates to his daughter for life, and should she live to become marriageable, leaving a child or children, for the support and maintenance of such child, if there was only one, and if more than one in fair and equal proportions, "for and during the term of their natural lives, and in like manner to their children and children's children, each family having among them the father's or mother's share," with a gift over on the death under twenty-one or before marriage of his daughter:—Held, that the daughter took an estate for life only, and not an estate tail. The limitations after the daughter's life estate were not all void, but her children (if she left any) would take life estates. *Hampton* v. *Holman*, 5 L. R., Ch. D., 183; 46 L. J., Ch., 248; 36 L. T. 287; 25 W. R. 459.

4. Where Gift over on Death without Children.

12. A devise and bequest of freehold and chattel interests to M. M. for life, and in case he should die unmarried, or without children, to revert for the residue of their different periods to T. H.:—Held, that M. M. took an estate for life only. *Egan* v. *Morris*, Ll. & G. *temp.* Plunk. 297.

1. A testator, the father of two daughters, who were his only children, gave his estate, real and personal property, equally between them, with a declaration that the share of his daughter A. should devolve, in case of her dying without children, to his daughter B. and her children. A. was married at the date of the will, but had no children; B. was at that time married, and had two children. A. died without ever having had a child:—Held, that she was entitled to an estate tail in the real estate, and was absolutely entitled to the personalty. *Bacon* v. *Cosby*, 20 L. J., N. S, Ch., 213; 15 Jur. 695; 4 De G & Sm. 261.

2. A testator, by his will dated in 1836, gave all his leaseholds and freeholds to his three daughters, share and share alike; but if either of his daughters should die leaving no lawful child or children, their share or shares to go to his surviving daughters, share and share alike, to them and his (the testator's) heirs for ever:—Held, that each daughter took an estate tail in her share of the freeholds, and an absolute interest in her share in the leaseholds. *Fenn* v. *Savory*, 2 W. R. 345.

XIX. Gifts to Cousins.

I. WHO ARE INCLUDED. IN GENERAL

3. Testator by his will gave legacies to several persons by name, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side as should be living at his decease, and to all the children of such of his said cousins as might theretofore have died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and also one first cousin once removed, but all the persons named in the will were first cousins:—Held, that they alone, and the children of such of them as had died in testator's lifetime, were entitled to the residue under the codicil. *Caldecott* v. *Harrison*, 9 Sim. 457; 9 L. J., N. S., Ch., 331; 4 Jur. 885.

4. A bequest to the testator's "first cousins or cousins-german" does not include the descendants of first cousins. *Sanderson* v. *Bayley*, 4 Myl. & C. 56; 8 L. J., N. S., Ch., 18; 2 Jur. 958.

5. Bequest to "all my cousins who shall be living at my decease, in equal shares":—Held (reversing 1 Jur., N. S., 789; 25 L. J., Ch., 116; 3 Eq. Rep. 841; 3 W. R. 592), that in the absence of anything to explain the meaning of the testator, "cousins" must be construed to mean first cousins only. *Stoddart* v. *Nelson*, *Stanger* v. *Nelson*, 6 De G. M. & G. 68; 2 Jur., N. S., 27; 25 L. J., Ch., 116; 4 W. R. 109.

6. Under a bequest "to my cousins (descendants from my father's and mother's brothers and sisters) living at my death, and such of the issue living at my death of any cousins of mine (descendants as aforesaid) who shall have died in my lifetime leaving issue living at my death," "cousins" construed "first cousins," although the testator, by a codicil, provided by name for all his first cousins, and excluded them from all benefit under the will. *Stevenson* v. *Abingdon*, 8 Jur., N. S., 811; 10 W. R. 591; 6 L. T., N. S., 345.

7. A testator made his will in the following terms: "Knowing that without a will all relatives of equal degree would take equal shares, I wish on account of the unequal portions thus going to them to make additional gifts in favour of those hereinafter mentioned; that is to say, 3,000*l.* stock to each of those my cousins (naming six persons, who were all first cousins) in addition to and not as substitution for the shares they would otherwise equally take with my cousins (naming persons, one of whom was a first cousin, and the others first cousins once removed), in New Brunswick or elsewhere. The residue of my property I give and bequeath unto all my cousins, in all respects":—Held, that first cousins only were entitled to take under the residuary bequest. *Burbey* v. *Burbey*, 6 L. T., N. S., 573; 9 Jur., N. S., 86.

8. In an ejectment on title, the plaintiff claimed under a will (made in 1861), whereby the testator devised the lands in question, which were of freehold tenure, "to my only son, during his natual life, and after his demise it is to revert to the most deserving of his male issue lawfully begotten of him, if he shall have such male issue, otherwise it is to revert to the nearest and most deserving male cousin, and a regular Power of the family." The testator's son died *sine prole*, having previously devised the lands in question to his only sister, one of the defendants in the present action; the plaintiff claimed by virtue of the limitation over on the death of the testator's son without issue, as the eldest of three brothers, the only male cousins of the testator:—Held, that the plaintiff was entitled to recover. *Power* v. *Quealy*, 4 L. R., Ir., 20.

II. GIFT TO "FIRST" AND "SECOND" COUSINS.

9. Under a bequest of a residuary fund to the testator's first and second cousins, and the children of his kinsman, G. C., which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousins are entitled. *Charge* v. *Goodyer*, 3 Russ. 140.

10. Legacies to first and second cousins includes first cousins once removed, and a grand-niece being more distant. *Mayott* v. *Mayott*, 2 Bro. C. C. 125.

11. A testator gave one-third of his property to his first cousins and two-thirds to his second cousins. At his death he left first cousins, second cousins, and children and grandchildren of first cousins:—Held, that the term "second cousin" did not include children or grandchildren of first cousins. *Re Parker*, *Bentham* v. *Wilson*, 17 L. R., Ch. D., 262; 50 L. J., Ch., 639; 44 L. T. 885; 29 W. R. 855.

Quære, whether the first cousins once and twice removed would have taken if there had

been one gift to the testator's first and second cousins. *Ib.*

Semble, that in such a case parol evidence cannot be given to explain the meaning of the testator. *Grant* v. *Grant* (5 L. R., C. P., 727) discussed. *Ib.*

1. Testator bequeathed a fund in trust for his second cousins:—Held, that a first cousin once removed was not entitled to a share. *Bridgnorth (Corporation)* v. *Collins*, 15 Sim. 541.

2. Testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead (*per stirpes*). She had no second cousins, but had had three first cousins once removed of the name of S., two of whom were living at her death, and the other had died leaving children:—Held, that these two, together with the children of the one who was dead, were entitled, to the exclusion of first cousins twice removed, *i.e.*, grandchildren of a first cousin, though standing in the same degree of relationship as second cousins. *Slade* v. *Fooks*, 9 Sim. 386; 8 L. J., N. S., Ch., 41; 2 Jur. 981.

3. In construing a will, the well-defined legal meaning of a term used by the testator should not be altered unless there is something in the nature of a context to show that it could not have been intended by the testator to have that meaning. Thus, a bequest to "first cousins," *simpliciter*, without a context, means cousins-german; and a similar bequest to "second cousins" includes only second cousins strictly so called, and not persons standing in the same degree as second cousins, as, for instance, children of first cousins, or, as they are commonly called, first cousins once removed. A testator gave one-third of all his property to his "first cousins," and two-thirds to his "second cousins." At his death the testator left first cousins, second cousins strictly so called, and also children and grandchildren of first cousins:—Held, that the term "second cousins" did not include children or grandchildren of first cousins. *Re Parker, Bentham* v. *Wilson*, 15 L. R., Ch. D., 528; 49 L. J., Ch., 587; 43 L. T. 115; 28 W. R. 823.

4. A testator, after giving to his sister a life interest in the whole of his property, devised and bequeathed the same after her death upon trust for sale, and to divide the proceeds amongst "my second cousins." The testator had no "second cousins" either at the date of his will or at his death, or any born afterwards:—Held, that first cousins once removed were entitled. *Slade* v. *Fooks* (9 Sim. 386) followed. *Re Bonner, Tucker* v. *Good*, 19 L. R., Ch. D., 201; 51 L. J., Ch., 83; 45 L. T. 470; 30 W. R. 58.

III. CLASS OF. WHEN ASCERTAINED, AND DISTRIBUTION WHETHER PER STIRPES OR PER CAPITA.

5. P. bequeathed to each of the first cousins of the late A., living in England at the time of A.'s death, a legacy:—Held, that those only who were living at the death of P. were entitled. *Nicholson* v. *Patrickson*, 7 Jur., N. S., 937; 5 L. T., N. S., 202.

6. A testator gave property, after the failure of prior limitations, "unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns for ever, as tenants in common":—Held, that the words, "and the issue," etc., did not make the class ascertainable *in futuro*, but that the first cousins *ex parte maternâ*, living at the testator's death, took vested interests, liable to be divested *pro tanto*, so as to let in all other first cousins born before the period of distribution. *Baldwin* v. *Rogers*, 17 Jur. 267; 22 L. J., Ch., 665; 3 De G. M. & G. 649.

7. A testator devised a copyhold estate to his wife for life, and after her decease he devised one-half thereof unto and equally between all his first cousins, or the lawful issue of any or either of them who might be dead, as tenants in common: Held, that the first cousins of the testator living at his death, and the issue in every degree of his first cousins who were then dead, were to take in equal shares *per capita*. *Cogswell* v. *Chapman*, 6 L. J., N. S., Ch., 184.

8. Upon the construction of a will:—Held, that the residue of the testator's personal estate devolved to his cousins-german living at his death, except that the issue of any cousin dying between the date of the will and the death took the prospective share of the parent. Upon the construction of the same will, the share of a cousin dying without issue between the date of the will and the death of the testator was held not to have lapsed, but to have fallen into the bequeathed residue. *Cort* v. *Winder*, 1 Colly. 320.

9. Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins deceased partake in equal shares and proportions with my first cousins now alive:" the residue is divisible *per stirpes* amongst the first cousins who were living at the testator's death, and such of the descendants of the first cousins who died before him, as were next of kin of the deceased first cousins, and living at the time of the death of the testator. *Humphreys* v. *Humphreys*, 2 Cox 187.

XX. Gifts to Descendants.

I. WHO ARE INCLUDED. IN GENERAL.

10. Under a devise to the descendants of F. T., in a certain district, grandchildren and great-grandchildren take *per capita*. *Crosley* v. *Clare*, 3 Swan. 320.n. S. C. *nom. Crossly* v. *Clare*, Ambl. 397.

11. Bequest to such of the children of J. as might be living at testatrix's death, and the

descendants of such of them as might be dead, *per stirpes*, in equal shares:—Held, not J.'s grandchildren only, but his children's descendants in every degree, entitled to shares. *Marshall* v. *Scales*, 3 W. R. 502

1. Legacy to the descendants of A. and B. equally: all descendants (children and grandchildren) take *per capita*. *Butler* v. *Stratton*, 3 Bro. C. C. 167.

2. In a will descendants mean persons upon whom an estate will descend; and failing lineals, collaterals are entitled. *Best* v. *Stonehewer*, 10 Jur., N. S., 1140; 34 L. J., Ch., 26; 13 W. R. 126; 11 L. T., N. S., 468; 34 Beav. 66.

A testator gave the proceeds of the sale of his estates, after the determination of certain life estates, "to such person or persons as shall at that time be the nearest in blood to me, as descendants from my great-grandfather, S., and whose kindred with me originates from him." At the date of the will the only lineal descendants of S. were the testator and his sister, a lady of about sixty years of age:—Held, that the objects of the gift were such persons as were nearest in blood to the testator out of a class composed both of the descendants of S. and the persons whose kindred with the testator originated from their being related to him. S. C. on appeal 2 De G. J. & S. 537; 34 L. J., Ch., 349; 11 Jur., N. S., 315; 13 W. R. 566; 12 L. T., N. S., 195; 5 N. R. 500.

3. A testator bequeathed "to each of the children, grandchildren, or other direct descendants of" A., who might be living at the testator's death, "100*l.* apiece." At the death of the testator there were living a child, grandchildren, great-grandchildren, and great-great-grandchildren of A.—Held, that they were all entitled to receive 100*l.* apiece. *Cambridge* v. *Rous*, 25 Beav. 409

4. Bequest to each of A.'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may may not be in existence at my death, to go to their respective descendants:—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v. *Pepper*, 27 Beav. 86.

Bequest to "descendants' of A., "in such proportions as each may be entitled" under the Statute of Distributions:—Held, that a child of A. took in exclusion of grandchildren. *Ib.*

5. A. bequeathed all the residue of his property, after the death of his widow, to the brothers and sisters of her and himself, and to their descendants, in such proportions as his wife should by her will appoint. The widow, by her will, gave part of the property to a son of one of her own sisters then living, and another part to a daughter of one of her late husband's brothers then living:—Held, that the will of the widow did not operate as an appointment of the power; and the Court declared that the persons entitled to take the property were those brothers and sisters of the testator and his wife who were living at the death of the tenant for life, and the children of such of them as were dead were entitled to take by way of substitution. *Tucker* v. *Billing*, 2 Jur., N. S., 483.

6. A testatrix bequeathed stock to trustees in trust for her brother R. G. for life, and after his decease in trust for his son J. R.-G., for life, and after the decease of both of them, upon trust for any immediate or direct descendants of her said brother or nephew, who should bear the name of R.-G., for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew, who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G. Both R.-G. and his son J. R.-G. survived the testatrix, and J. R.-G. survived R.-G., but died without ever having had any issue. At the death of J. R.-G. the only descendant of R.-G. who bore the name of R.-G., was a descendant in the female line, C. G. R.-G., and he had assumed the name of R.-G. by royal licence after the death of R.-G.:—Held, that the gift to descendants was not confined to those whose family name or birth name was R.-G., but included descendants who assumed that name. That the gift to descendants was void for remoteness, and that the gift, as well to the charities as to the descendant who had assumed the name of R.-G., failed *Re Roberts*, *Repington* v. *Roberts*, 45 L. T. 450; 19 L. R., Ch. D., 520. Affirming on this point 50 L. J., Ch., 265; 44 L. T. 300

Held, that the limitation to descendants was a gift for life to descendants living at the determination of the life interests and bearing the name of R. G. as joint tenants. *Ib.*

7. A husband, who died in June 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay the testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife and after the payment of all debts and legacies the whole residue of all his remaining property should be divided into twelve portions, and be given to the children of his late aunts "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive . . . and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his death; nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of his wife's jointure. The wife died in 1876.—Held (reversing 5 L. R., Ch. D., 984; 46 L. J., Ch., 530; 37 L. T. 112; 25 W. R. 530), that the substitutionary gift to "descendants" of children of an aunt was not confined to children of those children. *Ralph* v. *Carrick*, 11 L. R., Ch. D., 873; 48 L. J., Ch., 801; 40 L. T. 505.

The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children:—Held, that if the word used in the present case had been "issue" instead of "descendants," the gift over would have prevented the Court from confining the word to children. *Ib.*

1. Upon a gift over, after an estate for life of residue real and personal, to "daughters of B., and their descendants, *per stirpes*, to hold to them, their heirs and assigns, for ever," paying an annuity to L. for her life; B. left three daughters, one of whom survived the testator, and died in the lifetime of the tenant for life without ever having had issue:—Held, that the residuary estate belonged to the two surviving daughters. The words *per stirpes* are to be taken in a distributive sense, and "descendants *per stirpes*" to be considered as words of purchase, giving an absolute estate to the children, who took, not concurrently with their parents, but by substitution. *Dick* v. *Lacy*, 8 Beav. 214; 9 Jur. 21. S. C. *nom. Dick* v. *De Lacy*, 14 L. J., N. S., Ch., 150.

II. GIFT TO "MALE," "ELDEST MALE" DESCENDANTS.

2. A testator having made a provision for the necessitous "male children" of his nephews, and having shown his intention of making it a perpetual charity:—Held, that "male children" meant "male descendants." Held, also, that under the expressions "male descendants," descendants claiming through the male line were alone entitled, and that those males who claimed through a female were excluded. *Bernal* v. *Bernal*, 3 Myl. & C. 559; C. P. C. 55; 7 L. J., N. S., Ch., 115; 2 Jur. 273. And see S. C. 3 Myl. & C. 559. n.

3. The designation of "eldest male lineal descendant".—Held, to be inapplicable to a male person claiming in part through a female. *Oddie* v. *Woodford*, 3 Myl. & C. 584; 7 L. J., N. S., Ch., 117.

4. A testator who had three sons, A., B., and C., directed an accumulation of his property for a certain period, at the end of which the trustees were to divide it into three lots, one of which was to be conveyed to "the eldest male lineal descendant then living of A." When the time for making the allotment arrived, there were two persons who claimed to be entitled to the first lot, a grandson of A.'s eldest son, and a son of A.'s youngest son; the former being "eldest" in line, the latter "eldest" in years among the male descendants of A.:—Held, that the will was not void for uncertainty. *Thellusson* v. *Rendlesham*, 7 H. L. Ca. 429. S. C. *nom. Thellusson* v. *Robarts*, or *Rendlesham* (*Lord*), 5 Jur., N. S., 1031; 28 L. J., Ch., 948; 7 W. R. 563.

Held, also, that on the true construction of the words used by the testator, the grandson of A.'s eldest son was entitled to the first lot. *Ib.*

Under a devise, after the death of the survivor of several persons, to "the eldest male lineal descendant of A." then living, the Court considered itself so fettered by the dicta in the House of Lords, and of Lord Eldon and the judges in *Oddie* v. *Woodford* (3 Myl. & Cr. 584), as to suggest a decree without argument, which excluded male descendants claiming through females, and gave preference to a grandson of A., though younger in age, to a younger son of A., who was in age the eldest male lineal descendant of A. The decree was made accordingly. The Court held the question of uncertainty and intestacy under the will of Mr. Thellusson to be already determined. S. C., before the Master of the Rolls, *nom. Rendlesham* (*Lord*) v. *Robarts*, 23 Beav. 321.

III. DISTRIBUTION. WHETHER PER STIRPES OR PER CAPITA, AND CLASS OF WHEN ASCERTAINED.

5. Under a devise to the descendants of F. T., in a certain district, grandchildren and great-grandchildren take *per capita*. *Crosley* v. *Clare*, 3 Swan. 320.n. S. C. *nom. Crossby* v. *Clare*, Ambl. 397.

6 A testator directed his property to be divided and paid "to the persons being such descendants as next hereinafter mentioned in equal shares among and to the lawful descendants living at the time of my death, of such of the brothers and sisters of my late grandfather as have died leaving lawful descendants; such descendants respectively to be entitled to share the same moneys in a course of distribution *per stirpes* and not *per capita*":—Held, that the words "*per stirpes*," and not "*per capita*" were applicable to the descendants, who were to be classified *secundum stirpes*, or according to their families, and that the property was to be divided into as many shares as there were *stirpes* or families, each *stirpes* or family taking an equal share. *Robinson* v. *Shepherd*, 4 De G. J. & S. 129; 10 Jur., N. S., 53; 12 W. R. 234; 9 L. T., N. S., 527. Affirming 32 Beav. 665.

7. Bequest to the brothers and sisters of A. living at the testator's death, "such descendants to take as tenants in common *per stirpes*, and not *per capita*":—Held, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of A. of whom any descendant was living at the testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of A. respectively living at the testator's death, or having died and left any descendant then living; that the same principle was to be applied to every subdivision, and that no descendant was entitled to any share concurrently with a living ancestor. *Gibson* v. *Fisher*, 5 L. R., Eq., 51; 37 L. J., Ch., 67; 16 W. R. 115.

8. A testator gave the income of a trust fund to his wife for her life, and subject thereto the fund was to be held in trust for such of his cousins (the children of four deceased aunts and two deceased uncles of the testator named in the will) living at the determination of the wife's life interest, and such issue then living (if any) of said cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her, or their death, to take (if more than one) in a course of distribution according to the stock and not according to the number of individuals. At the time of the death of the tenant for life there were living one cousin of the testator (a child of one of the uncles named in the will) and children and other issue of fifteen deceased cousins (children of the other uncle and of the four aunts named in the will):—Held, that the words "according to the stocks,"

applied to the descendants of cousins, and not to the cousins themselves, and that the fund was divisible into sixteen shares. *Robinson* v. *Shepherd* (4 De G. J. & S. 129) preferred to *Gibson* v. *Fisher* (5 L. R., Eq., 1). *Re Wilson, Parker* v. *Wonder*, 24 L. R., Ch. D., 664.

1. Bequest to each of A.'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in existence at my death, to go to their respective descendants:—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v. *Pepper*, 27 Beav. 86.

2. A. bequeathed all the residue of his property, after the death of his widow, to the brothers and sisters of her and himself, and to their descendants:—Held, that the persons entitled to take the property were those brothers and sisters of the testator and his wife who were living at the death of the tenant for life, and the children of such of them as were dead were entitled to take by way of substitution. *Tucker* v. *Billing*, 2 Jur., N. S., 483.

XXI. Gifts to Executors or Legal or Personal Representatives.

See also SETTLEMENT, X. IV. and VIII.

I. *Executors Construed Strictly*, 7689.
II. *Executors Construed Next of Kin*, 7690.
III. *Legal or Personal Representatives Construed Executors*, 7690.
IV. *Legal or Personal Representatives Construed Next of Kin*, 7692.
V. *Legal or Personal Representatives Construed Descendants*, 7693.
VI. *Lapse where Gift to A. or his Executors or Representatives.* See XLII. I. 6 *post.*
VII. *Legacy to virtute officii and when Entitled to Residue Beneficially.* See EXECUTOR AND ADMINISTRATOR, VIII.

I. EXECUTORS CONSTRUED STRICTLY.

3. A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such person or persons as one of them, who was a married woman, should by will appoint, and in default of such appointment "to and for the benefit of her executors or administrators." The lady died without making any appointment:—Held, that her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate. *Att.-Gen.* v. *Malkin*, 2 Ph. 64; 10 Jur. 955.

4. A testator bequeathed a fund to such of his grandchildren who should be living at the death of A., and the executors or administrators of such of his grandchildren as should be then dead leaving a child or children living at the death of A., in equal shares, so that such executors or administrators of any such grandchild so dying, or leaving a child or children as aforesaid, should take the same share as such grandchild would have taken if he had been living at the time of the death of A. One of the grandchildren died in the lifetime of A. leaving a child, and having in his lifetime become bankrupt:—Held, that the share of the deceased grandchild passed, under the will, neither to his executors beneficially, nor to his next of kin, but that the words "executors or administrators" were words of limitation only; and that the share of the grandchild consequently vested in his assignees *Re Seymour*, 1 Johns. 472; 5 Jur., N. S., 1049; 28 L. J., Ch., 765; 7 W. R. 609; 32 L. T 314.

5. A testatrix bequeathed "to the executors or executrixes of A." 100*l.* A. left an executor and two executrixes, who all died in the lifetime of the testatrix:—Held, a bequest to the legal personal representatives of A. to hold on the trusts affecting A.'s estate. *Trethewy* v. *Helyar*, 46 L. J., Ch., 125; 4 L.R., Ch. D., 53. And see *Stocks* v. *Dodsley*, 1 Keen 325.

6. Bequest of personalty in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment, to her executors and administrators:—Held, that the legatee took the capital absolutely. *Devall* v. *Dickens*, 9 Jur. 550.

7. Where a testator bequeathed a fund in trust for his five daughters, share and share alike, for their respective lives, and if any daughter should die without issue, or leaving issue, if such issue should die under twenty-one, then upon trust to divide and pay the share of such daughter immediately, or as soon as could be after her decease, unto and amongst his son and the survivors of his daughters, to whom he gave the same, or to their personal representatives:—Held, that "survivors" must refer to the death of the tenant for life whose share was the subject of division. And that the words "personal representatives" were used in their ordinary sense, and referred to the possible death of one of the survivors between the time of her interest vesting and the time of actual payment. On the death of the last survivor of the five daughters without issue, her entire share ordered to be paid to the executors of the son. *Re Bates's Trust*, 2 N. R. 265; 11 W. R. 768; 9 L. T., N. S., 226.

8. A bequest of personalty to A. for life, with remainder to his issue male and the survivors for their lives, with remainder to the issue female of A. and the survivors for their lives, with remainder "to the executors, administrators, and assigns of the survivors of A., or such issue, male or female, who shall happen to be such survivor," is a bequest to a class, which is necessarily ascertainable within the limits prescribed by the rule against perpetuities, confers an absolute contingent interest in such one of that class as may be the survivor, and is not void for remoteness. *Avern* v. *Lloyd*, 37 L. J., Ch., 489; 5 L. R., Eq., 383; 16 W. R. 669; 18 L. T., N. S., 282.

9. Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators, and assigns:—Held, that the legatees, whether married or unmarried women, were each entitled upon petition, without executing any

formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund. *Holloway* v. *Clarkson*, 2 Hare 521; 6 Jur. 923.

To Executor.] 1. A testator directed his executors to invest 200*l.*, which was to arise from the sale of freeholds, in trust to pay the dividends to his brother W. D. for life, and after his death to pay and assign the same to the executor or administrator of his brother absolutely; W. D. died in the lifetime of the testator:—Held, that W. D.'s administrator took the 200*l.* absolutely and beneficially. *Nurse* v. *Oldmeadow*, 5 L. J., N. S., Ch., 300.

II. EXECUTORS CONSTRUED NEXT OF KIN.

2. A testator gave a legacy of 2,000*l.* to S. B., and, in case S. B. should die in his lifetime, he directed that the legacy should go and be paid to her executors or administrators. S. B. died in the lifetime of the testator, having made a will by which she appointed R. P. her residuary legatee:—Held, upon appeal, that at the death of the testator S. B.'s next of kin were entitled to the beneficial interest in the legacy of 2,000*l.*, and not S. B.'s residuary legatee. *Palm* v. *Hills*, 1 Myl. & K. 470; 2 L. J., N. S., Ch., 142.

3. A testatrix bequeathed certain personal property to trustees in trust for her daughter for life, for her separate use; and after the daughter's decease, upon trust to transfer the fund to the daughter's "executors or administrators, for his, her, or their own use and benefit absolutely." The daughter, who lived separate from her husband, made a will and appointed executors, who, however, did not prove the will, but her husband obtained letters of administration to her effects:—Held, that the wife had no power to dispose of the stock, and that the husband was entitled to the trust fund, to the exclusion of his wife's executors, and also of her next of kin. *Wallis* v. *Taylor*, 8 Sim. 241; 6 L. J., N. S., Ch, 68.

4. Under a gift for the sole and separate use of A., independently of any husband she might marry, during her life, and in case she died without issue, "unto the executors or administrators or other legal representatives of A. of her proper own blood and kindred:—Held, that the next of kin of A. took at her death, the intention being to confine the gift to the family of A. to the exclusion of any husband she might marry. *Re Morgan's Trusts*, 2 W. R. 439.

III. LEGAL OR PERSONAL REPRESENTATIVES CONSTRUED EXECUTORS.

1. In General.

5. "Legal representatives" means "executors or administrators," unless contrary intention is manifest. *Price* v. *Strange*, 6 Madd. 159. And see *Re Cranford's Trusts*, 2 Drew. 230; 28 Jur. 616; 23 L. J., Ch. 625; 2 W. R. 341; 2 Eq. Rep. 553.

6. The words "personal representatives" are to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. *Saberton* v. *Skeels* 1 Russ. & M. 587; Taml. 383.

7. E. compounded with his creditors; his widow, by her will, left a fund to pay the residue of the debts to the compounding creditors, "or their personal representatives;" the administratrix of a deceased creditor is entitled beneficially to his bequest, and not the next of kin, nor residuary legatee of the creditor. *Evans* v. *Charles*, 1 Anstr. 128.

8. The words "personal representative" or the words "legal personal representative" must ordinarily and *primâ facie* be taken to mean "executors or administrators." *Smith* v. *Barneby*, 2 Colly. 728; 10 Jur. 748.

Testator, after devising certain freehold estates in trust for A. in strict settlement, with remainder to B. in strict settlement, with remainder to his own right heirs, gave leasehold and copyhold property (of the nature of personalty) upon trusts similar thereto, yet so that the same should not vest absolutely in any child of a tenant for life, unless such child should attain twenty-one, "and so that in default of any person becoming entitled thereto under this my will, the same shall be in trust for my personal and not my real representative." And the testator gave the residue of his personal estate to his wife, and appointed her sole executrix of his will. Upon the death of all the tenants for life without issue, a question arose as to the devolution of the leasehold and copyhold estates between the next of kin of the testator at the time of his death, his next of kin at the time of the surviving tenant for life, and the representative of the widow:—Held, that the representative of the widow was entitled, to the exclusion of both classes of next of kin. *Ib.*

9. The expressions "personal representatives" and "legal representatives" have in some cases been held to be identical in meaning, but they are not necessarily so. *Kilner* v. *Leech*, 10 Beav. 362; 16 L. J., N. S., Ch., 503; 11 Jur. 859.

10. A bequest of a sum, after the death of S., to such of testator's other children as should be living at her death, equally, if more than one, and if only one to such only child, "and if all his other children should be then dead" (which was the event), then to his personal representatives, with directions to the trustees to transfer accordingly. S. and his other children survived, and were his next of kin at his death:—Held, that their personal representatives, and not his next of kin at S.'s death, were entitled under the ultimate bequest after the death of S. *Nicholson* v. *Wilson*, 14 Sim. 549; 14 L. J., N. S., Ch., 351; 9 Jur. 389.

11. By a gift to "personal representatives" the executors and administrators are *primâ facie* entitled. *Atherton* v. *Crowther*, 19 Beav. 448; 2 W. R. 639.

12. A testator, in 1841, bequeathed 200 guineas to such of the representatives as might be alive at his death of Messrs. P. and H., then both dead, with whom, in 1793, he had had some business by which they were losers to the amount of about 200 guineas:—Held, that the legal personal representatives of P. and H., and not the partners in the firm at

the death of the testator, were entitled; and, secondly, that such representatives took in equal moieties, and not in the proportion of their shares in the partnership. *Leak* v. *M'Dowell*, 33 Beav. 238; 3 N. R. 185.

1. A bequest to the representatives of the late mercantile house of A. and K., or to such persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by testator's father:—Held, claimable by the legal representative of the surviving partner, and not by the parties beneficially entitled to the properties of A. and K. *Kerrison* v. *Reddington*, 11 Ir. Eq. R. 451.

2. A testator, after the death of his daughter, gave real and personal estate to her "legal personal representative or representatives," to hold to them, their "heirs," executors, administrators, and assigns, according to the nature of the property. She left a husband, who took out administration, and an only child:—Held, that the husband took both the real and personal estate. *Dixon* v. *Dixon*, 24 Beav. 129.

3. A husband bequeathed a fund to his wife and four children for their lives, and after the death of the survivor to his four other children for their lives and the life of the survivor, and then the fund was to be divided among "the legal representatives" of the last four, "to be equally divided among them, share and share alike":—Held, that the executors or administrators of the last-mentioned children were entitled, and not their next of kin. *Wing* v. *Wing*, 34 L. T., N. S., 941; 24 W. R. 878.

Words of Limitation.] 4. Testator, by will, directed his executors to place out upon government securities such a sum of money out of the interest thereof as should be sufficient to produce an annuity of 50*l.*, which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Colly. 108; 13 L. J., N. S., Ch., 240; 8 Jur., 265.

5. A testatrix directed the interest of 1,000*l.* stock to be paid to D. for life, and at D.'s decease directed the stock to be transferred to D.'s personal representatives:—Held, that D. took an absolute interest. *Alger* v. *Parrott*, 3 L. R., Eq., 328.

6. A testator directed real estate to be sold, the proceeds to go in equal moieties between A. and B. as tenants in common, and their respective heirs or representatives:—Held, that these were words of limitation, and that the share of A., who predeceased the testator, lapsed. *Appleton* v. *Rowley*, 38 L. J., Ch., 689; 8 L. R., Eq., 139; 20 L. T., N. S., 600.

7. A bequest of residue to be divided equally "amongst all the children of my late cousin E. and my cousin P. and their lawful representatives" is a bequest to the children of E. and to P. himself, and not to the children of P. *Lugar* v. *Harman*, 1 Cox 540; 2 Bro. C. C. 85.

2. Gift by Substitution after a Life Estate.

8. "Legal representatives" mean executors or administrators, unless contrary intention is manifest. *Price* v. *Strange*, 6 Madd. 159.

9. Reversionary bequest to the testator's sons by name, and in case of the decease of all, or any of them, in the lifetime of the tenant for life, to their legal personal representatives:—Held, to take effect in favour of their executors, and not in favour of their next of kin, although the words "executors and administrators" occurred in other parts of the will. *Hinchcliffe* v. *Westwood*, 2 De G. & Sm. 205; 17 L. J., N. S., Ch., 167; 12 Jur. 618.

10. In a bequest to brothers and sisters or their representatives in equal shares, representatives mean executors or administrators, and not the next of kin. *Chapman* v. *Chapman*, 33 Beav. 556.

11. A testator gave 500*l.* upon trust to pay income thereof to a daughter for life, and if she died without issue, then to pay the same sum and interest to his four sons (naming them), share and share alike; but in case any of his sons should be then dead, the testator directed that the part or share of him or them so being dead should be paid to his or their child or children, share and share alike if more than one; or if but one, then to such only child; but if there should be no child, then to his or their legal representatives. One of the sons died a bachelor, and the others leaving children, some of whom died in their parents' lifetime; others survived their parent, but died before the tenant for life; and others survived both their parent and the tenant for life:—Held, that legal representatives meant executors and administrators. *Re Turner*, 2 Dr. & Sm. 501; 34 L. J., Ch., 660; 13 W. R. 770; 12 L. T., N. S., 695.

12. A. bequeathed stock to his aunt for life, and, after her death, to his father, "and in case of his death then to devolve on his brothers and sisters, or their representatives." The father and two brothers predeceased the aunt:—Held, that "representatives" meant executors or administrators, and not next of kin, and that they took as trustees, and not beneficially. *Re Henderson*, 28 Beav. 656.

13. Testator gave a life interest in certain funds, with remainder "to be equally divided between all my cousins german now existing, or their representatives":—Held, there being nothing in the rest of the will to control the primary legal meaning of the word representatives, that it meant executors, and not next of kin; and the fund went to the executors or administrators of the testator's cousins german, as part of their personal estate. *Re Crawford's Trusts*, 2 Drew. 230;

18 Jur. 616; 23 L. J., Ch., 625; 4 W. R. 341; 2 Eq. Rep. 553.

Investigation of the authorities, and general doctrine on the construction of the word representatives in a will. *Ib.*

1. Legacy given to A., with a declaration that if he should depart this life in the lifetime of the testator the legacy "should not lapse, but should go to or devolve upon his personal representative":—Held, A., having died in the testator's lifetime, that the legacy went to A.'s personal representative, who was also his residuary legatee. *Hewetson* v. *Todhunter*, 1 W. R. 78; 22 L. J., Ch., 76.

2. A., by his will, directed his executors to pay over all the residue of his property to B., but in case of B.'s death, then to pay over the same to the "executors or executrixes which B. by her will might appoint." B. died before A., having by her will given the residue of her property to C., and appointed D. her executrix:—Held, on a bill filed by D. against C., that D. took the residue of A.'s estate as part of the personal estate of B., and that he was to hold it upon the trusts and for the purposes of B.'s will. *Long* v. *Watkinson*, *Long* v. *Long*, 21 L. J., N. S., Ch., 844; 16 Jur. 235.

Where a bequest is made by A. to the executors of B., such executors hold it in trust, and to be administered as part of B.'s assets. The persons who take it beneficially take as *cestuis que trustent*, and not as *personæ designatæ*, and it may belong either to the creditors or the pecuniary or residuary legatee or next of kin of B., according to the circumstances. S. C. 17 Beav. 471.

See also preceding Subdivision.

IV. LEGAL OR PERSONAL REPRESENTATIVES CONSTRUED NEXT OF KIN.

1. Where Direction to Distribute.

3. A testatrix gave real and personal estate to trustees in trust for M. for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of M., and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representative of M. M. appointed only a part of the personal estate. The next of kin, and not the executors, were held to be entitled to the unappointed part of the personal estate. *Baines* v. *Ottey*, 1 Myl. & K. 465; 1 L. J., N. S., Ch., 210.

4. E. D., by settlement, declared that trustees should stand possessed of 4,000*l.*, as to a moiety for his daughter, A. J. D., and her children; and as to the other moiety for his other daughter, H. D., and her children; and that if both A. J. D. and H. D. should die without leaving issue living at the time or respective times of their decease, then that the trustees should divide the trust moneys among the personal representatives of E. D. in a legal course of administration. Both daughters died without having been married. E. D. did not leave a widow:—Held, that the persons intended to be benefited were the next of kin of E. D. living at his death. *Wilson* v. *Pilkington*, 16 L. J., N. S., Ch., 169; 11 Jur. 537.

5. The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life; and directed that after her death his trustees should sell his real estate, "and pay, distribute, and divide" the money thence arising and the money at interest; and he thereby gave and bequeathed one-third thereof unto his cousin J. S. "if he should be then living; but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike." J. S. died in the lifetime of the testator's widow, leaving a widow and children.—Held, that upon the death of J. S. his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common. *Smith* v. *Palmer*, 7 Hare 225; 13 Jur. 94.

6. Stock was bequeathed in trust for testator's brother and the brother's wife for their lives successively, and after their decease in trust to be divided equally, share and share alike, amongst the testator's nephews and nieces, children of the brother then living, or their legal personal representatives:—Held, that the representatives of nephews and nieces dying in the lifetime of the surviving tenant for life took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces. *King* v. *Clearland*, 4 De G. & J. 477; 28 L. J., Ch., 835; 4 Jur., N. S., 1044. Affirming 26 Beav. 166; 28 L. J., Ch., 76; 4 Jur., N. S., 702.

7. The words "legal representatives" held to mean next of kin, not executors or administrators. *Walker* v. *Camden* (*Marquis*), 16 Sim. 329; 17 L. J., N. S., Ch., 488; 12 Jur. 932.

8. A devise of real estate to a testator's widow for life, with remainder to his son if he should attain twenty-one; but in case he should die in the lifetime of his mother, then he directed his real estate to be sold, and one moiety of the proceeds he gave and bequeathed unto and equally amongst his (the testator's) legal personal representatives, in such and the like manner as if the same had been to be paid under the Statute of Distributions. He gave the other moiety unto and equally amongst the legal personal representatives of his wife. He left his widow and son alone surviving him. The son died in the lifetime of his mother:—Held, that under the gift to his legal personal representatives, the widow took one-third and the son two-thirds of the moiety. *Holloway* v. *Radcliffe*, 23 Beav. 163; 3 Jur., N. S., 198; 26 L. J., Ch., 401; 5 W. R. 271.

2 Where Direction to Pay, and Executors Appointed.

1. Testator gave 450*l.* to trustees, their executors, etc., in trust for his son for life, and after his son's decease to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son; and he gave the residue of his personal estate to his son, his executors, etc.:—Held, that the words "legal representatives" meant "next of kin." *Walter* v. *Makin*, 6 Sim. 148; 2 L. J., N. S., Ch., 173.

2. Testator bequeathed 700*l.* to his daughter's husband, his executors, etc., in trust, to pay the interest to his daughter for her separate use for life, and after her death to such persons as she should appoint by will, and in default of appointment to her personal representatives. The daughter died without having made any appointment:—Held, that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson* v. *Smith*, 6 Sim. 47; 2 L. J., N. S., Ch., 76. S. P. *Styth* v. *Monro*, 6 Sim. 49.

3. Money settled in trust, to be paid according to the appointment of A., and in default thereof to his legal representatives, according to the course of administration. A., by will, in pursuance of the power, appoints to his legal representatives, according to the course of administration, and makes a residuary legatee, whom he appoints one of his executors. Upon the will, the next of kin are entitled. *Jennings* v. *Gallimore*, 3 Ves. 146.

3. Effect of Explanatory Words.

4. Leasehold property bequeathed in remainder, in trust for a child *en ventre*, if a son for life, and after his decease for such of his issue male as should be his heir-at-law at his death; if no such then living, for such persons as should then be the legal representatives of the testator. A son being born and dying without issue, the limitation over was established in favour of the next of kin according to the statute at the time of the distribution. *Long* v. *Blackall*, 3 Ves. 486.

5. A fund was settled upon a wife for life, with remainder to her husband for life, with remainder to her children, with remainder in default of children to the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that "legal personal representative or representatives" meant next of kin according to the Statute of Distributions. *Robinson* v. *Evans*, 29 L. T., N. S., 715; 43 L. J., Ch., 82; 22 W. R. 199.

6. A testator bequeathed a legacy of 2,000*l.* upon trust for a married daughter, F., for life, then for her husband for life, and after the death of the survivor for such persons related by blood to F. as she should appoint; and in default of appointment to transfer the same to such persons as would be the personal representatives of F. in case she had died sole and unmarried. By a codicil the testator, in reciting the bequest, referred to these trusts as being trusts for the benefit of his daughter's relations and next of kin. F. died in testator's lifetime:—Held, that by the personal representatives of F. were meant the persons who were her statutory next of kin at the testator's death. *Re Grylls*, 6 L. R., Eq., 589.

7. An appointment to the grandchildren of persons named, with a direction that in the event of their death their shares should, for the purpose of transmission, and not as conferring an interest in such deceased grandchild, go and belong to the person or persons who would be entitled thereto in case such share had formed part of the personal estate of such deceased grandchild immediately before his or her death, and to the intent that the same might follow the destination of such personal estate, but only as a disposition by virtue of the deed of appointment:—Held, a gift of each deceased grandchild's share to the persons who would have been entitled to his personal estate if he had died intestate. *Jackson* v. *Crick*, 19 W. R. 547.

8. Bequest of three several sums to the testator's three daughters for life, and in default of appointment the same to go and be paid to their next personal representatives:—Held, that by reason of the word "next" the ultimate limitation could not signify executors or administrators; and that the nearest of kin, and not the next of kin according to the Statute of Distributions, took as joint tenants. *Stockdale* v. *Nicholson*, 36 L. J., Ch., 793; 4 L. R., Eq., 359; 15 W. R. 986; 16 L. T., N. S., 767.

4. Substitutionary Gift.

9. Bequest to A. or his legal representatives, A. being dead at the date of the will (which the testator did not know), having bequeathed his property on certain trusts:—Held, that A.'s next of kin, according to the Statute of Distributions, were entitled, to the exclusion of his legatees or executors. *Cotton* v. *Cotton*, 2 Beav. 67; 8 L. J., N. S., Ch., 349; 3 Jur. 886.

10. Bequest of residue to certain persons, and if they should die in the lifetime of the testatrix to their legal representatives. One died; his next of kin shall take the share of the residue; not his executor beneficially, or his residuary legatee. *Bridge* v. *Abbott*, 3 Bro. C. C. 224.

V. LEGAL OR PERSONAL REPRESENTATIVES CONSTRUED DESCENDANTS.

11. The word "representatives" construed to mean "descendants," the context of the will requiring it. *Styth* v. *Monro*, 6 Sim. 49.

12. By a gift "to personal representatives" the executors and administrators are *primâ facie* meant. *Atherton* v. *Crowther*, 19 Beav. 448; 2 W. R. 639.

Under a bequest to "personal representatives" of children to take *per stirpes*:—Held, first, that their executors and administrators were not entitled. *Ib.*

Held, secondly, principally upon the terms of the gift over to the testator's "next of kin," if there should be no "representatives," that the descendants of the children were intended. *Ib.*

13. Devise to A. and his wife for life, and

after the death of the survivor upon trust to sell and apply the produce to and among all and every the same child or children of A. by his said wife, and their representatives equally; the fund belongs to the children surviving the testator, but the issue of a daughter who died in the life of A. are entitled as representatives against the claim of their father as administrator. *Horsepool* v. *Watson*, 3 Ves. 383.

XXII. Gifts to Family.

See also POWER, XVII. VI

I. WHEN CONSTRUED CHILDREN.

1. Under a disposition by will to A.'s and B.'s families, the children are entitled, exclusive of their parents, and *per capita*. *Barnes* v. *Patch*, 8 Ves. 604.

2. Testator gave all his property, both real and personal, to his wife for life, "and after the death of my wife my nephew is to be considered as heir to all my property; but I direct that whatever portion of my property may hereafter be possessed by him shall be secured by my executors for the benefit of his family": —Held, taking the whole of the will together, that the testator by the word "family" meant the children but not the wife of his nephew, and that the property ought to be settled on the nephew for life, and on his children after his death. *White* v. *Briggs*, 15 Sim. 17; 9 Jur. 678.

3. A testatrix in her will used the following expression: "Observing that F. Beales and his family are my residuary legatees, for all but cash, or moneys so called." F. Beales had nine children living at the date of the will and at the testatrix's death, and the testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds and money, in her house and at her bankers:—Held, that by "Francis Beales and his family" the testatrix meant Francis Beales and his children, and that they took the note, annuities, and bonds, as joint tenants, those articles being neither cash, nor moneys so called. *Beales* v. *Crisford*, 13 Sim. 592; 13 L. J., N. S., Ch., 26; 7 Jur. 1076.

4. A testatrix bequeathed her house, furniture, etc., to A. for life, and directed that the same should afterwards remain in the family of A. A. died, leaving five children:—Held, that the children of A. took as tenants in common. *Owen* v. *Penny*, 14 Jur. 359.

5. Testator bequeathed several legacies, and among others to S. W. 14,000*l.*, "and to the latter gentleman's family 6,000*l.*" S. W. had six children, all living at the date of the testamentary instrument and at the death of the testator, and no other issue:—Held, that such six children were, as joint tenants, exclusively entitled to the legacy of 6,000*l.* *Wood* v. *Wood*, 3 Hare 65.

6. A legacy to three families equally; the children of the families shall take *per stirpes*, and not *per capita*. *Alexander* v. *Douglas*, Romilly's Notes of Cases 93.

7. A bequest to the family of G. held not to be void for uncertainty; but construed to be a gift to the children of G. (an uncle of the testator, known to and on terms of intimacy with him), as joint tenants, and not to include the parents or their grandchildren. *Gregory* v. *Smith*, 9 Hare 708.

8. The primary meaning of the word "family" is "children," and there must be some circumstance, either in the will or in the situation of the parties, to prevent that construction. *Re Terry*, 19 Beav. 580.

Legacies were given to A. and B, and in case they should predecease the testatrix, to their respective "families." A. having died before the testatrix:—Held, that her children alone took under the word "family." *Ib.*

9. Testator bequeathed the residue of his personal estate to trustees, in trust for his wife during her widowhood, and, after her death or second marriage, in trust to be divided, share and share alike, among his five sisters and their respective families, if any:—Held, that each sister and her children living at the testator's death were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue as joint tenants. *Re Parkinson's Trust*, 1 Sim., N. S., 242; 20 L. J., N. S., Ch., 224; 15 Jur. 165.

10. A. devised all the estates before specified to his sister's "family," and proceeded thus: "I give to D. (who was the sister's son) my Dalton estate, and the rest to be sold and divided equally":—Held, that the children of the sister, including D., took the produce of the sale equally. *Reay* v. *Rawlinson*, 29 Beav. 88; 7 Jur., N. S., 118; 30 L. J., Ch., 330.

11. The word "family" construed as children, and not descendants of a testator's children. *Burt* v. *Hellyar*, 14 L. R., Eq., 160; 41 L. J., Ch., 430; 26 L. T., N. S., 833.

A devise of freeholds to C. and his heirs, and "in case he should die leaving no issue, then equally between my surviving children or their families," is a gift (on the death of C. without issue) to the children of the testator, and the children of such of them as were dead, as to such children in joint tenancy. *Ib.*

12. The primary meaning of the word "family" in a will is "children." *Pigg* v. *Clarke*, 3 L. R., Ch. D., 672; 45 L. J., Ch., 849; 24 W. R. 1014.

A husband directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:—Held, that under the word "family" children alone could take. *Ib.*

13. A testamentary gift by a married man to his "family" should be read as a gift to his "children" to the exclusion of his wife.

Re Hutchinson, 8 L. R., Ch. D., 540; 39 L. T., N. S., 86; 26 W. R. 904.

1. A testator bequeathed to his executors a sum of 450*l.*, which he directed should be held by them in trust for his brother James's family, and should be by his said executors expended for the benefit of such family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court:—Held, that the word "family" in the above bequest meant "children," and that the parents were not entitled to any share in the fund. *Re Mulqueen's Trust*, 7 L. R., Ir., 127.

II. WHEN CONSTRUED NEXT OF KIN.

2. Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin; but if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant* v. *Lynam*, 4 Russ. 292; 6 L. J., Ch., 129.

3. A testator gave personalty to trustees for his wife for life, "and at her demise let the principal return to the good of my family, whoever survives the longest":—Held, a remainder vesting in the next of kin of the testator at the time of his decease. *Re Maxton*, 4 Jur., N. S., 407.

WHEN USED IN OTHER SENSES.

4. Meaning of the word "family" considered. *Elgood* v. *Cole*, 17 W. R. 953; 21 L. T., N. S., 880.

5. Where devise is to the stock or family, the Court confines it to the head of the family. *Crossly* v. *Clare*, Ambl. 397. See S. C. *nom. Crosley* v. *Clare*, 3 Swan. 322.n.

6. The word "family" admits of a variety of applications, and the construction to be put upon it, in a particular will, must depend upon the intention to be collected from the whole context of the will. Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust, that, at his wife's decease, the whole of it, as well freehold as personal, should be equally divided among his children, it was held that the testator, in the words, "my family," intended to comprise his wife, and, as to the testator's property devised after his wife's decease, to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate. *Blackwell* v. *Bull*, 1 Keen 176; 5 L. J., N. S., Ch., 251.

7. Testator, by his will, gave personal property to his wife absolutely, for her own use and benefit. By a codicil, which was in the form of a letter to his wife, he said, "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one not of your family should be the better for what, I feel confident, you will so well direct the disposal of":—Held, that the word "family" was not confined to children, but included descendants in every degree; and that the wife was entitled to the property absolutely, and not merely for her life, with a power in the nature of a trust for her children. *Williams* v. *Williams*, 1 Sim., N. S., 358; 20 L. J., N. S., Ch., 280; 15 Jur. 715.

8. A. B., in September 1842, devised and bequeathed, in trust for his wife, all his real and personal estate, except the real and personal estate which he might derive from his aunt, M. A. T., or any of her family. At the time of making his will, A. B. was entitled in remainder, under his maternal grandfather's will, to the C. estate, subject to the life estate of his aunt, M. A. T., and failure of her issue. In August 1843, M. A. T. died without issue, and thereupon A. B. became absolutely entitled in possession to the C. estate. He died in November 1843. Upon petition presented by his widow for a declaration that she was entitled to a life interest in the C. estate:—Held, that A. B. had included the C. estate in the exception under the words, "which he might derive from M. A. T. or any of her family":—Held, also, that the father of M. A. T. was a member of her family. *James* v. *Wynford Lord*), 18 Jur. 868; 23 L. J., Ch., 767; 2 W. R. 607; 3 Sm. & G. 350.

IV. DEVISES OF REAL ESTATE.

9. A testator directed his freehold estate at A. to be equally divided between his two sons, who were to enjoy the interest thereof, and then go to their respective families according to seniority:—Held, that the two sons took as tenants in common in tail general, in equal undivided shares. *Lucas* v. *Goldsmid*, 7 Jur., N. S., 719; 30 L. J., Ch., 935; 9 W. R. 759; 4 L. T., N. S., 632; 29 Beav. 657.

10. A. devised to B. in tail, and for want of issue he empowered her to dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate the estate from his "nearest family." B. appointed to her husband for life, with remainders over:—Held, that B. had a power of appointing to the nearest family only, that nearest family must be construed "heir," and that the appointment to the husband was void. *Griffiths* v. *Evans*, 5 Beav. 241; 11 L. J., N. S., Ch., 219.

11. Devise in fee to a brother of the testatrix, "on the condition that he never sells it out of the family":—Held, that "the family" meant the blood relations of the devisee, and that the condition was valid in law as a partial restraint on alienation. *Re Macleay*, 44 L. J., Ch., 441; 20 L. R., Eq., 186; 23 W. R. 718; 32 L. T., N. S., 682.

V. OTHER CASES.

12. A testator gave the residue of his estate to be equally divided among his two daughters,

their husbands, and families:—Held, that the daughters took absolutely as tenants in common, the words "husbands and families" being rejected. *Robinson* v. *Waddelow*, 8 Sim. 134; 5 L. J., N. S., Ch., 350.

1. A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the estate to an illegitimate son of one of the testator's sons:—Held, that the gift was valid. *Lambe* v. *Eames*, 6 L. R., Ch., 597; 40 L. J., Ch., 447; 25 L. T. 175; 19 W. R. 659. Affirming 40 L. J., Ch., 15.

2. Gift to A. and B. for the good of their families:—Held, that A. and B. took absolutely as tenants in common. *Alexander* v. *Alexander*, 4 W. R. 470; 2 Jur., N. S., 898. Affirmed 5 W. R. 28; 6 De G. M. & G. 593; 3 Jur., N. S., 28.

XXIII. Gifts to Heirs.

See also FEE SIMPLE—FEE TAIL—SETTLEMENT, X. v.

I. HEIR AT COMMON LAW OR IN GAVELKIND.

3. A testator seised of lands in common socage, and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use; and after her decease, devised his real estate to his then male heir and his heirs, in strict tail male:—Held, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law. *Thorp* v. *Owen*, 2 Sm. & G. 90; 18 Jur. 641; 23 L. J., Ch., 286; 2 Eq. Rep. 392; 2 W. R. 208.

4. Devise of leaseholds of gavelkind premises of inheritance (in one gift) to the "right heirs" of the testator:—Held, that the heir-at-law was entitled. *Sladen* v. *Sladen*, 8 Jur., N. S., 1075.

5. A testator made devises of gavelkind lands for lives and in tail, with remainder to his right heirs:—Held, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs. *Garland* v. *Beverley*, 9 L. R., Ch. D., 213; 47 L. J., Ch., 213; 26 W. R. 718; 38 L. T., N. S., 911.

II. HEIR MALE.

6. A. devises lands in trust, after debts paid, to convey the premises to the heirs male of the body of B.; the testator's great-grandfather C. is the heir male of the body of B., but not heir general, there being a daughter of an elder brother who is heir general:—Decreed trustees to convey to C. *Newcomen* v. *Barkham*, 2 Vern. 729; Pre. Ch. 442, 461; Gilb. Eq. Rep. 116.

7. On construction of a devise:—Held, that the words "heirs male of the body of his great-grandfather" are good words of purchase to pass the estate to him who is heir male, though not heir general. *Brown* v. *Barkham*, 1 Stra. 35; 2 Eq. Ca. Abr. 215, pl. 14.

8. Heir male takes by purchase, though he is not heir general from the manifest intention of the will. *Newcoman* v. *Bethlem Hospital*, Ambl. 8.

The general rule is, that a person who claims as heir male to another by purchase must be complete heir male; but in the case of a devise there may be exceptions to this rule from manifest intention of the testator. *Id.* 785.

Where there is a devise to the heirs male of the body of any person, he shall take an estate tail. *Id.* 793.

9. Where a person may take by the name of heir, though not heir general. *Starling* v. *Ettrick*, Pre. Ch. 54.

10. One seised in fee, devised land to his granddaughter for life, remainder to his right heirs male for ever, and dies, leaving his granddaughter heir-at-law, and his deceased brother's son his next heir male; the devise of the remainder is void. *Dawes* v. *Ferrers*, 2 P. W. 1; Pre. Ch. 589.

III. HEIR OF A PARTICULAR NAME.

11. A. devised his estates to B., his son, for life, remainder to the first and other sons of B. in tail, remainder to his daughters as tenants in common, remainder to C. for life, remainder to D., the son of C., if living at C.'s death, for life, remainder to the first and other sons of D. in tail, remainder to the male heir for the time being entitled to a certain family estate, remainder to the first and other sons of such male heir, remainder to the testator's own right heirs of his name; and he directed the residue of his personal estates to be laid out in lands to be conveyed to the same uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will, but by his will he directed that certain real and personal estates should be conveyed and assigned to the trustees under the will of A., upon the trusts of that will or such of them as could then be executed;

adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate; and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. On the death of B. without issue, C. entered into possession of the real estate devised by both wills, and the personal estate bequeathed by the will of B. At the death of C., D. entered into possession of the same real and personal estate. D. died without issue, and at his death there was no male heir entitled to the said family estate:—Held, that the ultimate limitation in the will of A. to his right heirs of his name vested at his death and not at the death of D.; that the co-heiresses-at-law of B. (or the parties claiming under them) were entitled to the real estate so devised by the wills of A. and B.; that inasmuch as the estates were made equitable by the will of B., the Court might properly send a case to a court of law, to try at the same time the right under the will of A. as well as under the will of B.; that the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into and to have descended as real estate. *Wrightson* v. *Macaulay*, 4 Hare 487; And see S. C. at law, 14 Mees. & Welsb. 214; 15 L. J., N. S., Exch., 121.

1. A testator having devised, after two life estates, "to my own right heirs of the name of H. T., if any such there shall then be":—Held, that a great-great-nephew named H. T., not being absolutely his right heir, though grandson of the right heir, did not take under the devise on the expiration of the life estates. *Thorpe* v. *Thorpe*, 8 Jur., N. S., 871; 10 W. R. 778.

IV. HEIR EX PARTE MATERNÂ.

2. One seised in fee, as heir of the mother's mother, devises the land to trustees in fee, in trust to pay several annuities, and the residue to go to the testator's right heirs on his mother's side for ever; the heirs of the mother's mother's side entitled to the estate and surplus of the profits after the annuities paid. *Harris* v. *Lincoln* (*Bishop*), 2 P. W. 135.

Parol evidence admitted to prove which heir was intended, viz., whether the heir of the mother's mother's side, or the heir of the mother's father's side. *Id.* 136.

3. F., having an estate which came to her *ex parte maternâ*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, after the deduction of 3,500*l.* to uses which vested in the plaintiff A., and after payment of 1,000*l.* to G., to pay the residue of the purchase money to the three defendants, H.; by codicil, she gave the plaintiff, her husband, a power of appointing the 3,500*l.* in case A. should marry without his consent. G. died, living the testatrix, before the codicil made, but F., in the codicil, took no notice thereof. The 1,000*l.* is real, not personal, and shall not go to the executors of G. (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase money, but to the heir-at-law *ex parte maternâ* (the side from which the estate came). *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128.

4. H. devised all his freehold and copyhold estates to D., his heirs and assigns, upon trust to sell certain specified parts thereof, and to apply the proceeds as therein mentioned; and as to all the rest, residue, and remainder of such real estate, upon trust to pay the rents, etc., to A for life, and after her death, upon trust to convey such residue to such person as should answer the description of his H.'s heir-at-law. At the time of H.'s death he was seised of certain copyholds not specifically mentioned in the will, which had descended to him *ex parte maternâ*. On the question between the heir-at-law and the heir *ex parte maternâ* of the testator, as to who was entitled to those lands:—Held, that the descent was broken by the devise of the whole fee-simple to a trustee upon trust to convey to the testator's heir; the trustee was bound to convey to the person who was heir of the testator according to the common law. *Davis* v. *Kirk*, 2 Kay & J. 391; 2 Jur., N. S., 875.

5 Under a residuary disposition to the testator's right heirs on the part of his mother, his sister, and a nephew by a deceased sister, were held entitled against remoter relations claiming on the ground of an express provision, by an annuity for the separate use of the sister. *Forster* v. *Sierra*, 4 Ves. 766.

6. Devise and bequest of real and personal estate to trustees, upon trust for the testator's daughter, for her life (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and, in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns *ex parte maternâ*, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter:—Held, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir *ex parte maternâ* was the heir at the death of the testator, and that the daughter was such heir; and the Court directed a conveyance to her accordingly. *Rawlinson* v. *Wass*, 9 Hare 673; 16 Jur. 282.

7. A testator directed his household furniture, etc., to be sold, and the produce, with other moneys, to be laid out in stock, the interest to be paid to his wife for her life, and after her death the stock to be sold, and the half of the produce to be paid to C., eldest son of his niece E., and the other half to be divided equally between the children of E. Secondly, he left all stock, etc., of which he should die possessed, to his wife during her life, and after her death he directed the same to be sold, and 3,000*l.* of the produce to be paid to C., and the remainder to be divided equally beween all the other children of his niece E., and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one-half to go to C., and the other half to be divided equally between all

the other children of his niece E., and he appointed an executor of his property in France; and he directed that his executors should not be liable for any loss which might happen in placing out his property according to the direction of his will, except for wilful neglect; and in case C. should die before he attained twenty-one, he directed that the said property and effects should go to his (the testator's) nearest heirs on his mother's side equally. E., the testator's niece, was his nearest heir both on his father's and mother's side, and his next of kin. C. died under age:—Held, that E. though heir and next-of-kin, both on the father's and mother's side, took H. C.'s share under the third clause. *Re Willomier*, 16 Ir. Ch. R. 389.

Held, also, "my said property and effects" in the third clause did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to C. *Ib.*

Held, secondly, that it applied to all the property which C. would have taken, and was not confined to the third clause. *Ib.*

V. HEIR BY ACKNOWLEDGMENT

1. The words in a will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of M.":—Held, to be an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. *Parker* v. *Nickson*, 1 De G. J. & Sm. 177; 32 L. J., Ch., 397; 1 N. R. 298; 9 Jur., N. S., 451; 11 W. R. 533; 7 L. T., N. S., 813.

A codicil contained the following expression: "T. N., my second cousin, is my next of kin and heir-at-law, as my brother J. is dead, and has left no issue":—Held, that it could not be inferred from this that the testator was ignorant of the state of the family of another brother, who had left issue. *Ib.*

VI. HEIR CONSTRUED AS A PERSONA DESIGNATA.

2. Devise to the heirs male of S. begotten; S. having a son, and the testator taking notice that S. was then living, a sufficient description of the testator's meaning, and such son shall take, though, strictly speaking, he be not heir. *Darbison* v. *Beaumont*, 1 P. W. 229; Fortesc. 18.

3. Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family":—Held, an estate for life only, with remainder in trust for the devisor's heir, as *persona designata*. *Wright* v. *Atkyns*, 17 Ves. 255. Affirmed 19 Ves. 299. See also S. C. Coop. 111; 1 Ves. & B. 313; T. & R. 143.

4. Lands are limited to the second son in fee, provided that, if the eldest son die without issue, the second son should, within six months after such death of the eldest son, pay 1,500*l.* to the sister, or in default thereof the lands should go to the sister and her heirs. The eldest son dies without issue; the sister dies within the six months; her heir, and not her executor, shall have the benefit of this devise over. *Winchelsea* v. *Wentworth*, 1 Vern. 402.

5. A man having mortgages, one of which was a mortgage in fee of lands in D., on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, etc. One of the daughters dies; her share of the land in D. shall go to her heir, and not to her administrator. *Noys* v. *Mordaunt*, 2 Vern. 582. And see *Forrester* v. *Cotten*, Ambl. 388; 1 Eden 532. But see 1 Swan. 408 n.

6. Construction of a will, giving to the testator's daughter by the description of heir under his will the legacy of a legatee, who died during the testator's life, by way of special substitution, not merely by lapse to her, as the residuary legatee. *Rose* v. *Rose*, 17 Ves. 347.

7. Where in a will the word "heir" is used in a popular sense as a word of description, so as that the capacity to inherit is not of the essence of the description, the want of capacity to inherit is immaterial if the person meant is otherwise ascertained. *Rittson* v. *Stordy*, 3 Sm. & G. 230; 1 Jur., N. S., 771.

8. An infant *in ventre sa mere*, under a devise to heirs of the body of the devisor, begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse* v. *Yerworth*, 3 Swan. 608.

9. A testator gave a legacy of 2,000*l.* stock to his two daughters, each of them 1,000*l.*, the interest to be paid to them in equal shares for life; the rest of his property to his children in equal proportions. By a codicil he directed that, after the decease of his two daughters, "the property for which they are to receive during their lives the interest, which is to be for their sole and separate use, independent of any connections they may form, the stock shall become the joint property of the lawful heirs of my said children and executors in equal proportions, viz., one-fourth part to the heirs of my daughter Nancy; one-fourth part to the heirs of my daughter Lydia; one-fourth part to the heirs of my son John; one-fourth part to the heirs of my daughter Sarah":—Held, that the gift was a tenancy in common, and that on the death of Sarah the moiety of the legacy became distributable in four equal shares to the heirs of the parties named as *personæ designatæ*. *Hansley* v. *Wills*, 14 L. T., N. S., 162.

10. The words "next heir" occurring in a will in a bequest of an annuity for life to be enjoyed by the next heir to a certain title and estate:—Held, by reference to the context, not to have been used in their strict sense, but to mean the person next presumptively entitled to succeed to the title and estate. *Dormer* v. *Phillips*, 4 De G. M. & G. 855.

Lord Dormer by will gave successive estates for life, with remainder in tail male, in his mansion and hereditaments to E. P. D., J. T. D., J. D., R. D., C. D., M. D., and R. D.; with the ultimate remainder to his own right heirs. The testator by a codicil gave to J. T. D., "his next heir after the death of E. P. D. without issue, an annuity of 150*l.* for life,

to become due from the day of the testator's death; but in case he should become possessed of the title and estate, then the annuity should be paid to his next male heir for life, and so on successively to all the sons of the testator's brother J. D., so that the next heir to the title and estate should always enjoy this annuity. To his cousin R. D., eldest son of J. D., 50*l.* a year, from the day of the testator's death, for life, to devolve to his next brother, and so on, in case of his becoming possessed of the annuity of 150*l.*" The annuity of 50*l.* was paid up to 1826, when E. P. D., the first tenant for life, died without issue, and J. T. became Lord Dormer, and C. D. became next heir after him, and the annuity of 150*l.* was paid to him till 1852, when he died, and M. D., son of J. D., the testator's brother, claimed it, as also did J. B. D., son of J. T. Lord Dormer, and the bill was filed to determine that question:—Held, that neither the plaintiff nor the son of J. T. Lord Dormer was entitled, the annuities having both determined. S. C. 3 W. R. 92, 337; 3 Drew. 39; 24 L. J., Ch., 168.

See also IX. *infra.*

VII. HEIRS, HEIRS OF THE BODY, CONSTRUED CHILDREN.

1. The word "heirs" in a will construed "children" to take a legacy. *Loveday* v. *Hopkins*, Ambl. 273.

2. "Heirs" read "issue" on the general construction of a will. *Garratt* v. *Cockerell*, 1 Y. & Coll. C. C. 494; 6 Jur. 909.

3. Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body, share and share alike. The sister had five children living at the testator's death:—Held, from the context of the will, that she took for life, with remainder to her children as tenants in common. *Symers* v. *Jobson*, 16 Sim. 267.

4. Where testator's intent appears plain, Court will construe the words "heirs of the body" to be words of purchase. *Bagshaw* v. *Spencer*, 2 Atk. 580.

"Heirs of the body" have at law been considered as words of purchase, even in a deed. *Ib.*

On the construction of Serjeant Maynard's will heirs of the body were held to be in the sense of the first and every other son. *Id.* 582.

5. Devise to the testator's wife, after her decease to the heirs of her body, share and share alike, and in default of issue to be lawfully begotten by him, to be at her own disposal. He dies, and leaves six children by his said wife:—Held, that the wife took an estate for life only, and that each of the six children took a fee-simple in remainder, expectant on the determination of the mother's life estate, in one-sixth part as tenant in common. *Gretton* v. *Haward*, 1 Meriv. 448.

6. The word "heirs" in a will:—Held, to be equivalent to children. *Swan* v. *Bowden*, 11 L. J., N. S., Ch., 155.

7. Devise of freeholds to six persons, equally, for life, and after the death of the survivor to sell, "and the money to be equally divided amongst their several heirs":—Held, that their children, and not their heirs-at-law, were intended. *Bull* v. *Comberbach*, 25 Beav. 540; 4 Jur., N. S., 526.

8. A testator gave his residuary real and personal estate to his wife for life, and after her decease to his brothers T. and E., "or their heirs in proportion to the number of children each might have then living, share and share alike." At the death of the wife both the brothers were dead; and there were then living four children of T. and two of E.—Held, that the word "heirs" meant children, and that the residue was divisible in sixths amongst the children living at the death of the wife. *Roberts* v. *Edwards*, 33 L. J., Ch., 369; 9 Jur., N. S., 1219; 12 W. R. 33; 9 L. T., N. S., 360; 32 Beav. 259.

9. Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her then at her death for her children equally; but, if she should have no heirs, the trust fund was then bequeathed to B., who was A.'s mother, and her heirs:—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children, other than A., became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., N. S., Ch., 329.

10. W. H. by will, after giving several legacies, left the remainder of his property to his wife for life, to be invested in the public funds, and at her demise to be equally divided between his children and the heirs of their bodies. The estates were retained unsold, and a bill filed raising the questions, whether there was a direction to convert, whether a surviving trustee was liable for non-sale, or what was meant by "heirs of the bodies":—Held, that there was a direction to convert; but inasmuch as loss was not caused by non-sale, the trustee was not liable, but the estate of the widow; and that the words "heirs of their bodies" meant "children," and were substitutionary, and the children of a deceased child were equally entitled. *Pattenden* v. *Hobson*, 1 W. R. 282; 17 Jur. 406.

11. In a devise "to the heirs of the body of A. and B. lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one then to such only child":—Held, that heirs of the body must be construed children. *Gummoe* v. *Howes*, 5 W. R. 219; 26 L. J., Ch., 323; 3 Jur., N. S., 176; 23 Beav. 184.

12. Testator gave his real and residuary personal estate in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease during his, her, or their minority; and when the youngest should have attained twenty-five, to pay, assign, and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one, then to pay and assign the share of such child to such his or their child or children; and the testator then expressed his further will to be,

that l is trustees should immediately after his nephew's decease, convey, release, and assign all his freehold and leasehold estates unto the heir or heirs who should be legally entitled thereto; and in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income, together with the whole residue, unto and equally between his next of kin. The daughter left five children living at her death, all of whom attained twenty-five:—Held, that the trust for them was not void for remoteness, but that they took vested interests in the trust property on their mother's death. *Milroy* v. *Milroy*, 14 Sim. 48; 13 L. J., N. S., Ch., 266; 8 Jur. 234.

1. Bequest to A. for life, and after her decease to the testator's four children, the survivor or survivors of them, equally, or their heirs lawfully begotten. One of the four children died in the life of A.:—Held, that his children took one-fourth by substitution. *Price* v. *Lockley*, 6 Beav. 180; 7 Jur. 143.

2. A residuary estate was given to three brothers and a nephew, for their lives as tenants in common, and after their decease, then in trust for their heirs and assigns as tenants in common. The will then contained provisions that the shares of any or either of their children dying under twenty-one without issue should go to the survivors, and that the share of such child as died under twenty-one, leaving issue, should go to the children of such child; but that in case one child only of the brothers and nephews should attain twenty-one or be married, then in trust for such child, his or her heirs or assigns:—Held, that the brothers and nephew took an absolute vested interest in the residuary estate, with an executory devise over in case of children being born. *Spence* v. *Handford*, 4 Jur., N. S., 987; 27 L. J., Ch., 767; 1 L. T., N. S., 244.

3. The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement, and after his youngest child should have attained twenty-one, he directed his executors to divide any surplus in their hands, every three years, during his wife's life or widowhood, and, after her death or marriage, every year equally amongst his children or their heirs, instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that at the end of the said fifty years, his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held, that the word "heirs" must be construed "issue," and not "children;" and that it was not a ground for departing from such meaning, that the consequence of adhering to it would be to render the will void for remoteness. *Speakman* v. *Speakman*, 8 Hare 180.

4. Heirs construed children. *Fowler* v. *Coles*, 21 Beav. 360.

VIII. WHEN CONSTRUED NEXT OF KIN.

1. In General.

5 Gift of personalty to A. for life, and afterwards to his children; and in default to the heirs of B.:—Held, that the next of kin were entitled under the ultimate limitation. *Evans* v. *Salt*, 6 Beav. 266.

6. A testator devised and bequeathed all real and personal estate to trustees, upon trust for certain persons for life, and afterwards for the heir-at-law of his family then living, whosoever the same might be:—Held, that the next of kin of the testator, according to the Statute of Distributions, took no interest under this gift. *Tetlow* v. *Ashton* 20 L. J., N. S., Ch., 53; 15 Jur. 213.

7. Testator bequeathed 5,000*l.* in trust for his daughter A. for life, and after her decease for such child or children as she shall leave at her decease, in such shares as she should think proper; and in case she shall die leaving no child, which was the event, then as to 1,000*l.* for her executors, administrators, or assigns; and as to the remaining 4,000*l.* in trust for such person or persons "as shall be my heir or heirs-at-law." The 4,000*l.* vested in A., and the other two daughters of the testator, being his co-heiresses-at-law, and next of kin at his death. If that union of characters had not occurred, *quære*, whether the next of kin could not claim, and supposing the heirs intended, what description of heirs. *Holloway* v. *Holloway*, 5 Ves. 399.

8. A testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees 500*l.* upon trust to invest and pay the proceeds to R. for life, and in case (which happened) R. should leave no child living at her (R.'s) decease, "then I direct my trustees to divide the 500*l* . . . amongst the heirs of my late brother" S.:—Held, that by the word "heirs" were meant the next of kin of S. according to the Statute of Distributions, together with the widow of S., if living at the testatrix's death. *Re Steeven's Trusts*, 15 L. R., Eq., 110. S. C. *nom. Re Steeven*, 21 W. R. 119; 27 L. T., N. S., 480.

9. The meaning to be given to the word "heirs," when it is used by a testator in a signification other than its ordinary one, must be gathered from the words and tenor of the will. *Powell* v. *Boggis*, 14 W. R. 670.

Where a will, in which the word "heir" is used in different places, is only intelligible by interpreting the word "heirs" differently in different places, such interpretation will be given in order to give effect to the will. *Ib.*

A share of the produce of real and personal estate directed to be sold was given to a feme sole for her life, "and after her decease to her heirs, as she shall give it by will, and if she die without leaving a will, to her right heirs for ever":—Held, that the words "right heirs" were to be construed executors and administrators. S. C. 35 Beav. 535.

10. Bequest of personalty "to the heirs of

my late partner, for losses sustained during the time that the business of the house was under my sole control":—Held, that the persons to take were those who, at the testator's death, would have been entitled, under the Statute of Distributions, to the personal estate of the deceased partner, in case he had died intestate, and not the heir-at-law strictly so called. *Re Gamboa*, 4 Kay & J. 756.

1. A testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, proceeded to give another seventh as follows: "To the heirs and assigns for ever of my late sister D., now deceased":—Held, that the persons entitled to this last-mentioned seventh were the next of kin of D. at her death, according to the Statute of Distributions. *Re Newton*, 4 L. R., Eq., 171; 37 L. J., Ch., 23.

2. The testator, after giving the income of his residuary real and personal estate to A. for life, and after her decease to B. for life, directed his trustees then to sell his estates and divide the proceeds amongst "the following persons, or their heirs for ever: the grandchildren of C., the grandchildren of D., and the grandchildren of E.":—Held, that the word "heirs" was to be construed heirs according to the nature of the property; and it being in this case given as money, "heirs" was construed "next of kin;" that the grandchildren of C., D., and E., living at the death of the testator, and afterwards born during the lives of the tenants for life, and the next of kin of any of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next of kin of each deceased grandchild taking the deceased grandchild's share; that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being that persons who were to take took absolutely. *Doody* v. *Higgins*, 9 Hare (App.) xxxii; 1 W. R. 30.

Gift of residuary personal estate to be divided equally, share and share alike, amongst the following persons, or their heirs for ever: to the grandchildren of A., also to the grandchildren of B., also the grandchildren of C. The Court having previously held that the word "heirs" must be construed according to the nature of the property as "next of kin":—Held, further, that the "next of kin," according to the Statute of Distributions, including the widow, were entitled to take, and not the nearest of kin simply. S. C. 2 Kay & J. 729; 25 L. J., Ch., 773; 4 W. R. 737.

3. Gift of personalty to A., and after his death to be equally divided among his legal heirs, is a gift after his death to his next of kin, according to the Statute of Distributions. *Low* v. *Smith*, 2 Jur., N. S., 344.

A testator, after giving all his residuary real and personal estate to his nephews, grandnephews, and nieces, directed his trustees to invest their shares according to their discretion, and to pay the income, or as much as might be necessary, for their maintenance until twenty-one, except A. L., and he to receive the interest until thirty; and then half to be applied, "at the discretion of the trustees," to assist him if they thought him capable—the remaining half to remain invested, and the income paid to him during his life, and at his death to be equally divided between his legal heirs. A. L. died under thirty, leaving a widow and heiress-at-law. Upon the questions, what was meant by "legal heirs," and whether any part of A. L.'s share was undisposed of:—Held, that next of kin according to the statute was meant, and that no part of A. L.'s share was undisposed of. S. C. 4 W. R. 429.

4. A husband bequeathed his personal estate to his wife for life, and after her death "to be divided amongst my heirs and to their children with H. R. P., share and share alike." The testator had five brothers and sisters, some of whom died in his lifetime, leaving issue; others survived him and died in the lifetime of their mother leaving issue:—Held, that by the word "heirs" was meant next of kin, exclusively of the widow; that it was a gift to a class to be ascertained at the testator's death, and consisting of the brothers and sisters living at the death of the testator, the children of brothers and sisters then dead, and H. R. P., and that those persons took vested interests. *Re Peppitt, Chester* v. *Phillips*, 36 L. T., N. S., 500.

2. Where Gift to Heirs of the Body.

5. In a will, "heirs of the body":—Held, to mean next of kin. *Pattenden* v. *Hobson*, 17 Jur. 406; 22 L. J., Ch., 697.

6. Gift by will of personalty to trustees for the separate use of A., the daughter of the testator, for life, with remainder to the trustees for the benefit of the heirs of the body lawfully begotten of A., first, to educate the said heirs, and, lastly, to pay to them the residue at their respective ages of twenty-one, in such proportions as A. should by will appoint:—Held, that the words "heirs of the body" must be construed next of kin, descendants of A. *Re Jeaffreson*, 2 L. R., Eq., 276; 12 Jur., N. S., 660; 35 L. J., Ch., 622; 14 W. R. 759.

3. Where Gift to Heirs or Next of Kin.

7. Testator, by will unattested, after giving, among others, charitable legacies, to be distributed by his executor, gave the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever, which he should be seised or possessed of, etc., "to next of kin or heir-at-law, whom I appoint my executor, after debts, etc., paid." He left one brother, and, by deceased brothers, a niece and several nephews, one of whom was heir-at-law:—Distribution decreed according to the statute. *Lowndes* v. *Stone*, 4 Ves. 649.

8. Testatrix bequeathed her real and personal estate to trustees upon trust to convert and pay one-third part to the "heirs or next of kin" of J. L. deceased. At her death she had only personal estate:—Held, that the description was intended to apply to one and the same class, and the gift was not an alternative gift, and that the description was sufficiently answered by the statutory next of kin of J. L. *Re Thompson's Trusts*, 48 L. J., Ch., 135; 27 W. R. 378; 9 L. R., Ch. D., 607.

4. Where Gift to A. or his Heirs.

Gift of Personalty.] 1. Legacy to A., "and failing him by decease before me, to his heirs." A. dies before the testator, having made a will containing a residuary bequest; the legacy belongs to the next of kin of A. living at the time of the testator's death. *Vaux* v. *Henderson*, 1 Jac & Walk. 388.

2. A testator gave to the children of his sister, the late E W., whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator:—Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. The same testator gave all the residue of his property "in equal shares to each of his sisters M. S. and S. G., and upon their deaths, respectively, to their heirs. Both sisters died in the lifetime of the testator:—Held, that the next of kin of M. S. and S. G., living at the death of the testator, were entitled by substitution to the gift of the residue. *Gittings* v. *M'Dermott*, 2 Myl. & K. 69; 2 L. J., N. S., Ch., 212.

3. Bequest of residue of personal estate to A. or his heirs, in such manner, however, as he might deem proper. A. died without making any disposition:—Held, that the property vested in the next of kin as tenants in common according to the Statute of Distributions. *Jacobs* v. *Jacobs*, 1 W. R. 238; 17 Jur. 293; 16 Beav. 557; 22 L. J., Ch., 668.

4. A bequest of personalty to certain persons, "or their heirs for ever," the word "heirs" being a word of substitution, and not a *designatio personæ*:—Held, to denote, not the nearest of kin in blood, but those who, under the Statute for the Distribution of the Personal Estates of Intestates, would have been entitled to the personal estates of such persons if they had died intestate. *Doody* v. *Higgins*, 2 Kay & J. 729; 25 L. J., Ch., 773; 4 W. R. 737.

The testator, after giving the income of his residuary real and personal estate to A. for life, and after her decease to B. for life, directed his trustees then to sell his estates, and divide the proceeds amongst "the following persons, or their heirs for ever; the grandchildren of C., the grandchildren of D., and the grandchildren of E.":—Held, that the word "heirs" was to be construed heirs according to the nature of the property; and it being in this case given as money, "heirs" was construed "next of kin;" that the grandchildren of C., D., and E., living at the death of the testator, and afterwards born during the lives of the tenants for life, and the next of kin of and of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next of kin of each deceased grandchild taking the deceased grandchild's share; that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being that the persons who were to take took absolutely. S. C. 9 Hare (App.) xxxii; 1 W. R. 30.

5. Where there is a bequest to A. for life, and after his decease to B. "or his personal representatives," or a bequest to B., to be paid so many months after testator's death to B. "or his personal representatives," the Courts have construed it simply as any other way of giving B. a vested interest upon the testator's death, and B. dying before the testator, the bequest has been held to lapse; but if, instead of "personal representatives," the word "heirs" be used, it shows the testator intended the persons he designates his "heirs" to take by way of substitution whenever B. may die, and there shall be no lapse although B. should die before the testator. *Re Porter*, 4 Kay & J. 188; 4 Jur., N. S., 20; 27 L. J., Ch., 196; 6 W. R. 187.

Bequest of residue to A. for life, and at her death a legacy to B. "or his heirs":—Held, that the legacy to B. did not lapse by reason of his death in the lifetime of the testatrix, but that his widow and only child took by substitution. *Ib.*

A substitutional gift to the heirs of a legatee who dies in the testator's lifetime goes to the next of kin of the deceased legatee, and not to his personal representatives. *Ib.*

6. A testator gave real and personal estate to trustees, upon trust for his wife for life, and after her death to sell and divide the proceeds among his children, A., B., C., D., and E, "or their heirs or assigns," and recommended his children to settle by arbitration any dispute as to the construction of his will —Held, that the gift to the children was absolute, and that the share of one of them, who survived the testator, and died in the widow's lifetime, went to his administrator. *Re Walton*, 2 Jur., N. S., 363; 25 L. J., Ch., 569; 4 W. R. 416; 8 De G. M. & G. 173.

The words "or their heirs or assigns" were superfluous, being added only as an indication of intention that the children were to take absolutely. Per Knight Bruce, L. J. *Ib.*

The testator had by the concluding clause interpreted his own words, and shown that children only were to take; but, *semble*, that the words "or assigns" were, without that clause, sufficient to show that the children were to take absolutely. Per Turner, L.J. *Ib*

7 Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns":—Held, that "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Re Hopkins*, 2 Hem. & M. 411.

8. Of a policy of 1,200*l.* testator bequeathed 1,000*l.* to A, and 200*l.* with all advantages and bonuses arising from the policy to his wife. By a codicil the 1,000*l.* was given in trust for A. and her children; and in case of her death without children, the 1,000*l.* was to become the property of the testator's widow, "or her heirs." The widow died, having bequeathed the 1,000*l.* (if A. died without issue) to B. A. died without issue:—Held, that the next of kin of the widow at the time of her death were entitled to the 1,000*l.* *Re Craven*, 23 Beav. 333.

9. A testator directed that certain stock should after the death of his wife be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the

will) were entitled to share in the fund along with the children who survived her. *Re Philps*, 7 L. R., Eq., 151; 19 L. T., N. S., 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death. *Ib.*

1. A testator gave real and personal estate to A., charged with the payment of annuities to the testator's six children "or their heirs respectively":—Held, that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of will were entitled to one of the annuities. *Parsons* v. *Parsons*, 8 L. R., Eq., 260; 17 W. R. 1005.

2. A testator gave real and personal estate to his executors, and after directing that certain legacies should be paid out of the proceeds of the whole, proceeded: "Whatever portion of my effects shall remain in the hands of my executors or the survivor of them, or, etc. (*sic*), after the payment of the above-mentioned legacies, I desire to be divided in the manner following, and giving two-thirds to the surviving sisters or sister of my wife or their heirs".—Held, that the gift to heirs being substitutionary, the statutory next of kin of deceased sisters took under it, and not the heirs as *personæ designatæ*. *Re Stannard*, *Stannard* v. *Burt*, 52 L. J., Ch., 355; 48 L. T. 660.

3. A testator gave his residuary personal estate to trustees upon trust for his wife during her life, and at her death for his children "or their heirs":—Held, that this was a substitutionary gift to the next of kin, according to the statute, of a child dying before the period of distribution. *Finlason* v. *Tatlock*, 9 L. R., Eq., 258; 39 L. J., Ch., 422; 18 W. R. 332; 22 L. T., N. S., 3.

4. A testatrix by her will gave a moiety of her personal estate in trust to be equally divided between two legatees, and afterwards by a codicil left the property, in the event of the legatees having no children, at their deaths to be equally divided to the children, or their heirs, of E. M. P. The original legatees having died without having had children:—Held, that the period of distribution was the date of the death of the survivor of the original legatees, and that, the gift to the "heirs" being a substitutional one, the property became divisible at that date between such one of the children of E. M. P. as was living both at the death of the testatrix and at that date, and the statutory next of kin of the remaining children of E. M. P. who, having been alive at the death of the testatrix, had died before the period of distribution. *Neilson* v. *Monro*, 27 W. R. 936.

Gift of a Mixed Fund of Realty and Personalty.] 5. In wills of personal estate, where the word "heirs" is used, it will be considered as indicating "successors according to the quality of the estate," and consequently the next of kin of a party who dies entitled to a share of personalty will take. *Re Preston*, 8 L. T., N. S., 20.

Where a testatrix gave personalty, subject to a life interest, equally to her brother and five sisters, if alive, and, if not, to their heirs: that is, she meant a deceased sister's children to have one-sixth:—Held, that the next of kin, according to the statute, of those sisters who died before the period for distribution took their shares. S. C. 1 N. R. 470.

6. A testatrix by her will, dated 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid," between her five sisters, *nominatim*, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will who died a spinster:—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wingfield*, 47 L. J., Ch., 768; 9 L. R., Ch. D., 658; 39 L. T., N. S., 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained, as regarded brothers and sisters who predeceased the testatrix at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

Held, fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share. *Ib.*

Held, fifthly, that the heir-at-law and next of kin of the sister who died before the date of the will, as well as the heirs-at-law and next of kin of the two brothers and the sister who died in the lifetime of the testatrix and after the date of the will, were so entitled. *Ib.*

IX. HEIRS CONSTRUED LITERALLY.

1. Gift of Personalty.

7. Where a pecuniary legacy is given by a testator to his "heir" the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will, and the heir-at-law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. *Mounsey* v. *Blamire*, 4 Russ. 384.

8. Goods devised to A. for life, and after

the death of A. to the heir of B. B. dies in the life of A.:—Decreed, the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A. *Danvers* v. *Clarendon*, 1 Vern. 35. And see *Pleydell* v. *Pleydell*, 1 P. W. 748.

1. A. gave all his personal estate, after payment of debts, to his wife for life, and upon her death he gave whatever should remain, after payment of various legacies, equally between the heirs of his late uncle N. and his aunt F., all of whom were dead at the date of the will:—Held, that the word "heirs" applied to the heirs-at-law of the three persons named, and not their next of kin. *Re Rootes*, 29 L. J., Ch., 868; 8 W. R. 625; 1 Dr. & Sm. 228.

2. A testator bequeathed 2,000*l.* consols, to be divided between his children, when each of them attained twenty-one; but should neither of them attain that age, then he bequeathed the stock to his wife for her life, and afterwards to his "next heir-at-law":—Held, that the heir-at-law, at the death of the testator, was the person entitled, and not the next of kin. *Southgate* v. *Clinch*, 4 Jur., N. S., 428; 27 L. J., Ch., 651; 6 W. R. 489; 1 L. T., N. S., 263.

3. Bequest of personal estate to "the children of A. during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs":—Held, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children." *Mounsey* v. *Blamire* (4 Russ. 384) disapproved of. *Smith* v. *Butcher*, 10 L. R., Ch. D., 113; 48 L. J., Ch., 136; 27 W. R. 281.

4. Personal estate was settled on a husband and wife successively for life, with remainder to their children, and, in failure of children, "then to the right heirs" of the survivor of the husband and wife:—Held, that, under the last limitation, the heir-at-law of the survivor and not the next of kin was entitled. *Hamilton* v. *Mills*, 29 Beav. 193.

5. The words in a will in the Spanish language, made use of by the testator, an Englishman, were, "As regards the lands, etc., of which I am the possessor in England and Scotland, I direct that the whole may be sold, and that the amount thereof may be divided between and amongst the heirs I have there in accordance with English law." The property was the produce of a mortgage in fee in England:—Held, that the co-heirs of the testator were entitled, and not the next of kin. *Re Caldcleugh*, 19 L. T., N. S., 377.

2. Gift of a Mixed Fund of Realty and Personalty.

6. Construction of the words "heirs" and "family," as applicable to dispositions of real and personal estate respectively. *White* v. *Briggs*, 2 Ph. 583; 17 L. J., N. S., Ch., 196.

7. Testator appointed his daughter-in-law his sole executrix, to have and enjoy all his real and personal estate, all the goods, cattle, chattels, enumerating several other articles of personal property, during her life, but not to diminish nor commit waste on the lands, and his nearest heir-at-law to enjoy the same after her death. An estate for life only in the whole, both real and personal estate, with remainder to the heir-at-law. *Gwynne* v. *Muddock*, 14 Ves. 488.

8. Testator devised all his estates in the funds of England, and all his manors, messuages, lands, etc., as well leasehold and freehold as copyhold, to A., B., and C., and their sons, in strict settlement, and ultimately to his own right heirs for ever, and empowered his trustees to invest the residue of his personal estates in the purchase of freehold lands in England, and to convey the same to such of the uses thereinbefore declared of his manors, messuages, lands, and premises devised by his will, as should be then subsisting. A. and B. died without issue in the testator's lifetime. C., who was his heir-at-law and executor, was living, but had no issue male. The testator's next of kin filed a bill against C., praying, amongst other things, for a declaration that, in the event of C. dying without leaving issue male, the plaintiff would be entitled to testator's personal estate. A general demurrer to the bill was allowed. *De Beauvoir* v. *De Beauvoir*, 15 Sim. 163; 15 L. J., N. S., Ch., 305; 10 Jur. 466. Affirmed 3 H. L. Ca. 524.

9. The words "next lawful heirs" in an ultimate gift of real and personal estate, construed in their strict sense as to the personalty and the heir-at-law, and not the next of kin, held entitled. *Haslewood* v. *Green*, 28 Beav. 1.

10. Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family":—Held, an estate for life only, with remainder in trust for the devisor's heir, as *persona designata*. *Wright* v. *Atkyns*, 17 Ves. 255. Affirmed 19 Ves. 299. See also S. C. Coop. 111; 1 Ves. & B. 313; T. & R. 143.

11. Devise of real and personal estate in trust for the nearest relation "of the Pyots:" the latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot by marriage held not to exclude. *Pyot* v. *Pyot*, 1 Ves. 335.

12. A testator devised estates to his trustees, to produce a maintenance out of the proceeds for his son John, who was born deaf and dumb, with a provision for his wife, if she should marry, and limitations in favour of his children if she should have any. He then limited divers estates for life and in tail, with the reversion "to his own right heirs." At the death of the testator, his son John was his heir-at-law; the immediate estates failed:—Held, that although the testator had provided a maintenance for his son during life, as for a person incapable of taking care of himself, yet there was nothing to show that he was intended to be excluded from taking under the limitation to the testator's own right heirs. The equitable reversion in fee, therefore, vested in John. Observations on *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 5. *Boidell* v. *Golightly*, 12 L. J., N. S., Ch., 187; 7 Jur. 53.

See also VIII. *supra.*

X. CLASS OF. WHEN ASCERTAINED.

13. Goods devised to A. for life, and after

the death of A. to the heir of B. B. dies in the life of A.:—Decreed, the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A. *Danvers* v. *Clarendon*, 1 Vern. 35.

1. A. bequeathed his residue to his widow for life, and after her decease to be divided between his two brothers or their heirs, in proportion to the number each might have then living, share and share alike. Both brothers died before the widow:—Held, that "heirs" was to be construed children, and that all the children living at the widow's death took in equal shares *Roberts* v. *Edwards*, 33 Beav. 259; 9 Jur., N. S., 1219; 12 W. R. 33; 9 L. T., N. S., 360.

2. A testator having large real estates in fee, and having one son, J, who was deaf and dumb, and had been born so, devised his estates to trustees in fee, upon trust to apply a certain sum of the rents and profits yearly in the maintenance of J., and giving other powers to the said trustees, which denoted that they were to manage the estate for him, then proceeded to limit estates tail to the first and other sons of J., then to J.'s daughters as tenants in common, then estates tail to other persons; "and for default of such issue in trust for my own right heirs for ever":—Held, that the circumstances of the case, as to the supposed incapacity of J. to manage his estate, were not sufficient to take this case out of the legal presumption in favour of the words "right heirs" meaning right heirs at the death of the testator, or from the rule of law in favour of the present vesting of estates; and that J. being the right heir of the testator at the time of his death, the equitable fee vested in him, and he had power to devise it. *Boidell* v. *Golightly*, 12 L. J., N. S, Ch., 187; 7 Jur. 53.

3. A testator by will gave and directed his real estates to be sold, and the interest of the proceeds of the sales to be paid to his daughter for life, with remainder as she should appoint by will, and, in default of appointment by her, then to his own heirs *ex parte maternâ*. By a codicil he directed the trustees (if his said daughter required it) to sink the whole or part of the same property in an annuity for her for life, to be paid to her sole and separate use, without power of anticipation. The testator left his daughter, his only child and heir-at-law, him surviving:—Held, that she was heir at the death of the testator, and that she was absolutely entitled to the real estates. *Rawlinson* v. *Wass*, 9 Hare 673; 16 Jur. 282.

4. One devises his freehold estate to trustees and their heirs, in trust to convey the premises to A. for life, remainder to his first, etc., son in tail male successively, remainder to his daughters in tail general; and if A. should die without issue, then the premises to be settled on B., C., D., and E., to each one-fourth in fee; and in case any of the four remaining persons die without issue, the trustees to convey such fourth part in fee to the respective heirs of the person so dying. One of the persons dies without issue; her fourth in equity belongs to her brother as her heir, and there was an executory devise to such person as would be the heir at the death of A. without issue. *Blackborn* v. *Edgley*, 1 P. W. 606.

5. A. devises an Exchequer annuity of 1,000*l.* to trustees in trust for J. for so many years as he should live, and from and after his decease for such person as at the time of his death should be the heir male of his body, and in case there should be no such person then in trust for the heir male of B., who was J.'s father. J. died an infant, and without issue, and about four years afterwards B. had another son born, G., who also died an infant without issue:—Held, that absolute property of annuity vested in G., and that upon his death it belonged to B. as his administrator. *Montagu (Duke)* v. *Beaulieu*, 3 Bro. P. C. 277; Ambl. 533

6. A. devised his estates to B., his son for life, remainder to the first and other sons of B in tail, remainder to his daughters as tenants in common, remainder to C. for life, remainder to D., the son of C., if living at C's death, for life, remainder to the first and other sons of D in tail, remainder to the male heir for the time being entitled to a certain family estate, remainder to the first and other sons of such male heir, remainder to the testator's own right heirs of his name; and he directed the residue of his personal estates to be laid out in lands to be conveyed to the same uses as his devised estates. B., his son and executor, did not lay out the personal estate as directed by the will, but by his will he directed that certain real and personal estates should be conveyed and assigned to the trustees under the will of A., upon the trusts of that will or such of them as could then be executed; adding, that he deemed such property an equivalent in value for the residuum of his father's personal estate; and he directed that the same should be settled and accepted accordingly. The real and personal estate were not conveyed or assigned according to the will. On the death of B. without issue, C. entered into possession of the real estate devised by both wills, and the personal estate bequeathed by the will of B. At the death of C, D. entered into possession of the same real and personal estate. D. died without issue, and at his death there was no male heir entitled to the said family estate:—Held, that the ultimate limitation in the will of A. to his right heirs of his name vested at his death and not at the death of D.; that the co-heiresses-at-law of B. (or the parties claiming under them) were entitled to the real estate so devised by the wills of A. and B.; that inasmuch as the estates were made equitable by the will of B., the Court might properly send a case to a court of law, to try at the same time the right under the will of A. as well as under the will of B.; that the personal estate bequeathed by the will of B., though not actually converted, must be deemed to be converted into and to have descended as real estate. *Wrightson* v. *Macaulay*, 4 Hare 487. And see S. C. at law, 14 Mees. & Welsb. 214; 15 L. J., N. S., Exch., 121.

7. Testator devised and bequeathed all his real estate and all the residue of his personalty to trustees, upon trust to pay his wife an annuity for her life, and subject to such annuity upon trust as to the whole of his said real and personal estate for his son F., his heirs, executors, administrators, and assigns, as and when he should attain the age of twenty-five;

and in case his said son should die after the age of twenty-one, but before twenty-five, then as his said son should by will or deed appoint; but in case his said son should not make any such appointment, or should die before attaining twenty-five without leaving issue, then upon trust for the testator's own heirs, executors, or administrators:—Held, that the last limitation embraced those persons only who were entitled to the testator's property at the time of his death, and that it was no objection to this construction that F. himself happened to be one of those persons. *Wilkinson* v. *Garrett*, 2 Colly. 643; 15 L. J., N. S., Ch., 416; 10 Jur. 560.

1. A testator directed his executors to set apart a sum of stock to answer an annuity of 60*l.* to be paid to his daughter Anna Maria (who was then his only surviving child) for her life, and on her death to divide the principal among her children, if she should leave any, on their respectively attaining the age of twenty-four; if no child, or none who should attain that age, to pay thereout two small legacies; "and all the rest and residue of the said principal fund he gave and bequeathed to and amongst his heirs-at-law, share and share alike;" and in a subsequent part of his will he appointed his said daughter by name his general residuary legatee:—Held, nevertheless, that as sole heiress-at-law and next of kin of the testator at the time of his death, she, and not his heir-at-law or next of kin at the time of her death, was entitled, under the ultimate gift, to the fund set apart to answer the annuity. *Ware* v. *Rowland*, 2 Ph. 635; 17 L. J., N. S., Ch., 147; 12 Jur. 165. Affirming 16 Sim. 587; 16 L. J., N. S., Ch., 427; 11 Jur. 622.

2. Testator devised his real estate to trustees in trust to permit A. to receive the rents during his life; and, upon his decease, to permit the eldest son of A. to receive the rents during his life; and, "upon the decease of such eldest son," in trust to convey the estate "to the right heir male of A. and his heirs." A. survived testator, and died in the year 1857, leaving B. his eldest son him surviving. The trustees refusing to convey the legal estate, B. presented a petition asking for a vesting order:—Held, that the general rule, that the heir of a person named in a will must be ascertained as soon as possible, applied; that B. was ascertained to be "the right heir male of A." upon A.'s death in 1857; and that he was therefore entitled to a vesting order. *Re Grayson*, 48 L. J., Ch., 354; 40 L. T. 98; 27 W. R. 534.

3. A testator gave certain property to his wife, and "in respect to his house at P. wished her to enjoy it for her life, and at her death to be sold and equally divided among his children, if living, but if dead before their mother he requested the house at her death to come to his brother J. S., or his next heir-at-law. The testator then gave 2,000*l.* to his two daughters; and as his wife was then pregnant, should she be delivered, he recommended the 2,000*l.* to be equally divided when each attained twenty-one; should each die, the survivor or survivors to receive the whole; but should neither attain twenty-one, the 2,000*l.* to go to his wife for life, and afterwards to his next heir-at-law. After the testator's death his widow had a son, but that son and the two daughters died infants in the widow's lifetime, as did the testator's brother and his son, who left a son, and such son claimed the fund:—Held, first, that "next heir-at-law," although a gift of personalty, did not mean "next of kin;" and that the person to take was the heir-at-law at the time of the testator's death, that is, his own son, although then unborn. *Southgate* v. *Clinch*, 6 W. R. 489; 4 Jur. N. S., 428; 1 L. T., N. S., 263; 27 L. J., Ch., 651.

4. A testator bequeathed to A. 1,000*l.*, part of a policy of 1,200*l.*, and the remaining 200*l.*, together with all advantages arising from the policy, to his widow. By a codicil he gave the 1,000*l.* to trustees for A. and her children, and in case of A.'s death without children, to his widow "or her heirs." The widow died, having bequeathed the 1,000*l.* to B., and A. died afterwards without children:—Held, that B. was not entitled, but that the next of kin of the widow (ascertained at her death, and not at the period of distribution), took the 1,000*l.* by substitution. *Re Craven*, 23 Beav. 333.

See also VIII. *supra*—XXVIII. XII. *post.*

XI. LIMITATION TO WHERE NO ESTATE IN ANCESTOR. ESTATE TAIL IN THE HEIR.

5. A testatrix, after giving estates tail to the then existing descendants of Sir T. S. by his first wife, devised as follows: "And for default of all such issue, then upon trust for the right heirs of my grandfather Sir T. S., deceased (the father of my late uncle Sir T. S.), by Mary his second wife, also deceased, who was the daughter of Sir G. C., for ever":—Held (affirming S. C. *nom. Wright* v. *Vernon*, 2 Drew. 439; 23 L. J., Ch., 881; 2 Eq. Rep. 1159), that this was a limitation of an estate tail to the heirs of Sir T. S. by Mary, his second wife, and not of an estate in fee. *Vernon* v. *Wright*, 4 Jur., N. S., 1113; 7 H. L. Ca. 35; 28 L. J., Ch., 198; 2 L. T., N. S., 11.

Devise "to the right heirs of my grandfather S., deceased, by M. his second wife, also deceased, for ever":—Held, that the estate tail was not enlarged into an estate in fee by the use of the words "for ever." *Ib.*

6. Devise of lands to A. for ninety-nine years, if he should so long live, and after the determination of the term to the heirs of the body of A., and in default of such heirs over:—Held, an estate tail in the heir of the body of A. as an executory devise. *Harris* v. *Barnes*, Ambl. 666; 1 W. Black. 643; 4 Burr. 2157.

7. Where there is a devise to the heirs male of the body of any person, he shall take an estate tail. *Newcoman* v. *Bethlem Hospital* Ambl. 793.

XII. OTHER CASES.

8. The meaning to be given to the word "heirs," when it is used by a testator in a signification other than its ordinary one, must be gathered from the words and tenor of the will. *Powell* v. *Boggis*, 14 W. R. 670.

Where a will, in which the word "heir is" used in different places, is only intelligible by interpreting the word "heirs" differently in different places, such interpretation will be given in order to give effect to the will. *Ib.*

A share of the produce of real and personal estate directed to be sold was given to a feme sole for her life, "and after her decease to her heirs, as she shall give it by will, and if she die without leaving a will, to her right heirs for ever":—Held, that the words "right heirs" were to be construed executors and administrators. S. C. 35 Beav. 535.

1. H. J. by his will, dated September 1838, gave the whole of his rents, profits, and interest of all his estates, both real and personal, situate in B. M. and H., to R. H. during his life, and the issue of R. H. after his death as therein mentioned, and in the event of R. H. dying without issue, his will was, that the whole of the said estates, both real and personal, should go to the heir-at-law of his family, and he ordered his trustees to give up the whole of his estates, both real and personal, to such heir. Inquiries were directed by the decree made in the Court below, for the purpose of ascertaining the particulars and locality of the testator's personal estate other than leasehold at the time of his death. The Court affirmed the decree, being of opinion that there was no intestacy, and that there was at all events sufficient doubt upon that point to make the inquiries necessary. *Horsfield* v. *Ashton*, 1 W. R. 259; 2 Jur., N. S., 193.

2. A testator (passing over his heir-at-law, the son of his deceased eldest brother) gave 1,000*l.* to the testator's father for life, and after his death to be continued to the testator's younger brother, and proceeded thus: "And after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family": —Held, that the ultimate limitation was void for uncertainty. *Thomason* v. *Moses*, 5 Beav. 77; 6 Jur. 403.

XXIV. Gifts to Husband or Wife.

See also HUSBAND AND WIFE II. IV.—JOINTURE I. V. 2—POWER, XVII. VII.

I. GIFT BY TESTATOR TO HIS WIFE.

1. In General.

3. A testator domiciled in Jamaica became, during a temporary residence at Frankfort, engaged and betrothed to a lady; and by a codicil, after mentioning her name, and alluding to his intended marriage with her, he gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died:—Held, that the lady was entitled to the legacy. *Schloss* v. *Stiebel*, 6 Sim. 1.

4. A bequest by a husband "to his beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife. *Garratt* v. *Niblock*, 1 Russ. & M. 629.

5. A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of 200*l.*, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of 300*l.*, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.* And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate." After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void *ab initio*, on the ground of the impotency of the testator. He died without altering his will:—Held, that the late wife was entitled to a legacy of 200*l.*, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence. *Re Boddington, Boddington* v. *Clariat*, 22 L. R., Ch. D., 597; 52 L. J., Ch. D., 239; 48 L. T. 110; 31 W. R. 449. Affirmed 25 L. R., Ch. D., 685; 53 L. J., Ch., 475; 50 L. T. 761; 32 W. R. 448.

Held, also, that she could not take the 2,000*l.* which was given in substitution for the annuity to which she was not entitled. *Ib.*

2. Reputed Wife.

6. A wrong description of a legatee will not defeat a legacy; but where the character, on account of which the legacy is given, has been fraudulently imposed upon the testator, the legacy will fail. A testator gave certain legacies "to his wife Anne." In the year 1817 the testator had married the plaintiff, who was the person thus alluded to; but it turned out that her first husband was then, and at the hearing of this cause, still living. The Court, being of opinion that no fraud had been practised on the testator, determined that the plaintiff, notwithstanding the misdescription, was entitled to the benefits given her by the will. *Penfold* v. *Giles*, 6 L. J., N. S., Ch., 4.

7. C. E., in the lifetime of her husband, contracted a second marriage with the testator, and after his death with J. C. The testator, believing C. E. to be his wife, bequeathed to her all his property, and appointed her his executrix; she proved his will, and J. C., as her husband, possessed part of the estate of the testator. The next of kin having filed a bill against C. E. and her real husband,

impugning the validity of the will and seeking an account of the testator's estate:—Held, that the husband of C. E., though he had not interfered, was a necessary party, but that J. C. her supposed husband was not. *M'Kenna* v. *Everitt*, 1 Beav. 134; 8 L. J., N. S., Ch., 42.

1. Where a legacy has been given to a legatee in a character which has been fraudulently assumed by her, and the existence of which character may be considered to be the sole motive of the testator's bounty, the legacy fails. *Wilkinson* v. *Joughin*, 12 Jur., N. S., 330; 35 L. J., Ch., 684; 14 L. T., N. S., 394; 2 L. R., Eq., 319.

A testator gave the income of his real and personal estate to a woman whom he described in his will as, and supposed to be, his wife. A marriage ceremony had been performed between the testator and such woman, but when it took place she knew she had a husband living:—Held, that the bequest was void by reason of the fraud practised on the testator. *Ib.*

A testator also gave a legacy to his stepdaughter S. W., the daughter of the above woman:—Held, that such legacy was valid, the supposed motive for the gift not being due to any fault on the part of S. W. *Ib.*

2. A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights. *Giles* v. *Giles*, 1 Keen 685; 5 L. J., N. S., Ch., 46.

3. A married woman, who had been separated for nineteen years from her husband, married the testator by the description of a widow. She had about that time heard a report that her husband was living and had made some loose inquiries, but believed he was dead. The testator having made bequests "to his wife," and the Court being of opinion that the evidence showed no fraud on her part towards the testator:—Held, that she was entitled to the legacies. *Re Petts*, 27 Beav. 576; 5 Jur., N. S., 1235; 1 L. T., N. S., 153. S. C. *nom. Re Pitts*, 29 L. J., Ch., 168; 8 W. R. 157.

4. A testator had been separated from his lawful wife, whose name was Elizabeth. He subsequently went through the marriage ceremony with another female, whose name was Sarah. At the time of his death he was cohabiting with the latter as his wife. He bequeathed the income of his property to "his wife Sarah" for life:—Held, that although not his lawful wife, Sarah was entitled to the yearly income. *Dilley* v. *Matthews*, 11 W. R. 614; 8 L. T., N. S., 762; 2 N. R. 60.

5. A testator, who had gone through the form of marriage with his deceased wife's sister in 1851, gave his plate, etc., "unto my wife," for her own use. He then devised and bequeathed his real and personal estate in trust "to my wife" for her life, and after her decease, "for all and every my children hereafter to be born." He had no children at the date of his will, but his reputed wife had a child by him two days afterwards. Both the reputed wife and child survived him:—Held, that the reputed wife was entitled, but that the gift to the child as one of a class of children "hereafter to be born" was void. *Pratt* v. *Mathew*, 22 Beav. 328; 2 Jur., N. S., 364; 25 L. J., Ch., 409; 4 W. R. 418. Affirmed 2 Jur., N. S., 1055; 25 L. J., Ch., 686.

II. GIFT TO WIFE OF A THIRD PERSON.

1. Reputed Wife.

6. A legacy was given to Lady F. C., widow of Sir N. C., so long as she shall continue single and unmarried. At the date of the will she had married again, but her husband was abroad, and she continued to use her former name, and kept the testator in ignorance of her real situation:—Held, that the wrong description did not invalidate the legacy. *Rishton* v. *Cobb*, 9 Sim. 615; 9 L. J., N. S., Ch., 110. Affirmed 4 Jur. 261.

7. A testator bequeathed a life interest in a legacy to H. the present wife of his son J. B. There was a woman named C. H. living with J. B., and they had falsely represented to the testator that they were married:—Held, that C. H. was entitled to the legacy, there being no evidence that the representation had been made for the purpose of obtaining the legacy. *Turner* v. *Brittain*, 3 N. R. 21.

8. Gift to the wife of A. B held not to pass the subject matter to a woman who had cohabited with A. B., and been introduced by him to testator's family as his wife, though never personally known to testator. *Re Davenport's Trust Estate*, 1 W. R. 103.

Bequest of stock, after the death of the testator's widow, upon trust to pay the dividends to G. for life, and then to his wife for life, and after the decease of the survivor, to divide the capital among the children of G. G. had, from a time previous to the date of the will up to the death of the testator, been living with a woman who was believed to be his wife, and by whom he had several children. G. was never married; he died after the death of the testator, in the lifetime of the testator's widow:—Held, that the description in the will applied to a lawful wife and children whom G. might have had after the date of the will, and to no others. S. C. 17 Jur. 314; 1 Sm. & G. 126.

2. Second Wife.

9. Devise to trustees to pay the rents to F. for life, and after his death, leaving his wife surviving, to pay the rents to such wife. The first wife of F., who was married at the date of the will, died after the testator's death, and F. married a second wife who survived him:—Held, that she was not entitled to the rents. *Firth* v. *Fielden*, 22 W. R. 622.

10. Held, the gift to the wife of B. applied to the wife who was living at the time of the will, and not to any wife whom B. might at

any time afterwards marry. *Be Burrow's Trust*, 10 L. T., N. S., 184.

1. A bequest of annuity to the testator's nephew for life, or until his bankruptcy or insolvency, and after his decease, bankruptcy, or insolvency, to be paid to his wife for the personal support of herself, her husband, and his children, during the life of his nephew and his wife, and the survivor of them; and in case they, or either of them, should attempt to alienate the annuity, the trustees to be empowered to apply it towards the support of the children. The first wife of the nephew, to whom he was married before the date of the will, survived the testator, and the gift of the annuity was held not to extend to the widow of the nephew, who was his second wife. *Boreham* v. *Bignall*, 8 Hare 131; 19 L. J., N. S., Ch., 461; 14 Jur. 265

2. Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life, remainder to the wife of A. for life, with remainders in tail to the sons and daughters of A, by such wife. A. was not married till after the testator.—Held, to extend to a second wife. *Peppin* v. *Bickford*, 3 Ves. 570.

3. A testator left his property to trustees in trust, as to different portions of it for each of his children for life, and after the death of each child for its issue, with a gift over of the share of any child dying without issue to the other children and their issue, and declared that if any of his sons should become bankrupt, his life estate should cease as if he were dead, and during the remainder of his life the trustees should apply the income to which, but for such forfeiture, he would have been entitled, for the benefit of the wife and children of such son in such manner as the said trustees should think fit. One of the testator's sons was married at the time of his death; he subsequently became bankrupt; his wife died, leaving him without issue: and he married again and had two children:—Held, that the trust for the wife and children of the bankrupt son revived as soon as there came to be any wife or child to take under it. *Longworth* v. *Bellamy*, 40 L. J., Ch., 513.

4. Under a bequest of a fund to the testator's son (then married) for life, and after his decease the fund to be divided equally between the wife of the said son, if she should survive him, and all and every the child or children of the said son:—Held, that no particular wife was designated, and that an after-taken wife who survived the son was entitled to share in the gift over. *Re Lyne*, 38 L. J., Ch., 471; 17 W. R. 840; 20 L. T., N. S., 735; 8 L. R., Eq., 65.

III. GIFT BY TESTATRIX TO HER HUSBAND

5. If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails; therefore, where a legacy was given by a woman to a man, in the character of her husband, which she supposed him to be and described as such, but who, at the time of the marriage ceremony with her, had a wife living, the Court, in respect of his conduct, held him not entitled; but inclined to think it would be otherwise, where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect. *Kennell* v. *Abbott*, 4 Ves. 802.

IV. GIFT TO HUSBAND OF A THIRD PERSON

6. A testator bequeathed money to trustees in trust for his daughter E. for her separate use independent of her husband, and after the death of E. to her husband for his life, with remainder to all and every the children of E. by her present or any future husband. After the testator's death E.'s husband died, and she married again. E died, leaving her second husband surviving. On a bill filed by him against the trustee of the will:—Held, that the benefit of the gift was confined to the husband living at the date of the will, and the death of the testator, and did not extend to the second husband. *Franks* v *Brooker*, 29 L. J., Ch, 292; 8 W. R. 205; 27 Beav. 635; 6 Jur., N. S, 87.

7. Testatrix gave legacies to her son, John Bryan, and to her daughters, Ann, the wife of James Winson, Harriet, the wife of William Darnborough, and Mary, the wife of William Dadley, and she gave her stock in the bank to her said daughter, Mary Dadley, for life, and, after her death, to be equally divided between the husbands of her said daughters and her son, or such of them as might be living at Mary Dadley's decease. All the husbands named in the will survived the testatrix, but William Darnborough was the only one of them who survived Mary Dadley. Ann Winson, however, married a second time, and her second husband was living at Mary Dadley's death, and he claimed a share of the stock. But the Court held, that by the words "the husbands of my said daughters," the testatrix meant their husbands whom she had named; and, therefore, that William Darnborough was exclusively entitled to the stock. *Re Bryan's Trust*, 2 Sim., N. S., 103; 21 L. J., N. S., Ch., 7.

8. A gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasible vested remainder to her first husband. *Radford* v. *Willis*, 7 L. R., Ch., 25; 25 L. T., N. S., 720; 20 W. R. 132. Reversing 12 L. R., Eq., 105; 40 L. J., Ch., 484; 19 W. R. 845; 24 L. T., N. S., 574.

A father gave his estates and the rents, upon trust for his two daughters A. and L., to receive the same equally as tenants in common for their lives independent of the control of any husband or husbands with whom they might intermarry; and after their death, he directed that the trustees should stand seised of the estates, and convey the whole unto the respective husbands of his daughters, provided that if either daughter should die unmarried the share of such daughter should accrue and belong to the survivor for life, and on her death the whole should devolve on and be conveyed to her husband. A. died, leaving a husband surviving. L. married P., who by his will gave to his wife all the estate to which he

was entitled under the will of her father absolutely. P. died, leaving his wife surviving. A party at an auction purchased three lots of the estates, but refused to complete on the ground that P. was not entitled to an absolute interest in remainder on the death of L. :—Held, that the title of L. was such as could be forced on a purchaser. *Ib.*

Effect of Divorce.] 1. A testator devised property to his daughter for life, and after her death in trust for "any husband with whom she might intermarry, if he should survive her, for his life." The daughter married the defendant, and was divorced from him on his petition, and he married again and survived her:—Held, that the defendant was entitled to the property devised for his life. *Bullmore* v. *Wynter, Re Bullmore*, 22 L. R., Ch. D., 619; 52 L. J., Ch., 456; 48 L. T. 309; 31 W. R. 396.

See also HUSBAND AND WIFE, II. IV.

XXV. Gifts to Illegitimate Children.

See also POWER, XVII. III.

I. IN GENERAL, AND ADMISSIBILITY OF PAROL EVIDENCE.

2. Question, as to whether a bastard could take under the denomination in a will of "eldest son," by way of *descriptionis personæ*, the testator knowing of his existence, and believing that there was no lawful issue. *Baker* v. *Baker*, 2 Ves. 167.

3. Though a bastard's name be mistaken in a devise, yet if the person meant can be clearly ascertained by evidence, the devise is good. *Rivers' case*, 1 Atk. 410.

4. A legatee in a will was described as "J. E., the son of S. E., by M. J., or M., or E., his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not, was utterly immaterial, for he was the person designated as the legatee. *Thompson* v. *East-Wood*, 2 L. R., App. Cas., 215.

5. An illegitimate child not entitled to a share under a devise to children generally, notwithstanding a strong implication in the will in favour of that child. *Cartwright* v. *Vawdry*, 5 Ves. 530.

6. Bequest to the children of A., described "Spinster," and nothing on the face of the will showing that illegitimate children were intended, inquiry whether she left illegitimate children refused. *Osmond* v. *Tindall*, 5 Ves. 534.

7. An illegitimate child not entitled under the description of a child in a will, though testator knew they were both legitimate children and those not so in the family. *Godfrey* v. *Davis*, 6 Ves. 43.

8. Testator gave legacies with maintenance to his two illegitimate children, naming them, by C. B., and to all the other children he might have by her 6,000*l.* each, and, after other bequests, the residue among his said children. By codicil he directed maintenance of another child born since, also interlining his name with those of the other children, in the first part of the will only. That child entitled only to maintenance and a share of the residue, not the legacy of 6,000*l.* *Arnold* v. *Preston*, 18 Ves. 288.

9. The word "children," legally construed, is confined to legitimate children. *Bell* v. *Phyn*, 7 Ves. 458.

10. "Child," etc., *primâ facie*, means legitimate. *Wilkinson* v. *Adam*, 1 Ves. & B. 462.

Under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children who had acquired the reputation of being his children by her before the date of the will, entitled, as upon the whole will intended, and sufficiently described; rejecting as a description of the devisees passages in a written book, unattested, of which probate was admitted under a reference in the will to "the observations and directions which I shall leave in a written book." Whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, *quære*. S. C. 1 Ves. & B. 422. Affirmed 12 Price 470.

Bastard may take by purchase, if sufficiently described, and having acquired the reputation of the child of that person. S. C. 1 Ves. & B. 466.

But cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child. S. C. 1 Ves. & B. 452.

A testator devised certain property to his wife for life, and after her death to A. L., who then lived with him, for life, provided she so long continued single and unmarried. Then he devised part of his estate (except what he had given to his wife and A. L.) to trustees for thirty-one years, upon certain trusts, and after the expiration of such term to the children which he might have by A. L., and living at his death, or born six months after, and in default of such children, to his nephew. The wife died, and the testator published his will after her death:—Held, by the judges and House of Lords, that the children of A. L. who had previously acquired the character of reputed children of the testator by A. L. took an estate in the lands demised. S. C. 12 Price 478.

1. Under the description of "children" in a will illegitimate children existing at the date of the will not entitled, unless proved by the will itself to be intended, and evidence can be received only for the purpose of collecting who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee. *Swaine* v. *Kennerley*, 1 Ves. & B. 469.

2. Where there are not, nor ever were, nor can by any possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will for the purpose of finding whether there were any who had acquired the reputation of children, and it is possible for illegitimate children to acquire that reputation. *Woodhouselee* (*Lord*) v. *Dalrymple*, 2 Meriv. 419.

3. Illegitimate children not entitled, under the description of "children" in a will, the intention not being sufficiently apparent upon the face of the will. *Harris* v. *Lloyd*, T. & R. 310.

4. Under a bequest by unmarried man "to my children, etc., each," parol evidence allowed to show who testator considered in character of children, and they having obtained a name by reputation admitted to take as a class, though illegitimate and not named in the will. *Beachcroft* v. *Beachcroft*, 1 Madd. 430.

5. Where J. S., who had contracted a marriage, which was void *ab initio*, and had from that marriage one son, made his will, and gave the residue of his personal estate to all his children by his reputed wife:—Held, that a son born at the time of the making of the will, having the reputation of being the testator's child, was entitled although illegitimate. *Bayley* v. *Snelham*, 1 L. J., Ch., 35; 1 Sim. & S. 78.

6. A. by his will bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not. And, after certain specific bequests, he gave the residue of his personal estate to his sons William and John, as tenants in common; but if either of them should die in his (the testator's) lifetime, the moiety of such deceased son should go to his children; but if both his sons should die in his lifetime, then he gave such residue to and among all their children, as tenants in common. The testator's two sons died in his lifetime, one leaving legitimate and illegitimate children, the other illegitimate children only:—Held, that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son, took the residue; and that the illegitimate children of the first-mentioned son took no interest. *Fraser* v. *Pigott*, 1 Young 354.

7. A testator devises his real and personal property to trustees, upon trust for four children of M. D., whom he described by their respective names, together with every other child of the body of M. D. alive at my decease, or born within nine months afterwards, share and share alike. M. D. had two other children born after the date of the will, but before the date of a codicil to it, and these, as well as the four previously born, were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer* v. *West*, 3 Russ. 370; 5 L. J., Ch., 181.

8. Wherever the general description of children in a will would include legitimate children, it cannot also be extended to illegitimate children. A testator devised a leasehold in trust for his grandchild, Elizabeth, the only surviving child of his son William, and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal share; Elizabeth was illegitimate, and William had no other child:—Held, that Elizabeth did not take any share of the residue. *Bayley* v. *Mollard*, 1 Russ. & M. 581; 8 L. J., Ch. 145. And see *Levy* v. *Solomon*, 37 L. T., N. S., 263.

9. Under a first bequest of a fund in moieties to the children of A. and B. respectively, at the death of the testator A. had six legitimate and two illegitimate children, and B. had one legitimate and three illegitimate children, who, in relation to another bequest, were named:—Held, that the illegitimate children of A. were not entitled, but that the children of B., as well legitimate as illegitimate, were entitled to share in the bequest. Under a second bequest to A. and her children, including a daughter by name who was illegitimate, but A. had no other daughter of that name:—Held, that the daughter was entitled to share in the fund. *Meredith* v. *Farr*, 2 Y. & Coll. C. C. 525; 7 Jur. 797.

10. A direction in a will that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, and only child, who was afterwards discovered to be illegitimate, do not amount by implication to a bequest of the personal estate in favour of the daughter. *Davis* v. *Davis*, 1 Russ. & M. 645; 1 L. J., N. S., Ch., 155.

11. A testator gave the residue of his estate to B., the interest to be paid to her until her first-born son should attain the age of twenty-one years; one-half of the said principal sum then to be paid to her aforesaid son, the other half to be paid to his mother. Should his mother die before the said son, the whole to be paid to him. Should the aforesaid son die before his mother, his share to go to her. B. had one illegitimate son at the date of the will, who was maintained by the testator:—Held, that this son was not entitled under the above bequest. *Durrant* v. *Friend*, 5 De G. & Sm. 343; 21 L. J., N. S., Ch., 323; 16 Jur. 709.

12. A testator gave specific legacies and the residue of his personal estate to his children *nominatim*, payable to them at twenty-one or marriage. He also gave the residue of his real estate, subject to the payment of an annuity to his wife, and other trusts, between all his said children (not naming them), share and share alike; and directed, in case any of his children by his second wife should die without issue, before he or she should attain twenty-one, that the interest of each in his, the testator's, last-mentioned real and personal estate, together with the hereinbefore-mentioned legacies bequeathed to them respectively, should go between his said second wife and such of his children by her as should be living, etc.:—Held, that one of the said legatees,

who was an illegitimate daughter of the testator by his second wife, was entitled to share with their legitimate children in the residue of the testator's property. *Evans* v. *Davies*, 7 Hare 498; 18 L. J., N. S., Ch., 180.

1. A testator bequeathed a portion of his estate in trust for C. P. W. for life, and, after his death, "the interest for the maintenance of C. P. W.'s wife and education of his children; at his wife's death the principal to be equally divided among his children then living." C. P. W., at the date of the codicil, was unmarried, but had illegitimate children, of which fact it was assumed the testator was cognisant:—Held, that such children were excluded. *Warner* v. *Warner*, 20 L. J., N. S., Ch., 273; 15 Jur. 141.

2. Testator, by his will, after reciting that he had nine children by his then present wife, and enumerating such children by their respective names and descriptions, devised his real estate upon trust for sale, and upon the death or second marriage of the testator's then present wife, to divide the proceeds of such sale among his children by his then present wife who should be then living, and the issue of such of them as should be then dead, such issue taking *per stirpes* and not *per capita*, but subject, as to the shares of daughters, to the directions thereinafter contained; and the testator thereby directed his trustees, during the life of each of his said children by his then present wife who should happen to be a daughter, to pay the dividends of her share of the proceeds of the real estate as such daughter should appoint; and in default of appointment, to such daughter, for her life, to her separate use: and after the decease of such daughter, upon certain trusts for the benefit of her children; and in default of issue of such daughter, then upon trust as such daughter should by will appoint; and in default of appointment, then upon certain trusts for the benefit of the brothers and sisters of the whole blood of such daughter and their issue; and in default of such brothers and sisters, or their issue, then upon trust for the next of kin of such daughter at her death, according to the Statute of Distributions. The testator, at his death, left by his said wife the nine children only enumerated in the will; but of these one, a married daughter, was illegitimate, having been born before the marriage:—Held, upon the context of the whole will, that the illegitimate daughter was entitled to participate in the benefit of the gift to the testator's children of the proceeds of his real estate. *Owen* v. *Bryant*, 16 Jur. 877; 21 L. J., Ch., 860; 2 De G. M. & G. 697.

3. Where there is a gift to children as a class, unless the words necessarily apply to and include illegitimate children, or exclude any but such children, the gift includes legitimate children only. Where, therefore, a gift by will was to divide a capital sum after the death of a legatee for life between all his children and the children of M., the wife of W. B., and M. had six illegitimate children only:—Held, that they were not entitled, and that it made no difference that the testatrix knew that M. had children whom she believed to be legitimate, and that M. was aged forty-nine at the date of the will:—Held, also, that *Beachcroft* v. *Beachcroft* (1 Madd. 430) and *Fraser* v. *Piggott* (1 Younge 354) have been overruled by other authorities. *Re Overhill's Trust*, 1 Sm. & G. 362; 17 Jur. 342; 22 L. J., Ch., 485; 1 W. R. 208.

4. A testator by his will gave to trustees 1,000*l.* stock on trust to pay the dividends to his nephew for life; and after his decease, in case his nephew's wife should survive him, to pay the same to her for life, and afterwards on trust to pay the capital among his nephew's children. The nephew died unmarried, but left surviving a woman with whom he had cohabited for many years, who was supposed by the testator to be his wife, and was frequently referred to as such:—Held, the gift was void. *Re Davenport's Trust*, 1 Sm. & G. 126; 17 Jur. 314.

5. A testator, by his fourth codicil, made gifts to M., his wife, and E., their child, and also to a boy, F., and in this codicil he spoke of E. and F. as "the children," and appointed his wife their guardian. By the fifth codicil he bequeathed 4,000*l.* to M. "for her own and the children's benefit." The marriage of the testator with M. turned out to be invalid:—Held, that by the term "children" in the fifth codicil E. and F. were meant. *Hartley* v. *Tribber*, 16 Beav. 510.

6. Gift to a woman, designated by the testator as his wife, for herself and the children's benefit:—Held, by reference to a previous codicil, to include the child of another woman, though that woman repudiated the guardian appointed by the testator for her child. *Hart* v. *Tribe*, 22 L. J., Ch., 890.

A testator gave a legacy to a woman whom he had deceived by pretended ceremonies of marriage, to be used for her own and the children's benefit, and he appointed her their guardian:—Held, with reference to a former codicil, to comprise her child and the child of another woman, both of whom were specifically named in the former codicil. *Ib.*

7. Illegitimate children cannot take under a gift to a class of children, unless it is clear that the illegitimate children never could have taken under the gift. *Pratt* v. *Mathew*, 22 Beav. 328; 2 Jur., N. S., 364; 25 L. J., Ch., 409. Affirmed 2 Jur., N. S., 1055; 25 L. J., Ch., 686.

8. Illegitimate children, unless expressly mentioned, cannot be included in a class. *Edmunds* v. *Fessey*, 7 Jur., N. S., 282; 30 L. J., Ch., 279; 3 L. T., N. S., 765; 9 W. R. 365; 29 Beav. 233.

9. Bequest of a sum of money to a trustee in trust to pay to A. N. the interest during her life, or until she married, for the support of her children, W. and R., and in case of her death or marriage to apply it to the use of her children; and on their coming to the age of twenty-one, to divide the said sum between them. The children of A. N. born after the date of the will, and in the lifetime of the testator, do not take under this bequest. *Re Connor*, 2 J. & L. 456; 8 Ir. Eq. R. 401.

10. Bequests to illegitimate children, *in esse*, will take effect when they are appropriately described; but a prospective gift to future illegitimate children of a woman is wholly void *Medworth* v. *Pope*, 27 Beav. 71; 5 Jur., N. S., 996; 28 L. J., Ch., 905.

11. To enable an illegitimate daughter to take under a bequest in favour of daughters as a

class, it is not sufficient to show that there was, at the date of the will, no possibility of legitimate daughters, and that the claimant was a reputed daughter; but evidence must be given from which the testator's knowledge of these facts may be inferred. *Re Herbert*, 1 John. & H. 121; 6 Jur., N. S., 1027; 29 L J., Ch., 870; 8 W. R. 660.

Where a testator made a bequest in favour of the daughters of A. (his first cousin once removed), and it was proved that A. died seven years before the date of the will, leaving no legitimate daughters, but having had two reputed daughters, of whom one survived at the date of the will, and it being further proved that the testator had been in communication with members of A.'s immediate family, who recognised the illegitimate children as daughters of A., and that he had taken a small bequest under the will of A.'s brother, by which will the death of A. and the existence of the reputed daughters appeared:—Held, that these facts were sufficient to entitle the surviving daughter as *a persona designata*. *Ib.*

1. Bequest to "A. and her daughters," equally. A. had an illegitimate daughter at the date of the will, and never had any other daughter. A. predeceased the testator:—Held, that legitimate daughters alone could take under this bequest, and that the construction was not altered by the circumstance that, in the same will, there was a bequest to B. and her son John, the son John being illegitimate. *Kelly* v. *Hammond*, 26 Beav. 36.

2. Illegitimate children, born at the date of the will, are entitled under a bequest to children as a class, the testator having had no other children. *Dilley* v. *Matthews*, 11 Jur., N. S., 425; 13 W. R. 676; 12 L. T., N. S., 488.

3. A testator bequeathed money upon trust for his reputed daughter for life, and after her death to her children. He was aware that she was living in concubinage and had illegitimate children:—Held, that her illegitimate children, one of whom was born after the testator's death, took under the will. *Re Williams*, 12 W. R. 818; 10 L. T., N. S., 405.

4. A testatrix, who was never married, describing herself as a spinster, bequeathed her property in trust for her children. She had four illegitimate children at the date of the will, three of whom and an after-born child were living at her death, and in a codicil she described her children by name:—Held, that the children, and not the next of kin of the testatrix, were entitled to her property. *Clifton* v. *Goodbun*, 6 L. R., Eq., 278.

5. A testator made a bequest to his illegitimate son, T. by name, and he divided the proceeds of his residuary estate into seven parts, one of which he gave to his wife for life, with remainder among his children, to whom he gave the other six parts; and he gave such six parts among all his children, except his son T. Besides T. the testator left six children, of whom one daughter, A., was also illegitimate:—Held, that she was not entitled to a share as one of the testator's children. *Re Wells*, 37 L. J., Ch., 553; 6 L. R., Eq., 599; 16 W. R. 784; 18 L. T., N. S., 462.

6. A testator, at the date of his will, had a wife living by whom he never had issue, but by another woman who was commonly supposed to be his wife he had then had three children (only one of whom survived him), and after the date of his will he had by her another child who survived him. All these children were known by his name, and were supposed to be legitimate. By his will, in which the mother of these natural children was throughout referred to as his wife, he directed his residuary estate after her death or "second" marriage to be divided among all his children equally, and in case there should be only one, then the whole to go to such child:—Held, that the child, born before the date of the will and surviving the testator, was sufficiently designated, and was entitled to the whole fund. *Lepine* v. *Bean*, 39 L. J., Ch., 847; 10 L. R., Eq., 160; 18 W. R. 797; 22 L. T., N. S., 833.

7. An illegitimate child, or illegitimate children *in esse* as a class, may take under a gift to a child or children as a class, if it appears certainly from the context, or proper evidence, that they are the persons meant by the word "child" or "children." But illegitimate children unbegotten at the time of the testator's death cannot under any circumstances be entitled under such a description. *Holt* v. *Sindrey*, 7 L. R., Eq., 170; 38 L. J., Ch., 126; 17 W. R. 249; 19 L. T., N. S., 669.

8. Illegitimate children of an unmarried sister of the testator described in the will by her maiden name are entitled to shares in a legacy to her "and her two youngest daughters." *Savage* v. *Robertson*, 7 L. R., Eq., 176.

9. A testatrix left a fund upon trust to pay the income to E. S. for life, and after her death for "all and every the child and children of E. S." E. S. left one legitimate and two illegitimate children living at the date of the will and of the testatrix's death. The trustee, after the death of E. S., was about to pay the fund to the three children, but on his solicitor's advice paid the fund into court, as there were adverse claims. The eldest illegitimate child offered to send the certificates of birth of all the children, but the trustee did not accept the offer, and made no inquiries:—Held, that as there was no evidence from the words of the will to include the illegitimate children, the legitimate child only was entitled. The fund was improperly paid into court, and the trustee ordered to pay costs of the petition, for which he had his remedy against the solicitor for improper advice. *Re M'Naughtan*, 33 L. T. N. S., 774.

10. The word "children" in a will means *primâ facie* "legitimate children," as much so as if the word "legitimate" had been introduced before it, unless, when the facts are ascertained, some repugnancy or inconsistency would result from so interpreting it, and not merely some violation of a moral obligation, or of a probable intention, would result from their exclusion. The probable intention of the testator cannot be taken into account. *Dorin* v. *Dorin*, 7 L. R., H. L., 568; 31 L. T., N. S., 281; 23 W. R. 570; 45 L. J., Ch., 652.

When, therefore, a person who had two illegitimate children by a certain woman, married her, and the day after his marriage made a will in which, after leaving her his real and personal property for life, he said, "I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit,

and should she make no will I desire that the property existing at her death shall be divided as far as it may be practicable to do so, equally between my children by her," and had not any child born after the date of the will, but lived for some time after making it, and always treated the two illegitimate children as his own children:—Held, that the real and personal estate of the testator was, subject to the interest given to the widow for her life, undisposed of by the will. *Ib.* Reversing 17 L. R., Eq., 463; 43 L. J., Ch., 462; 29 L. T., N. S., 731.

1. A father bequeathed his residuary estate to "all and every my daughters in equal shares who shall attain the age of twenty-one or marry." He never had any legitimate children, but he had three illegitimate daughters, whose mother he had married two years before the date of his will, and whom he always treated and spoke of as his children:—Held, that the illegitimate daughters were entitled to take under the will as *personæ designatæ*. *Laker* v. *Hordern*, 24 W. R. 543; 1 L. R., Ch. D., 644; 45 L. J., Ch., 315; 34 L. T., N. S., 88.

2. A father, in 1839, gave property to trustees in trust to pay the income to his "daughter A., the wife of J. H.," for life, and to divide the principal between all the children of his daughter when they should attain twenty-one in equal shares, and in case all the children of his daughter should die under twenty-one without issue there was a gift over in favour of a son. For some time prior to the date of the will and the death of the testator in 1840, J. H. and the daughter were living together as man and wife at B., where the testator resided, until within a few months of his death. They were married in 1845. Three children were born before the marriage, one before the testator's will and two after his death. One child was born after the marriage:—Held, that the legitimate child only was entitled to the bequest. *Re Ayles*, 1 L. R., Ch. D., 282; 45 L. J., Ch., 223; 24 W. R. 202.

3. A father bequeathed moneys in trust after the decease of his daughter for "all the children of his daughter, whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one, their executors, administrators, and assigns. But in case his daughter should die leaving no issue either by her putative husband or by any other person, who should attain the age of twenty-one," then over. The father, at the date of his will, knew that his daughter had an illegitimate son by B., with whom she was then living, and he recognised this son as his grandchild. After his death his daughter married B., but had no other child:—Held, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them. *Re Brown*, 43 L. J., Ch., 84; 16 L. R., Eq., 239; 21 W. R. 721; 28 L. T., N. S., 616.

4. A testator bequeathed trust funds and moneys "in trust for all the children, to be equally divided amongst them, their respective executors, administrators, and assigns, of my brother H. M. W., of my nephew A. W. D., of my sister H. C. D., and of my niece M. B., of Jamaica, and my nephew G. D. himself (if he shall be then living, but not otherwise, G. D. taking a share with all such children), and the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived testator. There was enough in the case to enable the Court to presume that the testator was aware of the state of H. M. W.'s family:—Held, that the children of H. M. W. could take under the bequest. *Milne* v. *Wood*, 42 L. J., Ch., 545.

Held, also, that G. D. took two shares under it; the one vested, the other vested subject to be divested. *Ib.*

5. A natural daughter being included by description in a prior class of daughters was held entitled to take with legitimate daughters under a subsequent general gift to "my daughters." *Worts* v. *Cubitt*, 19 Beav. 421; 2 W. R. 633.

6. In construing a will, a gift to "children" may include existing illegitimate children, if from expressions in the will, or from the state of testator's family at the date of the will, the probability that he intended them to take is sufficiently strong, and this although the gift may be capable of being extended to future legitimate children, so that such future legitimate children would take with the illegitimate children as a class under the same gift. *Hill* v. *Crook*, 42 L. J., Ch., 702; 6 L. R., H. L., 265; 22 W. R. 137. Affirming S. C. *nom. Crook* v. *Hill*, 40 L. J., Ch., 216; 6 L. R., Ch., 311; 24 L. T., N. S., 488; 19 W. R. 649.

A father by his will left property for his daughter, whom he described as Mary the wife of John Crook. Mary was not in law the wife of John Crook, though she had gone through the ceremony of marriage with him, he being the widower of her deceased sister. The property was to be held in trust for her for life to her separate use, "independent of her present or any future husband," with remainder to her "children." There was issue of the union between Mary and John Crook four children, of whom two were living at the date of the will, and were always recognised by the testator as his grandchildren:—Held, that the two children living at the date of the will took under the bequest to the children of Mary Crook. *Ib.*

7. A. married B. on the 6th July 1865. In September 1865 they voluntarily separated, but the marriage was never dissolved by sentence of divorce, nor was there any judicial separation. A child was born on the 13th May 1866. B. went to live with another man, R., in November 1866, and lived with him as his wife until shortly before her death in April 1876. She had three children, born in 1868, 1870, and 1873 respectively, who were described in their baptismal certificates with the surname of R., and were supported by him and reputed his children. On a petition by the child born in May 1866, to have a fund in court carried over to his separate account as being solely entitled under a gift in a will "in trust for all the children or any the child of B.":—Held, that though all the children above mentioned were alive at the date of the will, yet, it being possible for B. to have future legitimate children, only legitimate children could take, so that the petitioner, being the only legiti-

mate child, was entitled to the whole of the trust fund. *Re Yearwood*, 46 L J., Ch., 478; 5 L. R., Ch. D., 545; 25 W. R. 461.

1. A testatrix gave a sum of stock to trustees to pay the dividends to her brother Charles and his wife Elizabeth for their lives, and after the decease of the survivor the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife Elizabeth before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife Elizabeth she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, and that she believed such to be the effect of the words of the will:—Held, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to show what the intention of the testatrix was. *Ellis* v. *Houstoun*, 10 L. R., Ch. D., 236; 27 W. R. 501.

2. A testator gave to "my grandson J. (the son of my daughter Alice Jane, and who is now residing with me)" the sum of 500*l.*, to be paid to him if and when he should attain twenty-one, with power to apply the income in the meantime for his maintenance; but if he died under twenty-one the 500*l.* and the unapplied income was to go in augmentation of the legacy of 2,000*l.* "hereinafter bequeathed in favour of the children and issue of my said daughter Alice Jane." The testator gave to trustees 2,000*l.* to be accumulated till the expiration of twenty-one years, or the death of Alice Jane, whichever might first happen, and then directed the fund and its accumulations to be divided amongst all the children of Alice Jane who should be then living, and the issue of such of them as should be then dead *per stirpes*. He gave two sums of 2,500*l.* upon trust for the children and the issue of his two other daughters respectively, corresponding with the trusts of the 2,000*l.* The grandson was illegitimate. He attained twenty-one, and survived his mother:—Held, by the Master of the Rolls, and by the Court of Appeal, that the grandson J. was not entitled to participate in the 2,000*l.* *Megson* v. *Hindle, Re Hindle*, 15 L. R., Ch. D., 198; 43 L. T. 551; 28 W. R. 866.

3. A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the estate to an illegitimate son of one of the testator's sons:—Held, that the gift was valid. *Lambe* v. *Eames*, 6 L. R., Ch., 597; 40 L. J., Ch., 447; 25 L. T., N. S., 175; 19 W. R. 659. Affirming 40 L. J., Ch., 15.

Proof and Establishment of Legitimacy.] See LEGITIMACY.

II. GIFT TO "NATURAL" CHILDREN.

4. A. B., in 1857, bequeathed the whole of her estate to E. B., then living with her as her husband, for his use for life; and after his death to be equally divided between the natural children of E. B. which might be then living. E. B. lived with the testatrix as her husband, but was not married, and there were living with him and the testatrix two natural or illegitimate children which she had had by him, and he had no other natural children:—Held, that the description of the objects of the testatrix's bounty was sufficient, and that the two natural children of the testatrix, in case they survived E. B., would be entitled to the fund. *Bentley* v. *Blizard*, 4 Jur., N. S., 652.

5. Bequest to A. and B. for life, and afterwards to their surviving children (which gift failed), and in default to "the children, legitimate or illegitimate, of my brother H.," equally. H. had five illegitimate children at the date of the will, two of whom predeceased the testator, and he had nine legitimate children after the testator's death:—Held, that the gift was valid, and that the property was divisible amongst the three illegitimate and the nine legitimate children. *Barnett* v. *Tugwell*, 31 Beav. 232; 31 L. J., Ch., 629; 8 Jur., N. S., 787; 10 W. R. 679; 7 L. T., N. S., 121.

6. Gift of income for "my wife Ann, my natural daughter Ann, and all my other daughters," followed by a gift of the capital "to be divided among my said wife and all my daughters":—Held, that the latter gift included the natural daughter. *Worts* v. *Cubitt*, 2 W. R. 633; 19 Beav. 421.

III. GIFT TO CHILDREN NOT IN ESSE.

7. *Semble*, a bequest to future illegitimate children is void; and there is no distinction between illegitimate children described as the children of a particular mother, without reference to their paternity, and those who are described as the children of a particular father. *Re Connor*, 2 J. & L. 456; 8 Ir. Eq. R. 401.

8. One devises 3,000*l.* to all the natural children of his son by J. S.; the bastards born after making the will shall not take; though in the principal case the money was to be paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment, the deed of appointment referring to the will was held as part of the will. *Metham* v. *Devonshire* (*Duke*), 1 P. W. 529. See 8 Price 22.

9. A testator devised certain property to his wife for life, and after her death to A., who then lived with him, for life, provided she so long continued single and unmarried. Then he devised part of his estate (except what he had given to his wife and A.) to trustees for thirty-one years, upon certain trusts, and after the expiration of such term to the children which he might have by A., and living at his death, or born six months after, and in default of such children to his nephew. The wife died, and the testator published his will after her death:—Held, by the Judges and House of Lords, that the children of A., who had previously acquired the character of reputed children of the testator by A., took an estate in the lands devised. *Wilkinson* v. *Adams*, 12 Price 478. Affirming 1 Ves. & B. 422.

Under a devise by a married man having no legitimate children, "to the children which I may have by A., and living at my decease," natural children who had acquired the reputation of being his children by her before the date of the will, entitled as upon the whole will intended and sufficiently described, rejecting, as a description of the devisees, passages in a written book, unattested, of which probate was admitted under a reference in the will to "the observations and directions which I shall leave in a written book." Whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, *quære*. S. C. 1 Ves. & B. 422.

1. A testator devises his real and personal property to trustees upon trust for four children of M. D., whom he described by their respective names, "together with every other child or children of the body of M. D., alive at my decease, or born within nine months afterwards, share and share alike." M. D. had two other children born after the date of the will, but before the date of a codicil to it, and these, as well as the four previously born, were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer* v. *West*, 3 Russ. 370; 5 L. J., Ch., 181.

2. It is settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; but it is not settled whether a gift can be made to the future illegimate children of a woman *Pratt* v. *Mathew*, 22 Beav. 328; 2 Jur., N. S., 361; 25 L. J., Ch., 109. S. C. Affirmed 2 Jur, N. S, 1055; 25 L. J, Ch., 686.

A testator having married his deceased wife's sister, and while living with her as his wife made his will, whereby he gave all his real and personal estate "to my wife" for life, and after her death, upon trust "for all and every my children hereafter to be born." At the date of the will he had no children whatever, but two days after a son was born:—Held, that the gift "to my wife" was good, but that the son could not take under the gift to his children "hereafter to be born." *Ib.*

3. Bequests to illegitimate children, *in esse*, will take effect when they are appropriately described; but a prospective gift to future illegitimate children of a woman is wholly void. *Medworth* v. *Pope*, 27 Beav. 71.

A devise of two houses and hereditaments to "such other child, if any, that may be born of my housekeeper, in my lifetime, or in due time after my death":—Held, that a natural child of the testator by his housekeeper, born after the date of the will, could not take. S. C. 5 Jur., N. S., 996; 28 L. J., Ch., 905.

4. The children of a marriage between a man and his deceased wife's sister, born after the date of the instrument of gift, are equally, with any other illegitimate children, excluded from participating under a gift to a class. *Howarth*, otherwise *Mills* v. *Mills*, 2 L. R., Eq., 389; 12 Jur., N. S., 794; 14 L. T., N. S., 841.

5. A testatrix gave all her property to trustees, in trust for life, and then to pay and divide the fund "to and among all the children of N. born or to be born," who shall live to attain twenty-one or marry. N. could not be proved to have been married. At the time of the will she was living with a man supposed to be her husband, and by common reputation in the neighbourhood they were man and wife. There were three children of N. living at the date of the will, and also at the death of the tenant for life, all well known to the testatrix, and all of whom lived to attain twenty-one. N. never had any other child. On the application of these three children, after notice to all persons claiming in default of them, and no opposition nor suggestion as to their illegitimacy, the fund was ordered to be paid to them, without any further proof of N.'s marriage beyond common reputation. *Re Nixon*, 2 Jur., N. S., 970.

6. C., after the death of his second wife, went through the ceremony of marriage with M. L., her niece, by whom he had two children, one posthumous. By his will he gave to trustees all his estate, to sell and convert, and pay the interest of 3,000*l.* to his wife M. L. C. for her life, in case she should so long continue his widow, and subject thereto to all and every his children (naming them), and all and every other child and children that he might have by his said wife M. L. C. The testator left children by each wife:—Held, that M. L. C. and her child born before the testator's death took, but not the posthumous child. *Smith* v. *Charles*, 13 W. R. 224; 11 L. T., N. S., 533.

7. The ultimate limitation in a settlement was to all the children as well those already born as hereafter to be born of A. and B., his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children, but before their marriage B. had several children still living, who were reputed to be children by A.:—Held, that these children were entitled to the property under the limitation. *Gabb* v. *Prendergast*, 1 Kay & J. 439; 1 Jur., N. S., 900; 24 L. J., Ch., 431; 3 Eq. Rep. 648; 3 W. R. 395.

Semble, the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before the testator's death. *Ib.*

8. An illegitimate child, or illegitimate children *in esse* as a class, may take under a gift to a child or children as a class, if it appears certainly from the context, or proper evidence, that they are the persons meant by the word "child" or "children." But illegitimate children unbegotten at the time of the testator's death cannot under any circumstances be entitled under such a description. *Holt* v. *Sindrey*, 7 L. R., Eq., 170; 38 L. J., Ch., 126; 17 W. R. 249; 19 L. T., N. S., 669.

9. A person, who had gone through the ceremony of marriage with M. L., his deceased wife's sister, who had two daughters, C. and E., by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for M. L. for life, and after her death for his reputed children C. and E., and all other children which he might have or be reputed to have by M. L. then born or thereafter to be born. The third child was

born before the testator's death, and was acknowledged by him as his child:—Held, that the after-born child was entitled to share with her sisters under the will. *Occleston* v. *Fullalove*, 9 L. R., Ch., 147; 43 L. J., Ch., 297; 22 W. R. 305; 29 L. T., N. S., 785. Reversing 21 W. R. 783; 42 L. J., Ch., 514; 28 L. T., N. S., 615.

1. A gift by a testator or testatrix to his or her unborn child by a particular person, not being the wife or husband of the testator or testatrix, is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix. *Re Goodwin*, 17 L. R., Eq., 345; 43 L. J., Ch., 258; 22 W. R. 619.

When, therefore, a testatrix who had gone through the ceremony of marriage with the husband of her deceased sister bequeathed her residuary estate upon trust for all her children by him, and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:—Held, that the second child, having before the death of the testatrix acquired the reputation of being her child by the husband of her deceased sister, was entitled to share in the estate. *Ib.*

IV. CHILDREN EN VENTRE SA MÈRE.

2. Bequest to a natural child *en ventre sa mère*:—Held, good if there is not affixed to gift by construction of will a condition precedent that it must be ascertained to be the child of testator. *Evans* v. *Massey*, 8 Price 22.

3. Under a bequest "to such child or children, if more than one, as A. may happen to be *enceinte* of by me," a natural child of which she was then pregnant cannot take, though a bequest to the natural child of which a woman was *enceinte*, without reference to any person as the father, would probably be good, having no uncertainty. *Earle* v. *Wilson*, 17 Ves. 528.

4. Bequest to the natural child of which a woman was *enceinte*, without reference to any person as the father:—Held, good, there being no uncertainty in the object described. *Gordon* v. *Gordon*, 1 Meriv. 141.

5. An illegitimate child may take by particular description before its birth. *Dawson* v. *Dawson*, 6 Madd. 292.

6. One devises 3,000*l.* to all the natural children of his son by J. S.; the bastards born after making the will shall not take; nay, the child *en ventre sa mère* shall not take. And though in the principal case the money was to be paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment, the deed of appointment referring to the will was held as part of the will. *Metham* v. *Devonshire* (*Duke*), 1 P. W. 529. And see 8 Price 22.

7. A testator, who had married his deceased wife's sister, gave his real and personal estate to trustees for "my wife" for life, and after her decease for all and every "my children" hereafter to be born. The testator had no children at the date of his will, but his then wife was *enceinte*, and shortly afterwards a son was born:—Held, that there was a sufficient designation in the will to entitle the wife to a life interest in the estate; but that the gift being to a class, the restrictions upon such marriages did not permit his son to be considered one of that class, and that there was no sufficient designation by which he could take. *Pratt* v. *Mathew*, 22 Beav. 328; 2 Jur., N. S., 364; 25 L. J., Ch., 409. Affirmed 2 Jur., N. S., 1055; 25 L. J., Ch., 686.

8. A gift to "children" (meaning illegitimate children) includes a child *en ventre sa mère* at the date of the gift. *Crook* v. *Hill*, 46 L. J., Ch., 119; 3 L. R., Ch. D., 773; 24 W. R. 876.

A bequest in favour of a woman's illegitimate child *en ventre sa mère* at the date of the will, though not born until after the testator's death, is not contrary to public policy. *Ib.*

A father, whose daughter M. had with his knowledge gone through the ceremony of marriage with J. C., her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again *enceinte*. He thereby gave leaseholds to trustees on trust for "my daughter M., the wife of J. C.," for her life, with remainder to "the child or children of my daughter M. C." as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. M. appointed to the two children born at the date of the will, the child of which she was then *enceinte*, and a former child begotten and born after the testator's death. The House of Lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:—Held, that the child *en ventre sa mère* at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take. *Ib.*

9. A father directed the income of one-half of his residuary estate to be paid to his son during his life and afterwards to his lawful issue; one of the issue was *en ventre sa mère* at the date of the death of the tenant for life, but his parents were not married till after that date, though before the birth of the child:—Held, that such child was not entitled to share in the distribution of the half of the residue. *Re Corlass*, 24 W. R. 204; 1 L. R., Ch. D., 460; 45 L. J., Ch., 118; 33 L. T., N. S., 630.

10. O. by his will, dated the 9th July 1868, bequeathed property to trustees for his reputed children, C. O. and E. O., "and all other the children which he might have, or be reputed to have by M. L." (his deceased wife's sister, with whom he had gone through the ceremony of a marriage), "then born or thereafter to be born." At the date of the will M. L. was *enceinte;* and six months later she had a child, who was named M. O., otherwise M. L., and was born on the 6th January 1869. The testator died on the 25th December 1870:—Held, that M. O., otherwise M. L., was entitled to share in the bequest. *Occleston* v. *Fullalove*, 9 L. R., Ch., 147; 43 L. J., Ch., 297; 22 W. R. 305; 29 L. T., N. S., 785. Reversing 42 L. J., Ch., 514; 21 W. R. 783; 28 L. T., N. S., 615.

V. GIFT TO CHILDREN OF A WOMAN PAST CHILD BEARING

1. Bequest of stock upon trust to pay the dividends to one for life, and then to divide the capital equally "between all the children of G., and the children of M. the wife of W. B., who should be alive at the respective deaths of the said G. and M." M. was married at the date of the will; she died after the testatrix without lawful issue, but leaving several illegitimate children, all born before the date of the will, and whom the testatrix believed to be legitimate. The Court admitted evidence of all facts in the testatrix's knowledge at the time she made her will; but upon the result of this evidence, there being a possibility that M. might have had legitimate children after the date of the will, and there being nothing on the face of the will to confine the description to the illegitimate children who were in existence at the date of it:—Held, that the illegitimate children took nothing. *Re Overhill's Trusts*, 17 Jur. 342; 22 L. J., Ch., 485; 1 Sm. & G. 362; 1 W. R. 208.

2. A testator, after giving a share of his property by his will upon trust for his niece B. and her husband, and for her child, if only one, or all her children, if more than one, gave another share upon such trusts in favour of his niece C. and her husband, and her child or children, as should correspond with the preceding trusts in favour of B. C. had only one child, born before her marriage, and illegitimate. She was fifty years old at the date of the will, and fifty-seven years old at the date of a subsequent codicil:—Held, that, on the death of C, her illegitimate child was not entitled. *Paul* v. *Children*, 12 L. R., Eq, 16; 25 L. T., N. S., 82; 19 W. R. 911.

3. H., having been married to R. (who was ignorant that his first wife was alive), had nine children by him. S., the sister of H., knowing that H. was fifty-seven years old, made her will, leaving certain property to the children of H., mentioning one by name as her niece, and referring to them as "born or to be born":—Held, that there was a sufficient indication of an intention, upon the knowledge which the testatrix had, to entitle the children of H. to the benefit of the gift as *personæ designatæ*. *Robinson* v. *Neal*, 19 L. T., N. S., 142.

VI. GIFT TO CHILDREN OF A DECEASED PERSON.

4. Legacy "to the children of the late C. K. who shall be living at the testator's decease;" C. K. being dead at the date of the will, leaving illegitimate children (of whom three were living at the death of testator), and not having, at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. *Woodhouselee* (*Lord*) v. *Dalrymple*, 2 Meriv. 419.

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children; and it is possible for illegitimate children to acquire that reputation. *Ib.*

5. A testator gave a legacy to "every of the sons and daughters of his late cousin;" his cousin left one legitimate daughter, and one son and one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of the testator. *Hart* v. *Durand*, 3 Anstr. 684.

6. Under the description of children in a will, illegitimate children, existing at the date of the will, not entitled unless proved by the will itself to be intended, and evidence can be received only for the purpose of collecting who had acquired the reputation of children. An only legitimate son, therefore, held entitled as devisee. *Swaine* v. *Kennerley*, 1 Ves. & B. 469.

7. A testatrix gave a share of her residuary estate to the children of M. G., deceased. M. G. left two children, one legitimate and the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of M. G., that the testatrix well knew that fact, and that M. G. left only those two children. *Gill* v. *Shelley*, 2 Russ. & M. 336.

8. Illegitimate children, unless they are expressly mentioned, cannot be included in a class. *Edmunds* v. *Fessey*, 7 Jur., N. S., 282; 30 L. J., Ch., 279; 3 L. T., N. S., 765; 9 W. R. 365; 29 Beav. 233.

A. gave "to each of the sons and daughters of his late cousin 100*l.* apiece." There were three sons and a daughter, one son and the daughter being illegitimate:—Held, that the gifts were made to a class, and that the illegitimate son could not take any legacy, as there were sons to answer the description; but that the daughter being the only one, was entitled to her legacy by express description. *Ib.*

9. A testator gave his property equally among all the children of his late nephew L., who should be living at the testator's decease, and who should attain twenty-one or marry; and if but one such child, to such child solely. Three children of L., two illegitimate and one legitimate, survived the testator. He had treated all three as being equally the children of L., and they were generally so received:—Held, that, L. being dead at the date of the will, there could never be legitimate "children" to answer the description; and that the gift was to the two illegitimate children, as well as the one legitimate child; but that the case would have been different if L. had been living at the date of the will. *Leigh* v. *Byron*, 1 Sm. & G. 486; 17 Jur. 822; 22 L. J., Ch., 1064; 1 W. R. 407; 1 Eq. Rep. 519.

10. A testator gave property by will to B., and after his death to B.'s children, "share and share alike; the two children of the late Ann B. to take the share that would have fallen to their mother had she been living, to be divided between them, share and share alike, if more than one survive; but if only one of them be then surviving, then and in such case the surviving child to take the whole of the mother's share." The testator also directed that if the wife of B. survived her husband, she should enjoy the property for her life, and the division should not take place till after her death. After the testator's death B. married a second wife, who survived him. He had three children, viz., George, Mary, and Ann, the first of whom only survived him. Ann died unmarried before

the date of the testator's will, leaving two illegitimate children:—Held, that the gift to the children of Ann applied to her illegitimate children; that the words of survivorship in the will applied exclusively to the children of Ann, and that all the children of B. took vested interests. *Re Burrow*, 10 L. T., N. S., 184.

Held, also, that the gift to the wife of B. applied to the wife who was living at the time of the will, and not to any wife whom B. might at any time afterwards marry. *Ib.*

1. A testatrix bequeathed to A., "the eldest daughter of my deceased daughter S., my gold watch." And she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S. who shall attain twenty-one, absolutely, equally, share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use.' S had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A., the eldest daughter of S.":—Held, that there was a sufficient indication of an intention that A. should be included in the description of "the children of S." *Re Humphries, Re Smith* v. *Millidge*, 24 L. R., Ch. D., 691; 49 L. T. 594.

VII. GIFT TO CHILDREN OF ILLEGITIMATE CHILDREN.

2. Where a testator in his will calls the son of his own illegitimate son his grandson, having no legitimate son, after giving his property to be divided between his son and daughter's children, and if there should be no grandchildren, then a gift to his nephew:—Held, that a legitimate daughter of the testator's illegitimate son was within the description of grandchildren. *Allen* v. *Webster*, 2 Giff. 177; 6 Jur., N. S., 574.

3. R. S. bequeathed the residue of his personal estate upon trust after the death of his wife for "all and every the children lawfully begotten of my nephews and nieces, equally to be divided between them share and share alike." The testator had only one nephew, W. A., who was legitimate, but there was another child of the same parents, namely J. A., who was born before the marriage of the parents; and the testator had no nieces properly so called, the only persons who could be so called being the wives of W. A. and J. A. In part of the will J. A. was spoken of as the testator's nephew. On the question of what class of persons took the residue:—Held, that the children of J. A. as well as the children of W. A. were entitled. *Tugwell* v. *Scott*, 3 Jur., N. S., 653.

XXVI. Gifts to Issue.

See also XLV. v. 5. *post.*—POWER, XVIII. III. —SETTLEMENT, X. VI.

I. WHEN CONSTRUED CHILDREN. IN GENERAL.

4. "Lawful issue" in a will, held, upon the context, to mean "children," and that, to the exclusion of "grandchildren" born prior to the period of distribution. *Edwards* v. *Edwards*, 12 Beav. 97.

5. The word "issue," in a will, may be held to mean children, when such is the manifest meaning of the testator. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

6. Upon a bequest of personal estate to the testatrix's sisters, or in case of any one dying and leaving issue the share to go to such child or children equally; all the sisters died in the lifetime of the testatrix, without leaving any issue, except one, who left two grandchildren:—Held, that the word "issue" meant child or children, and that, in the events that happened, the estate of the testatrix was undisposed of *Goldie* v. *Greaves*, 14 Sim. 348.

7. A devise to the issue of A., and for want of such issue to B.; A. has a son and a daughter, they shall take as persons described; but shall take only an estate for their lives. *Cook* v. *Cook*, 2 Vern. 545.

8. Testator directed his trustees to sell his real and personal estate, and to pay the interest of the proceeds to his daughter for life, and, after her death, to assign the principal and the parts of his real and personal estate remaining unsold (if any) to her children, when they should attain twenty-one; and if his daughter should die without leaving issue, or leaving issue all of them should die under twenty-one and without issue, then to assign the proceeds, and the parts of his real and personal estate remaining unsold (if any), to his personal representatives, his, her, or their heirs, executors, administrators, and assigns. The daughter, who was the testator's next of kin at his death, died without having had a child:—Held, that by "issue" the testator meant "children;" and that the persons who were his next of kin at his daughter's death were entitled under the ultimate trust. *Minter* v. *Wraith*, 13 Sim. 52.

9. Where the testator by one clause gave one-sixth of the residue to and amongst the children of his late sister, and by a subsequent clause another one-sixth to her sister for her life, and after her death to and amongst her issue, in like manner, as expressed before concerning the children of I.:—Held, that the word issue was to be construed to mean children, but that under neither clause could a grandchild take by way of substitution for its parent. *Peel* v. *Catlow*, 9 Sim. 372; 7 L. J., N. S., Ch., 273; 2 Jur. 759.

10. A testator provided that if "his daughter should have no issue male of her body living

at her death, or no such issue male as should be entitled by the true meaning of that his will to his real estates thereby limited, then and in either of those cases he devised the estates" to the daughters of his daughter living at her death:—Held, that the daughters of the daughter did not take any estate under the limitations in the will, for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. *Eden* v. *Wilson*, 4 H. L. Ca. 257. Reversing *Wilson* v. *Eden*, 12 Beav. 454. And see S. C. at law 5 Exch. Rep. 752; 20 L. J., N. S., Exch., 73; 19 L. J., N. S., Q. B., 104; 14 Jur. 616.

1. A testator gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one, for their respective lives, and after the death of any of them, as to an equal portion of the moiety proportionate to the number of his children then living, for the use of the issue of such child or children so dying, absolutely for ever:—Held, that the word "issue" included only children of the testator's children, to the exclusion of their more remote descendants. *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63.

2. A. conveyed freeholds to trustees and their heirs, for his wife during widowhood, and afterwards to convey and divide "such estate and premises" amongst the children and the issue of their children who should be then living as tenants in common (the issue of any deceased child to take their parents' share):—Held, that "issue" must be read children. *Tatham* v. *Vernon*, 29 Beav. 604; 7 Jur., N. S., 815; 9 W. R. 822; 4 L. T., N. S., 531.

3. A testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces, and for the benefit of "their respective children," as provided with respect to the legacies:—Held, that "issues must be construed "children," and that the children of nieces took, to the exclusion of grandchildren. *Baker* v. *Bayldon*, 31 Beav. 209.

4. A testatrix gave a fund to trustees, upon trust to pay the dividends to her niece; and, after her decease if her husband should survive her, and she should leave no "issue" living at her decease, then to the husband for life; but if she should leave "issue," then upon trust to pay a moiety of the dividends to the husband, and to apply the other moiety, during his life, for the benefit of "such issue" during their minorities. After the decease of the niece as to one moiety of the fund, and after the decease of the survivor of her and her husband then as to the whole of the fund, the trust was to transfer and divide the same unto and amongst the "children" of the niece, the shares of sons to be vested at twenty-one, and of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for "children," during minority; and, in case the niece should die in the lifetime of the husband leaving issue, and all should die and unmarried, then the trust was to pay the whole of the dividends unto the husband. "And from and after the decease of my said niece and her husband, and the survivor of them, and failure of issue of my said niece, upon trust to transfer the fund to other persons":—Held, that the word "issue" in previous parts of the will obviously meant "children," and that the gift over on failure of "issue" meant a failure of "children," and that the gift over took effect *Bryan* v. *Mansion*, 5 De G. & Sm. 737; 17 Jur 202; 22 L. J., Ch., 233.

5. A testator by his will gave a fund to trustees "in trust for the lawful issue of F. H. surviving him, equally to be divided between them if more than one, . . . and if but one then for such only child," with a gift over "in default of issue of F. H. becoming entitled." The issue of F. H. who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter:—Held, that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and the fund go in moieties between the surviving son and daughter. *Re Hopkins*, 9 L. R., Ch. D., 131; 26 W. R. 629; 47 L. J., Ch. D., 672.

See also LXIV. *post.*

II. WHEN CONSTRUED ALL DESCENDANTS. IN GENERAL.

6. Upon a legacy to the issue of A., all descendants are entitled, and take *per capita* as joint tenants. *Davenport* v. *Hanbury*, 3 Ves. 257.

7. The word "issue," unconfined by indication of intention, includes all descendants. Intention necessary to restrain it to children; grandchildren therefore entitled with children *per capita*. *Leigh* v. *Norbury*, 13 Ves. 340.

8. Grandchildren entitled under a bequest to issue. *Freeman* v. *Parsley*, 3 Ves. 421.

9. Issue not confined to children, but includes grandchildren. *South* v. *Searle*, 2 Jur., N. S., 390.

10. Bequest to A. for life, and after her death if she shall die leaving legitimate issue, upon trust to transfer the fund amongst such issue towards their education and maintenance at the discretion of the trustees, with a gift over if A. should die leaving no legitimate issue:—Held, that the word "issue" was not cut down to children, and that all the issue living at the death of A. took *per capita*. *Re Jones's Trusts*, 23 Beav. 242.

11. Gift to "issue" after the death of a tenant for life, held to include issue of every degree. *Maddock* v. *Legg*, 25 Beav. 531.

Bequest to persons for life, and after their death unto their and each of their issue, and the survivor or the survivors of them, on their severally attaining twenty-one, in equal proportions. On the death of the last tenant for life, there were three generations of issue living:—Held, that all who survived, and attained twenty-one, participated in the fund. *Ib.*

12. A will made in 1794 contained the following gift over: "But if my daughter happens

to die without issue, then in such case, at the decease of my daughter, I give and bequeath the said sum to my two daughters S. and E., equally to be divided between them, share and share alike, if then living; but if either of my daughters S. and E. should be then dead, then I give and bequeath the share of my daughter so dying to her issue, equally to be divided among them if more than one":—Held, that the word "issue" did not confine the gift to the children of the testator's daughters, but that the remoter issue were also entitled. *Weldon* v. *Hoyland*, 6 L. T., N. S., 96.

1. Bequest of leaseholds to four for life, remainder to their issue as tenants in common. Devise of other estates to the same four, remainder to their children as tenants in common:—Held, that "issue" must be construed children and grandchildren, and "children" confined to its strict signification. *Waldron* v. *Boulter*, 22 Beav. 284.

2. Bequest of a fund in trust for A. for life, and after her death to pay the capital among all the issue of A., in case she should marry, in equal shares; and in case she shall have no issue living at her death, then over:—Held, to be a gift to such of the children of A. as should survive her, and the issue of such of her children as should die before her. *Courthorpe* v. *Wood*, 2 Jur. 126.

3. Where there were bequests to L. for life, and after her death for her issue:—Held, that the children of the deceased children of L. were entitled to share with her surviving children in the property. *Louis* v. *Louis*, 9 Jur., N. S., 244; 7 L. T., N. S., 666.

4. A husband gave his residuary real and personal estate to trustees to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—Held, that the children and remoter issue of the son living at his death took together as joint tenants. *Re Corlass*, 1 L. R., Ch. D, 460; 45 L. J., Ch., 118; 33 L. T. 630; 24 W. R. 204.

5. Devise of lands to all the children of A. and B. his wife, "already or hereafter to be born" of their bodies, whether male or female, for and during their joint lives and the life of the survivor, but all the sons to take the name and arms of W. in addition to their own name, remainder to the trustees to preserve, etc.; and after their several deceases unto and equally between all their issue, male and female; and for want of such issue, over. That the word "issue" is *nomen collectivum*, and takes in the whole class of descendants, and that the words "in default of such issue" must refer to all such descendants; and consequently, rejecting the words which create a tenancy in common among the issue, the first taker would have an estate tail. *Woodhouse* v. *Herrick*, 3 Eq. Rep. 817; 3 W. R. 303; 1 Kay & J. 352; 24 L. J., Ch., 649.

6. Bequest of leaseholds in trust for F. for life, and after his decease for the issue of the body of F. if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over:—Held, to confer a life interest in F. with a gift over to his issue, meaning descendants who should be living at his death as joint tenants. *Hill* v. *Nalder*, 17 Jur. 224; 22 L. J., Ch., 242.

7. B. devised copyholds to his sons G., J., and F., upon certain trusts during the life of his wife, and after her death upon trust to pay the rents equally between his three daughters, R., M., and H., or to sell the same and invest the produce as therein mentioned, and to pay it to his three daughters during their lives for their separate use, and upon further trust "that in case my daughters shall depart this life leaving lawful issue," then the trustees should appropriate "the share of such daughter or daughters to the maintenance and education of such child or children until the age of twenty-one," and directed that his copyhold estates or their produce should be divided amongst "the whole of my grandchildren, share and share alike, in case there should be no lawful issue but of one of my daughters, that is, the children of George, James, and Frederick, with the child or children of only one of my daughters, share and share alike," and directed that his trustees should then sell if they had not before done so, the produce to be divided amongst such grandchildren, share and share alike, and as they should respectively attain the age of twenty-one; but should he have no grandchildren or not one who should attain the age of twenty-one, then the estate was to go to K., and as to all the rest, residue, and remainder of his estate and effects, he devised and bequeathed the same to his wife for her own use. All the daughters survived their father; R. died without leaving children, H. died leaving children, M. died having survived her children, but leaving grandchildren:—Held, that the word "issue" was to be read in its widest sense, and would include grandchildren, and that the respective issue of M. and H. took their respective shares by implication, and that they took *per capita*. *Mitchison* v. *Buckton*, 23 W. R. 480; 32 L. T., N. S., 11.

8. A testator left property on trust for his widow for life, and after her death upon trust for his brothers and sisters A., B., C., D., and E., but in case any of them should die leaving lawful issue, he directed that the share or shares of him, her, or them so dying should go to his, her, and their respective issue. A. and B. died before the testator, leaving issue. D. and E. died after the testator, but before his widow, and left issue:—Held, that issue included remoter descendants as well as children. *Hobgen* v. *Neale*, 19 W. R. 144; 40 L. J., Ch., 36; 11 L. R., Eq., 48; 25 L. T., N. S., 681.

III. ISSUE OF ISSUE CONSTRUED CHILDREN.

9. Where, upon the decease of the testator's "children," the estate was given to the "issue" of such "children," and where it was given over in case the testator's "children" should die "without leaving issue," and in like uses of the word issue, the word "issue" must be read "child or children," although in other parts of the will it might be necessary to read the word "issue" in a different sense. *Williams* v. *Teale*, 6 Hare 239.

10. The word "issue" construed "children"

by force of the gift to the issue of the issue being of their "parents'" share. *Pope* v. *Pope*, 14 Beav. 591; 21 L. J., N. S., Ch., 276.

Bequest to A. for life, with remainder to B. for life, with remainder to "all and every the issue" of A. living at the death of the survivor of A. and B., but in the event of any of A.'s "issue" dying in the lifetime of A. and B. leaving "issue," such issue to stand in the place of their "parents":—Held, that the first-mentioned "issue" was to be construed "children," and there being one daughter only of A., and two of her children living at the death of the survivor of A. and B., held that such daughter was alone entitled to the fund. *Ib.*

1. Devise to A. for life, and after her decease to the lawful issue then living and the children of such of them as should be then dead, in equal shares, the children of such issue to take their parents' share:—Held, that the word issue was to be construed children, and that the children of A. and the children of A.'s children who pre-deceased her took for life only. *Fairfield* v. *Bushell*, 32 Beav. 158.

2. Gift of personal estate to C. during her life; and after her decease, among all her children and their issue, such children and their issue to be entitled, as amongst themselves, to the benefit of survivorship, and accruer of surviving shares:—Held, that the children and grandchildren of C. took as tenants in common. *Law* v. *Thorp*, 4 Jur., N. S., 447; 27 L. J., Ch., 649.

3. A testator gave property unto and amongst all and every the children of his sister J., who should be then living, and the issue of such of her children as should be then dead leaving issue, share and share alike, but so as such issue should have no greater share thereof than such as their, his, or her parent would have had if living. The will contained a further proviso, that if any one or more of such issue should be then dead having left issue, then the issue of such issue as should be so dead should have and receive the part or share to which their, his, or her parent would have been entitled if living:—Held, that the issue of grandchildren of J. must be confined to children. *Heasman* v. *Pearce*, 41 L. J., Ch., 705; 7 L. R., Ch., 275; 20 W. R. 271; 26 L. T., N. S., 299.

IV. ISSUE BEGOTTEN OR TO BE BEGOTTEN.

4. Bequest to testator's brother and sisters, A., B., and C. for their several lives, share and share alike; and after the decease of either of them, then, as to the share or shares of one or either of them so dying, the testator bequeathed the same to the issue of the body or bodies of him, her, or them so dying, begotten or to be begotten by their present husbands, share and share alike for ever. Assuming that A., B., and C. took life estates only in the fund, the Court was of opinion that the words "issue of the body," etc., comprehended not only children, but grandchildren, and more remote descendants of A., B., and C. *Evans* v. *Jones*, 2 Colly. 516.

V. ISSUE MALE.

5. In a will, the words "failing the male issue" were, upon the whole context, construed to mean "if there shall be no son then living." *Murray* v. *Addenbrook*, 4 Russ. 407; 8 L. J., Ch., 79.

6. In the absence of words to control the technical meaning, a gift to "issue male" must be confined to "males claiming through males," and that males claiming through females were excluded, and this whether it be of real or personal estate. *Lywood* v. *Kimber*, or *Warwick*, 29 Beav. 38; 7 Jur, N. S., 507; 30 L. J., Ch., 507; 9 W. R. 88.

VI. WHEN JOINED WITH CO-RELATIVE WORD "PARENT."

1 When Construed Children.

7. Though the word "issue" will comprehend all descendants, upon construction of this will it was confined to "children." *Sibley* v. *Perry*, 7 Ves. 522.

8. Where in a will, after a bequest to certain persons and the lawful issue of such of them as should be dead, it is provided that such issue are to take only the share which their deceased parents would have been entitled to if living, "issue," will be read "children." *Pruen* v. *Osborne*, 11 Sim. 132.

9. The word "issue," upon the construction of the will, confined to children, to the exclusion of grandchildren or remoter issue, it being used in connection with the word "parent." *Bradshaw* v. *Melling*, 19 Beav. 417; 23 L. J., Ch., 603.

The testator devised and bequeathed to eight persons by name during their respective lives, and if any of them should die leaving issue his share to go to "such issue if more than one, and if only one, to such only child;" during the life of the survivor he devised and bequeathed to the issue of the eight persons then living, and directed that they should not take equally, but only their parent's shares:—Held, that "issue" meant children, and that the children of any of the eight persons dying took an estate *pur autre vie* in their parent's share during the life of the survivor of the eight, and that at the death of the survivor of the eight, the children of each then living took their parent's share to the exclusion of grandchildren. *Ib.*

10. The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary; but when the word "parent" is used in reference to his "issue," it is confined to his "children;" the word "issue" in reference to the word "parent" in a substitutional gift:—Held, from the context of the will, not limited to "children." *Ross* v. *Ross*, 20 Beav. 645.

Bequest to C. R. for life, with remainder to the children of C. R. who should be living at her decease, equally, and the issue then living of such of her children as might have

died in her lifetime, the issue to take the share which their parent would have been entitled to had he survived C. R.; and if but one, then to take "a child's share." There was a gift over on the death of C. R., "without leaving a child or issue" generally. One of C. R.'s children predeceased her, leaving no children, but only a grandchild, who survived C. R.:—Held, that he took a child's share with C. R.'s children. *Ib.*

1. The word "issue," when used with the word "parent" in a will:—Held, not to extend to grandchildren, but to include only children. *Re Sims's Trusts*, 2 W. R. 578.

2. A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease to distribute and divide the whole, etc., among such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—Held, that "issue" here meant children; and that the words "should then be dead leaving issue" meant, should before then have died leaving issue. *Martin* v. *Holgate*, 1 L. R., H. L., 175; 15 W. R. 135; 35 L. J., Ch, 789. Reversing S. C. *nom. Holgate* v. *Jennings*, 34 Beav. 79; 11 L. T., N. S., 501; 11 Jur., N. S., 5; 34 L. J., Ch., 120; 5 N. R. 180.

3. A testator bequeathed his residue equally to his five cousins, who should be living at the time of his decease, and to the issue of such of them as should be then dead, leaving issue, share and share alike, "such issue respectively, nevertheless, taking between them a parent's share":—Held, that the word "issue" was to be construed "children," and that grandchildren were excluded. *Smith* v. *Horsfall*, 25 Beav. 628. And see *Re Merrick's Trusts*, 1 L. R., Eq., 551; 12 Jur., N. S., 245; 35 L. J., Ch, 418; 14 L. T., N. S., 130. S. C. *nom. Re Merricke*, 14 W. R. 473.

4. A testator directed the interest of the residue of his property to be paid to his three surviving daughters, and his son-in-law, the husband of his deceased daughter A., and as to the principal, he directed that the same should be vested (subject to certain bequests), for the issue of his late daughter A., and the issue of his other three daughters, so that after the decease of each of his respective daughters who should die and leave any issue, that such issue which said daughters should leave should be entitled to receive the share of the interest of the property which his, her, or their mother respectively would be entitled to receive, and that the principal should be disposed of and given to such issue of his daughters respectively, share and share alike, on their respectively attaining the age of twenty-one years, or if female issue, on their attaining such age or marriage, with consent of their guardians thereinafter mentioned; and if any of his said daughters should happen to die without leaving any issue, then that the share of interest which said daughter so dying would be entitled to should go to the issue of his surviving daughters and the issue of his deceased daughter A.; and the share of the principal sum whereon the same arose should go to the child or children of his said daughters; and if any of his daughters should die leaving children, and any of them should die before being entitled to receive his proportion, the surviving child or children the issue of such daughter so dying should receive it; and he appointed guardians to his said grandchildren:—Held, that "issue" meant "children." *Black* v. *Campbell*, 14 Ir. Ch. R. 92.

5. Issue substituted for parents construed children. *Lamphier* v. *Buck*, 2 Dr. & Sm. 484; 11 Jur., N. S., 837; 34 L. J., Ch., 650; 13 W. R. 767; 12 L. T., N. S., 600; 6 N. R. 196.

6. The word "issue" restricted to "children," by force of the co-relative expression "parent." *Maynard* v. *Wright*, 26 Beav. 285.

Gift to "my grandchildren, and their issue, as shall stand, in respect to me, in equal degree of consanguinity".—Held, not void for uncertainty, the sentence being read in the alternative. *Ib.*

A testator devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which the accumulations to be paid to the testator's sons and daughters, or such of them as should be living at the respective periods of division; and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parents' share, to be vested interests in the same respectively, at the age of twenty-one, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of the children. And from and after the expiration of the term of twenty-one years he devised the same premises unto such of his grandchildren, and their issue, as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common:—Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Ib.*

7. The word "issue" construed "children" by force of the gift to the issue of the issue being of their "parents" share. *Pope* v. *Pope*, 14 Beav. 591; 21 L. J., Ch., 276.

Bequest to A. for life, with remainder to B. for life, with remainder to "all and every the issue" of A. living at the death of the survivor of A. and B., but in the event of any of A.'s "issue" dying in the lifetime of A. and B. leaving "issue," such issue to stand in the place of their "parents":—Held, that the first-mentioned "issue" was to be construed "children," and there being one daughter only of A. and two of her children living at the death of the survivor of A. and B.:—Held, that such daughter was alone entitled to the fund. *Ib.*

8. Gift "to survivors of a class and the issue of such survivor, such issue to take parent's share only," is a gift to the parents for life, with remainder to their children, and not a substitutionary gift. *Parsons* v. *Coke*, 4 Drew. 296.

2. When Construed all Descendants.

9. A. bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their issue, if there should be any children to take

their parents' share. But in case the nephew or niece died without issue, or leaving such they should die under twenty-one without issue, then he gave his or her share to the other of them, or his or her issue, if he or she be then dead leaving issue as aforesaid. The niece died in 1811, leaving issue; the nephew died in 1862, leaving no issue:—Held, that issue in the first part of the will meant children, but in the latter part issue generally, and that on the death of the nephew all the issue of the niece then living took *per capita*. *Re Corrie*, 32 Beav. 426.

1 A testator bequeathed legacies to his nephews and nieces, and directed that if any or all of his nephews and nieces should have legitimate issue, that issue respectively should have possession and enjoy the bequest which he made and intended for the parents of such issue respectively; but the sums bequeathed to such of his nephews or nieces respectively as should not leave issue should go to the survivors or survivor of his said nephews and nieces, and to the issue of the same:—Held, that "issue" meant all descendants, and that the survivors of the nephews and nieces, at the time of the death of one of them, took her share absolutely. *Re Kavanagh*, 13 Ir. Ch. R. 120.

2. A testator bequeathed the income of his residuary estate to his wife for her life; and after her decease, the residuary estate was to be equally divided among his brothers and sisters and the brothers and sisters of his wife. And he directed that in case of the death of any of his residuary legatees before his or her share should become payable, leaving issue, such issue should take that share equally:—Held, that the grandchildren of any of the residuary legatees who died before his or her share became payable were entitled equally with the children. *Dodsworth* v. *Addy*, 11 L. J., N. S., Ch., 382; 6 Jur. 700.

VII. CHILDREN CONSTRUED ISSUE.

3. Grandchildren and great-grandchildren included by the term "issue," and the word "children," following it, explained as meaning issue likewise. *Wyth* v. *Blackman*, 1 Ves. 196.

4. The word "issue" may be restricted so as to mean children, and conversely the word "children" may, from the context, be enlarged so as to be construed "issue;" each case depends on the peculiar expressions used, and the structure of the sentences. If the case be doubtful, the Court prefers that construction which will most benefit the testator's family, on the supposition that this must more nearly correspond with his intentions. *Farrant* v. *Nichols*, 9 Beav. 327; 15 L. J., N. S., Ch., 259.

5. "Child or children" may mean "issue." A testator bequeathed property to trustees upon trust to pay the income thereof to his daughter during her life, and directed that, in case she should leave any issue living at her death, the property should be disposed of, and the produce thereof paid to and amongst such child or children as she should appoint, and in default of appointment to and amongst such issue as tenants in common, or if there should be but one child the whole to be paid to such one; and if there should be no issue of his daughter living at her decease, or they should die infants, then over:—Held, that the words "child or children" must be construed "issue," and therefore that an appointment to the exclusion of the grandchildren was void. *Dalzell* v. *Welch*, 2 Sim 319.

6. Where the words "children" and "issue" are used interchangeably in a will, the operation of the word "children" may be extended to issue generally, to effectuate the intention. *Harley* v. *Mitford*, 21 Beav. 280.

A testator declared, that in case his daughters should "leave issue," they might appoint a fund "unto such children" in "such manner" as they should choose, and in default of any child, they might appoint it to their sisters and their children; "and in case all his daughters should die without issue," then over:—Held, that "children" must be construed "issue," and that an appointment to a grandchild was within the power. *Ib.*

Held, also, that the word "such" did not refer to the issue a daughter might leave, but to such of the class as she might choose. *Ib.*

VIII. WHEN CONSTRUED IN DIFFERENT SENSES IN THE SAME WILL.

7. The word "issue" in a will:—Held, on the context, to have two different meanings, as to two moieties of a devised estate. *Carter* v. *Bentall*, 2 Beav. 551; 9 L. J., N. S., Ch., 303; 4 Jur. 691.

8. Though the word "issue" be, in one clause of a will, construed "children," it does not necessarily follow that it will receive the same construction in all the other clauses. *Hedges* v. *Harpur*, 9 Beav. 479; 10 Jur. 578.

A testator gave fourteen Phœnix shares on trust, to pay the produce of ten to his daughters for life, and afterwards to his son, and afterwards to the son's "children;" and he gave the other four shares to his son for life, and afterwards to his "children;" and in default of "such issue" of his son, he gave all the shares to his "daughters" and their "issue," share and share alike, such issue not to be entitled to or take more than their deceased parent's share. The son died without issue:—Held, that the daughters took absolute interests, and that their children took only by way of substitution for their parents, and not by way of limitation or succession. *Ib.*

9. The word "issue" was used in a will on several occasions as equivalent to "children," and the issue were in some instances spoken of in reference to their "parent":—Held, that issue must receive the same construction throughout the will. *Rhodes* v. *Rhodes*, 27 Beav. 413.

It is a canon of construction that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it unless it violates the sense. *Ib.*

10. A father bequeathed a share of his residuary personalty to the issue of his daughter; and if his daughter should die without leaving "issue or issue of her issue" then over:—Held, that the word "issue" must have the same meaning throughout the will, and that as in the latter clause it was clear that "issue" meant

"children," the gift to the issue must be confined to the children. *Livesay* v. *Walpole*, 23 W. R. 825.

1. It does not follow, because the word "issue" in one part of the will means children only, that it should have that meaning also in another part; and where, after a bequest to A, and B. and their issue, in the sense of children, the residue was given to A. and B. equally, and to be divided between them, with benefit of survivorship, upon the death of either under twenty-one; not to be subject to the control of their husbands, but to be held in trust for them and their issue respectively until they attained twenty-one, if unmarried, or if married until a proper settlement could be made upon them and their issue, so that they should receive the dividends exclusively of their husbands, and if they both died under twenty-one, and without issue, then over; both attained twenty-one, and one of them died leaving children and grandchildren:—Held, that both the children and grandchildren were entitled to her share *per capita* as tenants in common. *Head* v. *Randall*, 2 Y. & Coll. C. C. 231; 7 Jur. 298.

2. A testator bequeathed leaseholds equally to his four grandchildren, and after their decease, to "such lawful issue" as they, or any or either of them, should leave:—Held, that on the death of each grandchild, his issue of every degree, then living, became equally entitled to his one-fourth, and that issue was not to be read "children," though in a subsequent gift he had used that expression. *Waldron* v. *Boulter*, 22 Beav. 284.

3. A. bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their issue, if there should be any children to take their parents' share. But in case the nephew or niece died without issue, or leaving such they should die under twenty-one without issue, then he gave his or her share to the other of them, or his or her issue, if he or she be then dead leaving issue as aforesaid. The niece died in 1811, leaving issue; the nephew died in 1862, leaving no issue:—Held, that issue in the first part of the will meant children, but in the latter part issue generally, and that on the death of the nephew all the issue of the niece then living took *per capita*. *Re Corrie*, 32 Beav. 426.

IX. CLASS OF. WHEN ASCERTAINED.

4. A testator directed his residue to be divided on the death of his wife (who survived him) equally between his brothers and sisters by name, and declared that if any of them should die leaving issue, his, her, or their shares should go to his, her, or their respective issue:—Held, that the class was to be ascertained, as to the issue of a legatee who had died before the testator, at the death of the testator, and as to the issue of a legatee who had survived him at the death of the legatee. *Hobgen* v. *Neale*, 11 L. R., Eq., 48; 40 L. J., Ch., 36; 25 L. T. 681; 19 W. R. 144.

5. M., by her will, gave the whole of her property to A. for her life, remainder as to one-fourth to L. or her issue, as to one-fourth to the issue of C., deceased, as to one-fourth to G. or his issue, and as to the other fourth to H. or her issue. The question having been raised as to the period at which the class of issue entitled under the gift was to be ascertained:—Held, that all issue coming into existence before the death of the tenant for life were included in the class, and that they took as joint tenants. *Re Jones, Hume* v. *Lloyd*, 26 W. R. 828; 47 L. J., Ch., 775.

6. A testator gave the interest of 3,000*l.* stock to his wife for life, and after her decease the interest of 1,000*l.*, part of the 3,000*l.*, to his daughter E. for life, and then to her issue; and as to another 1,000*l.* to his daughter M., and all her issue at twenty-one, with trusts for maintenance; and if she should not leave issue at her decease, or they should not attain twenty-one, to the issue of his daughters E. and S. equally, in the same terms as the former gift; and as to the remaining 1,000*l.*, to his daughter S., and her issue after her decease. He then directed a valuation of his farm stock, and gave the amount thereof, and all his personalty and estate whatsoever, to his sons J. and T. equally, and appointed his sons R., J., and T. residuary legatees, subject to the payment of 10*l.* a year to his wife out of the valuation. By a codicil the testator gave to his daughter M. 1,000*l.* consols for life, and after her decease to her issue; and in default of issue, to her two surviving sisters' issue at twenty-one. M. survived her two sisters, and was not married, and the testator left grandchildren and great-grandchildren:—Held, that M. took for life only; that the three sons of the testator, R., J., and T., all took the residue, and their issue at M.'s death took as purchasers as joint tenants; that is, such issue as were either alive at the testator's death, or came into *esse* before the death of M. *Surridge* v. *Clarkson*, 14 W. R. 979.

7. A father gave his residuary estate upon trust for his three daughters for life, and if any of his daughters should die leaving issue, a share proportioned to the number of his daughters was to go to the issue of such daughter, and if only one of such daughters should die leaving issue the whole to such issue, and if all his daughters should die without issue, then to his sisters. He had three daughters. One died leaving four children, one of whom died leaving two children born after their grandmother's death; afterwards another of his daughters died a spinster:—Held, that there were implied cross limitations, so that the surviving daughter had a life interest in half the share of the daughter so last dying. *Re Ridge*, 7 L. R., Ch., 665; 41 L. J., Ch., 787 27 L. T. 141; 20 W. R. 878.

Held, also, that the gift to issue was to the issue living at the death of the daughter, and therefore the three survivors of the four children and the representative of the dead one were entitled to the second moiety, and would, if the third daughter of the testator died without issue, become entitled to the whole. *Ib.* And see *Re Corrie*, 32 Beav. 426.

8. A husband gave his residuary real and personal estate to trustees to convert and invest, and pay the income to his wife during widowhood, or until his son should attain twenty-two, and then to call in half the money invested and pay it to his son, and as to the

other half, to pay the income to the wife during widowhood, and then to his son for life, and afterwards to his lawful issue:—Held, that the children and remoter issue of the son living at his death took together as joint tenants. *Re Corlass*, 1 L. R., Ch. D., 460; 45 L. J., Ch., 118; 24 W. R. 204; 33 L. T., N. S., 630.

1. A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares *per capita*." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life:—Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares. *Re Sibley*, 5 L. R., Ch. D., 494; 46 L. J., Ch., 387; 37 L. T., N. S., 180.

X. AS A WORD OF LIMITATION.

2. Whatever be the *primâ facie* meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be collected from the words of the will; and therefore it requires a less demonstrative context to show the testator's intention in regard to the word "issue," than in regard to the technical expression "heirs of the body." *Lees* v. *Moseley*, 1 Y. & Coll. 589.

3. It is established, that in a will the word "issue" is as strong as the word "heirs." *Bagshaw* v. *Spencer*, 2 Atk. 582.

4. "Issue" is *primâ facie* equivalent to "heirs of the body;" but the Court leans against so construing it when there are other expressions in the will to control that meaning. If words of limitation be superadded, as a gift to "issue and their heirs," the issue take as purchasers in fee simple, and a gift over on a general failure of issue operates nothing. *Kavanagh* v. *Morland*, 1 Kay 16; 18 Jur. 165; 23 L. J., Ch., 41; 2 W. R. 8; 2 Eq. Rep. 771.

See also XLIII. II. and III. *post*—SETTLEMENT, XIII.

XXVII. Gifts to Nephews and Nieces.

See also POWER, XVII. v.

I. IN GENERAL.

5. The description of nephews and nieces includes the child of a brother or sister of the half-blood. *Grieves* v. *Rawley*, 10 Hare 63; 22 L. J., Ch., 625.

6. Under a bequest to the testator's male nephews, nephews who were children of his brothers are entitled in exclusion of nephews, children of his sisters. *Lucas* v. *Cuday*, 10 Ir. R., Eq., 514.

7. A testatrix gave a sum of money in trust for "my nephew and nieces." She had numerous nephews and nieces, but in a former part of the will she had mentioned by name four nieces and one nephew:—Held, that all the nephews and nieces were entitled to a share of the money. *Re Lever*, 18 W. R. 35.

8. Parol evidence is admissible to explain the sense in which the word "nephew" is employed in a will *Grant* v. *Grant*, 22 L. T., N. S., 233; 18 W. R. 576; 5 L. R., C. P., 727. Discussed in *Re Parker*, *Bentham* v. *Wilson*, 17 L. R., Ch. D., 262; 50 L. J., Ch., 639; 44 L. T. 885; 29 W. R. 855.

II. INCLUSION OF GRAND-NEPHEWS.

9. Power to appoint among nephews and nieces does not extend to great-nephews, etc.; and if part be appointed, not pursuant to the power, the money so appointed lapses into, and passes under, the appointment of the residue which was properly appointed. *Falkner* v. *Butler*, Ambl. 514.

10. Testator gives the residue, to be divided, after his sister's death, amongst his nephews and nieces, and by a codicil gives to a great-niece, whom he calls his niece, 500*l.* over and above her share after the decease of his sister, in the body of his will treated of more at large:—Held, that none of the great-nephews or nieces were entitled to share in the residue. *Shelley* v. *Bryer*, Jac. 207.

11. Devise in remainder to the said T. B. for life, and after his decease to the said T. B., the son of my nephew S., and his heirs; a nephew of the same name, T. B., not being before mentioned, and in every other instance the devisee being pointed out by reference and particular description of the degree of relationship, the great-nephew held to be intended in both limitations. *Chambers* v. *Brailsford*, 18 Ves. 368. Affirmed 19 Ves. 652.

12. Testatrix bequeathed as follows:—"To my niece M. M., daughter of my nephew T. M., 30*l.*; to A. L. and M. L., son and daughter of my late niece M. L., 30*l.* each." And she gave all the residue of her property not thereafter disposed of, unto and equally to be divided amongst all her nephews and nieces. Afterwards she gave a specific legacy to M. D., and described her as her niece:—Held, that by the words "my nephews and nieces" in the residuary bequest, the testatrix meant not only her nephews and nieces, but their children also. *James* v. *Smith*, 14 Sim. 214; 13 L. J., N. S., Ch., 376; 8 Jur. 594.

13. A testator devised an estate to one for life, and afterwards to be sold, and the proceeds to be equally divided between "his surviving nephews and nieces." He had, in another

part of his will, designated A. and B. (who were really his great-nephew and great-niece) as his nephews and nieces:—Held, that A. and B. did not participate in the proceeds. *Thompson* v. *Robinson*, 27 Beav. 486; 29 L. J., Ch., 280; 5 Jur., N. S., 1196; 1 L. T., N. S., 121.

1. Under a gift to "nephews and nieces, being descendants of my brothers and sisters," alive at a certain period, grand-nephews and grand-nieces held not to be entitled. *Williamson* v. *Moore*, 8 Jur., N. S., 875; 10 W. R. 536

2. A testator gave his residue to his nephews and nieces equally. Afterwards, by a codicil, he gave a pecuniary legacy to his great-nephew A., describing him as a nephew; and by another codicil of even date he declared his meaning to be, that A. should have the pecuniary legacy in addition to his share of the residue:—Held, that the testator, under the words "nephews and nieces," intended to include great-nephews and great-nieces; and consequently that A. and all other great-nephews and great-nieces were entitled to share in the residue. *Weeds* v. *Bristow*, 2 L. R., Eq., 333; 12 Jur., N. S., 446; 14 W. R. 726; 14 L. T., N. S., 587; 35 L. J., Ch., 839.

3. A testatrix gave "to each of the present nieces of A., for her own absolute benefit, the sum of 2,000*l*., and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then and in every or any such case, the legacy intended for her so dying shall go to her child or children in equal shares, if more than one." At the date of the will and death of the testatrix, there was only one niece of A. alive, but there were several grand-nieces:—Held, that the bequest was confined in its term to the niece of the first degree, and that the children of nieces who were dead at the date of the will were not entitled to take by substitution, grand-niece or grand-nephew being excluded from the term "niece." *Crook* v. *Whitley*, 7 De G. M. & G. 490; 3 Jur., N. S., 703; 26 L. J., Ch., 350; 5 W. R. 383. Affirming 2 Jur., N. S., 998; 25 L. J., Ch., 657; 4 W. R. 534.

4. A testator gave the proceeds of the sale of an estate to his grand-nephew G., and to such other of his nephews and nieces as should be living at his own or his sister's decease equally. In one place in his will the testator called one of his great-nephews his nephew, but in all other places he called them great-nephews:—Held, that nephews and nieces must be confined to their primary signification, so as not to include great-nephews and great-nieces. *Re Blower*, 6 L. R., Ch., 351; 25 L. T., N. S., 181; 19 W. R. 666; 42 L. J., Ch., 24. Reversing 19 W. R. 121; 23 L. T., N. S., 548.

5. A testator gave legacies to "my niece, Elizabeth S." When he made his will he had a great-great niece, named Elizabeth Jane S., who was known to him, and there was not then any other person at all answering the description. He formerly had had a niece, with whom he was intimate, and to whom he had, by a former will, made precisely the same bequests as those in question, but when he made his last will he knew that she had been dead some time:—Held, that Elizabeth Jane S. was entitled to the legacies. *Stringer* v. *Gardiner*, 4 De G. & J. 468; 5 Jur., N. S., 260; 28 L. J., Ch., 758.

III. INCLUSION OF NEPHEWS BY AFFINITY.

6. Under a gift by a testator, who was married, to "my other nephews and nieces on both sides":—Held, that the children of the brothers and sisters of the testator's wife were included. *Frogley* v. *Phillips*, 7 Jur., N. S., 349; 3 L. T., N. S., 718; 3 De G. F. & J. 466. Affirming 6 Jur., N. S., 641; 30 Beav. 168.

7. Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers or sisters, and therefore no nephews and nieces:—Held, that the nephews and nieces of his wife were entitled. *Hogg* v. *Cook*, 32 Beav. 641.

8. Residuary gift in trust for "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me." The testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will:—Held, that the nephews and nieces of the testator's wife took under the gift, and that evidence of circumstances making it improbable that the testator intended to benefit them, but not tending to show that any other class was intended, was inadmissible. *Sherratt* v. *Mountford*, 8 L. R., Ch., 928; 42 L. J., Ch., 688; 21 W. R. 818; 29 L. T., N. S., 284. Affirming 15 L. R., Eq., 305; 42 L. J., Ch., 353; 21 W. R. 719.

9. A testator, after giving a legacy to each of several persons, whom he called respectively his nephews and nieces, gave the residue of his property to be divided between all his nephews and nieces equally, share and share alike. At the date of the will, he had one nephew and one niece, who were both mentioned in the will, and there was no possibility of his having future nephews or nieces. The other persons mentioned in the will, and therein respectively called his nephews and nieces, were, in fact, the nephews and nieces of his wife:—Held, that the nephews and nieces by affinity were included in the gift of the residue. *Adney* v. *Greatrex*, 38 L. J., Ch., 414; 17 W. R. 637; 20 L. T., N. S., 647.

10. A testator devised freehold property to be divided between the children of his sister-in-law and A. and B., and "my niece M." (the last-named three devisees being nieces of his deceased wife). He gave other real property to trustees upon trust for sale, and to pay the income of the proceeds of sale amongst "all my nephews and nieces," for their lives and the life of the survivors of them, and bequeathed the capital to the survivor, and he gave other real property unto "all my said nephews and nieces" as tenants in common, and he gave his residuary realty upon trust to pay the income to "all my said nephews and nieces" for their lives and the life of the survivor, and then devised such residue to the survivor, and bequeathed his residuary personal estate equally amongst "all my nephews and nieces":—Held, that the circumstance of the testator having given property to his wife's nieces, and having even called one of them his niece, was not sufficient to include any of his wife's nephews and nieces in the subsequent gifts to all his nephews and nieces; and those only who were related by consanguinity were

entitled to take *Grant* v. *Grant* (5 L. R., C. P., 180, 727) dissented from. *Re Foster, Merrill* v. *Morton*, 17 L. R., Ch. D., 382; 50 L. J., Ch., 239; 43 L. T. 750; 29 W. R. 394.

1. A testatrix having given legacies to several persons by name, describing each as her niece, bequeathed her residuary personal property upon trust for her respective "nephews and nieces," in equal shares. Two of the legatees in the will called nieces, were nieces not of the testatrix, but of her late husband:—Held, that the circumstance that the testatrix had, in her will, called these two her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest, so as to make it include all the nephews and nieces of her husband living at her death, nor even to include the two legatees whom she had called her nieces in the will. *Smith* v. *Lidiard*, 3 Kay & J. 252.

2. A testatrix, after giving a specific bequest to A. B., who was her husband's niece, but whom she there described as "my niece A. B.," afterwards gave the residue of her property thus, "unto all my nephews and nieces:"—Held, that the nephews and nieces by blood of the testatrix were entitled to the residue, to the exclusion of A. B. *Wells* v. *Wells*, 18 L. R., Eq., 504; 43 L. J., Ch., 681; 22 W. R. 893; 31 L. T., N. S., 16.

IV. ILLEGITIMATE NEPHEWS AND NIECES.

3. A. bequeathed to his "niece, Louisa B., the wife of W. B., 100*l*.," and after other dispositions of his property gave the residue to be divided equally between all his "nephews and nieces." The testator had but one legitimate niece; Louisa B. was illegitimate.—Held, that she was entitled to a share of the residuary estates, as one of his nieces. *Thomas* v. *Putt*, 22 L. T., N. S., 775; 18 W. R. 987.

4. A testator had only one illegitimate nephew (John), and only one legitimate nephew (William), and he had no nieces. By his will, he gave a legacy to John, whom he described as "his nephew"; and he gave his residuary estate "to the children lawfully begotten of his nephews and nieces:"—Held, that the children of John participated in the residue. *Tugwell* v. *Scott*, 24 Beav. 141; 3 Jur., N. S., 653.

V. CLASS OF, WHEN ASCERTAINED, AND DISTRIBUTION, WHETHER PER STIRPES OR PER CAPITA.

5. A testator gave specific legacies to three of his nieces (daughters of his sister) by name, and the residue to his sister and her husband for their lives, subject to an annuity to A.; and, after the death of the parents and A., he directed the residue to be "divided equally between the daughters of his said sister," and which he bequeathed "to his said nieces." There was a gift over, if no daughter of his sister should be then living. The sister had four daughters born at the date of the will, and another born after the testator's death; some only survived the tenants for life:—Held, that the residue was divisible among all the nieces, and that they took vested interests, subject to be devested in an event which had not happened. *Locker* v. *Bradley*, 5 Beav. 593.

6. A testator gave his real and personal estate to his sister for life, and if she should have any family living at her decease, they should have "their due proportion of the property:" and in case of the demise of his sister's children, his two nephews were to stand in the same situation as his sister's children would have stood had they been living:—Held, that such only of the nephews as survived the sister and the children took, and one of the nephews having died in her lifetime, that the other nephew was entitled to the whole residue. *Lewis* v. *Lewis*, 17 Beav. 221.

7. A gift of real and personal estate to trustees for the testator's brothers and sisters for life, with a direction after the decease of the survivor of them to sell and to divide the proceeds unto and equally between all his nephews and nieces, grandnephews and grandnieces, to take *per capita*, with power to apply the presumptive shares for advancement and maintenance:—Held, that all the class, including those born after the testator's decease, were entitled *per capita*. *Re Partington*, 3 Giff. 378; 8 Jur., N. S., 877; 5 L. T., N. S., 559.

8. Bequest of stock to trustees in trust, after the death of A., to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children: under this bequest a nephew not expressly named is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eccard* v. *Brooke*, 2 Cox 213.

9. A testator, by his will, gave the residue of his personalty to his nephews and nieces living at his death, in equal shares. By a second codicil to his will, he gave to his nephew B. 100*l*. By a third codicil, he declared that such 100*l*. was given to B., "in addition to the share of residue given to him by his will, it being his intention that he should receive first the 100*l*., and afterwards, in addition thereto, the share of the residue." The testator died, leaving several nephews and nieces, and also several grand-nephews and grand-nieces, and B. was one of such grand-nephews:—Held, that the grand-nephews and grand-nieces of the testator living at his death were entitled to participate in the residue. *Weeds* v. *Bristow*, 35 L. J., Ch., 839; 2 L. R., Eq., 333; 12 Jur., N. S., 446; 14 W. R. 726; 14 L. T., N. S., 587.

10. A testator gave all his personal estate to trustees, upon trust, to pay an annuity to his wife for her life, and to pay the remainder of the interest equally between his nephews and nieces, and his sister, E. W., in equal shares; but that the share of the said interest should be paid to E. W. during her life, and, after her decease, to go to her children; and he directed that, after the death of his wife and sister, the principal money should be divided between his nephews and nieces equally; at the death of the testator E. W. was living, but no other sister and no brother of the testator; E. W. had three children, and there

were five other nephews and nieces:—Held, that all the nephews and nieces were equally entitled to the property, with the qualification that the shares of the children of E. W., during her life, belonged to her. *Blakelock* v. *Sharpe*, 17 L. J., N. S., Ch., 453; 12 Jur. 819; 2 De G. & Sm. 484.

1. A testatrix bequeaths the residue of her personal estate to trustees, upon trust, to pay the interest to A. during her life; and from and after her death, to pay the interest thereof to B. during his life; and from and after his decease, to transfer the trust moneys to such of the testatrix's nephews and nieces as should be then living at the time of B.'s decease: the testatrix dies; then B. dies, and afterwards A. dies:—Held, that all the nephews and nieces of the testatrix who were living at the death of B., though not living at the death of A., were entitled to take. *Netherwood* v. *Hall*, 3 L. J., Ch, 159.

2. Under a bequest "unto and to the use of and equally between all and every my brothers and sisters, their respective executors, administrators, and assigns, absolutely and for ever," the brothers and sisters who survived the testator took the whole, excluding the representatives of the deceased ones. *Shuttleworth* v. *Greaves*, 4 Myl. & C. 35; 8 L. J., N. S., Ch., 7; 2 Jur. 957.

3. A testator, having one nephew and one niece, and eight great-nephews and nieces, living at his death, gave one-tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children at twenty-one, and he empowered his trustees to apply all or any part of their respective shares for their advancement:—Held, that all the great-nephews and nieces born before the eldest attained twenty-one, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 3 Sim. 417.

4. Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable to them at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate for them in the meantime, with benefit of accruer and survivorship: and in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid:—Held, that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained twenty-one or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 3 Sim. 492.

XXVIII. Gifts to Next of Kin.

See also Settlement, X. vii.

I. WHEN CONSTRUED NEAREST OF KIN.

5. A., by will, bequeathed a fund to trustees, upon trust to divide the same "equally amongst his next of kin":—Held, that the nearest of kindred in blood, and not the next of kin under the Statute of Distributions, were entitled. *Avison* v. *Simpson*, 1 John. 43; 5 Jur., N. S., 594.

6. The Master was directed to inquire who were the nearest in blood of a testator, *ex parte paternâ*, at a certain period:—Held, that "nearest of blood" and "next of kin" were synonymous terms; and as the suit related to personal estate, that the Master ought to follow the civil, and not the canon, law mode of computation in prosecuting the inquiry. *Cooper* v. *Denison*, 13 Sim. 290; 12 L. J., N. S., Ch., 404.

7. The words "next of kin" used *simpliciter*, and without explanatory context, must be taken to mean "nearest of kin." *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J., N. S., Ch., 200. Reversing on the latter point 2 Myl. & K. 82; 3 L. J., N. S., Ch., 17; and overruling *Phillips* v. *Garth*, 3 Bro. C. C. 64, and *Hinckley* v. *Maclarens*, 1 Myl. & K. 27.

8. Under a residuary bequest to the next of kin in equal degree, brothers entitled, excluding nephews and nieces. *Wimbles* v. *Pitcher*, 12 Ves. 433. See also *Anon.* 1 Madd. 36.

9. A. gave his property, after the death of his wife, to his or her next of kin, in equal shares. The testator was illegitimate, and died without any next of kin:—Held, that the next of kin of the wife took to the exclusion of the Crown, and the nearest of kin to the exclusion of the more remote, and that the only surviving brother of the wife was entitled to the fund. *Rook* v. *Att.-Gen.*, 31 L. J., Ch., 791; 10 W. R. 745; 31 Beav. 313; 9 Jur., N. S., 9.

10. A testatrix by her will gave 2,000*l.* to trustees upon trust to pay the interest to H. during her life for her separate use, and after her death to pay the fund to such persons as H. should by will appoint, and in default of appointment to the next of kin of the testatrix living at the death of H. And the testatrix directed that in case H. should die without

leaving issue, who should attain twenty-one, the trustees should divide the 2,000*l.* between certain persons therein mentioned. H. died leaving one son who attained twenty-one, and without having exercised the power of appointment:—Held, that there was no gift by implication to the son, nor to H. absolutely; but that in the events which had happened the nearest in blood to the testatrix living at the death of H. were entitled to the fund as joint tenants under the first gift over in default of appointment. *Re Hayton's Trusts*, 4 N. R. 55; 10 L. T., N. S., 336.

1. A husband bequeathed his personal estate equally between his wife and children, and directed that the share of his daughters should be vested in the bank in their own names, and the interest for life to be received by them, to remain as a jointure for their use in case of their marrying, untouchable by their husbands, "but to descend to their legal or next of kin": —Held, that "legal or next of kin" meant nearest of kin without regard to the Statute of Distributions, and that the daughters took only life estates. *Harris* v. *Newton*, 25 W. R. 228; 36 L. T., N. S., 173; 46 L. J., Ch., 268.

See also VII. *infra.*

II. GIFTS TO NEAREST OF KIN IN THE MALE LINE.

2. A testator directed that a portion of his property should be invested, and the dividends paid among his brothers and sisters and their children; that the residue should accumulate for twenty-one years after his death, at the end of which time the accumulated fund (to which he gave the name of his "capital property") was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The inheritor of this capital property was to assume the testator's surname, "if not of that surname," and was to "bear and use the arms, with the differences, which may have been at any time previous to my death assigned to me." The testator, in a memorandum dated some time afterwards (and which was admitted to proof as a codicil), directed that his gold medal, given for the capture of Java, should descend with "the patent of my armorial bearings to the inheritor of my capital property." The Crown, in consideration of his distinguished services, had, between the date of the will and of the codicil, made a grant of arms to the testator "and his descendants," and failing them, then (with the omission of emblazoning the Java medal) "to be borne by the descendants of his late father, with due and proper differences." At the date of the will and at the death of the testator, he had two brothers and several sisters living. The brothers (unmarried), the unmarried sisters, and two of the married sisters, died within the twenty-one years, leaving one married sister and the sons and daughters of her married sisters and of herself surviving. B., the son of a paternal uncle of the testator, claimed the capital property of the testator, as being the only person who answered the description of "nearest of kin in the male line":—Held, that he was not entitled, the words of the will not restricting the gift to a male claiming through males; and the married sister was held entitled to the "capital property." *Sayer* v. *Bradly* or *Boys*, 5 H. L. Ca. 873; 2 Jur., N. S., 887; 25 L. J., Ch., 593; 4 W. R. 808. Affirming 10 Hare 389; 17 Jur. 159; and S. C. on appeal, *nom. Boys* v. *Bradley*, 4 De G. M. & G. 58; 1 W. R. 143; 1 Eq. Rep. 201; 17 Jur. 517; 22 L. J., Ch., 617.

Semble, that "inheritor" may denote a class. S. C. *nom. Boys* v. *Bradley*, 1 W. R. 143.

III. GIFT TO NEAREST OF KIN BY WAY OF HEIRSHIP

3. Under a devise of land "to my nearest of kin by way of heirship":—Held, that the heir was entitled. *Williams* v. *Ashton*, 1 John. & H. 115.

IV. NEXT OF KIN EX PARTE MATERNÂ.

4. Bequest to A. B. for life, and afterwards to her children, but in default of children "to pay or assign and transfer" to C. D. if living, but if dead to his next of kin *ex parte maternâ*. C. D. died before A. B.:—Held, that the next of kin *ex parte maternâ* were not excluded because they also filled the character of next of kin *ex parte paternâ*. *Gundry* v. *Pinniger*, 14 Beav. 94; 20 L. J., N. S., Ch., 635; 15 Jur. 1147. Affirmed 1 De G. M. & G. 502; 21 L. J., N. S., Ch., 405; 16 Jur. 488.

5. The testatrix devised and bequeathed the rents, issues, and profits of her real and personal estate to her sister for life, and upon and after her decease upon trust to sell the real estate and pay the money arising therefrom to such persons as the testatrix should by any codicil direct, and if she should not bequeath the same by any codicil, then to pay the same unto and amongst her next of kin; and by her codicil the testatrix revoked the former devise and bequest made by her will, and devised and bequeathed all the said real and personal estate to other trustees upon the like trusts, but directed that all the said residue should be paid to her next of kin on the part of her mother, and not to any of her next of kin on the part of her father:—Held, that the testatrix died intestate as to the residuary personal estate; that the next of kin of the testatrix *ex parte maternâ*, at the death of the tenant for life, were under the codicil entitled to the proceeds of the real estate. *Say* v. *Creed*, 5 Hare 580; 16 L. J., N. S., Ch., 361; 11 Jur. 603.

V. GIFT TO NEXT OF KIN OF A PARTICULAR NAME OR BLOOD.

6. Devise to the devisor's sister A., then unmarried, for life, with remainder to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail; remainder to the first and nearest of his kindred, being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body. A person claim-

ing under the last limitation must be of the name as well as the blood; and the qualification as to the name is not satisfied by having the name taken by the King's license previous to the determination of the preceding estates. *Leigh* v. *Leigh*, 15 Ves. 92.

1. A. M. devised certain estates to his nephew R. M. and his heirs, "not entertaining the least doubt but that he would in due time, and upon the first proper occasion, take care not only to have the said estates so devised to him by me, but my paternal estates settled in such manner, that the said estates may continue in the male line of our family, and in our name and blood." At the death of the testator there were seven persons of the male line of his family and of his name and blood alive, one of whom was the plaintiff's paternal grandfather, who was descended from the paternal great-grandfather of the testator:—Held, that the objects were sufficiently defined and certain to enable the Court to execute the trusts created by the words of recommendation in the will, and that the Court, in executing the trust, might go into the ascending line, and was not confined to the descendants of the father of the testator; a general demurrer to the bill for want of equity was therefore overruled. *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunk. 465.

2. Under a bequest to next of kin of the surname of C. living at decease of A.:—Held, that a person whose maiden name was C., and who was sole next of kin at A.'s decease, but who had married after the death of the testator, was entitled. *Carpenter* v. *Bott*, 15 Sim. 606; 16 L. J., N. S., Ch., 433; 11 Jur. 723.

3. Devise of real and personal estate in trust for the nearest relation "of the Pyots:" the latter held to be *nomen collectivum*, and descriptive of that particular stock, and that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot by marriage not to exclude. *Pyot* v. *Pyot*, 1 Ves. 335.

4. The testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G., and had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, and from and after the decease of both of them upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only," upon trust for certain specified charitable societies. There was a clause for determining the interest of any descendants who, after becoming entitled to the receipt of the income, should abandon the name of R. G. Before the death of the nephew, a son born after the death of the testatrix, of the daughter of the testatrix's brother, assumed by royal license the name of R. G., and at the decease of the survivor of the brother and nephew there was no other descendant of either of them who bore that name:—Held, that the gift was not, as in *Leigh* v. *Leigh* (15 Ves. 92), confined to persons entitled to the name of R. G. by birth, and that the brother's grandson, as he bore the name of R. G. at the determination of the life interests, was entitled for life, and that on his decease the gift to the charities would take effect. *Re Roberts, Repington* v. *Roberts-Gawen*, 19 L. R., Ch. D., 520; 45 L. T. 450. Affirming on this point 50 L. J., Ch., 265; 44 L. T. 300.

VI. ILLEGITIMATE NEXT OF KIN.

5. A testator, who had none but illegitimate children, by his will, made five months before his death, devised and bequeathed all his real and personal estate to trustees, on the arrival of a future event, to sell the realty, and to divide the residue of the proceeds and of the personalty into four parts, and pay one to his son J., and if his son should die under twenty-one, and should not leave any child who should attain twenty-one or marry, the share was to be held in trust for such persons as would at his son's decease be his next of kin under the Statute of Distributions. The testator directed another share to be held upon certain trusts for the benefit of his daughter A. (a married woman), her husband, appointees, and children; and if she should leave no child or issue who should become entitled, he directed the share to be paid or assigned to such persons as would at A.'s death be her next of kin under the Statute of Distributions in case she had died intestate and unmarried. He directed the third and fourth shares to be held upon similar trusts for the benefit of his two other daughters, H. and E., then unmarried, their husbands, appointees, children, and next of kin. He then provided that any shares or moneys to which any or either of his three daughters should become entitled "by virtue of the provisions hereinbefore contained, as next of kin of the others or other of them," or of his son, should be held upon the like trusts as the original shares. The daughter H. having married and died, without having had a child, and without having made any appointment, and her husband being also dead:—Held, that the phrase "next of kin" of H. could not be read as designating the surviving illegitimate children of the testator, and that there was an intestacy as to the share of H. *Re Standley*, 5 L. R., Eq., 303.

VII. GIFT TO NEXT OF KIN OF A. AS IF DEAD UNMARRIED.

6. A fund was devised to A. for life, and after her death to such persons as she should appoint, and in default of appointment to such persons as at the time of the death of A. would be entitled to her personal estate under the Statute for the Distribution of Intestates' Estates as if she had died intestate and unmarried. A. subsequently married, and had eight children, but died a widow, and without having appointed the fund:—Held, that "unmarried" meant not having a husband at the time of her death, and therefore that the children of A., and not the persons who would have been entitled to A.'s personal estate if she had died

without ever having been married, were entitled to the fund. *Day* v. *Barnard*, 1 Dr. & Sm. 351; 30 L. J., Ch., 220; 3 L. T., N. S., 537; 9 W. R. 136.

1. A testatrix gave a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband." This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband. *Hardwicke* v. *Thurston*, 4 Russ. 380; 6 L. J., Ch., 124.

2. A married woman, by her will, bequeathed her separate property upon trusts for the benefit of her son and daughter and their children; and in case her said son and daughter should die without leaving children who should attain a vested interest under the will, upon trust for the person or persons of the blood and kindred of the testatrix who would be entitled to the same as her next of kin in case she had died intestate and unmarried. Upon the death of the testatrix, leaving her son and daughter surviving:—Held, that the word "unmarried" was not to be construed "without having been married," so as to exclude the testatrix's children; and that, consequently, the next of kin of the testatrix other than her children were not necessary parties to a suit for the administration of the estate. *Coventry* v. *Lauderdale (Earl)*, 10 Jur. 793.

The word "unmarried" is flexible in its meaning, and may be construed to mean "never having been married," or simply "unmarried at the time of the death," according to the obvious meaning of the parties, as manifested by the words of the instrument or the nature of the transaction itself. *Ib.*

3. A testator bequeathed the residue of his moneys to trustees, in trust as to one-fourth for such person as his daughter C., notwithstanding her coverture, should by deed or will appoint; and in default, in trust to pay the interest to C. for her separate use for life; and after her decease, in trust for such person as at the time of her decease should have been entitled thereto as her next of kin in case she had died possessed or entitled to the same intestate and unmarried. C. was married at the date of the will. She died leaving her husband and three children her surviving. No appointment of the fund was ever made in pursuance of the power. The husband and the brothers and sisters of C. claimed the fund, and thereupon the trustees paid it into court:—Held, that the word "unmarried" was used by the testator only to exclude the husband from taking any benefit under the will, and that the childern of C. were absolutely entitled. *Re Gratton*, 3 Jur., N. S., 684; 26 L. J., Ch., 648; 5 W. R. 795.

4. A testat,or bequeathed the residue to his wife for life with remainder to his children living at his death; and if there should be none (which happened), then he directed, "that immediately after his wife's decease it should become the property of the person who should then become entitled to take out administration to his effects, as his personal representative," according to the Statute of Distributions, and in the proportions thereby pointed out, in case he had died intestate and unmarried":—Held, that the next of kin at the death of the testator, and not those at the death of the tenant for life, were entitled. *Cable* v. *Cable*, 16 Beav. 507.

5. A testator gave a legacy to his daughter for life, and in default of issue in trust "for her next of kin in blood as if she had died unmarried." The daughter died without issue:—Held, that the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers and sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, and that next of kin, therefore, must be taken as meaning nearest relations, and not persons entitled as next of kin according to the statute. *Halton* v. *Foster*, 3 L. R., Ch, 505; 37 L. J., Ch., 547; 18 L. T., N. S., 623; 16 W. R. 683.

A bequest was made, in a certain event, which happened, to "A.'s next of kin in blood, as if A. had died unmarried." A. left surviving her a sister and several nephews and nieces:—Held, that the sister, being A.'s next of kin in blood, was solely entitled, to the exclusion of the nephews and nieces. *Ib.*

To entitle the next of kin according to the Statute of Distributions there must, in order to take the case out of the authority of *Withy* v. *Mangles* (10 Cl. & F. 215; 10 L. J., Ch., 391), be an express reference to the statute, and not one which has to be spelt out of the words of the will. *Ib.*

VIII. WHEN CONSTRUED STATUTORY NEXT OF KIN.

6. M. M. gave and bequeathed all her real and personal estate to her daughter L. for her separate use for life, remainder to L.'s husband for life; and after the decease of both of them, then to such persons as L. should by deed or will appoint, and in default "unto and to the use of the person or persons who at the decease of my said daughter shall be her next of kin according to the Statute of Distributions of Personal Estate, and in the like shares and proportions as if she had died without being married." The will further directed L. to appoint two trustees for the purposes of the will, in whom the property was to be vested, and power to appoint new trustees was given to L. L. died in the lifetime of her mother M. M., leaving her husband her surviving, but leaving no issue. At the death of L. her next of kin according to the statute were her mother and a nephew, who was thereby child of the only sister of L.; and upon the death of M. M. this nephew was the only next of kin of L. then living, and as such he claimed the whole real and personal estate of M. M.:—Held, on demurrer to a bill filed by the nephew, that the gift to the next of kin of L. had not lapsed; that the gift to the "next of kin" did not mean nearest of kin, and that the nephew was entitled to one-half of the property. *Nichols* v. *Haviland*, 1 Kay & J. 504; 1 Jur., N. S., 891.

7. The term "nearest of kindred," with reference to the Statute of Distributions, has the same meaning as "next of kin." *Markham* v. *Ivatt*, 20 Beav. 57.

1. Testator, by will unattested, after, among others, charitable legacies, to be distributed by his executors, gave the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever which he should be seised or possessed of, etc., "to next of kin or heir-at-law, whom I appoint my executor," after debts, etc., paid. He left one brother, and by deceased brothers a niece and several nephews, one of whom was heir-at-law. Distribution decreed according to the statute. *Lowndes* v. *Stone*, 4 Ves. 649.

2. Under a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, and a gift, in default of such appointment, to her next of kin as in case of intestacy:—Held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin according to the statute were entitled to the benefit of it. *Edwards* v. *Salaway*, 2 Ph. 625; 12 Jur. 487. Affirmed 17 L. J., N. S., Ch., 329.

See also next Subdivision.

IX EXCLUSION OF HUSBAND OR WIFE.

3. Residuary clause "to be divided amongst my next of kin as if I had died intestate" is a bequest to the next of kin as they would take under an intestacy; and the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words. *Garrick* v. *Camden* (*Lord*), 14 Ves. 372.

Primâ facie bequest by a husband to his next of kin does not include his wife, nor does a similar bequest by a wife, under a power, include her husband. *Id.* 382.

4. Testator bequeathed 700*l.* to his daughter's husband, his executors, etc, in trust to pay the interest to his daughter for her separate use for life, and after her death to such persons as she should appoint by will, and in default of appointment to her personal representatives. The daughter died without having made any appointment:—Held, that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* *Robinson* v. *Smith*, 6 Sim. 47; 2 L. J., N. S., Ch., 76.

5. Testator bequeathed the interest of 1,000*l.* stock to his granddaughter for life, and gave the residue of his personal estate to his wife. He then, after giving certain benefits to his daughter and granddaughter out of his real estate, directed that, in case both of them, his said daughter and granddaughter, should die without leaving children to attain twenty-one, the proceeds of the sale of the real estate, together with the said 1,000*l.* stock, should go to the persons who would have been entitled to his personal estate under the Statute of Distributions in case he had died intestate:—Held, that the right of the widow to the 1,000*l.* stock under the residuary clause was divested by the subsequent clause, although she was herself one of the persons who, by virtue of that clause, and in the event therein mentioned, were to share the 1,000*l.*; but held, also, that, until the event happened on which the gift was divested, she was entitled to all the dividends. *Martin* v. *Glover*, 1 Colly. 269; 8 Jur. 640.

6. Under a bequest, in the event of daughters dying without leaving issue, in trust for the persons who would at the time of the decease of such daughters respectively be entitled, as next of kin or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects.—Held, that the husbands of the daughters did not take. *Milne* v. *Gilbart*, 2 De G. M. & G. 715; 18 Jur. 611; 23 L. J., Ch, 828; 2 W. R. 611; 2 Eq. Rep. 999; 5 De G. M. & G. 510.

7. A testator disposed of his residue as follows: "The residue of my personal estate and effects not hereinbefore disposed of, I propose to bequeath by a codicil to this my will, or otherwise to allow the same to go, to my next of kin, according to the Statute for the Distribution of Estates of Intestates." The testator made no codicil to his will. He left a widow and brothers and sisters, and the children of a deceased sister, surviving:—Held, that the testator showed an intention to die intestate in case he made no codicil, and that his widow took her moiety under the statute. *Ash* v. *Ash*, 10 Jur, N. S., 142; 9 L. T., N. S., 673; 33 Beav. 187; 12 W. R. 185.

8. Wife is not one of the next of kin under the Statute of Distributions. *Horn* v. *Coleman*, 17 Jur. 408; 22 L. J., Ch., 779; 1 Sm. & G. 169; 1 W. R. 194.

9. Bequest to A. for life, and afterwards to his children, and in default, "then" unto the persons "of the blood, or next of kin," of the testator "as would, by virtue of the Statute of Distributions, have become then entitled thereto in case the testator had died intestate." A. died without issue:—Held, that the class comprising the ultimate gift was to be ascertained on the death of the testator, and not of A., and that the class took as tenants in common, notwithstanding the exclusion of the testator's widow. *Downes* v. *Bullock*, 25 Beav. 54. Affirmed *sub nom. Bullock* v. *Downes*, 9 H. L. Ca. 1.

10. Bequest upon trust for the testator's only child A. for her life; and after her death, to be equally divided between his next of kin according to the Statute of Distributions:—Held, that the testator's widow did not take any share as one of the next of kin. *Lee* v. *Lee*, 1 Dr. & Sm. 85; 6 Jur., N. S., 621; 29 L. J., Ch., 788; 8 W. R. 443.

11. A father bequeathed a fund in trust for his daughter for life, with remainder to her next of kin according to the statute, but in exclusion of any husband. He also bequeathed a fund in trust for his son for life, with remainder to his next of kin according to the statute. The son died, leaving a widow, and brothers and sisters:—Held, that as the testator had expressly excluded the husband of his daughter from sharing with her next of kin, but had not excluded the widow of his son, she was entitled to share with her husband's next of kin. *Re Collins*, 36 L. T., N. S., 437.

X. EXCLUSION OF ONE OF NEXT OF KIN BY TAKING A LIFE INTEREST.

12. A testator, after bequests of personal

estate with a direction to convert, and a life estate to his daughter, gave as follows: "If there should be no child of my daughter who should live to attain twenty-one, or die under that age leaving lawful issue, then I give, devise, and bequeath the trust moneys and dividends unto my own personal representatives and next of kin for ever, to be assigned, distributed, and paid according to the directions of the statute passed for the distribution of the estates of persons dying intestate." The daughter was the sole next of kin at his death. On her death:—Held, that her administrator was entitled to the fund. *Re Lang*, 9 W. R. 589; 4 L. T., N. S., 577.

1. Where, after specific limitations, a testator gives his property to his next of kin, much weight is not to be attached to that, which is supposed to be the testator's intention in favour of or against particular persons as his next of kin; for infinite variations may take place in that class between his will and his death. It is probable, that a testator, in such cases, means to provide for particular persons, and then adds that, if they fail, then the law may take its course. *Scifferth* v. *Badham*, 9 Beav. 370; 15 L. J., N. S., Ch., 345; 10 Jur. 892.

2. Testator devised and bequeathed his real and personal estate to D. and G. upon trust to pay the income to D. for life, and after his death to pay the income to F. for life: and at her decease he directed the principal to be divided between his (the testator's) next of kin; but if no claimant appeared within twelve calendar months after deaths of D. and F., he directed the money to be paid to certain charities. D. and F. survived the testator, and at his death were his next of kin; excluding them, G. was his next of kin. On the question as to which of the persons would be entitled under the gift to the next of kin:—Held, that D. and F. were not excluded from taking under the gift. *Gorbell* v. *Davison*, 18 Beav. 556.

3. Testator bequeathed his residue to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her will, and the other two-thirds were to go and be paid "to any other of the next of kin of my paternal line." The daughter was the testator's sole next of kin at his death; and exclusive of her, the testator's brothers were his next of kin at the same time; at the death of the widow (who survived his daughter) the daughter's children were the testator's next of kin according to the statute, but they and the testator's brothers were his nearest of kin, all of them being his relations in the second degree:—Held, that the brothers as well as the children were entitled to the two-thirds of the residue. *Cooper* v. *Denison*, 13 Sim. 290; 12 L. J., N. S., Ch., 404.

4. Bequest upon trust for testator's only child A. for life, and after her death to be equally divided between his next of kin according to the Statute of Distributions:—Held, that A. was not precluded from taking as next of kin, and that A., as next of kin at the testator's death, was entitled to the reversion. *Lee* v. *Lee*, 1 Dr. & Sm. 85; 6 Jur., N. S., 621; 29 L. J., Ch., 788; 8 W. R. 443.

XI. OTHER CASES.

5. Testatrix devised lands "to the next of kin of her father and mother, both deceased, his or her heirs and assigns, and if more than one, in equal shares." The testatrix being unmarried, and the only child of her parents, and the parents being strangers in blood to each other, there could be no person who was next of kin to both:—Held, however, that the testatrix meant the next of kin of both parents. *Pycroft* v. *Gregory*, 4 Russ. 526; 6 L. J., Ch., 121.

6. A testator made certain bequests on the death of his wife, and directed, that if the person entitled to claim any property by virtue of his will should die before he could prosecute his claim thereto, the property so falling to the deceased person should be divided amongst the nearest relations and next of kin:—Held, that the testator thereby intended not his own, but the next of kin of such legatee. *Robson* v. *Ibbs*, 6 L. J., N. S., Ch., 213.

XII. CLASS OF. WHEN ASCERTAINED.

See also XXIII. x. *ante.*

1. At the Death of the Testator.

7. The rule, that in a gift to the next of kin of A. the next of kin are to be ascertained at the time of A.'s death, is not affected by the fact that the gift compromises the proceeds of sale of real as well as of personal estate. *Cusack* v. *Rood*, 24 W. R. 391.

8. A testator having directed his executors to pay the interest of his residue to a woman during her life, and after her decease to divide the residue amongst the next of kin:—Held, the next of kin at the time of testator's death were the persons entitled. *Collisam* v. *Sams*, Taml. 346.

9. Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and, at the end thereof, gave the same to his next of kin. Although the expression "next of kin" means generally those who are so at a testator's death, yet here, upon the intention, the period of vesting was held to be at the expiration of the ten years. The testator, therefore, having but one brother who was next of kin (at his death), but who died within the ten years, so much as was produced by the real estate was held to belong to the heir-at-law of the testator, so much as was personal going to the representatives of the brother. *Spink* v. *Lewis*, 3 Bro. C. C. 355.

10. Bequest to testatrix's daughter for life, and after her death as she should appoint, and in default of appointment to testatrix's next of kin, to be considered as a vested interest from testatrix's death, except as to

any after-born child of daughter. The daughter having died without any child, and without executing any appointment:—Held, that the persons who would be next of kin at testatrix's death if her daughter had then been without children were entitled. *Bird* v. *Wood*, 2 Sim. & S. 400; 4 L. J., Ch., 86.

1. Testator directed his trustees to pay the dividends of certain stock to his wife for life, and after her decease to transfer the capital to such person or persons, in such shares and proportions, at such times and in such manner, as might be expressed in any codicil or codicils to his will; and in default of such direction or appointment, to transfer and make over the same unto such person or persons, as would, under and by virtue of the Statutes of Distribution of Intestates' Estates, have been entitled to his personal estate in case he had died intestate. The testator died without making an appointment by codicil, leaving his wife surviving him. The wife afterwards died:—Held, that the fund belonged to those who at the testator's death, and not to those who at the widow's death, would have been entitled to his personal estate in case he had died intestate; consequently, that the widow was entitled to a distributive share of the fund; but, *semble*, that there was no joint tenancy between the widow and the next of kin of the testator living at his death, and, therefore, that the widow, having survived those next of kin, was not entitled to take the whole fund by survivorship. *Jenkins* v. *Gower*, 2 Colly. 537; 10 Jur. 702.

2. Testator bequeathed the residue of his personal estate to his wife for life, and after her decease to his sister for life for her separate use, and after her decease to such person or persons as under the Statute of Distributions should be legally entitled to the same:—Held, that the residue, after the death of the sister, was bequeathed either to the next of kin of the testator living at his death, as joint tenants, or to the next of kin of the testator or of the sister living at the death of the sister, as tenants in common, and consequently that the wife, who died in the sister's lifetime, was not entitled to anything beyond a life interest in the residue. *Godkin* v. *Murphy*, 2 Y. & Coll. C. C. 351.

3. Testator, by his will, gave the residue of his property to a trustee in trust, out of the rents of particular leaseholds, to pay the annuities given by his will, and on further trust to invest the surplus rents of such leaseholds, upon trust, when his grandson, E. R. W., the child of a deceased daughter of the testator, should attain the age of twenty-one years, to transfer the same to E. R. W. absolutely; and the testator then directed, that after E. R. W. should attain twenty-one the trustee should pay the whole surplus income of his residuary estate, after satisfaction of the said annuities, and upon the death of the last annuitant, to E. R. W. for life, with remainder in favour of his issue; and in case E. R. W. should die under twenty-one without lawful issue, upon trust to pay and apply such surplus rents and profits unto and amongst testator's next of kin, in such proportions and manner as is provided by the Statute of Distributions, until the last of the said annuitants should depart this life; and in case E. R. W. should die after twenty-one years of age without leaving lawful issue, then upon trust, when the last of the said annuitants should die, but not before, to distribute the whole of the residue unto and amongst his next of kin, in such proportions and manner as aforesaid. E. R. W., after surviving the testator, died a minor, without issue:—Held, that, as sole next of kin, according to the statute, of the testator at his death, E. R. W., and not the next of kin at the time of the death of E. R. W., was entitled to the residuary estate, after payment of the annuities. *Bird* v. *Luckie*, 8 Hare 301; 14 Jur. 1015.

A testator, after bequeathing his residuary estate to trustees upon trust for his grandson, the child of his deceased daughter, for his life, directed them, in case his grandson should die under twenty-one without issue, then to pay the rents and profits unto and amongst his (the testator's) next of kin in such proportions and manner as is provided by the Statute of Distributions; and in case the grandson should die after attaining twenty-one without leaving issue, or such issue should die under twenty-one, or unmarried, or without issue, then to distribute the whole of the residue amongst such next of kin, in the same proportions and manner:—Held, that the gift was to the next of kin of the testator at his death, and this notwithstanding his sole next of kin at the time of making the will, and at the time of his death, was the grandson of the testator, to whom the life estate was given, and the sole next of kin of the grandson at the same time was the father of the grandson, the husband of the deceased daughter of the testator. *Ib.*

The mere circumstance that the gift to the next of kin of a testator is not immediate, but is contingent upon a future event which might or might not happen, is insufficient to render the description applicable only to such person or persons as should form the class at the time of the occurrence of the event. *Ib.*

4. Testator directed one-half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her after his wife's death; but if she died first without marrying or leaving issue, then that the trustees should accumulate the interest of the residue so far as it was not directed to be paid to his wife, and that on her death one-half of the capital should be divided amongst his nearest of kin, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his death; she died a spinster before her mother. At the mother's death the testator's sister was his nearest of kin:—Held, that by "my nearest of kin" the testator meant his nearest of kin at his own death, and not at the death of his wife; and, consequently, that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue. *Urquhart* v. *Urquhart*, 13 Sim. 613; 8 Jur. 161.

5. A testator gave his residuary estate to his daughter for life, with remainder to her children, and in default to his next of kin:—Held,

that the class of next of kin was to be ascertained at the testator's death. *Lasbury* v. *Newport*, 9 Beav. 376.

1. Upon an ultimate limitation to a testator's next of kin:—Held, that the next of kin at the testator's death, and not those at the time when such ultimate limitation took effect, were entitled. *Seifferth* v. *Badham*, 9 Beav. 370; 15 L. J., N. S., Ch., 345; 10 Jur. 892.

2. A testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B, to be equally divided between them, share and share alike, if then living; but if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow:—Held, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund *per stirpes*. *Booth* v. *Vicars*, 1 Colly. 6; 13 L. J., N. S., Ch., 147; 8 Jur. 76.

3. A testatrix, having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives":—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

4. A testator bequeathed part of the residue of his property to trustees in trust for his daughters during their lives, and after their respective deceases for their children, and in case there should be no children of his daughters respectively in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions:—Held, that upon the death of a daughter who survived the testator without issue her share went to the persons who were the testator's next of kin at her death. *Butler* v. *Bushnell*, 3 Myl. & K. 232; 3 L. J., N. S., Ch., 139.

5. A testator directed the sale and conversion of his property, and that a daughter should be entitled for life to a certain sum, to be invested in the usual way, with remainder to her husband, A., in case he should survive her, and in default of children or child, then to pay the same "according to the Statutes of Distribution of Intestates' Effects":—Held, that the next of kin of the testator at the time of his death was entitled to the principal so invested. *Royds* v. *Royds*, 8 L. T., N. S., 199; 1 N. R. 516.

6. A testator gave his residuary real and personal estate to his widow during widowhood, and then on trusts for the child of which his wife was *enceinte* when he should attain twenty-one, with maintenance in the meanwhile, but if such child died under twenty-one without having lawful issue then living, then on these trusts "in trust for such person or persons as shall be my next of kin according to the Statute of Distributions." The child, who at his father's death was his sole next of kin, died six months after his father:—Held, that the next of kin must be ascertained at the death of the testator, and not at the death of the son or of the widow. *Harrison* v *Harrison*, 28 Beav. 21.

7. A testator gave his real and personal estate to trustees for his wife for life, and after her decease for his daughter for life, and for her husband and children. And in case she died without lawful issue attaining twenty-one, then after her decease he directed that his personal estate, including the proceeds of the copyholds, should be for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto if he were to die possessed thereof and intestate, to be divided among them, if more than one, in the shares in which the same would be divisible under the same statutes. The wife and daughter and her husband survived the testator, the daughter never having any child; and on her husband's death the fund under the ultimate trust became divisible:—Held, that the period of ascertaining the class was the testator's death, and the wife and daughter's representatives were entitled. *Michell* v. *Bridges*, 11 L. T., N. S., 727; 13 W. R. 200.

8. A., after giving all his real and personal estate to trustees for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise and settle, not exceeding 5,000*l*., upon each such daughter, in part of her presumptive share, in trustees of her own nomination, in trust for her for life, with remainder for her children: and if all such children should die under twenty-one, in trust for the testator's next of kin. One of the daughters, having attained twenty-one, settled her 5,000*l*. upon herself and children, with a trust in default of children for the next of kin of the testator, according to his will. She died without having had any child.—Held, that the next of kin of the testator living at his death were entitled to the fund as joint tenants *Re Aspinall*, 30 L. J., Ch., 321; 9 W. R. 269; 4 L. T., N. S., 176.

9. A testator gave his residuary personal estate to trustees upon trust to pay the dividends to J. B., A. L., and J. L., for their lives, and the life of the survivor of them; and on the decease of the survivor "in trust, to divide the fund among the children of J. L., and in default of such children for all and every my next of kin who shall be in equal degree, and those who legally represent them according to the statute." At the testator's death, A. L. was his sole next of kin:—Held, that she was entitled to the fund. *Re Barber's Will*, 1 Sm. & G. 118.

10. A testator gave his residue to his wife, and on her death or marriage to his children; but in case she should die or marry again without leaving any child, or should any such child die before twenty-one, he directed the trustees to pay it to "such person or persons as might be legally entitled to the same under the Statute of Distributions." There was one child only, who was born after the testator's death, and who died three years old. The widow married again:—Held, that the class to whom the residue was given over was to be ascertained at the testator's death, and not at the death of the child, and that the widow was not excluded. *Starr* v. *Newberry*, 23 Beav. 436.

11. G. gave to trustees a sum of money to

invest, and pay the interest unto such person as his daughter M. should during her life direct; and in default of appointment, to her for life; and after her decease, to her husband and children: and in case M. should not have a child, then to assign and transfer the fund unto such person or persons as should happen to be his next of kin according to the Statute for the Distribution of Intestates' Effects. M. died in 1860, without having been married. The next of kin of G. at his death were his four children, two of whom died before M, and at her death the next of kin of the testator were one child and eight grandchildren:—Held, that the persons entitled were the next of kin at the death of M, but that they took as joint tenants. *Re Greenwood*, 3 Giff. 390; 8 Jur., N. S., 907; 31 L. J., Ch., 119; 10 W. R. 117.

1. Bequest to A. for life, with remainder to B. for life, and after their deaths to the testator's next of kin; but should no claimant appear within twelve months after their death, then to charities. A. and B. were sole next of kin at the testator's death:—Held, that the next of kin were to be ascertained at the testator's death. *Gorbell* v. *Davison*, 18 Beav. 556.

2. At a Subsequent Period.

2. Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin:—Held, to mean next of kin at the death of the wife, and not those living at the testator's death, they having express bequests under the will. *Miller* v. *Eaton*, Coop. 272.

3. A testator gave his personal estate to trustees upon trust to convert into money, and invest the same and pay the interest to his mother for her life; and after the decease of his mother he gave all his estate and effects to such person or persons as she should by her will direct and appoint, and in case his said mother should die without a will, then to such person or persons as should be entitled to the same by virtue of the Statute of Distributions. The mother survived the testator and died intestate:—Held, that the testator's next of kin at the death of the mother were entitled to the bequest. *Bridon* v. *Hewlett*, 2 Myl. & K. 90; 1 L. J., N. S., Ch., 114. And see S. P. *Spink* v. *Lewis*, 3 Bro. C. C. 335.

4. A testator directed that upon the death, without leaving issue, of his daughter, who was his sole next of kin, a certain fund should be assigned to the nearest of kin of his own family for ever:—Held, upon the construction of the will, that these words were meant to describe some person or persons to be ascertained at the daughter's death, and not the person or persons who should be his own next of kin at the time of his own death. *Clapton* v. *Bulmer*, 5 Myl. & C. 108. Affirming 10 Sim. 426; 9 L. J., N. S., Ch., 261; 4 Jur. 288; 5 *id.* 477.

After bequest of residue to testator's daughter for life, with remainder to her children, it was provided that if she should die without leaving issue, 3,000*l.* should be paid as she should appoint, and if testator's wife should survive the daughter, and the daughter should die without issue, then he gave 2,000*l.* to his wife, and the residue unto the nearest of kin of his own family for ever. The daughter, who was the sole next of kin of the testator, survived the wife, and died without issue:—Held, that her next of kin were entitled, to the exclusion of her personal representative. Affirmed by the Lord Chancellor, who observed, that the same person was next of kin of the daughter and of the testator at her death. S. C. 10 Sim. 426.

5. C. devised freehold estate in trust for his son D. for life, with remainder to D.'s sons in tail, with remainders over; but in case D. should die under twenty-five without leaving any children him surviving, then in trust for such persons as at the time of such failure of issue should be his (the testator's) next of kin according to the statute made for the distribution of intestates' estates, and as if he (C.) had survived D. C. made a similar devise in trust in favour of another son, and then he declared that the leasehold premises given to his sons should not vest in them during the life of his wife, but in case they or either of them should attain twenty-five, and should die in the lifetime of his wife without children, should belong to such persons as should then be his next of kin in manner aforesaid. C. then bequeathed a legacy in trust for his daughter for her separate use, and after her decease for her children; and in case she should leave no children, then in trust for his next of kin in manner aforesaid:—Held, that the persons entitled, upon the death of the testator's daughter without leaving children, were those persons who at that period, and not at the death of the testator, were the testator's next of kin. *Bessant* v. *Noble*, 2 Jur., N. S, 461; 26 L. J., Ch., 236; 4 W. R. 475.

6. Testatrix bequeathed all her personal estate to her executors, upon trust that same be placed out at interest for the sole use of E B., until she should arrive at the age of twenty-one years, or be married; and directed her executors to draw the interest thereof during the minority of E. B., or until her marriage, and apply same towards her maintenance and education; and when E. B. should attain her age of twenty-one years, or be married, then to pay the principal and interest to her, as and for her own proper money; and in case E. B. should die under age and unmarried, the testatrix bequeathed the said principal money and interest to her (the testatrix's) next of kin, share and share alike, as tenants in common; and if but one, the whole to such one. E. B. was the sole next of kin of the testatrix at the time of her decease, and afterwards died under age and unmarried:—Held, that the personal representative of E. B., and not the next of kin of the testatrix at the time of E. B.'s death, was entitled to the trust funds. *Murphy* v. *Donegan*, 3 J. & L. 534.

7. A husband gave his residuary personal estate to his wife for life, and after her death he directed his trustees to pay and divide three-fifths of the residue among such person or persons as under the Statute of Distributions would have become entitled on his late father's side to his personal estate at the death of his wife if he had died intestate, and the other two-fifths he gave in similar terms to his next

of kin on his late mother's side:—Held, that the period for ascertaining the classes was the date of the death of the widow and not that of the testator himself. *Re Morley*, 25 W. R 825.

1. Where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the Statute of Distributions be his next of kin, the class is an artificial class, to be ascertained on the hypothesis that the testator lives up to and dies at the subsequent period of time. *Re Sturge and Great Western Railway Co*, 19 L. R., Ch. D., 444; 51 L. J., Ch., 185; 45 L. T. 787; 30 W. R. 456.

2. Bequest to A. B. for life, and afterwards to her children; but, in default of children, "to pay or assign and transfer" to C. D. if living, but if dead, to his next of kin *ex parte maternâ*. C. D. died before A. B.:—Held, that the next of kin were to be ascertained at the death of C. D., and not of A. B. *Gundry* v. *Pinniger*, 14 Beav. 94; 20 L. J., N. S., Ch., 635; 15 Jur. 1147. Affirming 1 De G. M. & G. 502; 21 L. J., N. S., Ch., 405; 16 Jur. 488.

The word "then" construed as pointing to the event, and not to the time. *Ib.*

3. A. bequeathed a leasehold for the benefit of B., and gave her a power to appoint it by will, and in default to A.'s "nearest of kindred, precisely in the same manner directed by the statute made for the distribution of intestates' effects." On B.'s death without appointment:—Held, the next of kin of A. at her own death, and not those at the death of B., were entitled. *Markham* v. *Ivatt*, 20 Beav. 579.

3. Gift to Next of Kin of a Deceased Person.

4. A bequest to the next of kin of a person who is dead at the date of will—Held, to be analogous to a gift to the testator's own next of kin as regards the period of ascertainment. *Philps* v. *Evans*, 4 De G. & Sm, 188; 15 Jur. 809.

Therefore, where a testatrix bequeathed her personal estate in trust for her sister for life, and after her death for the sister's daughter for her life with limitations to the children of the daughter, and if there were none, to another niece for life, with a limitation to her children, and in the event (which happened) of both nieces dying without leaving any child, the testatrix directed the residue to be paid and assigned to "the personal representatives or next of kin" of her late father:—Held, that the case was in principle similar to *Bird* v. *Luckie* (8 Hare 301; 14 Jur. 1015), and that the next of kin meant were those living at the testatrix's death, although they all took expressly under the will. *Ib.*

4. Effect of the Word "Then."

5. A testatrix left her real and personal estate upon trust after the death of her sister to pay all income to her niece during her life, and after her death to stand possessed of the estate for the children, if any, of the niece, but in case of her niece leaving no children, then for "such persons as shall then be my next of kin." The niece died childless:—Held, that the general rule did not apply here, and that the persons to take would be the next of kin at the time of the death of the tenant for life, the niece. *Travis* v. *Taylor*, 12 Jur, N S., 791; 14 W. R. 909.

6. A testator bequeathed a mixed residue upon trust, as to one moiety for his daughter Mary for life with remainder for her children, and as to the other moiety for his daughter Sarah for life, with remainder for her children, with cross-remainders, and proceeded thus: "And in case both my daughters should die without issue, or leaving such, all should die under twenty-one without leaving issue, then I direct my trustees to pay one moiety unto the person or persons that shall then be considered as my next of kin and personal representative or representatives, agreeable to the order of the Statute of Distributions, and the other moiety unto the person or persons that shall then be considered the next of kin and personal representative or representatives of my late wife Sarah, agreeable to the order of the Statute of Distributions." At the date of his will his daughter Sarah was the only child and sole next of kin of his late wife Sarah. The daughter survived the testator, and died without issue:—Held, that the persons entitled to the second moiety were those who at the death of the surviving daughters were the next of kin, according to the statute, of the testator's deceased wife; and, having regard to the juxtaposition of the bequests, that the persons entitled to the first moiety were those who at the same period were the next of kin, according to the statute, of the testator. *Wharton* v. *Barker*, 4 Kay & J. 483; 4 Jur., N S, 553; 6 W. R. 534

Review of the authorities as to the time when the persons taking under bequests of this description are to be ascertained. *Ib.*

Where there is simply a gift to tenant for life, and then to the testator's next of kin, the class must be ascertained at the decease of the tenant for life, so that the gift then vests immediately in them, although not in enjoyment, yet in right and interest; subject, however, to open so as to admit any subsequent next of kin (if any) who may come into existence before the period of enjoyment arrives. *Ib.*

7. Bequest to A. B. for life, and afterwards to her children; but, in default of children, "to pay or assign and transfer" to C. D. if living, but if dead, to his next of kin *ex parte maternâ*. C. D. died before A. B.:—Held, that the next of kin were to be ascertained at the death of C. D., and not of A. B. *Gundry* v *Pinniger*, 14 Beav. 94; 20 L. J., N. S., Ch., 635; 15 Jur. 1147. Affirmed 1 De G. Macn. & G. 502; 21 L. J., N. S., Ch., 405; 16 Jur. 488.

The word "then" construed as pointing to the event, and not the time. *Ib.*

8. D., after specific bequests to different members of his family, gave the residue to three persons, in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity for life, and the residue to his son's children, and in case there should not be any child of the son, "then to stand possessed of the same for such person or persons of the blood of me as would by virtue of the Statutes of Distributions of Intestates'

Effects have become and been entitled thereto in case I had died intestate." At D.'s death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without even having had a child:—Held, that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that on the death of the son without issue the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four. *Bullock* v. *Downes*, 9 H. L. Ca. 1. Affirming S. C. *nom. Downes* v. *Bullock*, 25 Beav. 4.

1. A testator, who had four daughters, divided a fund into four equal amounts, giving one to each daughter and her children; but when one died and left no child the interest was to be paid to the others, and after the death of the last survivor the fund was to be divided among her children; "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates." One of the daughters left issue; the others had no issue. On the death of the last daughter:—Held, that under the words of the will the class of "next of kin" described the persons who filled that character at the time of the death of the testator, and not at the death of the last surviving daughter; and that the shares of the daughters who had died without issue were divisible among the persons representing the four daughters. *Mortimore* v. *Mortimore*, 4 L. R., App. Cas., 448; 48 L. J., Ch., 470; 27 W. R. 575. Affirming S. C. *nom. Mortimer* v. *Slater*, 7 L. R., Ch. D., 322; 47 L. J., Ch., 134; 37 L. T., N. S., 520; 26 W. R. 134. Reversing 36 L. T., N. S., 947; 25 W. R. 646.

2. A testator gave his residuary real and personal estate upon trust out of the income to pay an annuity to his widow for her life, and after her death he directed that the trustees should hold the proceeds of the trust property in trust, to divide them among his children on their attaining twenty-one (with full powers of maintenance and advancement in the meantime), and the issue of such children if dead; and in case there should be no child of the testator living at his death, upon trust for such persons who at "the failure or determination of the preceding trusts" would be entitled under the Statute of Distributions as his next of kin to the trust estate if he had "then died possessed thereof intestate and without leaving any wife" him surviving:—Held, that the sole next of kin at the time of the testator's own death was the person entitled under the ultimate bequest. *Fletcher* v. *Fletcher*, 3 De G. F. & J. 775.

5. Express Direction by Testator.

3. A testator gave in a certain event all the residue of his estate to "the person or persons, exclusive of my surviving grandchild, who, under the Statute for Distribution of the Personal Estates of Intestates, would, immediately after the decease of the survivor of my other two grandchildren, be entitled to my personal estate." At the period in question the surviving grandchild was the sole next of kin:—Held, that the persons who would have been next of kin if the surviving grandchild had been dead at the period in question were entitled. *White* v. *Springett*, 38 L. J., Ch., 388; 4 L. R., Ch., 300; 17 W. R. 336. Affirming 16 W. R. 1032.

4. A limitation to the next of kin of a wife after the death of the surviving husband and failure of children:—Held, to be an exception to the general rule, and to mean not the wife's next of kin at her death, but at the death of the surviving husband. *Pinder* v. *Pinder*, 28 Beav. 44.

XIII. INTERESTS OR SHARES, AND DISTRIBUTION, WHETHER PER STIRPES OR PER CAPITA.

5. Bequest of 1,000*l.* stock in a certain event "to the person or persons who would, under the Statute of Distribution of Intestates' Effects, have been entitled to my personal estate in case I had not disposed of the same by will." The description of the legatees is not one of persons, but of interest, and therefore their shares will not be equal, but according to the statute. *Martin* v. *Glover*, 1 Colly. 262; 8 Jur. 640.

6. Bequest of 2,000*l.* to be equally divided amongst testator's next of kin, both maternal and paternal.—Held, that the fund was divisible between the two classes *per capita*, and not *per stirpes*. *Dugdale* v. *Dugdale*, 11 Beav. 402.

7. A testator directed that the residue of his personal estate after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living; but if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow:—Held, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund *per stirpes*. *Booth* v. *Vicars*, 1 Colly. 6; 13 L. J., N. S., Ch., 147; 8 Jur. 76.

8. A testator devised real estate in trust for the persons who at his decease should be the next of kin of R. D., deceased, according to the Statute of Distributions, and their heirs, as tenants in common; the next of kin consisted of great-grandchildren's children and the children of great-grandchildren's children:—Held, that they took *per stirpes*, and not *per capita*. *Mattison* v. *Tanfield*, 3 Beav. 131; 4 Jur. 933.

9. A testator directed his executors to pay and divide the residue "unto and amongst his own next of kin under the Statute of Distributions":—Held, that brothers and deceased brothers' children took *per stirpes*. *Lewis* v. *Morris*, 19 Beav. 34.

1. On a devise of copyhold and leasehold in trust for the son for life, and afterwards to assign "unto and among the person or persons who at the son's death would be entitled to his personal estate in case he should die intestate":—Held, that the widow and four children of the son took as tenants in common in equal parts. *Richardson* v. *Richardson*, 14 Sim 526; 9 Jur. 322.

2. A testator bequeaths personal estate upon trust for A. for life, and afterwards to B. (if he shall survive) for life, after the death of the survivor upon trust for such person or persons as should at A.'s death be entitled thereto as the testator's next of kin under the Statute of Distributions. At A.'s death there were two next of kin to the testator:—Held, that they took as tenants in common, and not as joint tenants, the statute 22 Car. 2, c. 10 in this respect determining the mode of taking as well as the persons entitled. *Horn* v. *Coleman*, 1 W. R. 194; 17 Jur. 408; 1 Sm. & G. 169; 22 L. J., Ch., 779.

3. Real estates were limited in remainder in trust for the next of kin of a married woman as if she had not been married:—Held, that next of kin took as joint tenants. *Lucas* v. *Brandreth*, 6 Jur., N. S., 945.

Held, also, that they took life estates only. *Ib.*

4. A bequest, after the termination of a life estate, to "such person or persons as shall happen to be my next of kin according to the Statute for the Distribution of Intestates' Effects":—Held, that those persons took who were next of kin at the testator's death, and did so as joint tenants. *Re Greenwood*, 10 W. R. 117; 3 Giff. 390; 3 Jur., N. S., 907; 31 L. J., Ch., 119.

5. A testatrix, having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives":—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

6. A., after giving all his real and personal estate to trustees for his children, directed his trustees, when any of his daughters should attain twenty-one or marry, to raise and settle, not exceeding 5,000*l.*, upon each such daughter, in part of her presumptive share, in trustees of her own nomination, in trust for her for life, with remainder for her children; and if all such children should die under twenty-one, in trust for the testator's next of kin. One of the daughters, having attained twenty-one, settled her 5,000*l.* upon herself and children, with a trust in default of children for the next of kin of the testator, according to his will. She died without having had any child:—Held, that the next of kin of the testator living at his death were entitled to the fund as joint tenants. *Re Aspinall*, 30 L. J., Ch., 321; 9 W. R. 269; 4 L. T., N. S., 176.

7. D., after specific bequests to different members of his family, gave the residue to three persons in trust to pay the dividends to his son for life, and after the son's decease to pay to any widow of the son (who was not then married) an annuity for life, and the residue to his son's children, and in case there should not be any child of the son, "then to stand possessed of the same for such person or persons of the blood of me as would by virtue of the Statute of Distribution of Intestates' Effects have become and been entitled thereto in case I had died intestate." At D.'s death, he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without even having had a child:—Held, that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right as one of the next of kin was not affected by the previous gift of a life interest in the whole of the residue, so that, on the death of the son without issue, the residue became divisible into five shares, of which his personal representatives took one, and his sisters the other four. *Bullock* v. *Downes*, 9 H. L. Ca. 1. Affirming S. C. *nom. Downes* v. *Bullock*, 25 Beav. 54.

Held, also, that these shares were not taken in joint tenancy, for where there is a bequest to persons who would have been entitled under the Statute of Distributions they take as if there had been an intestacy. *Ib.*

8. A father gave one-fourth of a fund to one of his four daughters by name for life, and after her death to her children then living; but if she left no child, then he directed that the interest should be paid to his other daughters then living and the survivors and survivor of them, and after the decease of the last survivor he directed the same fourth share to be divided among her children, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statutes for the Distribution of Intestates' Estates." He declared similar trusts of the other fourth shares respectively in favour of his other three daughters respectively and their respective children, with the same ultimate limitations. One daughter died after the testator, leaving children; the other three afterwards died without issue:—Held, that the shares of the daughters who died without issue were divisible in fourths among the persons representing the four daughters. *Mortimer* v. *Slater*, 7 L. R., Ch. D., 322; 47 L. J., Ch., 134; 37 L. T., N. S., 520; 26 W. R. 134. Affirmed *sub. nom. Mortimore* v. *Mortimore*, 4 L. R., App. Cas., 448; 48 L. J., Ch., 470; 27 W. R. 575. Reversing 36 L. T., N. S., 947; 25 W. R. 646.

XXIX. Gifts to "Relations."

See also POWER, XVII. VIII.

I. WHEN CONSTRUED NEXT OF KIN, IN GENERAL.

1. Where the word "relations" is used, the Court has no other rule to go by but the Statute of Distributions. *Crossly* v. *Clare*, Ambl. 397. See S. C. *nom. Crosley* v. *Clare*, 32 Wan. 322 n.

2. A legacy of personal estate to testator's wife for life, and after her decease to the testator's relations who shall be then alive, confined to relations within the Statute of Distributions. *Green* v. *Howard*, 1 Bro. C. C. 31.

3. Gift of a residue to be divided among persons related to the testator; confined to relations within the Statute of Distributions. *Rayner* v. *Mowbray*, 3 Bro. C. C. 234.

4. A man devises his personal estate to the use of his relations without specifying any in particular; it shall be distributed according to the Statute of Distributions. *Roach* v. *Hammond*, Pre. Ch 401; 1 P. W 327.

5. Under a gift to "relations" next of kin are generally entitled. *Crahlow* v. *Norrie*, 7 L. J., N. S., Ch., 278.

6. The word "relations" construed by reference to the Statute of Distributions. *Brandon* v. *Brandon*, 3 Swan. 319; 2 Wils. 14.

7. Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sisters: a trust for her next of kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 Ves. & B 198.

8. Legacy for a mourning ring to each of the testator's relations, by blood or marriage, confined to the Statute of Distributions, and those who have married persons entitled under it. *Devisme* v. *Mellish*, 5 Ves. 529.

9. A bequest of a fund to be at the disposal of the testator's widow by her will, therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of a parish as she may prefer, and under such restrictions as she may prescribe, and the remainder to be at her disposal among the testator's relatives as she may direct:—Held, that although the widow might have exercised her power in such a manner as to include more distant relatives, still, as she had died without so exercising it, none could take as "relatives" but such as were capable of taking within the Statute of Distributions. *Salusbury* v. *Denton*, 3 Kay & J. 529; 3 Jur., N. S., 740; 26 L. J., Ch., 856.

10. Bequest to "near relations" means those within the Statute of Distributions. *Whithorne* v. *Harris*, 2 Ves. 527.

11. Bequest to "relations," confined to next of kin according to Statute of Distributions. *Crawys* v. *Coles*, 9 Ves. 323.

Though upon bequests to "relations," with a power of selection, the party may go beyond those included in Statute of Distributions; the contrary is adhered to whenever the execution devolves on the Court. *Id.* 324.

Bequest to testator's relations, with power of selection, is, if that power is not exercised, a trust for next of kin at death of party who had the power. *Id.* 325.

12. Testator directed the residue of his estate to be parted to "his next relations as sisters, nephews, and nieces." Testator left his three sisters, A., B. and C., and D., the only child of a deceased sister, and L., the only child of a deceased brother, his next of kin; but at the time of his death his sister A. had two children living. The residue must go according to the Statute of Distributions. *Stamp* v. *Cooke*, 1 Cox 234.

13. The words "relations or near relations," from their indefinite extent, confined to the next of kin under the Statute of Distributions. *Smith* v. *Campbell*, 19 Ves. 403.

14. Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit; the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin; but if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant* v. *Lynam*, 4 Russ. 292; 6 L. J., Ch., 129.

15 Devise to three sisters for life, and subject thereto the survivor to divide and devise "to such of my nieces and other relations as shall be unprovided for at the decease of such survivor, in such proportions as she, in the goodness of her heart, shall think fit;" appointment by survivor to all her nieces living at her decease equally:—Held, that the nieces were entitled either as appointees or as the next of kin of the first testatrix. *Paclow* v *Laurie*, 2 Jur. 204.

16. A testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would, consider his near relations as he would have done if he had survived her:—Held, that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale* v. *Moore*, 1 Sim. 534.

17. Testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him by lineal descent. He had no wife or issue at the time of making his will nor afterwards. He died leaving several first cousins his next of kin:—Held, that the first cousins were entitled to the residuary estate, both real and personal. *Craik* v. *Lamb*, 1 Colly. 489; 14 L. J., N. S., Ch., 84; 9 Jur. 6.

18. A father, after bequeathing a legacy to his daughter, left an annuity to his mother and sister for their lives, and directed that upon their deaths the residue of his property should be divided amongst his relations as his executors, his brothers, should think fit and

most worthy to receive it. At the death of the testator, and at the deaths of his mother and sister, his daughter was his sole next of kin:—Held, that she was entitled to the residue. *Lawlor* v. *Henderson*, 10 Ir. R., Eq., 150.

1. Relations construed next of kin. *Lees* v. *Massey*, 3 De G. F. & J. 113; 7 Jur., N. S., 534; 7 W. R. 425; 4 L. T., N. S., 36; 6 Jur., N. S., 2.

II EXCLUSION OF WIFE OR RELATIONS BY MARRIAGE.

2. J., seised in fee of land, devised the same to his wife for life, and after her decease to R. and the heirs of his body, and for want of such issue to be sold, and divided among his relations according to the Statute of Distributions:—Held, that the wife being no relation, the next of kin shall take the whole in exclusion of her, both by the words of the will, and the intent of the testator. So where A. gave the residue of his personal estate to trustees to permit his wife to receive the produce for her life, and after her decease to such of his relations as would have been entitled under the Statute of Distributions in case he had died intestate, the wife is not to be considered as a relation. *Worsley* v. *Johnson*, 3 Atk. 758.

Relation, in dictionaries, signifies *consanguineus* and *affinis*, but a wife is no relation either by blood or affinity; and of a wife, Calvin, in his Lexicon, says *non affinis est, sed causa affinitatis*; *affinis est ab eodem stipite*. The Statute of Distributions means kindred, by blood only; but the stat. 21 Hen. 8, c. 5, s. 3 distinguishes more clearly between a wife and the next of kin than the Statute of Distributions; the word "my" relations means exactly the same as "my own" relations. *Id.* 761.

3. Where in a will a wife not included in the word relations according to the Statute of Distributions. *Davies* v. *Baily*, 1 Ves. 84.

4. Bequest to relations does not include those by marriage. *Adair* v. *Maitland*, 7 Bro. P. C. 587; 3 Ves. 231.

See also VI. *infra*.

III. ILLEGITIMATE RELATIONS.

5. A testator gave a legacy to his relatives in such shares as his wife should appoint. She appointed part to children of the testator's illegitimate brother:—Held, that relatives are legitimate relatives, where there is nothing on the face of the will itself to lead to a different conclusion. *Re Saville*, 14 W. R. 603.

Held, also, that the class of relatives who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, and not of the testator. *Ib.*

IV. "NEAREST RELATIONS."

6. Bequest by a testator in India "to my nearest surviving relations in my native country, Ireland," confined to brothers and sisters living in Ireland or elsewhere; the addition of a mistaken description, viz., of the place of residence, not vitiating a gift to persons otherwise sufficiently described. Nephews and nieces included. *Smith* v. *Campbell*, 19 Ves. 400.

7. "Such of my nearest relations as my executors shall think the greatest objects of charity":—Held, to extend only to such as would take under the Statute of Distributions. *Edge* v. *Salisbury*, Ambl. 70; 1 Ves. 230.

8. Devise to his nearest poor relations; parol evidence admitted to show that testator knew he had such in S., but no farther; not to prove from declarations or instructions whom he meant by written words of the will. *Goodinge* v. *Goodinge*, 1 Ves. 231.

Bequest to such of nearest relations as A. should think poor and objects of charity, confined to those within the Statute of Distributions under A.'s advice. *Ib.*

9. Bequest to "near relations" means those within the Statute of Distributions. *Whithorne* v. *Harris*, 2 Ves. 527.

V. POOR RELATIONS.

10. Who take under words "poor relations." *Anon.*, 2 Eq. Abr. 191.

11. Bequest to testator's wife for life, and after her death to his and her poorest relations:—Held, only those who were nearest of kin were entitled. *Isaac* v. *Defriez*, Ambl. 595.

12. Bequest "to the most necessitous of my relations" shall go according to the Statute of Distributions. *Widmore* v. *Woodroffe*, Ambl. 636; 1 Bro. C. C. 13. n.

13. Bequest to testator's mother's "poor relations," construed relations who are poor and objects of charity. *Brunsden* v. *Woolredge*, Ambl. 507; S. C. *nom.* *Brunsden* v. *Woolridge*, Dick. 380.

14. Bequest to such of nearest relations as A. should think poor and objects of charity, confined to those within the Statute of Distributions under A.'s advice. *Goodinge* v. *Goodinge*, 1 Ves. 231.

15. Legacy to executor to be distributed amongst the poor relations of testator. A relation who was poor at the time of the testator's death, but became rich before distribution, not entitled. Poor relation dying before distribution, his claim not transmissible to his personal representative. Where a person has a power of distribution among poor relations, he may distribute amongst all poor relations, however remote; but where the Court is called on to distribute, in failure of the person so empowered, it will confine itself to relations within the Statute of Distributions. *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

16. The testator having given a sum to his widow, to be distributed amongst such of his "relations" as she should deem requiring and most deserving relief:—Held, not to include in that case the widows of the testator's relations, and that a relative showing no qualifications, and to whom no part had been appropriated, was not entitled to question the distribution by the testator's widow. *Harvey* v. *Harvey*, 5 Beav. 134. And see 4 *id.* 215.

17. J. S. gave "all his real and personal estate" to trustees on certain trusts, remainder "to such of his relations on his mother's side who were most deserving, and in such manner as they should think fit," and for such charitable uses and purposes as they should also think most proper and convenient:—Held, *per*

Master of the Rolls, that the limitation over of the personal estate was good, and his Honour (deciding by the known rule of equity) directed that one half of the said estates should go to the testator's relations on his mother's side, and the other half to charitable uses; his Honour could not judge of the merits of the testator's relations, nor prefer the one to the other, but he should exclude those beyond the third degree:—Held, also, that the representatives of those relations who died in testator's lifetime could have no claim. *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 485 (C.) Pl. 16.

Charitable Gifts to.] See CHARITY, IV. v. 9.

VI. CLASS WHEN ASCERTAINED.

1. Testator gives a residue to A. for life, remainder to B. for life, then to be divided among his (testator's) relations. This is a mere intestacy, and goes to the relations at the death of testator. *Masters* v. *Hooper*, 4 Bro. C. C. 207.

2. A testator devised his real estates to his first cousin, Thomas Pearce, for life, and, after T. P.'s decease, he devised and bequeathed all his real and personal estates in trust for such of his relations of the name of Pearce, being a male, as T. P. should by deed or will appoint; and in default of such appointment, for such of his relations of the name of Pearce, being a male, as T. P. should approve of or adopt, if he should be living at the death of T. P., and his heirs, executors, etc.; and in case T. P. should not adopt any such male relation, or no such male relation should be living at the death of T. P., then to the next and nearest relation or nearest of kin of him, the testator, of the name of Pearce, being a male; or the elder of such male relations, in case there should be more than one of equal degree, who should be living at the testator's decease, his heirs, etc., for ever. The testator had a brother, Z. P., who had gone to sea, and had not been heard of for many years; and, supposing Z. P. to have died without issue, the nearest relation of the testator, answering the description in the ultimate limitation at his decease, was the tenant for life, T. P., and next to him R. P., the plaintiff. T. P. died without issue, and without having exercised the power of appointment or adoption given to him by the will:—Held, that T. P. took under the ultimate limitation. *Pearce* v. *Vincent*, 2 Keen 230; 7 L. J., N. S., Ch., 285. Affirming 2 Bing. N. S. 328; 2 Scott 347; 1 Cr. & M. 598; 1 L. J., N. S., Exch., 194; 5 L. J., N. S., C. P., 82. And see S. C. 2 Myl. & K. 800; 2 L. J., N. S., Ch., 187.

3. A testatrix directed all her property at the death of A. and B. "to pass to my relatives in America":—Held, that the class was to be ascertained at her death, and that all her next of kin in America then living were entitled as joint tenants. *Eagles* v. *Le Breton*, 15 L. R., Eq., 148; 42 L. J., Ch., 362.

4. Residuary bequest to a brother of the testator for life, and after his death to his wife, and at her death to go to such of the testator's relations as survived them:—Held, to give the whole to the only one of the brothers of the testator who survived the tenants for life, to the exclusion of the children and representatives of brothers of the testator who survived him, but died in the lifetime of the second tenant for life. *Bishop* v. *Cappel*, 1 De G. & Sm. 411; 11 Jur. 939.

5. Devise to trustees to invest in stock and pay dividends to testator's son for life; and after his decease, to his eldest son and his heirs for ever; and in case of their death without issue, to his (testator's) nearest relation, and the nearest relation of such nearest relation for ever. First, this is a double contingency, and the event of the son dying without issue is good; secondly, it goes to the person who was nearest relation at the time, the half-sister, though there were living representatives of a person as near, viz., a half-brother. *Marsh* v. *Marsh*, 1 Bro. C. C. 293.

6. 20,000*l.* left to executors in trust to dispose of in such proportions, etc., as they should think fit amongst such of the testator's relations as should not be worth 2,000*l.*, and should apply within two years after the testator's death. One within the description applied and had a sum ordered her, but died before it was paid:—Held, her representative entitled to it. A child born after the death of the testator, who was of consanguinity, claimed and died without issue:—Held, not within the description, though *en ventre sa mère* at testator's death. *Bennett* v. *Honywood*, Ambl. 708.

7. A married woman, by her will, made in execution of a power given to her in her marriage settlement over certain freehold estates, in which her husband had a life interest under the settlement, directed and appointed that the estates in question should be charged and chargeable with the sum of 1,500*l.*, to be paid twelve months next after the death of her husband, amongst the relations of her late mother, in such manner and form, and to such of them particularly, and in such shares, as her said husband should by his last will and testament appoint; and, for want of such appointment, amongst her mother's relations, according to the Statute of Distributions. After the death of the testatrix, the husband, in exercising the power, made an appointment, by will, of the fund, which was invalid as to 1,495*l.*, part thereof:—Held, upon bill filed after the husband's death to establish a claim to the 1,495*l.*, that the next of kin of the testatrix's mother, according to the Statute of Distributions, at the death of the testatrix's husband, were the parties entitled to the fund. *Davidson* v. *Proctor*, 19 L. J., N. S., Ch., 395; 19 Jur. 31.

8. Residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one, and, after the decease of his daughter and of her children under that age, to go and be distributed among his relations in due course of administration. Great-nephews and great-nieces, the next of kin of the testator, at the death of the daughter, entitled, against the claim of the personal representatives of the daughter, the sole next of kin at the death of the testator, and of the representatives of nephews and nieces, who died in her life; insisting that she was excluded by the will. *Jones* v. *Colbeck*, 8 Ves. 38.

9. A. devised a moiety of the rents of his real estates to his wife for her life, and directed

the other moiety to be applied to the maintenance of his daughter, and after the death of his wife he devised all his real estates to his daughter in fee; but if his daughter should die without issue in the lifetime of his wife (which happened), in such case he gave his real estates to his wife for life, and after her decease to his relations, share and share alike. Romilly, M. R., was of opinion that the class of persons to take, was to be ascertained at the death of the testator. On appeal:—Held, that the death of the daughter was the period when the class was to be ascertained. *Lees* v. *Massey*, 7 Jur., N. S., 534; 9 W. R. 425; 4 L. T., N. S., 36; 3 De G. F. & J. 113. Varying 6 Jur., N. S, 2.

1. A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster, and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator:—Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Re Ham's Will*, 2 Sim N. S. 106; 21 L. J., N. S., Ch., 217; 15 Jur. 1121.

2. Bequest to A. for life; and afterwards, in an event (which happened), the testator directed advertisements to be made for his relations, to such only of whom as should claim within two months he left the property, to be divided according to the discretion of his executors. The executors died in A.'s lifetime:—Held, that the next of kin of the testator, according to the statute, took equally, and that the class was to be ascertained at the death of A, and not at the death of the testator. *Tyhn* v. *Longman*, 15 Beav. 275.

3. A testator gave a legacy to his relatives in such shares as his wife should appoint. She appointed part to children of the testator's illegitimate brother:—Held, that the class of relatives who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, and not of the testator. *Re Saville*, 14 W. R. 603.

VII. IN WHAT PROPORTIONS AND DISTRIBUTION, WHETHER PER STIRPES OR PER CAPITA.

4. A devise to relations is to be confined to such as would take by the Statute of Distributions, but their shares may not be the same as under that statute. *Thomas* v. *Hole*, Forrest. 251; Dick. 50.

5. Testator directed that a sum of stock, standing in his name, should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions as would have been the case in case she had died possessed of it a spinster and intestate. The wife had sixteen next of kin living at her death. Five of them died before the testator:—Held, that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue, and ought to bear the costs of the petitioners and respondents. *Re Ham's Will*, 2 Sim. N. S. 106; 15 Jur. 1121; 21 L. J., Ch., 217.

6. A gift of residue to be distributed "to my relatives, share and share alike, as the law directs," means a distribution under the Statute of Distributions, *per stirpes* and not *per capita*. *Fielden* v. *Ashworth*, 20 L. R., Eq., 410; 33 L. T., N. S., 197.

See also preceding Subdivision.

VIII. OTHER CASES.

7. Legacy for a mourning ring to each of the testator's relations, by blood or marriage, confined to the Statute of Distributions, and those who have married persons under it. *Derisme* v. *Mellish*, 5 Ves. 529.

8 An uncle, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts":—Held, that only such of the legatees as were blood relations were entitled under the residuary gift. *Hibbert* v. *Hibbert*, 15 L. R., Eq., 372; 42 L. J., Ch., 383; 21 W. R. 506; 28 L. T., N. S., 397.

9. Devise of real and personal estate in trust for the nearest relation "of the Pyots:" the latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir-at-law of that name. A change of the name of Pyot by marriage held not to exclude. *Pyot* v. *Pyot*, 1 Ves. 335.

10. A. devised an estate to T. and his heirs, upon trust that he should convey it to such of the relations of the testator as he should think best and most reputable for his family. A. died without issue, and the heir-at-law, testator's brother, preferred a bill against defendant, praying to have the estate conveyed to him. Evidence was admitted of testator's dislike to plaintiff; but if the trustee would give him the estate, plaintiff was not disabled to take it. *Clarke* v. *Turner*, 2 Freem. 198.

11. Under devise of personal residue to relations in such proportion as testator had given other part of his fortune, pecuniary legatees only are entitled, and not a devisee of real estate. *Adair* v. *Maitland*, 7 Bro. P. C. 587; 3 Ves. 231.

12. "I give to A. 500*l*., and it is my will and desire that A. may dispose of the same amongst her relations, as she by will may think proper":—Held, a trust for the relations of A., and the 500*l*. well bequeathed by the will of A. to her sister and her sister's children, though made without reference to the will of the first testator. *Forbes* v. *Ball*, 3 Meriv. 437.

13. After a devise to a party for life, remainder, in default of certain powers of appointment, to the testator's male relations of the name:—Held, that the devisee for life filling the character to whom the estates were given in certain events, was not, because he was tenant for life, to be excluded from taking under the description on the ultimate limitation which he afterwards filled. *Pearce* v. *Vincent*, 2 Keen 230. S. C. 7 L. J., N. S., Ch., 285. And see 5 L. J., N. S., C. P., 82; 2 Bing. N. S. 328; 1 Cr. & M. 598; 2 Scott 347.

XXX. Gifts to Servants.

1. Under a general bequest to servants, a coachman (provided with the carriage and horses by a job master, according to the usual course of that business) not entitled. *Chilcot* v. *Bromley*, 12 Ves. 114.

2. Under a bequest to the testator's "servants in his service at the time of his decease": —Held, that the out-door servants, continually employed at weekly wages, were entitled, but that a boy employed a few months in the year, whilst the testator was at his country residence, at weekly wages, to carry letters to the post, and who was so employed at the testator's death, was not entitled. *Thrupp* v. *Collett*, 26 Beav. 147; 5 Jur, N. S., 111.

3. Bequest to the two servants that should live with testatrix at her death; she had three at that time, and all of them were held entitled. *Sleech* v. *Thorington*, 2 Ves. 560.

4. A testator, who was a farmer, by his will gave a legacy in these terms: "To W. R., one of my farming men.' At the date of the testator's will, and at the time of his death, he had two persons in his service named W. R., one of whom was a farming man, and the other was employed both in the house and in the farm:—Held (upon some evidence that the testator intended to benefit the latter), that the latter, and not the former, was entitled to the legacy. *Reynolds* v. *Whelan*, 16 L. J., N. S, Ch., 434.

5. A testator directs that his executors pay to A. B. a yearly sum as wages, so long as she should continue in his wife's service: and if she should continue in such service, that the payment should be made to her quarterly, free from all deductions, to cease in case she should leave the service of his wife, until the decease of his wife. The testator's wife died in his lifetime:—Held, that A. B. was entitled to the annuity during her life. *Burchett* v. *Woolward*, T. & R 442.

6. A. bequeathed a legacy to V. in case she should be in his service at his decease. A. was shortly afterwards removed to a lunatic asylum, and V., who was a yearly servant, voluntarily quitted the house, receiving from the family her wages up to the end of the year, which did not expire till after the death of the testator:—Held, that she was not entitled to the legacy. *Re Serres, Venes* v. *Marriott*, 31 L. J., Ch., 519; 10 W. R. 751; 6 L. T., N. S., 892; 8 Jur., N. S., 882.

7. Bequest of a legacy to the servant of the testatrix, in consideration of her long and faithful services, to be paid within twelve months after her decease, provided "she remains in my service till my death." The servant was in the service of the testatrix for twenty-one years, when one of the next-of-kin of the testatrix caused the testatrix to be removed to a lunatic asylum, and upon her own authority dismissed the servant, who was desirous to continue in the service of her mistress. Subsequently an order in lunacy was obtained by the next-of-kin, by which it was declared that the testatrix had been ascertained to be of unsound mind, and her furniture and effects were directed to be sold: —Held, that the order in lunacy operated as a dismissal of the servant, and that the conditional legacy to her therefore failed. *Re Hartley*, 47 L. J., Ch, 610; 26 W. R. 590.

8. Under a bequest of "500*l.* each to the other servants," a servant who quitted the service after the date of the will was held entitled. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290; 11 L. J., N. S., Ch., 223; 6 Jur. 292. Affirmed 2 Y. & Coll. C. C. 279; 12 L. J., N. S., Ch., 314; 7 Jur. 457.

9. Legacy to A., if in the testator's service at the time of his decease: parol evidence admitted to show that, though she had quitted his house, she continued and was by him considered as in his service, and upon that evidence the legacy was established. *Herbert* v. *Reid*, 16 Ves. 481.

10. A. acted as the land agent and house steward of a testator, but he resided out of the house:—Held, that he was entitled under a bequest "to all my servants and day labourers, who shall be in my service at the time of my death, one full year's wages." *Armstrong* v. *Clavering*, 27 Beav. 226.

11. A bequest of a year's wages, to each of the testator's servants, over and above what may be due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year. *Booth* v. *Dean*, 1 Myl. & K. 560; 2 L. J., N. S., Ch., 162.

12. A. devises a year's wages to such of his servants as shall be living with him at his death. Stewards of court and such who are not obliged to spend their whole time with master are not entitled, but only such servants as live in house and have diet from master. *Townshend* v. *Windham*, 2 Vern. 546.

13. A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service:—Held, not to exclude servants of the testator living in a different house from that in which the testator lived, but to exclude servants not hired by the year; and held, therefore, that a gardener, employed at weekly wage (although paid at irregular intervals), was not entitled to the benefit of the bequest. *Blackwell* v. *Pennant*, 9 Hare 551; 16 Jur. 420; 22 L. J., N. S., Ch., 155.

Whether the words "living with me," as applied to servants, should not be understood "living in my service," *quære*. *Ib.*

A legacy of a "year's wages" cannot properly be construed to mean the aggregate of the weekly wages of a servant for fifty-two weeks. *Ib.*

14. A testator gave one year's wages in advance to each of his servants in his service at his death who should have lived with him five years or upwards:—Held, that a farm bailiff was a servant within the meaning of the testator's will, and that the plaintiff, being such farm bailiff living with the testator at the time of his death, and having lived the required time in his service, was entitled to a year's wages. *Bulling* v. *Ellice*, 9 Jur. 936.

15. A. bequeathed to each of his servants who should be living in his service for six months previously to his decease the amount of one year's standing wages. B. had been living in the service of A. as a gardener for more than six months at a rate of wages payable by weekly allowance in money, and by the use of a house and certain rations, calculated to amount to 52*l.* a year:—Held,

that B. was not entitled to any legacy under the above bequest. *Breslin* v. *Waldron*, 4 Ir. Ch. R. 333.

1. A testator, by his will, gave to each person as a servant in his domestic establishment at the time of his decease a year's wages beyond what should be due to him or her for wages:—Held, that a head-gardener, who lived in one of the testator's cottages and was not dieted by the testator, was not entitled to a year's wages under the will. *Ogle* v. *Morgan*, 1 De G. M. & G. 359; 16 Jur. 277. Reversing 19 L. J., N. S., Ch., 531; 14 Jur. 801.

The mere temporary absence of the gardener would not have precluded him from claiming the legacy had he come within the description. *Ib.*

2. Sir F. B., by his will, directed his executors to pay to each of his domestic servants who should be with him or in his service at the time of his decease, such sum of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of Sir F. B. at a mansion, where Sir F. B. formerly resided, but which for a short time previously to and at the time of the decease of Sir F. B. was let by Sir F. B. to Lady M. for a short time. A., however, had never ceased to be the servant of Sir F. B., but had the charge and management of the gardens at the mansion, for which he received an annual sum from Sir F. B. in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by Sir F. B:—Held, following *Ogle* v. *Morgan* (1 De M. & G. 359; 16 Jur. 277), that A. was not entitled to a legacy as coming within the description of "a domestic servant of the testator living with him or in his service at the time of his death." *Vaughan* v. *Booth*, 16 Jur. 808.

Legacy to Creditor who is a Servant of Testator.] See LEGACY, V. IV. 3.

Whether Cumulative or Substitutional.] See LEGACY, IV. IV.

XXXI. Gifts to Personæ Designatæ and Persons filling a Particular Description.

I. ERROR IN NAME OR DESCRIPTION.

1. In General.

3. Mistake in the description of legatees; yet legacy:—Held, good, and took place according to intention. *Bradwin* v. *Harpur*, Ambl. 374.

4. A wrong description of a legatee will not defeat a legacy given to him by name. *Standen* v. *Standen*, 2 Ves. 589.

5. Bequest of 800*l.* to the four eldest children of the testatrix's cousin A. B., and 200*l.* to the three remaining children of her uncle A. B. The testatrix had a cousin and an uncle of that name. The cousin had seven children, and the uncle but one, but he had three remaining granchildren, one other having died:—Held, that the three younger children of the cousin were entitled to the 200*l.* *Bristow* v. *Bristow*, 5 Beav. 289.

6. Testator gave 100*l.* in trust to pay the interest to A., till her daughter B. should attain twenty-four, and then he gave the said 100*l.* and the interest then due to her said mother A.:—Held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke* v. *Norris*, 3 Ves. 362.

7. Legatee's name very falsely spelt: referred to a Master to see who was intended. *Masters* v. *Masters*, 1 P. W. 425.

8. The Christian name of legatee was mistaken in will; legacy was established on evidence, etc., after great delay in filing bill. *Smith* v. *Coney*, 6 Ves. 42.

9. Legatee entitled, notwithstanding a mistake of his name. *Campbell* v. *French*, 3 Ves. 322.

10. Legatee's both Christian and surnames mistaken, yet the legacy is good. *Beaumont* v. *Fell*, 2 P. W. 141.

11. One name may be substituted for another in the construction of a will, where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. *Dent* v. *Pepys*, 6 Madd. 350.

12. Evidence admitted to prove mistake in name of legatee in will; but one legatee in will who might otherwise have had a claim to that legacy being an infant, inquiry was directed as to the party entitled. *Still* v. *Hoste*, 6 Madd. 192.

13. Legacy to "James, son of Thomas A." There was no person of that description; there was a "Thomas, son of James A." The Court will not receive evidence to show that this was a mistake in the description. *Andrews* v. *Dobson*, 1 Cox 425.

14. Legacy "to my namesake Thomas, the second son of my brother John," there being no son named Thomas, established in the favour of the second son William, as an erroneous description, not a condition. *Stockdale* v. *Bushby*, 19 Ves. 381; Coop. 229.

15. Bequest to the children of R. H., late of

N., and now of L., the sum of 100*l.* apiece; R. H. had left N. at the age of fourteen or sixteen, and died in L. several years before the will: his only surviving child entitled to the legacy against the claim of the children of G. H., formerly of N., residing in L. at the testator's death, upon the suggestion of mistake. *Holmes* v. *Custance*, 12 Ves. 279.

1. Legacy to son and daughter of W.; W. had four sons:—Held, none of the sons could take, but the daughter took the whole. *Dowset* v. *Sweet*, Ambl. 175.

Legacy to John and B., sons of S.; S had two sons, James and B., but no son of the name of John:—Held, James should take. *Ib.*

2. Latent ambiguity propounded and dissolved by parol, but parol never admitted on patent ambiguity. Bequest to the "son and daughter" of one who has several sons is a latent ambiguity. *Delmare* v. *Robello*, 1 Ves. J. 415.

Testator devised to all the children of his two sisters A. and B.; A., long before the date of the will, changed from the Jewish to the Roman Catholic religion, was baptized by a new name, and became a professed nun at Geneva. Bill by the children of C., a third sister, living with B. at Leghorn, upon ground of mistake in testator, and evidence of intent to provide for his sisters at Leghorn, dismissed. *Id.* 412.

3. A bequest to the children of the testator's late aunts, Rachael Walker and Diana Walker, who should be living at his death. The testator had no aunt nor any relative named Diana Walker, but he had a cousin, the daughter of his aunt Rachael, named Dinah Walker, who married Harrison long before the date of the will, and survived the testator. Evidence proved that the testator called his cousin by her maiden name of Walker after her marriage:—Held, that the children of Dinah Harrison were not entitled as the children of his late aunt, Diana Walker. *Shearman* v. *Jennett*, 9 L. J., Ch., 148.

4. A testator devised an estate to "Elizabeth Abbott (a natural daughter of Elizabeth Abbott, of G., single woman, and who formerly lived in his service)" for life, with remainder to her children. At the date of the will, there was no person answering this description; for though Elizabeth Abbott, who had formerly lived in his service, had a natural child, yet it was a son and not a daughter, and was named John and not Elizabeth; besides this, Elizabeth herself was not then a single woman, but had married one Caddy, and had a legitimate daughter Margaret. John Abbott being dead, the property was claimed, first, by the plaintiff, on the ground that the gift was void for uncertainty; secondly, by the children of John Abbott; and, thirdly, by Margaret; but the Court held, under the circumstances, that the children of John Abbott were entitled. *Ryall* v. *Hannam*, 10 Beav. 536; 16 L. J., N. S., Ch., 491; 11 Jur. 761.

5. A testator devised his estates on trust for "the second son of Edward Weld, of Lulworth," for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said Edward Weld, and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said Edward Weld successively in tail male; with like remainders to the second and other sons (except the eldest) of Lady Stourton, "one of the sisters of the said Edward Weld." There was not, at the date of the will or death of the testator, any such person as Edward Weld, of Lulworth, but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was the then possessor of Lulworth; that he had an eldest brother living; that Lady Stourton was one of his sisters; and that he had an eldest son named Edward Joseph, commonly called Edward, and a second son named Thomas, both unmarried:—Held, that the descriptions of the unnamed devisee, taken with the whole context of the will, and with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, and that he was entitled, as tenant for life in possession, to the devised estates. *Camoys* (*Lord*) v. *Blundell*, 1 H. L. Ca. 778. Affirming S. C. *nom. Blundell* v. *Gladstone*, 1 Ph. 279; 11 Sim. 467; 12 L. J., N. S., Ch., 225; 7 Jur. 269; 5 Jur. 481.

6. Legacy to "R. C., my nephew, the son of Joseph C.," other clauses describing "my nephew R. C." generally, and one legacy to "my nephew, R. C., the son of John C." The testator had only two brothers, John C. and T. C., each having a son named R. C.: parol evidence admitted to resolve this latent ambiguity; showing intimacy with the son of John C. and very slight knowledge of the other, and the legacy was decreed to the former. *Careless* v. *Careless*, 19 Ves. 601; 1 Meriv. 384.

Where it was impossible to ascertain the mistake in a devise, the name belonging to one, the description to another, it was held void for uncertainty. *Id.* 604.

7. "Bequest to Miss Sarah Jameson;" there was no Miss Sarah Jameson. The testatrix was acquainted with Mrs. Sarah Jameson and her daughter Miss Frances Ann Jameson. Miss Frances Ann Jameson was held to be entitled to the legacy. *Lee* v. *Pain*, 4 Hare 253; 14 L. J., N. S., Ch., 346; 9 Jur. 247; and see *id.* 24.

8. Erroneous description of a legatee rejected upon extrinsic evidence. *Re Blackmun*, 16 Beav. 377.

A. the grandchild of C., and B. the widow of a child of C.:—Held, under the circumstances, entitled to a bequest made to A., and B., widow, described as "children of C." *Ib.*

9. A bequest will not be held void for uncertainty, although the meaning be not absolutely certain, if the Court can arrive at a reasonable degree of certainty. *Adams* v. *Jones*, 9 Hare 485; 16 Jur. 159; 21 L. J., Ch., 352.

Where a legacy was given to a legatee by the name and description of "C. H., the wife of A.," H. being in fact the wife of A., and C. H. his daughter, an infant of tender years, the Court would not presume that there was any mistake in the preparation of the will; and it being more probable that the testatrix had mistaken the name than the description of the legatee, the Court held that the legatee intended was reasonably certain, and decreed the legacy to be paid

according to the description, and not according to the name. *Ib.*

1 Where a gift is made by a will to persons described by their surnames only, extrinsic evidence is admissible to show what persons having such surnames were known to the testator, and in what respective relations they stood to him. *Re Gregson*, 2 Hem. & M. 504; 4 N. R. 222; 10 Jur., N. S., 696.

Semble, where the number of persons entitled to any such surname, and known to the testator, exceeds the number of legatees of that name, the Court will not look at external evidence of the testator's intention, but will determine which of the persons are entitled to the gift from evidence derived from the state of the family, and the rest of the will itself. *Ib.*

2. A testatrix made a bequest in favour of "John Bird, son of the late Charrington Bird, who was my first husband's brother." H. W. Charrington, son of a brother-in-law of the first husband, claimed the fund, as being the person meant by the testatrix:—Held, that the claim was good. *Re Meredith*, 12 W. R. 849; 10 L. T., N. S., 565.

3. Where there is a person corresponding in name and address, but not in other particulars, to the description of the legatee contained in a will, and another person corresponding in every particular except the Christian name, the Court admitted parol evidence to show that the latter was the person intended to be benefited. *Re Roland*, 14 W. R. 317.

4. Testatrix bequeathed 100*l.* to T. T., of R. Square, Brighton. The testatrix had two nephews, one J. T. of R. Square aforesaid, surgeon; and another, the Reverend T. T., of Little Preston, Daventry, clerk. Each of these persons claimed the legacy. The money having been paid into court under the Trustee Relief Act, T. T. presented a petition for payment of it to him, and adduced extrinsic evidence in support of his claim, such evidence going to show that he was in some sense properly described as of R. Square. In opposition to the claim of T. T., evidence was adduced by J. T. to show that the testatrix had made a mistake in his name, and a former will of the testatrix was produced made three years before the instrument in question, in which she gave a legacy to "T. T., of R. Square, Brighton, surgeon," that being, with the exception of the wrong Christian name, the exact description of J. T.:—Held, that such evidence was admissible, and that the evidence of the prior will was conclusive in favour of J. T. *Re Feltham's Trusts*, 1 Kay & J. 328, 533.

5. A. bequeathed a legacy to his niece, E. S. After her death, he made another will, in which the same bequest was copied. The latter alone was proved. The legacy was claimed by E. J. S., a great-great-niece:—Held, that she was entitled, and that parol evidence was inadmissible to show that the deceased niece was intended. *Stringer* v. *Gardiner*, 27 Beav. 35. Affirmed 4 De G. & J. 469.

6. A. gave a legacy to his great-nephew and great-niece by the description of "my nephew and niece, J. and S.;" he then gave real estates on certain events to be sold, and the proceeds to be equally divided between his surviving nephews and nieces:—Held, that this designation was not sufficient to include J. and S. among the nephews and nieces, though in the event which had happened they lost a legacy of 150*l.*, which the testator gave "to my nephew William's surviving children." *Thompson* v. *Robinson*, 29 L. J., Ch., 280.

7. Testator gave a share of his residuary personal estate to "my niece, the daughter of my late sister Sarah." The testator had had one sister only, named Sarah Ann, who had died fifteen years before, and who had never had any daughter, and but one child, a son:—Held, that such son was entitled. *Re Rickit's Trust*, 17 Jur. 664; 22 L. J., Ch., 1044; 1 Eq. Rep 251. S. C. *nom. Re Ricket*, 11 Hare 299; *nom. Re Rickett's Estate*, 1 W. R. 492.

8. A., by will, left to F. M. F., and to "his sister, M. F., my granddaughter, share and share alike, M. F. now living in France with her uncle M.," all his estates. M. F. was not then living, and had never lived, while her sister, C. F., was living, and had lived for some time with the uncle:—Held, that extrinsic evidence was admissible to explain the ambiguity in the will. *Re Plunkett*, 11 Ir. Ch. R. 361.

Held, also, that the name should control the description, and that M. F. was therefore entitled. *Ib.*

9. A testatrix, without professional assistance, made her own will and named Robert John M. (the eldest son of her brother) her executor. She then created two annuities of 50*l.* each in favour of two persons, and made a gift to a third, but in terms which left it doubtful whether the gift was of that specific sum, or of an annuity to that amount. She then proceeded thus: "My dear nephew, John Henry M., of H., surgeon, but late of Calcott Hall, the above bequests to fall into his hands; and should he not marry, to be divided equally between Samuel M., John M., and Mary D.," formerly Mary Margaret M., but then a married woman, "all of them late of Calcott Hall, must each receive 50*l.*, the residue to fall into my above-named executor's hands." There was a son Thomas, born between Samuel and Mary, but there was no son named only John, the second nephew John Henry, and unmarried. The others survived him:—Held, that a court of justice could not safely arrive at the conclusion, that the words "John M." in the last stated gift were written by mistake for "Thomas M.," either on the ground that if "John M." meant John Henry M. there would be two inconsistent provisions for his benefit, or on the ground that the testatrix evidently intended to benefit all the children, and that in regular order of seniority the name of Thomas M. would have come in that place. *Mostyn* v. *Mostyn*, 5 H. L. Ca. 155; 23 L. J., Ch., 925. Affirming 3 De G. M. & G. 140; 22 L. J., Ch., 673.

10. A name and a description of a legatee were given in a will, which, taken together, could not be applied to any one person. Evidence of the state of the family was admitted, and an affidavit of a solicitor who prepared the will was offered to show what had been the cause of the mistake:—Held, that the affidavit was not admissible. *Drake* v. *Drake*, 8 H. L. Ca. 172; 29 L. J., Ch., 850. Affirming 25 Beav. 642; 4 Jur., N. S., 727; 6 W. R. 791.

A. devised a life interest in an estate to his "sister, Mary Frances Tyrwhitt Drake;" he had no sister, but he had a sister-in-law, of that name. After other devises and bequests, he gave the residue equally among four persons, one of whom was named and described, "my niece Mary Frances Tyrwhitt Drake." He had no niece who bore those two names conjointly; he had nieces who bore one or other of those names:—Held, that the bequest as to the fourth part was void for uncertainty. *Ib.*

1. A will contained a legacy of 300*l.* to Commodore P. D., of S., and a like legacy to the children of P. H. D. This legacy was claimed by the three children of H. O. D., and also adversely by the five children of P. D., whose real name was P. J. D. P. J. D. and H. O. D. were both in the same degree of relationship to the testatrix, and she had given like legacies to their brothers and sisters. H. O. D. was dead at the date of the will:—Held, that the previous gift to Commodore P. D., and the fact that the gift was not to the children of "the said" P. H. D., together with the intention manifested in the will to provide for all the members of the D. family, was sufficient to enable the Court to decide, upon the face of the will, that the children of H. O. D. were intended, although there was no reference to him as "the late" H. O. D.:—Held, also, that this construction did not strike out the name "P.," but treated it as having been used by mistake:—Held, lastly, that extrinsic evidence of the intention of the testatrix was not admissible, although it might have been if there had been only one class of claimants. *Douglas* v. *Fellows*, 1 Kay 114; 2 W. R. 654; 23 L. J., Ch., 167.

2. A testatrix gave a sum of stock in trust for "S. D., for life, and after her decease, in trust for D., daughter of the said S. D." At the date of the will, S. D. had one, but at the death of the testatrix, three daughters. On evidence, showing that the eldest daughter of S. D. was alone known to the testatrix, who was not aware of the existence of the other daughters, the Court declared her entitled. *Phillips* v. *Barker*, 1 Sm. & G. 583; 17 Jur. 1146; 2 W. R. 110; 2 Eq. Rep. 795.

3. A gift by the testator to his first cousin, Vincent B., the son of his late uncle, Peter B. The testator had no cousin named Vincent B., who was the son of his late uncle Peter; but he had a first cousin named George Vincent B., who frequently visited and dined with him, whom he commonly called "Vincent," and who was the son of a deceased uncle named Joseph. The son of Peter was named Frederick, and was not in the habit of visiting the testator. The Court admitted evidence of these extrinsic circumstances, and:—Held, that the testator was mistaken in the description rather than in the name of the legatee; and that George Vincent B., the son of Joseph, was entitled to the legacy. *Bernasconi* v. *Atkinson*, 10 Hare 345; 17 Jur. 128; 1 W. R. 152.

Held, also, that the evidence of the solicitor who prepared the will, that the testator had by his instructions expressly indicated that George Vincent B. was the person for whom the legacy was intended, and that he (the solicitor) had inserted the description without the direction of the testator, and in a mistaken belief of the parentage of the legatee, was not admissible. *Ib.*

Where a legatee is pointed out by name and description, and there is no person to whom the name and description both apply, but the name only applies to one and the description only applies to another, the Court will endeavour, from such of the extrinsic circumstances as are admissible, to ascertain the person meant by the testator, and will not hold the bequest void for uncertainty, except in cases where it is impossible to discover any preponderance in favour of one of the persons rather than of the other. *Ib.*

The Court will not adopt an intestacy for uncertainty, except in the very last resort. *Ib.*

Extrinsic evidence is only admitted to assist in the construction of wills where the ambiguity is created by matter *dehors* the will. *Ib.*

A testator will always be held to have used the very description in his will, notwithstanding it may, in fact, be the description rather of his legal adviser than his own. *Ib.*

4. By his will the testator gave his residue amongst his nephews and nieces, excluding John Shutt. By a codicil, he varied the limitation to this class, and excluded William Shutt "as in his will was directed":—Held, that the exclusion was void for uncertainty, and that they both took a share. *Cope* v. *Henshaw*, 35 Beav. 420.

5. In 1841 lands were settled to the use of J. C., the elder, for life, remainder to E. C. for life; remainder to the first and other sons of E. C., in tail. E. C. had two sons, namely, J. C, the younger, and H. C. In 1848 J. C., the elder, made his will, by which he bequeathed an annuity of 200*l.* a year, during the life of E. C., to J. C., the younger; and in case of his death, to the person or persons who would be entitled to the rents of the settled lands under the limitations of the settlement of 1841, if E. C. were dead. J. C., the younger, married, and had one son, J. M. C. In 1866 the lands were re-settled and limited, after the death of E. C., to the use of H. C. for life. J. C., the younger, died:—Held, upon the construction of the entire of the will of J. C., the elder, that J. M. C., and not H. C., was the person entitled during the life of E. C. to the annuity of 200*l.* a year. *Re Croker*, 2 Ir. R., Eq., 58.

6. A testator described his daughter as Mary, the wife of John Crook, and spoke of him as her present husband. The daughter was the sister of the deceased wife of John Crook. There were children of Mary Crook by John Crook, whom the testator recognised as his grandchildren, and no other children of Mary Crook:—Held, that such children could not take under a bequest to "the children or child of my daughter Mary Crook." *Crook* v. *Hill*, 38 L. J., Ch., 579; 17 W. R. 1092.

7. A testatrix left by her will "to the five children of the late post captain Horatio Nelson Noble, her husband's son," 50*l.* each. Her husband had two sons, Horatio Nelson, who had been a major in the Indian army, and was dead many years, and Jeffrey, who had died shortly before the testatrix, and had been a post captain in the navy. There were five children of each son living at the date of the will. It was proved that the testatrix had been on terms of great intimacy and

affection with Jeffrey and his children, but had little intercourse with the children of Horatio Nelson; that she had directed the widow of Jeffrey to be written to for the Christian names of her children shortly before making her will, and that when the will was read over to her, she had directed the word "post" to be inserted in the draft before "captain":—Held, that the children of Jeffrey, the post captain, were entitled to the legacies. *Re Noble*, 5 Ir. R., Eq., 140; 18 W. R. 881

1. A father gave the residue of his property in trust for his four children, Ann, Charles, Florence Mary, and Agnes Emily. He had living four children, Ann, Charles, Florence Mary, and Alice Martha. He had previously had a child, Agnes Emily, but she had been dead more than five years:—Held, that the name of Alice Martha must be substituted for that of Agnes Emily. *Gregory* v. *Gregory*, 19 W. R 711.

2. A brother, having two sisters, E. D. and E. B., appointed J. M, E. C., and his sister E. D. joint executors of his entire property for the purpose of putting it to the best advantage for "his sister, wife, and children":—Held, that E. D., being the sister in the mind of the testator when making his will, was the person entitled to share in his property, and that E. B. was not entitled to any share therein. *Murphy* v. *Donnelly*, 6 Ir. R., Eq., 203.

3. A testator, by his will made in 1856, gave a legacy of 10*l.* to his servant, Susanna Cole. He had at that date a servant of that name, but in 1858 she married and left the testator's service, although for five years she continued to be employed occasionally in his house. When she left, her place was taken by her sister, Ann Cole. In 1871 the testator made a codicil, by which he gave a legacy of 100*l* "to my servant, Susanna Cole" At the date of the codicil, Ann Cole was still in the testator's service:—Held, that Ann Cole was entitled to the legacy of 100*l*. *Re Fry, Matthews* v. *Greenman*, 31 L. T., N. S., 8; 22 W. R. 813. Affirming 22 W. R. 679.

4. When a legatee is once correctly described in a will, and the same name is mentioned again without any description, evidence is not admissible to show that a different person was intended. *Webber* v. *Corbett*, 16 L. R., Eq, 515; 29 L. T., N. S., 365.

An aunt gave "to her niece Laura, the second daughter of her brother John Webber," certain chattels. In a subsequent part of her will she gave to "each of her nieces, Laura Webber" and others, 50*l.*: and almost immediately afterwards "to each of her nieces, the said Laura Webber" and others, 100*l.*: and divided her residuary estate equally between "the said Laura Webber" and three others. The testatrix had two nieces, one named Laura, the second daughter of her brother John, and the other named Laura Frances Tonkin, the daughter of her brother William:—Held, that having once clearly and accurately described her niece Laura, as Laura "the second daughter of her brother John," whenever she mentioned "her niece Laura" afterwards, she must be presumed to have meant the same person: there was consequently no latent ambiguity, and parol evidence was therefore not admissible to show which of the two nieces was meant. S. C. 29 L. T., N. S., 365.

5. A father, by his will, appointed his son, "Forster Charter," his executor, and made him his general devisee. At the date of the will he had two sons, William Forster Charter and Charles Charter. Another son, who was named Forster Charter, had died many years before. The elder son was usually called Willie, never Forster. He for many years had lived one hundred miles or more away from his father, was married, and he carried on an independent business as a butcher. The younger son, Charles, lived with his father and mother, working on their farm. The will directed the "executor, Forster Charter," to pay to the testator's wife an annuity of 10*l.*, and to allow her ordinary maintenance "so long as they reside together in the same house. . . . But should they think proper to live separately, then, besides the annuity and the maintenance, 'Forster Charter' shall allow my wife, rent free, the use of the cottage," which adjoined his house. Any difference between the executer and widow as to the latter's maintenance was to be referred to the arbitration of a person named, who lived near the farm. On the hearing of the case, the evidence of the testator's intention to make Charles Charter his executor and devisee was admitted:—Held, that such evidence was not admissible. But that, from the words "so long as they reside together," and from the other directions above mentioned, there was enough to show that the testator intended to name his younger son Charles, and that the demonstration of the legatee thus afforded must prevail over the incorrect description of the legatee by the name "Forster Charter." *Charter* v. *Charter*, 7 L. R., H. L., 364; 43 L. J., P, 73; 2 L. R., P. & M, 315.

6. An aunt bequeathed a legacy to a niece, whom she described as "Monimia Mahon, daughter of my brother Walter," and it appeared that the only daughter of Walter, named Monimia, had been married to a person named Smith, and was dead at the date of the bequest, as the testatrix was aware, but that she had another niece named Monimia Mahon, who survived her. This lady, however, was not a daughter of Walter:—Held, that, notwithstanding the inaccuracy in the description of the legatee, the testatrix had indicated with sufficient certainty that the legacy was intended for the niece Monimia who survived her. *Dooley* v. *Mahon*, 11 Ir. R., Eq., 299.

7. When there is an error both in the names and description, parol extrinsic evidence will not be admitted to explain who were the intended objects of the testator's bounty. *Acworth* v. *Benton*, 18 W. R. 988; 22 L. T., N. S., 776.

8. Parol evidence is admissible to prove that a person exactly answering to a description in a will is not the person intended by the testator, and that another person who does not exactly, but does substantially, answer the description is the person intended by the testator. *Re Woolverton*, 26 W. R. 138; 37 L. T., N. S., 573; 47 L. J., Ch., 127; 7 L. R., Ch. D., 197.

A father left a legacy to the children of his daughter by any husband other than Mr. Thomas Fisher, of Bridge Street, Bath. There

was a Mr. Thomas Fisher, of Bridge Street, Bath, who was a married man. There was also a Henry Tom Fisher, son of Thomas Fisher, who sometimes lived with his father:—Held, that although Mr. Thomas Fisher answered the description, and his son's name was not Thomas but Tom, parol evidence of these circumstances might be admitted to show which was intended. *Ib.*

1. Bequests unto "my niece Mary Elizabath G., now residing with me." The only niece of testator was named Elizabeth W. Mary Elizabeth G. was a stranger in blood to testator, being the wife of an illegitimate son of testator's wife. Neither Elizabeth W. nor Mary Elizabeth G. actually resided with testator, but both of them visited at his house and were in attendance upon him during his last illness, in the course of which his will was made:—Held, that Mary Elizabeth G. was the person designated. *Re Lyon's Trusts*, 48 L. J., Ch., 245.

2. Bequest to "the two daughters of Serjeant-Major Gill, late of the 2nd Dragoon Guards, and who was lately stationed at N. barracks, and who is married to my cousin, M. A. M., the sum of 400*l.* to be equally divided between them." M. A. M. was not cousin to the testatrix; she was the testatrix's father's stepdaughter; but they had been brought up together, and sometimes called each other cousins, sometimes sisters. M. A. M. was married to Serjeant Simons, by whom she had two daughters. Raynah, married to Serjeant-Major Gill, 3rd Dragoon Guards (which regiment had been stationed at N. barracks, shortly before the date of the will), and who had one daughter, an infant; and Rachel married to Adams:—Held, on the evidence of statements made by the testatrix with reference to herself, M. A. M., and her husband's name, that the testatrix, when making her will, had mistaken the name "Gill" for "Simons," and that Raynah and Rachel, the daughters of M. A. M., were entitled to the legacy. *Baxter* v. *Morgan*, 7 L. R., Ir., 501.

3. Administration granted to Andrew Carroll, of R., as universal legatee, although named in the will "Matthew Carroll, of R.," on satisfactory evidence of the mistake, and that there was no such person as "Matthew Carroll" living at R. *Murphy, In goods of*, 7 L. R., Ir., 561.

4. A testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew John and his niece Hannah (whom he described as the children of his late brother Joseph), "and all and every the children of my late nephew Mark Ingle and my niece Eliza Wheelwright," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same as before mentioned. In a codicil he referred to the "legacy left and apportioned to my niece Eliza." Some years before the date of the will a brother of the testator, named Mark, had died, leaving three sons, and a third son named Mark. The evidence showed that, at the testator's death, the nephew Mark, who had had a son born to him in England, and had emigrated to America, where he had another child, was still living; also, that the testator knew of the birth in England of the child of Mark, and of his emigration to America, and that from such circumstances he (the testator) had, shortly before the date of the will, been led to suppose that Mark might be dead:—Held, that by the words "my late nephew Mark," the testator meant his (living) nephew Mark, and not his late brother Mark. *Re Ingle*, 11 L. R., Eq., 578; 40 L. J., Ch., 310; 24 L. T., N. S., 315; 19 W. R. 676.

Held, also, that, there being only one living person answering to the name Mark Ingle, this was not a case of equivocation, and that evidence of intention was not admissible. *Ib.*

Held, also, that by the words "and my niece Eliza," the testator intended a gift to Eliza, and not a gift to the children of Eliza. *Ib.*

5. Gift by the will of 100*l.* to Highbury College, and of another 100*l.* by the second codicil under a gift of that sum to each of the charities mentioned in the will. In the same codicil was a legacy of 500*l.* to Hoxton Academy. The establishment known as Highbury College was formerly called Hoxton Academy. There was no Hoxton Academy at the date of the codicil or subsequently, but other charitable societies had for some time occupied the same premises:—Held, that the Highbury College was not entitled to the legacy of 500*l.* *Lee* v. *Pain*, 4 Hare 254.

6. A bequest of 500*l.* to the Westminster Asylum for Pregnant Women:—Held, upon extrinsic evidence, and the context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *General Lying-in Hospital* v. *Knight*, 21 L. J., N. S., Ch., 537.

7. Testator gave the residue of his estate to the poor of the parish of K. in L., but that parish was in N. It was set up by the next of kin, that testator did not imagine his *residuum* would exceed 10*l.*, and had so declared, whereas it amounted to near 1,000*l.* The Court thought parol evidence should be admitted to help out the description of the parish, but not as to the quantity of the thing given. *Brown* v. *Langley*, 2 Barnard. 118.

8. A testator, who had never been in England, bequeathed the residue of his personal estate to "the hospitals of Paris and London." In another part of the same will he spoke of a solicitor, whose offices were in Savile Place, as his "notary at London":—Held, that the word "London," as used by the testator, included Brompton. *Semble*, that it included all houses in a continuous line of streets with the City, Westminster, and Southwark, and the houses contiguous to such streets. *Quære*, whether "the hospitals of London" would not include all hospitals for the benefit of the inhabitants of London. *Wallace* v. *Att.-Gen.*, 3 N. R. 555.

9. Charitable bequest in trust to the rector for the time being of W., W. being a vicarage, ordered to be paid to the vicar. *Hopkinson* v. *Ellis*, 5 Beav. 34.

10. A legacy was given to the provost and fellows of Queen's College. The proper name of the corporation was "The Provost and scholars":—Held, that the provost and scholars were entitled. *Queen's College* v. *Sutton*, 12 Sim. 521; 11 L. J., N. S., Ch., 198; 6 Jur. 906.

11. A testator bequeathed nineteen guineas

each to the "surgeon" and "resident apothecary" of the Southern Dispensary of Bath, or any who might hold the like situations at his decease. There were two surgeons and no resident apothecary, but a "dispenser":—Held, that the three were entitled to nineteen guineas each. *Ellis* v. *Bartrum*, 25 Beav. 109.

1. A testator gave legacies of 25*l.* each to the Rev. J. B, the Rev. N. L., and the Rev. J. D. C. W., described as curates of a particular church. At the date of the will and the death of the testator, the Rev. J. B., the Rev. N. L., and the Rev. W. C. B. were curates of the church: there never had been any curate of that church named W., but there was a clergyman of that name whose initials were J. D. C.:—Held, that the Rev. J. D. C. W. was entitled to the legacy, and that extrinsic evidence of the testator's intention was inadmissible. *Farrer* v. *St. Catharine's College, Cambridge*, 16 L. R., Eq., 19; 42 L. J., Ch., 809; 28 L. T., N. S., 800.

See also CHARITY, IV. 1

2. Description supplying a Motive for the Gift.

2. A false character, attributed by a testator to a legatee, will not affect the validity of the legacy, unless the false character has been acquired by a fraud which has deceived the testator; and where the testator and legatee have a common knowledge of an immoral or criminal act, by which the legatee has acquired the false character, the rights of the legatee, as such, will not be affected, it being no part of the duty of courts of equity to punish parties for immoral conduct, by depriving them of their civil rights *Giles* v. *Giles*, 1 Keen 685; 5 L. J., N. S., Ch., 46.

3. If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails; therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who, at the time of the marriage ceremony with her, had a wife living; the Court in respect of his conduct held him not entitled; but inclined to think it would be otherwise where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a testator gives a legacy to a child from motives of affection supposing it his own, but is imposed upon in that respect. *Kennell* v. *Abbott*, 4 Ves. 802.

4. A legacy to A., described as, and believed by the testator to be, his wife, A. being, in fact, aware that she had a husband living when she went through the marriage ceremony with the testator, and during the whole coverture, is void. *Wilkinson* v. *Joughin*, 2 L. R., Eq., 319; 12 Jur., N. S., 330; 35 L. J., Ch., 684; 14 L. T., N. S., 394.

But a legacy given by the same testator to B., a daughter of A. by her husband, under the designation of the testator's step-daughter B. (B. being innocent of the fraud), is valid. *Ib.*

5. A testator, by will dated in 1874, shortly before his death, bequeathed to his executors a sum of new 3*l.* per cent. annuities, upon trust to sell the same and apply the proceeds in the purchase of a life annuity in "the name and for the benefit of my housekeeper M. R., whether living in my service at the time of my death or not." M. R. had left the testator's service six or seven years before, and married in 1871, and her sister E. R. had been since 1870, and was, at the time of the testator's death, in his service as his housekeeper:—Held, that the primary description of the legatee, "my housekeeper," and not the name, was in this case the guide to the testator's intention, and that E. R. was entitled to the fund. *Re Nunn*, 19 L. R., Eq., 331; 44 L. J., Ch., 255; 23 W. R. 376.

6. A testator directed his trustees to set apart and invest 1,000*l.*, and to stand possessed thereof and the income thereof in trust for Y. for life, and, after his death, "in trust for his daughter, my godchild, for her sole and separate use." Y., at the date of the will and the testator's death, had a son who was the godchild of the testator, and a daughter who was married. The testator had not been sponsor to any of Y.'s children, except the son, and had left legacies to several other godchildren of his, and was on intimate terms with the son, but not with his sister:—Held, that the son was entitled to the legacy, the leading motive of the bequest appearing to be that he was the testator's godchild. *Re Blayney*, 9 Ir. R., Eq., 413.

7. A testator, by his will made in 1856, gave a legacy of 10*l.* to his servant, Susanna Cole. He had at that date a servant of that name, but in 1858 she married and left the testator's service, although for five years she continued to be employed occasionally in his house. When she left her place was taken by her sister, Ann Cole. In 1871 the testator made a codicil, by which he gave a legacy of 100*l* "to my servant, Susanna Cole." At the date of the codicil, Ann Cole was still in the testator's service:—Held, that Ann Cole was entitled to the legacy of 100*l.* *Re Fry, Matthews* v. *Greenman*, 31 L. T. 8; 22 W. R. 813. Affirming 22 W. R. 679.

Gifts to Reputed Wife or Husband.] See XXIV. *ante.*

3. Assumed Names. Nicknames.

8. The Court will not allow parol evidence to explain a blank in a will; but where a legatee is nicknamed, or where there are two of the same name, parol evidence will be admitted to explain. *Baylis* v. *Att.-Gen.*, 2 Atk. 240. And see *Beaumont* v. *Fell*, 2 P. W. 141.

When a person is mentioned by a nickname, or where there have been two, who have had the same Christian and surname, parol evidence has been admitted to ascertain whom the testator meant. *Ib.*

9. A legacy having been given to a legatee, in a name which she had for many years assumed, the Court will direct an inquiry who was the person meant. *Neathway* v. *Hann*, Taml. 316.

10. Annuity bequeathed to testator's brother E. for life, remainder to his children by his present wife: at the date of the will, E. and

his wife were dead, and their children had other legacies under it, and testator had only one brother, S., having a wife and children, whom he had been in the habit of calling E.: his children held to be entitled upon these circumstances. *Parsons* v. *Parsons*, 1 Ves. J. 266.

1. Legacy to "Mrs. G." Evidence admitted to prove who was intended. *Abbott* v. *Massie*, 3 Ves. 148.

2. The testatrix bequeathed to Mrs. and Miss B., the widow and daughter of the late B., 200*l.* each; at the date of the testamentary instrument there were no persons answering the description. The legacy was claimed by a Mrs. W., the daughter of the late B., and her daughter, Miss W. (the granddaughter of the late B.); it was proved that the testatrix was intimately acquainted with the late B. and also with Mrs. and Miss W., and used to call them by Mrs. W.'s maiden name of B.:—Held, that this evidence was admissible, and Mrs. and Miss W. were declared to be entitled to the legacies. *Lee* v. *Pain*, 4 Hare 251; 14 L. J., N. S., Ch., 346; 9 Jur. 247. And see *id.* 24.

3. Annuity bequeathed to testator's brother Edward for life, remainder to his children by his present wife; at the date of the will Edward and his wife were dead, and their children had other legacies under it, and testator had only one brother Samuel, having a wife and children, whom he had been in the habit of calling Edward and Ned. His children:—Held, to be entitled upon these circumstances. *Parsons* v. *Parsons*, 1 Ves. J. 266.

4. Equivocation.

4. Latent ambiguity arises *dehors* the will, and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child; not to explain a patent ambiguity upon the face of the will. *Baugh* v. *Read*, 1 Ves. J. 259; 3 Bro. C. C. 192.

5. Two schools in the same town, one a free school, and the other a charity school for boys and girls: A. devises 500*l.* to the charity school; and though both be charity schools, yet only the charity school for boys and girls shall take. *Att.-Gen.* v. *Hudson*, 1 P. W. 674.

6. Legacy to "R. C., my nephew, the son of Joseph C.;" other clauses describing "my nephew R. C." generally, and one legacy to "my nephew R. C., the son of John C." The testator had only two brothers, John and T. C., each having a son named R. C. Parol evidence admitted to resolve this latent ambiguity, showing intimacy with the son of John C., and very slight knowledge of the other C.; the legacy was decreed to the former. *Careless* v. *Careless*, 19 Ves. 601; 1 Meriv. 384.

7. Legacy to Miss S.; if more than one person answering that description must be intended the eldest. *Lee* v. *Pain*, 4 Hare 249. And see *id.* 24; 14 L. J., N. S., Ch., 346; 9 Jur. 247.

8. A testator, who was a farmer, by his will gave a legacy in these terms: "To W. R., one of my farming men." At the date of the testator's will, and at the time of his death, he had two persons in his service named W. R.; one of them was a farming man, and the other was employed both in the house and in the farm:—Held (upon some evidence that the testator intended to benefit the latter), that the latter, and not the former, was entitled to the legacy. *Reynolds* v. *Whelan*, 16 L. J., N. S., Ch., 434.

9. Devise "to William Marshall, my second cousin." The testator had no second cousin so named, but he had two first cousins once removed, one named William Marshall, the other named William John Robert Blandford Marshall:—Held, a latent ambiguity, and parol evidence admitted to dissolve it. *Bennett* v. *Marshall*, 2 Kay & J. 740.

10. Testator bequeathed his residue to his first cousins, the children of his father's brother of the name of C. The testator's father had two brothers of the name of C., both of whom had left children:—Held, that the bequest was not void for uncertainty, but that the children of both the brothers were entitled to share in the residue. *Hare* v. *Cartridge*, 13 Sim. 165.

11 A testator having several nephews, among them Joseph Healy, the son of his deceased brother James, and Joseph Healy, the son of a living brother Joseph, devised his farm to "my nephew Joseph Healy," with remainder, in case of his death without issue, to his nephew Thomas Healy. He bequeathed to his brother Joseph 300*l.*, legacies to Thomas Healy and three other nephews, "all of whom are children of my brother the late James Healy." To a niece, "daughter of my brother Joseph Healy," and to "Joseph Healy, only son of my brother Joseph Healy aforesaid," 200*l.*, to be paid to him at such time and in such manner as his said brother Joseph Healy should direct. He bequeathed the residue of his property of every kind to his "said nephew Joseph Healy":—Held, that Joseph, the son of James, took the farm and the residue. *Healy* v. *Healy*, 9 Ir. R., Eq., 418.

Before resorting to parol evidence to explain a latent ambiguity, the Court should be satisfied that the ambiguity cannot be removed by the construction of the will itself, having regard to the circumstances surrounding the testator. *Ib.*

12. Gift to "my granddaughter E. B." There were two of that name, one of them constantly visiting the testator, and much noticed by him, and the other not:—Held, that the former was entitled to the legacy. *Jefferies* v. *Michell*, 20 Beav. 15.

13. A devise to my son E. F., and then to my grandson H. F. (the testator having two grandsons of that name through different sons), does not necessarily mean to H. F., son of E. F.; and parol evidence is admissible to show which was meant. *Fleming* v. *Fleming*, 8 Jur., N. S., 1042; 31 L. J., Exch., 419; 10 W. R. 778; 6 L. T., N. S., 896.

14. An aunt, after making specific bequests to her niece Clara and "my niece Laura, second daughter of my brother J. H. W.," bequeathed as follows: "To each of my nieces, K. G., H. M. T., H. B., and Laura W., 50*l.*," and further bequeathed "to each of my nieces, C. W., Laura W., R. W., M. E. S. S., and E. G. S., 100*l.*," and gave the residue "in trust for M. E. S., Laura W., E. G. M., and R. W." The testatrix had two nieces, one Laura W., a daughter of

her brother J. H. W., and the other Laura Frances Tomkins W., a daughter of her brother William W. Parol evidence had been entered into to show which Laura was intended:—Held, that in the first gift the person who was intended was accurately described; that there was no latent ambiguity, and that parol evidence was not admissible; that the same Laura W. mentioned in the first gift took both the legacies of 50*l.* and 100*l.*, and also the share of the residue. *Webber* v. *Corbett*, 43 L. J., Ch., 164; 16 L. R., Eq., 515; 29 L. T., N. S., 365

5. Gift to an Eldest, Youngest, or other Son.

1. A bequest "to my nephew John Newbolt, second son of the Rev. W. S. N., vicar of Somerton, Somerset." The vicar of Somerton at the date of the will was the Rev. W. R. N., who was brother-in-law to the testatrix, his second son's name was R. H. N., and his third son's name was John Pryce Newbolt:—Held, that it was a good bequest to the third son John Pryce Newbolt, and that his description by the name "John" was sufficient to make the *veritas nominis* overcome the *error descriptionis*. *Newbolt* v. *Pryce*, 14 Sim. 354; 8 Jur. 1112.

2. A. bequeathed 4,000*l.* in trust for his brother for life, and after his decease upon trust to pay or divide the principal unto or equally between the child or children of the brother living at his decease except Thomas (his eldest son), and the issue then living of any (except Thomas) then dead, such issue taking their parent's share only. It was shown by evidence, that Thomas was the youngest son of the testator's brother at his decease; and that, to his knowledge, when he made his will, the eldest son of his brother was possessed of a large fortune, while the youngest and other children were unprovided for:—Held, that the eldest son, and not Thomas, was the son intended to be excepted. *Hodgson* v. *Clarke*, 1 De G. F. & J. 394. See S. C. 1 Giff. 139; 5 Jur., N. S., 1024.

3. Testator devised an estate in Jamaica to trustees, upon trust, so long as Robert B., the second son of his daughter E. B., should be under the age of twenty-one years, to pay and apply 150*l.* per annum out of the rents and profits for his maintenance and education, and subject thereto upon various other trusts in favour of his daughter E. B., and his said grandson Robert B., and subject to all those trusts in trust for the said Robert B. for life, with remainder to his first and other sons in tail male, with remainder in moieties in favour of H. C. and R. C., the second and third sons of J. C., and their issue. The testator also devised his estate in England in trust for his said daughter E. B. for life, with remainder to his said grandson Robert B. for life, with remainder to his first and other sons in tail male, with remainder to the third, fourth, fifth, and every other son of the said E. B. severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, and that of the second son, Henry:—Held, under the circumstances, that this was a mistake in the name and not in the description of the devisee, and consequently that Henry and not Robert was entitled to take under these devises, and parol evidence was admitted to explain the ambiguity. *Bradshaw* v. *Bradshaw*, 2 Y. & Coll. 72; 6 L. J., N. S., Exch. Eq., 1.

4. Bequest to "Francis G., the youngest son of my brother Francis G." There was no son of Francis G. answering the description; his youngest son being named Arthur Charles, and his eldest Arthur Francis. In support of the claim of the youngest son, parol evidence was admitted of a bequest to him, by a prior will, of the same property, and of a general belief that the testator was his godfather:—Held, that the youngest was entitled to the legacy. *Re Gregory*, 34 Beav. 600; 11 Jur., N. S., 364; 13 W. R. 828; 6 N. R. 282.

5. A testator devised freehold property to trustees to the use of his son George Gillett for life, and after his decease to the use of "Robert Gillett, the fourth son of George Gillett," in fee, in case he should attain twenty-one; but if he should die under that age, to the use of the fifth son in fee, and if he should die under twenty-one, to the first son coming after the fifth who should attain twenty-one. Robert Henry Gillett was the third, and John William Gillett was the fourth son of George Gillett, who had seven sons. There were reasons apparent why the testator passed over the first and second sons, but none for omitting the third son:—Held, that the name must prevail over the description, and that Robert Henry Gillett, the third son, took under the devise. *Gillett* v. *Gane*, 10 L. R., Eq., 29; 39 L. J., Ch., 818; 18 W. R. 423; 22 L. T., N. S., 58.

6. Land was devised on trust for A. for life, with remainder to "W., the eldest son of A.," for life. At the date of the will A. had two sons living, both children; J., the elder, the third born, and W., the younger:—Held, that W. was the person designated. *Re Garland*, *Garland* v. *Beverley*, 47 L. J., Ch., 711; 9 L. R., Ch. D., 213; 26 W. R. 718; 38 L. T., N. S., 911.

See also YOUNGER CHILDREN.

6. Gifts to Illegitimate Children.

7. Though a bastard's name be mistaken in a devise, yet, if the person meant can be clearly ascertained by averment, the devise is good. *Rivers' case*, 1 Atk. 410.

8. A legatee in a will was described as "J. E., the son of S. E., by M. J., or M., or E. his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not was utterly immaterial, for he was the person designated as the legatee. *Thompson* v. *East-Wood*, 2 L. R., App. Cas., 215.

II. GIFT TO FRIENDS OF TESTATOR.

9. A testator devised freehold lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends, and be their property. With the exception of a few nominal legacies, he bequeathed to his wife all his

personal and chattel property absolutely, and appointed her sole residuary legatee:—Held, upon the construction of the will, that the words "my friends" were capable of meaning the testator's kindred who would have taken his interest in the lands but for the interposed devise to his wife; that the devise over, on the death or marriage of the wife, was not void for uncertainty; and that upon her death the testator's heir-at-law became entitled under the devise. *Coogan* v. *Hayden*, 4 L. R., Ir., 585

III. GIFT TO OFFSPRING.

1. A gift of personalty by will to A. for life, remainder to her children; "but if there should not be any child or offspring," then a legacy to B., and the remainder to other persons. A. died, leaving only grandchildren:—Held, that the legacy to B. failed, offspring meaning issue beyond children. *Thompson* v. *Beasley*, 3 Drew. 7; 18 Jur. 973; 24 L. J., Ch., 327; 3 Eq. Rep. 59.

2. A testator directed a policy on the life of his son, to be settled, and the interest to be paid to his son's widow for life, and after her decease to her offspring:—Held, that the children of his son, who survived him, were entitled, to the exclusion of grandchildren. *Lister* v. *Tidd*, 29 Beav. 618.

3. The word "offspring" in its natural and proper sense, means lineal issue, or descendants. *Young* v. *Davies*, 9 Jur., N. S., 399; 32 L. J., Ch., 372; 11 W. R. 452; 8 L. T., N. S., 80; 2 Dr. & Sm. 167; 1 N. R. 419.

Where there is a gift of personalty for life to a testator's son, and "at his death to my surviving daughters, and their lawful offspring," that is a gift to the daughters only who survive the son, absolutely, the word "offspring" being a word of limitation, and meaning the same as "issue." *Ib.*

IV. GIFT TO AN ORPHAN.

4. A testatrix devised the rents and profits of houses to be applied "for and towards the maintenance, education, and support of my granddaughter until she arrives at twenty-one, provided she be left an orphan, unprovided for, and lives with part of my family. On a bill by the granddaughter, an infant, by her father as next friend, the mother being dead at the time of the execution of the will:—Held, that she was not an orphan within the meaning of the will, and the rents and profits were not applicable to her support or education. *Guilmette* v. *Mossop*, 7 L. T., N. S., 190.

V. GIFT TO A SON OR A CHILD.

5. A testator at the time of making his will had four children, one of them married (who had then one daughter), and three others unmarried. He gave an estate to one of the four for life, remainder to "one child" of each, provided that if the three then unmarried, naming them, should never have any lawful children, their part should go to the next of kin:—Held, that the first-born child of each of the four children took a fourth share in fee, as they successively came *in esse*. *Powell* v. *Davies*, 1 Beav. 532; 3 Jur. 839.

6. A testator devised certain estates in remainder to "a son of my nephew J. W., his heirs and assigns." J. W. had three sons, the two elder of whom died infants and unmarried:—Held, that the eldest son of J. W. took an estate in fee-simple in remainder in the estates. *Ashburner* v. *Wilson*, 19 L. J., N. S., Ch., 330 14 Jur. 497.

7. A., having a power to appoint real estate and 4,000*l.*, to all or any, or one or more of the children, or more remote issue of his marriage, made his will before any child was born, but while his wife was *enceinte*, bequeathing all his property on trust in the event of his leaving one child, that he or she should inherit all his landed and personal property; but in case of his leaving a son and daughter, he devised and bequeathed all his landed and personal property to his son, save and except 4,000*l.* to his daughter. He afterwards died, having no real estate except what was the subject of the power, but considerable personal estate, and leaving two sons and two daughters:—Held, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened. *Russell* v. *Russell*, 12 Ir. Ch. R. 377.

Gift to a First, Second, Eldest, Younger, or other Child or Son.] See YOUNGER CHILDREN.

VI. CONSTRUCTION OF THE WORD "UNMARRIED" IN DIRECT GIFTS AND GIFTS OVER.

1. *In General.*
2. *Limitation to Next of Kin of a Feme Coverte as if She had died Unmarried.* See XXVIII. VII. *ante.*
3. *Gift Over on Death Unmarried or Without Issue. "And," when construed "Or."* See XI. II. 2, and III. 7 *ante.*

See also SETTLEMENT, X. X.

1. In General.

8. The word "unmarried" is flexible in its meaning, and may be construed to mean "never having been married," or simply "unmarried at the time of the death," according to the obvious meaning of the parties, as manifested by the words of the instrument, or the nature of the transaction itself. *Coventry* v. *Lauderdale (Earl)*, 10 Jur. 793.

9. Limitation over upon the death of a person unmarried and without issue, unmarried, in its usual sense, meaning never having been married; "and" was construed "or," to afford a reasonable construction. *Maberly* v. *Strode*, 3 Ves. 450.

10. Bequest to the son and unmarried daughters of G. D. G., as he, G. D. G., might by will direct, and failing such direction, to them equally:—Held, that the word "unmarried" had reference to the state of G. D. G.'s family at the date of the will, and that therefore daughters of G. D. G., who were unmarried at the date of the will, were not excluded from participating in the benefit of the bequest by the circumstance of their having afterwards

married in the lifetime of the testator. *Hall* v. *Robertson*, 18 Jur. 635; 23 L. J., Ch., 241; 2 Eq. Rep. 15; 4 De G. M. & G. 781. Reversing 17 Jur. 874; 22 L. J., Ch., 1054; 1 W. R. 464; 1 Eq. Rep. 245.

1. A testator gave a legacy to his daughter (a spinster) at her mother's decease, if she should be then unmarried, as an outfit and to answer her immediate purposes:—Held, by Stuart, V.-C., not conclusively forfeited upon her marrying in her mother's lifetime. But on appeal:—Held, upon the construction of the context and upon a comparison of the use of the word "unmarried" in the bequest with its use in other parts of the will, that it meant "without having been married." *Re Thistlethwaite's Trust*, 3 W. R. 466; 1 Jur., N. S., 570. And on appeal, S. C. *nom. Re Thistlethwayte's Trust*, 1 Jur., N. S., 881; 24 L. J., Ch., 712; 3 W. R. 629.

2. Construed to mean wifeless. *Re Sanders*, 1 L. R., Eq., 675; 12 Jur., N. S., 351; 14 W. R. 576.

3. Bequest of 100*l.* each to the two sisters, and his ornaments to be equally divided amongst the unmarried ones:—Held, that the class of unmarried daughters was to be ascertained at his death. *Blagrove* v. *Coore*, 27 Beav. 138.

4. Gift to the wife of the use of all testator's property (following an absolute bequest of 500*l.* to her), for the benefit of herself and unmarried children that they might be comfortably provided for during her life:—Held, to confer on the wife and the children who were unmarried at the testator's death an equal share in the income of the property during the life of wife. *Jubber* v. *Jubber*, 9 Sim. 503.

5. The expression "without being married," in a will, construed, according to the common acceptation, "without ever having been married." The word "children," legally construed, is confined to legitimate children. *Bell* v. *Phyn*, 7 Ves. 458.

6. Property was given by will to trustees in trust for A. for life, "but if he should die unmarried," to be equally divided between the children of B. At the date of the will A. was a bachelor, and at the time of his death he was a widower:—Held, that, in the absence of context showing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married," and therefore that the gift to the children of B. did not take effect. *Dalrymple* v. *Hall*, 16 L. R., Ch. D., 715; 50 L. J., Ch., 302; 29 W. R. 421.

7. A testator gave his trustees all his residuary estate for his two daughters in equal shares, subject as thereinafter mentioned. He declared that the shares of his children should be vested interests in them at the age of twenty-four or marriage with consent. The trustees were to pay the dividends to his daughters during their lives without anticipation. Each daughter was to have power to dispose of her share by will on attaining twenty-four. In case of the death of a daughter intestate her share was to go to the other. The trustees were to apply the dividends of the share of a daughter whose interest had not become vested for her maintenance, etc. The testator then declared that in case his daughters should both die under twenty-four and unmarried as aforesaid, then he gave the whole of his residuary estate equally amongst his brothers and sisters. One of the daughters died an infant, and without having been married. The other attained twenty-one and married, but had not attained twenty-four:—Held, that the gift over could not any longer by possibility take effect, the Court refusing to change "and" into "or," or to give "unmarried" any other than its primary sense of never having been married. *Gonne* v. *Cook*, 15 W. R. 576.

8. A father devised and bequeathed freehold, leasehold, and personal property, and the rents, issues, and profits, to trustees to pay to or permit his daughters, A. and L., to receive in equal shares for their lives, for their separate use, and after their deaths to convey and assure, assign, pay, and transfer the whole unto and equally between the husbands of his daughters, to hold to them and their heirs, executors, administrators, and assigns. Provided always, that if either of his daughters should happen to depart this life unmarried, then and in such case the share of such daughter, in and to his trust estate, should accrue and belong to the survivor of them, and be taken and enjoyed by her for her life in like manner as was directed with respect to her original share, and on her death the whole should devolve to, and should be conveyed and assured, assigned and transferred, to the husband of his surviving daughter, as was with respect to her original share. After the testator's death, L. married, and her husband died in her lifetime, having by his will given to her all his interest under the testator's will. Subsequently, a portion of the freehold property devised by the testator on trust for L. and her husband was put up for sale, and at the sale W. became the purchaser. He, afterwards, upon investigating the title, objected to complete his purchase, upon the ground that L. might marry again, and that if her second or any subsequent husband survived her, he would, under the will of the testator, be entitled to the property put up for sale. Thereupon, a bill for specific performance was filed against him, and he demurred to the bill for want of equity:—Held, that the property given to the trustees upon trust for L. and her husband, vested in the first husband whom she married, subject to her life estate, and that this vested remainder passed under the husband's will to L. *Radford* v. *Willis*, 25 L. T., N. S., 720; 7 L. R., Ch., 7; 20 W. R. 132. Reversing 12 L. R., Eq., 105; 40 L. J., Ch., 484; 19 W. R. 845; 24 L. T., N. S., 574.

Held, therefore, that the title was one which the Court would compel the purchaser to accept. *Ib.*

Held, also, that the word "unmarried" in the gift over meant "without ever having been married." *Ib.*

Effect of Divorce.] 9. A testator by his will devised freehold and leasehold estates to trustees upon trust out of the rents and profits arising therefrom to pay an annual sum to his son and his son's wife E. jointly, and if his son predeceased E., to E. "so long as she continues unmarried." Before his son's death his son obtained a divorce from E.

He was now dead, and E. had not been re-married. On an application that the receiver might be directed to pay E. the arrears unpaid since her husband's death, and continue to pay the annuity:—Held, that the phrase "so long as she continues unmarried" was not equivalent to "during widowhood," and that, although E. was not a widow, as she was the "E." named in the will, and was unmarried, she was entitled to the annuity so long as she remained unmarried. *Knox* v. *Wells*, 48 L. T. 655; 31 W. R. 559.

1. A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, and after her death to hold it on trust for her children. In June 1878 the testatrix died, and her husband died in April 1883. In April 1861 J. H. married, and in November 1878 a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again:—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Re Lesingham's Trusts*, 24 L. R., Ch. D., 703; 49 L. T. 235; 32 W. R. 116.

Unprovided for by Marriage.] 2. A testator bequeaths the sum of 400*l.* sterling to each of his sister's children that may be alive and unprovided for by marriage at her death; and in a subsequent passage of his will adds, "I have left small legacies to my sister's children, that they may not in their turn become the prey of unprincipled men":—Held, that this was a bequest to daughters only, and not to sons: that "unprovided for by marriage" meant "unmarried": that a daughter who was a widow at her mother's death was entitled to her legacy of 400*l.* *Dunbar* v. *Boldero*, 4 L. J., Ch., 76.

Gift of Annuity to Wife during Widowhood—Invalid Marriage.] 3. A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E. C., within one month after his decease, a legacy of 200*l.*, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of 300*l.*, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.* And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate." After the date of the will the marriage was, in a suit in the Divorce Court instituted by the wife, declared void *ab initio*, on the ground of the impotency of the testator. He died without altering his will:—Held, that the late wife was entitled to a legacy of 200*l.*, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence. *Re Boddington, Boddington* v. *Clarnat*, 22 L. R., Ch. D., 597; 52 L. J., Ch. D., 239; 48 L. T. 110; 31 W. R. 449. Affirmed 25 L. R., Ch. D., 685; 53 L. J., Ch., 475; 50 L. T. 761; 32 W. R. 448.

Held, also, that she could not take the 2,000*l.* which was given in substitution for the annuity to which she was not entitled. *Ib.*

4. A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman:—Held, that the sister, on afterwards becoming a widow, was not entitled to the annuity. *Bartleman* v. *Murchison*, 2 Russ. & M. 136; 9 L. J., Ch., 60.

5. Bequest to Lady C., a widow of Sir N. C., considered valid although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C. The bequest was the bequest of a fund to trustees to pay to her the dividends so long as she should continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the testator's residue:—Held, that she took an absolute interest in the fund. *Rishton* v. *Cobb*, 9 Sim. 615; 5 Myl. & C. 145; 9 L. J. N. S., Ch., 110; 4 Jur. 261.

See also SETTLEMENT, X. x.

VII. OTHER WORDS OF DESCRIPTION.

6. A legacy was given to A. "if not an uncertificated bankrupt at the testator's death." He was a bankrupt at the testator's death, but his bankruptcy was annulled four months afterwards:—Held, that he was not entitled to the legacy. *Cox* v. *Fonblanque*, 6 L. R., Eq., 482.

7. A bequest to Roman Catholic bishops and their successors is void, no such characters being known to the laws of Ireland; but where they are particularly named, though so described, the bequest is good, for their joint lives, subject to the control of the Court of Chancery. *Att.-Gen.* v. *Power*, 1 Ball. & B. 145.

8. A testator, by a codicil to his will having devised certain lands to trustees for charitable purposes, and having recited that they were then let at a clear yearly rent of 237*l.*, which he directed to be appropriated in the particular manner specified in the codicil for the maintenance of an almshouse, etc., declared that in the event of there being an increase in the rents by any new letting, the surplus so to arise should go to the only use and behoof of the person or persons of the S. and C. families who, for the time being, should be lord or lords, lady or ladies, of the manor of D.; and in case the said families did not protect the said charities, or if the said families should become extinct, then and in either of said

cases the trustees were to apply the said surplus rents in addition to the former provisions for the charity. After the death of the testator, the families of S. and C. sold the manor of D.:—Held, that the families of S. and C. had not, by the sale of the manor of D., become extinct within the meaning of the codicil. *Charitable Donations and Bequests (Commissioners of)* v. *De Clifford*, 1 Dr. & War. 245.

1. By articles of agreement of the 19th November 1812, purporting to be made in contemplation of a then intended and soon after solemnised marriage, it was declared that 600*l.*, portion of the wife's fortune, should be secured by the bond and warrant of her father L. On the 19th January 1826 L. made his last will and testament, wherein he (correctly) recited that he was tenant for life of the lands of Aggard, which, by the terms of his marriage settlement, were charged with 4,000*l.* for his daughters in such shares as he should by will or other writing appoint, and he thereby further (erroneously) recited that the sum of 600*l.* was on the marriage of his daughter charged for her on the lands, and he thereby directed the said last-mentioned sum, together with other sums amounting to 1,100*l.* to be for her, his married daughter's portion, and he then also appointed three several sums of 900*l.* each to his third, fourth, and fifth daughters, which, with sums charged on other lands, made 1,100*l.* each:—Held, that the will sufficiently indicated an intention on the part of the testator to appoint the 600*l.* to his married daughter, notwithstanding that he had not therein made any appointment to her by name. *Burke* v. *Lambert*, 15 W. R. 913.

2. A. gave her residuary estate equally among such of her nephews and nieces as should "be" in England at the time of her decease, and the children of such as should be then dead "living" in England, such children taking only the parents' share, and her great-niece J. G., and the children of her deceased niece M. W., such last-mentioned children only to take one of such shares in right of their mother equally among them:—Held, that two nieces who had for many years been permanently settled in America were excluded. That two nieces who at the time of the testator's death were temporarily in Ireland were not excluded, and that J. G. and the children of M. W. were entitled to claim double interests as parties named, and as included in the class. *Woods* v. *Townley*, 1 W. R. 504; 23 L. J., Ch., 281; 3 Jur., N. S., 41; 11 Hare 314.

3. Devise of several estates to A. for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of A. in tail male, with divers remainders over, with power to the persons from time to time entitled to the estates devised, to lease all such estates, except an estate called Juts, and with a direction that the persons who should be entitled to and possessed of the devised estates should not lease the estate called Juts or any part thereof, and that every such person should live and reside on the said estate called Juts, and, for default thereof, all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts were actually dead:—Held, in a suit by parties making title under a recovery suffered by A. and his eldest son against a purchaser for specific performance, that it was too uncertain what the testator meant by the words live and reside, for the Court to determine that there had been a forfeiture, and specific performance decreed. *Fillingham* v. *Bromley*, T. & R. 530.

4. Bequest in a will "to such of my nephews and nieces as shall at my decease be residing in this country." At the date of the will, and at her death, the testatrix had one nephew residing in the United States, and another in the East Indies. A third nephew was a seafaring person, born and in his youth resident in Durham, where the testatrix resided. He was thenceforth continually a seafaring man, without any fixed residence on shore, living, however, occasionally at Durham, and sometimes in Ireland. He married an Irishwoman in Ireland, but neither did he provide any fixed residence for her, and she sometimes lived in England, sometimes in Ireland. At the time of the death of the testatrix this nephew was in Belfast Harbour, on board ship, having just arrived from North America:—Held, that he was entitled within the words "residing in this country." *Dale* v. *Atkinson*, 3 Jur., N. S., 41.

5. A father directed the residue of his estate to be divided into fourteen equal parts, and gave one such part to the daughters of his late niece, and one other part to each of thirteen persons or such of them as should be living in England at his death:—Held, that there was an intestacy as to the shares of the persons who were not living in England at the time of his death. *Ross* v. *Iles*, 20 W. R. 858.

Conditions as to Residence.] See CONDITION, XVI.

XXXII. Gifts to a Class.

XIII. *Gifts to First, Second, etc., Children, and Fluctuation between Eldest and Younger Children.* See YOUNGER CHILDREN.

XIV. *Gifts by Way of Substitution.* See LVIII. *and* LXVII. *post.*

XV. *Gifts to Survivors.* See LI. *post.*

XVI. *Vesting of Interests in.* See VESTED, CONTINGENT, AND FUTURE INTERESTS.

XVII. *Right to Intermediate Rents and Profits.* See LII. I, II., *and* III. *post.*

I. CLASS WHAT IS.

1. A testator directed his property to be sold, and the proceeds to be divided between his three sons and his daughter (naming them), or as many of them as should be then living. He then referred to a power of appointment over a fund under his marriage settlement, and of the appointment of 2,000*l.*, part thereof, to his daughter on her marriage, and declared his wish to be that the residue should be "equally divided among my sons, as also any other sum of money that I may die possessed of":—Held, that the gift of the residue of the trust fund was made to his sons as a class generally, and not to the three sons named in the previous gift. *Fitzroy* v. *Richmond (Duke)*, 5 Jur., N. S., 971; 28 L. J., Ch., 750; 27 Beav. 186.

2. Bequest to wife for life, and afterwards to all testator's nephews and nieces living at the death of his wife, namely, "all the children of my brother S. N.," etc. (naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by name, and giving her a legacy) —Held, that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named. *Re Hull*, 4 W. R. 194; 21 Beav. 314.

3. Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her, then at her death for her children equally; but if she should have no heirs, the trust fund was then bequeathed to B., who was A.'s mother, and her heirs:—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children other than A. became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., N. S., Ch., 329.

4. Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes:—Held, nevertheless, that they were entitled to only one share each. *Pruen* v. *Osborne*, 11 Sim. 132.

5. A testator gave 2,000*l.* in remainder to his sisters except A., and he then gave a legacy to A. He afterwards gave "to each of his sisters, namely, B., C., and D., 500*l.* each;" and in case of death of either, portion to go to the surviving sisters above mentioned:—Held, that A. was not included among the surviving sisters. *White* v. *Wakley*, 26 Beav. 23; 28 L. J., Ch., 79.

6. Bequest to A. for life, and at her death for her brother and sister and the testator's brothers and sisters equally. At the date of the will A. had one brother and sister, and the testator had three brothers and one sister:—Held, that this was not a gift to an unascertained class, but to the brothers and sisters living at the date of the will. *Havergal* v. *Harrison*, 7 Beav. 49; 13 L. J., N. S., Ch., 30; 7 Jur. 1100.

7. A testatrix bequeathed the residue of her property to be equally divided between the five daughters of Samuel and Mary L. for their own use —Held, that this was a bequest to the five daughters as *personæ designatæ* and not as a class. *Re Smith*, 9 L. R., Ch. D., 117; 27 W. R. 132; 38 L. T., N. S., 905.

8. To a gift equally between father, mother, brothers, and sisters of the testatrix was added a direction that the shares of brothers should not vest till they attained twenty-one, nor of sisters till they attained that age or married:—Held, that brothers and sisters constituted only one class, and a child *en ventre sa mère* but not born at the time of ascertaining the class, did not participate. *Garratt* v. *Weeks*, *Re Gardiner*, 45 L. J., Ch., 193; 20 L. R., Eq., 647.

9. Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son, John, by reason of his becoming entitled to a piece of property by a different title, should receive 30*l.* "less than each of my other children":—Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the Wills Act 1837. *Re Stansfield*, *Stansfield* v. *Stansfield*, 15 L. R., Ch. D., 84; 49 L. J., Ch., 750; 43 L. T. 310; 29 W. R. 72.

10. Under a gift to one for life, with remainder "to my grandchildren":—Held, that the bequest was not limited to grandchildren to whom legacies had previously been given *nominatim*, but that all the grandchildren who came into *esse* prior to the period of distribution were entitled. *Moffatt* v. *Burnie*, 18 Beav. 211; 18 Jur. 32; 23 L. J., Ch., 591; 2 W. R. 83.

11. Where a testator directed his trustees to pay all or any part of the residue of the income of his personal estate, so long as his mother should live, as in their discretion, and to the exclusion of any one or more of them, his trustees should think fit and proper, for the maintenance and education or otherwise for the advancement of "my nephew A. W. and my nieces, the son and daughters of my late sister A.," and after the decease of his mother to pay an annuity, which he had given her, "for the benefit of my nephew and nieces," in the same manner and for the same purposes as thereinbefore directed, until they should respectively attain twenty-one, and provided that "in case my said nephew or any or either of my said nieces" should marry under twenty-one, and die leaving issue, his trustees should make advances out of income for the benefit of such issue "as they may deem ex-

pedient or think fit," and directed that immediately after the decease of his mother, and upon his nephew and nieces respectively attaining twenty-one, his trustees should transfer one equal share of the trust estate to each, and provided that in the event of his nephew or either of his nieces dying under twenty-one married and leaving issue the issue should take their parent's share:—Held, that the gift to the nephew and nieces was made to them *nominatim*, and not as a class. *Re Barnshaw*, 15 W. R. 378.

1 A testatrix bequeathed stock to trustees in trust for her brother R.-G. for life, and after his decease in trust for his son, J. R.-G., for life, and after the decease of both of them upon trust for any immediate or direct descendants of her said brother or nephew who should bear the name of R.-G. for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G. Both R.-G. and his son J. R.-G. survived the testatrix, and J. R.-G. survived R.-G., but died without ever having had any issue. At the death of J. R.-G., the only descendant of R.-G. who bore the name of R.-G. was a descendant in the female line, C. G. R.-G., and he had assumed the name of R.-G. by royal licence after the death of R.-G.:—Held, that the intention of the testatrix was not that the descendants described should take singly and successively, but as a class for life, and that C. G. R.-G., being the only member of the class, took the whole for life. *Re Roberts, Repington* v. *Roberts*, 45 L. T. 150. Reversing on this point 50 L. J., Ch., 265; 44 L. T. 300.

See also X. III. *ante*—XLII. 8, 9, 10 and 11 *post*.

II. WHEN ASCERTAINED IN CASE OF GIFTS TO CHILDREN.

1. Immediate Gift. Children Living at the Death of the Testator.

2. Gift by will to the children of a deceased sister is a gift to those who were living at the death of the testator. *Viner* v. *Francis*, 2 Cox 190; 2 Bro. C. C. 658.

3. A will can never relate to a child who was not *in esse* till some years after testator's death. *Heathe* v. *Heathe*, 2 Atk. 122.

4. A. devises 20*l.* apiece to all the children of his sister B. A child born after making of will, and before testator's death, shall take. *Garbrand* v. *Mayot*, 2 Vern. 105; 2 Freem. 105.

5. Devise in favour of children of testator's sister:—Held, on construction of the whole will, to apply to such children only as were living at the testator's death, and not to include after-born children. *Scott* v. *Harwood*, 5 Madd. 332.

6. Where there is no immediate devise to children and grandchildren generally vesting in possession on death of the testator, after-born children are excluded. But if the vesting in possession be postponed, then after-born children *in esse* at the time of distribution are entitled, though devise immediate. *Crone* v. *Odell*, 1 Ball & B. 483. Affirmed 3 Dow 61.

Where devise immediate, and the description of persons to take general, those answering it on testator's death alone can take, and after-born children are excluded. But where the enjoyment is postponed to a particular period, or until a particular event happen, those then answering the description will take, and after-born children will be included. S. C. 1 Ball & B. 459. Affirmed 3 Dow 61.

7. E. devised all her real estates to trustees for a term of five hundred years, to raise 200*l.* for the purposes in the will mentioned, and after the determination of that term, and subject thereto, to other trustees for one thousand years, in trust to pay out of the rents certain annuities; and subject to the said two terms, she gave the premises to all and every the child and children of her brother T. and the heirs of their bodies, etc. T. had two children at the death of the testatrix and one born afterwards, but before the death of the annuitant. This is an immediate devise; and the last-mentioned child being born after the testatrix's death, is not entitled to any share of the premises. *Singleton* v. *Gilbert*, 1 Cox 68.

8. A devise to a man and his children of personal estate. A child born after the death of the testator shall not take. *Cook* v. *Cook*, 2 Vern. 545.

9. One devises the surplus of his estate to his grandchildren living at his death. Grandchildren born after his decease shall not take. *Musgrave* v. *Parry*, 2 Vern. 710.

10. Devise thus: "All the rest of my estate I give to be equally divided between my three daughters, F., G., and A., and all my grandchildren and great-grandchildren, or so many of them as shall be living within two years next after my decease." This was held to extend only to those then born, and not to any to be born within two years after testator's death. *Trelawney* v. *Molesworth*, Colles's P. C. 163.

11. Bequest of residue to children of A., the interest to be paid for their learning, and at the age of twenty to be equally divided between them; but if A. have no children, the interest to be paid to A. for seven years, and then the whole to be paid to her. Whether after-born child shall take, *quære* on. A new bill by the husband after the death of his wife and several children to whom he was administrator to have the question determined; Lord Camden, Chancellor, was clearly of opinion that the interest vested at the death of the testator, being given *per verba de presenti*, and

that the after-born child was excluded. *Hodges* v. *Isaac*, Ambl. 348.

1. Bequest of 100*l.* each to the testator's two sisters, and the testators ornaments to be equally divided amongst the unmarried ones:—Held, that the class of unmarried daughters was to be ascertained at his death. *Blagrove* v. *Coore*, 27 Beav. 138.

2. A testator gave 5,000*l.* to be invested in the names of trustees for the benefit of a tenant for life, and at his death the principal to his son and unmarried daughters as he might by will direct, and failing such direction, to them equally:—Held, that "unmarried daughters" meant those who were unmarried at the date of the codicil. *Hall* v. *Robertson*, 4 De G. M. & G. 781; 18 Jur. 635; 23 L. J., Ch., 241; 2 Eq. Rep. 15. Reversing 17 Jur. 874; 22 L. J., Ch., 1054; 1 W. R. 464; 1 Eq. Rep. 245.

2. Future Gift by way of Remainder. Children Born before the Period of Distribution.

(*a*) *In General*, 7761.
(*b*) *Interests Vested Subject to being Devested pro tanto*, 7762.

(*a*) *In General.*

3. Testator gave the residue of his real and personal estate to his wife for life, and upon her decease he bequeathed it to the children of A. and his wife Jane, to be equally divided amongst them, the said Jane's children, and not to any children by any other marriage of either party; the residue is divisible amongst the children of A. and his wife who were living at the death of the wife, but will not extend to children born after that time. *Ayton* v. *Ayton*, 1 Cox 327.

4. Bequests to the testator's wife for life, then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests, a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton* v. *Messenger*, 5 Ves. 136.

5. Devise of real estate to H., the testator's daughter, for life; and after her death without issue to sell and divide the money among all and every the children of his two sisters. The sisters had several children born in the lifetime of testator; one of them had a child born afterwards, but in the lifetime of H. H. died without issue:—Held, the after-born child entitled. *Bartlett* v. *Hollister*, Ambl. 334; 1 Bro. C. C. 530. n.

6. Child born after death of testator decreed to take under a general gift to A. for life, then to the children of A., but this point not contested. *Simmons* v. *Vallance*, 4 Bro. C. C. 345.

7. A legacy of a sum to be divided among children. All those born before the time of division take. *Pulsford* v. *Hunter*, 3 Bro. C. C 416.

8. Devise to S. for life, and after her decease estate to be settled by counsel, and go amongst testator's grandchildren of male kind, and issue in tail male with remainder over. Only one grandchild was born in testator's lifetime, but two were born afterwards, before death of S.:—Held, such after-born children were entitled. *Marshall* v. *Bousfield*, 2 Madd. 166.

9. Bequest of residue after death of testator's wife to five of his children, and to "the son of his son T. or his other children that is living":—Held, to pass shares to children of son born after the testator's death, and before the death of the wife. *Tebbs* v. *Carpenter*, 1 Madd. 290.

10. A testator directed his property to be settled upon his daughter H., in such manner that in case of her death it should devolve upon her children, if she had any, and if she should not have any, then that she should bequeath it to any person she might think fit. The word "devolve" imports transmission to children living at the death of the mother; and upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will. *Parr* v. *Parr*, 1 Myl. & K. 647; 2 L. J., N. S., Ch., 167.

11. A gift of a sum on death of a tenant for life to the children of A. includes only children of A. born at the death of the tenant for life, notwithstanding the gift was made by reference to another and independent gift, which included all children of A. *Batson* v. *Rowlands*, 14 W. R. 261; 13 L. T., N. S., 663.

12. Where property is limited to A. for life, and the will contains a subsequent limitation in favour of A.'s children, and a question arises as to which of the children are to participate, the Court will not decide the question until the death of A., when all the parties interested in discussing the question are *in esse*. *Heather* v. *Winder*, 5 L. J., N. S., Ch., 41.

A testator devised and bequeathed to his trustees all his freehold, leasehold, and personal estate, in trust to accumulate the rents and interests until his daughter H. attained twenty-one, then to be divided between his children, W., A., and H.; and he directed that the rents and interests arising therefrom after his daughter attained twenty-one should be paid to W., A., and H. equally; all the rest and residue of his personal estate, he gave unto the issue of W., A., and H., share and share alike. W. and H. died without issue:—Held, that such of the children of A. as were living at the time of the death of H. were entitled to the one-third given to H. for life, and similarly of the share of W. *Ib.*

13. J. L., by his will, gave to his niece the rents of houses for her life, and after her death devised the houses to her children by her late husband, in what proportions she should by her will direct. At the testator's death, the niece had nine children, but four died in her lifetime:—Held, that all the five surviving children were entitled, to the exclusion of the representatives of those who died in the lifetime of their mother; held, also, that these children took as tenants in common. *Arrow* v. *Bellamy*, 9 L. J., Ch., 198.

14. A. bequeathed to trustees certain lease-

hold property, in trust to pay the rents to B. for life; and after B.'s death A. gave the leasehold to the heirs and children of the body of B. lawfully begotten, whether males or females, equally between them, for all the residue of the term of years that should remain unexpired thereon at B.'s death. B. had ten children, some of whom died during her lifetime, and others survived her:—Held, that the respective personal representatives of the children who predeceased B took equal shares in the leaseholds with the children who survived her. *Swan* v. *Bowden*, 11 L. J., N. S., Ch., 155.

1. Where there is no immediate devise to children and grandchildren generally vesting in possession on death of the testator, after-born children are excluded. But if the vesting in possession be postponed, then after-born children *in esse* at the time of distribution are entitled, though devise immediate. *Crone* v. *Odell*, 1 Ball & B 483. Affirmed 3 Dow 61

Where devise immediate, and the description of persons to take general, those answering it on testator's death alone can take, and after-born children are excluded. But where the enjoyment is postponed to a particular period, or until a particular event happen; those then answering the description will take, and after-born children will be included. S. C. 1 Ball & B. 459. Affirmed 3 Dow 61.

When life estate is interposed between the death of testator and the enjoyment by the children of the tenant for life, and there is nothing to limit the general description, after-born children will be included. S. C. 1 Ball & B. 462. Affirmed 3 Dow 61.

Under a devise of the entire residue, real and personal, to A., B., and C. (children of the testator), and all their younger children, their heirs, executors, etc., for ever, A., B., and C. to receive the yearly interest for their respective lives of such parts thereof as were intended for their respective younger children; and in case of the death of A., B., and C., the share of any of them so dying to go to his or her younger children; and in case of the death of A., B., and C., or any of them, without leaving younger children, the share of such child so dying to go to the survivors and their younger children, with power of appointment amongst their respective younger children; and in case of the death of any of the younger grandchildren before twenty-one or days of marriage, the shares of such to go to the brethren of the child so dying. At the time of the will and of the testator's death, A. had one younger child, B. several, C. none; each had several since. On bill by after-born grandchildren:—Held, first, that the residue was divisible into three parts, the yearly interest of each to go to A., B., and C. for their respective lives; secondly, that after-born grandchildren were entitled, subject to the power of appointment in their parents; thirdly, that the share of a younger child dying under twenty-one and unmarried goes over to the brothers and sisters of such child; fourthly, that the share of A., B., and C., dying without leaving younger children, goes over to the survivors for the same estate as their own original shares; fifthly, that a younger grandchild dying in the lifetime of its parent under twenty-one and unmarried had not a vested interest in its share, transmissible to its representatives. S. C. 1 Ball & B. 449, 450. Affirmed 3 Dow 61.

2. Where property is given to trustees upon trust for a person or persons for life or until a contingency, and afterwards upon trust for a class of children or others, the members of the class are those who are members of it at the death of the testator and all who become members of it before the arrival of the event. *Re Wood, Moore* v. *Barley*, 43 L. T. 730; 29 W. R. 171.

3. In a legacy to the children of A., those born before the time of distribution are entitled to share, unless a time of distribution is expressly provided, excluding those born afterwards by the necessity of a previous distribution. *Walker* v. *Shore*, 15 Ves. 125.

Bequest of the produce of the sale of a copyhold estate to A., the wife of B., for life, and after her death to divide the principal among the children of B. and C. equally, and of the testator's reversionary interest in bank stock on the death of D., if in his name at his decease, and if not, at D's death equally among the same children. Vested interests in all the children, comprising those who died and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Id.* 122.

4. Where a fund was given to be divided upon the death or alienation by tenant for life among his children who should attain twenty-one, and the gift over took effect upon his bankruptcy, there being then three children, of whom two had attained twenty-one, the Court allowed them the dividends of one-third each, but refused them the capital. *Brandon* v. *Aston*, 2 Y. & Coll. C. C. 30; 7 Jur. 10.

See also 5 (*a*) *infra.*

(*b*) *Interests. Vested Subject to being Divested pro tanto.*

5. Bequest "and after death of, etc, I give and leave to each of the children of —— R., and of B. his wife, 50*l*, which shall be paid to them when they shall be of age":—Held, vested legacies, and that after-born child shall take. *Att.-Gen.* v. *Crispin*, 1 Bro. C. C. 386.

6. After specific legacies to three of the testator's nieces (a sister's children), there was a gift of the residue, subject to the life interest of the sister and her husband and of an annuitant, "to be divided equally between the daughters of his said sister," and which he bequeathed "to his said nieces," and a gift over if no daughter of his sister should be then living; the sister had four daughters born at the date of the will and one daughter born after the testator's death, but some only survived the tenants for life:—Held, that all the nieces took vested interests, subject only to be divested by an event which had not happened. *Locker* v. *Bradley*, 5 Beav. 598.

7. A testator directed his trustees to pay the income of his personal estate between his son and two daughters and a granddaughter for life; the son to have one-third of such income, one of the daughters another third, and the remaining third was to be divided between the other daughter and the granddaughter; and from and after the decease of

each of the tenants for life, the trustees were to pay and transfer the share in the principal moneys of the party dying equally amongst all and every his or her children; and there was a gift over, in case of any of the tenants for life dying without issue, of the share of the party dying to the children of the others: —Held, that the children of the tenants for life took interests which vested immediately on the testator's death, and that the gift was not to a class to be ascertained at the death of the tenant for life. *Salmon* v. *Green*, 11 Beav. 453; 18 L. J., N. S, Ch., 166; 13 Jur. 621.

1. Bequests to the testator's wife for life; then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests, a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton* v. *Messenger*, 5 Ves. 136.

2. Testator gave annuities to three of his relations, and directed that if the annuities were paid by the interest of money in the stocks, at the death of the different parties the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death, but only one of them survived the annuitant:—Held, that the capital of the stock which had been provided to answer the annuity did not vest in the surviving child on the annuitant's death, but vested on the testator's death in all the children then living, as tenants in common. *Watson* v. *Watson*, 11 Sim 73.

3. S. gave 5,000*l.* to purchase stock, the interest to M. for life, then to W. for life, at his decease to testator's godson S., and at his death to be divided among his brothers equally. S. was dead at the time of the will made. A son of W. born after the testator's death, who would have been a brother of S. had he lived, shall take a share in the 5,000*l.* The testator also, by codicil, gave 4,000*l.* to L. for life, and in case he had no children, to revert to W.'s children. A daughter of W., who was alive at the time of the codicil being made, but died before W., was held to have a vested interest transmissible to her representative. *Devisme* v. *Mello*, 1 Bro. C. C. 537.

4. Bequest of stock to testator's wife for life, and then, as she should by will direct, amongst A., B., and C., and their respective children, and in default of appointment the same at his wife's death to go amongst all the children equally. No appointment was made:—Held, that the fund vested in the children living at the testator's death, subject to be divested *pro tanto* for the purpose of admitting any after-born child coming into existence before the period of division, *i. e.*, before the death of the tenant for life. *Pattison* v. *Pattison*, 19 Beav. 638.

5. Testator directed the residue of his personal estate after the death of his wife, who was tenant for life, to be divided as follows: to his five nephews and nieces, A., B., C., D., and E., two shares each, and to their children one share each; the nephews and nieces survived the testator:—Held, that the residue vested in the nephews and nieces living at the testator's death or born in the lifetime of the tenant for life, the children taking *per capita*, but the shares of each of the nephews and nieces being double that of each child. *Cooker* v. *Bowen*, 4 Y. & Coll., Exch. Eq., 244.

3. Future Executory Gifts.

(*a*) *In General.*

6. Testator directed all his property to be sold and bought into the funds in the names of his executors, in trust for all his grandchildren, to be divided equally among them at the expiration of twenty years after his death: —Held, that all the grandchildren living at the death of the testator took vested interests, subject to be opened to let in after-born grandchildren. *Oppenheim* v. *Henry*, 1 W. R. 126.

7. Testator gave 30,000*l.* unto and amongst the children of his daughter who should be living at the time the eldest should live to attain the age of twenty-four years and the issue of such of them as might be then dead, to be equally divided amongst them *per stirpes*, and not *per capita*, and to be paid to them respectively when and as they should attain twenty-four, but without interest in the meantime. At the testator's death, his daughter had three children, who were of the ages of thirteen, twelve, and nine:—Held, that the testator intended that such only of his daughter's children should take as should be living when the eldest for the time being should attain twenty-four, and consequently that the bequest was too remote. *Dodd* v. *Wake*, 8 Sim. 615.

8. A bequest to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's death, is an absolute gift to such children of A. as are living at the testator's death. *Butter* v. *Ommaney*, 4 Russ. 70; 6 L. J., Ch., 54.

A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then dead leaving children; he directed that the children should stand in the place of their parents:—Held, that the children of such children of B. as died in the testator's lifetime took no share of the residue. *Id.* 73.

9. Legacy of 300*l.* to E., to be paid at twenty-one or marriage, but if she died before, then to the younger children of F., E. having died unmarried, under twenty-one:—Held, to vest in such of the younger children as were living at that time. *Ellison* v. *Airey*, 1 Ves. 111.

10. Testator had four daughters, A., B., C. and D., and by his will gave 4,000*l.* to each of his daughters A. and B., with a direction that if either of them died unmarried, 3,600*l.*, part of the 4,000*l.*, should be divided among his surviving daughters and the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A., but the other three died in her lifetime. The five children of C. took

vested interests in equal fifths of the fund, as well those who died before as those who survived A. *Stanley* v. *Wise*, 1 Cox 432.

1. A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue; and in default of such issue of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by their mother's side and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators, and assigns for ever as tenants in common, and not as joint tenants:—Held, first, that the gift to the cousins was not too remote; secondly, that it was not a gift to a class to be ascertained at a future period, but that the first cousins *ex parte maternâ* living at the testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution; thirdly, that the shares of first cousins who died before the period of distribution leaving no issue were not divested, but went to their real and personal representatives; fourthly, that the share to a first cousin who died before the period of distribution leaving children went to those children. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 17 Jur. 267; 22 L. J., Ch., 665.

2. A husband directed that after the death of his wife his trustees should pay and divide 1,000*l.* equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living:—Held, that the sum was to be divided equally amongst them. *Carthew* v. *Enraght*, 20 W. R. 743; 26 L. T. 834.

(*b*) *Effect of Subjecting Land or Personalty to Charges.*

3. Legacies in trust for grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one; mesne interest for education; surplus to accumulate with survivorship; residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund was set apart to pay life annuities:—Held, that grandchildren born after the testator's death were not entitled to a share of the residue into which the fund under the codicil falls, after the purpose answered. *Hall* v. *Chapman*, 1 Ves. J. 405; 3 Bro. C. C. 391.

4. A testator directed a reversionary sum to fall into his residue. He gave an annuity to A. for life, and his residue to a class of children, who should attain twenty-one. The only residue was the reversionary sum and the fund set apart to answer the annuity. On the death of A.:—Held, that children born in the life of A., but after one of the class had attained twenty-one, were excluded, and did not participate in the fund then distributable. *Hagger* v. *Payne*, 23 Beav. 474; 3 Jur., N. S., 479; 26 L. J., Ch., 617.

Where a residue, consisting partly of reversionary property, is given directly to a class, the class is to be ascertained at once, and not from time to time as the reversions fall into possession, and become distributable. *Ib.*

5. A testator, by his will, directed a fund to be set apart to answer an annuity which he directed to be paid to his widow. After her death he directed the fund to form part of his residuary estate; and he bequeathed his residuary estate to all his children equally, to be divided between them, with a proviso that if any child should die either in his lifetime or after his decease, and before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors, but in case any child should die leaving issue, then such issue should take their parent's share:—Held that the second branch of the proviso must be read in connection with the first, and that in both the death contemplated was a death before the share vested in possession. *King* v. *Cullen*, 2 De G. & Sm. 252.

6. Bequest of residue in trust, after payment of an annuity of 50*l.* to A. for life, to apply the residue of the interest towards the maintenance of the children of B. until twenty-one, and, in case of the death of A. during their minority, to apply the whole, or so much as was necessary, in the same way, and after the death of A., when such children attained twenty-one, to transfer the principal to them. There was a gift over in case there should be no children of B. living at the death of A. The fund was more than sufficient to provide for the annuity:—Held, that the gift to the children was not confined to those living at the death of the testatrix. *Gardner* v. *James*, 6 Beav. 170.

7. A testator devised his freehold, leasehold, and copyhold estates upon trust to pay his debts; and subject thereto, as to one-half, he gave the income to his wife for her life, and at her death directed it should go into and form part of his residuary estate; and as to the other half, he directed it to accumulate till 1875, when he directed it should fall into his residuary estate. And as to the residue of his estates, whether real or personal, the testator devised the same amongst his son, his daughter-in-law, and all his grandchildren, share and share alike:—Held, that grandchildren living at the death of the testator would alone take; and that adult grandchildren could claim the immediate enjoyment of their shares notwithstanding the accumulation clause. *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; 13 W. R. 985; 13 L. T., N. S., 83.

8. Where there was a gift of residue to a class, and no tenancy for life of the income of that residue, but the division of the principal was postponed until after the death of one annuitant, the general rule that the class must be ascertained at the death of the testator was adhered to. *Bortoft* v. *Wadsworth*, 12 W. R. 523.

9. A testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the income to arise therefrom to pay certain annuities to his wife and children respectively. The trustees were then directed to stand possessed of the balance thereof upon the trusts thereinafter declared; and the testator directed that if any of his children should die in his lifetime or afterwards, without having acquired a vested interest in the income or trust moneys, leaving any child or children, then and in such case such last-mentioned child or children

should be entitled to the same share of the income as his, her, or their deceased parent would have been entitled to if living; and from and after the determination of the estates and interests in the trust property therein before limited and given, upon trust to divide the same between and amongst the whole of the testator's grandchildren in equal shares *per capita* as and when they, being respectively a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, for their own use and benefit absolutely. Upon the questions as to what would be the period of distribution of the capital, and amongst whom such capital would be divisible:—Held, that no distribution could take place until the death of the last surviving annuitant, and that all the testator's grandchildren then existing would be entitled to share equally. *Re Hiscoe, Hiscoe* v. *Waite*, 48 L. T. 510.

4. Where no Child in Existence at the Death of the Testator.

1. One devises the surplus of his personal estate to the children of A. and B.; neither of them has a child at the making of the will or the death of testator; the devise is executory, and shall extend to any children that A. and B. shall afterwards have; and the children of each shall take *per capita*, and not *per stirpes*. *Weld* v. *Bradbury*, 2 Vern. 705.

2. Legacy in trust for the children of A. to be equally divided between them, with benefit of survivorship, and a provision for maintenance out of the interest, A. having no children at the death of the testator:—Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*, T. & R. 310.

3. Testator bequeathed 500*l.* to be paid to his grandson P. if he lived to be twenty-one, and in case he died before then, to the other child or children of his daughter equally arriving at such age. P. died before twenty-one, and no child of P. was born or living at testator's death. The grandchildren born after the death of testator were held entitled to the 500*l.*; for not being *in esse* in his lifetime, he must have had in his view the future children of his daughter. *Haughton* v. *Harrison*, 2 Atk. 329.

A parent is bound by nature to support a child, but this has not been extended to grandchildren, and therefore not entitled to interest. *Ib.*

If the child or children of P. arrive at twenty-one, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable. *Ib.*

4. Devise of estate to A., subject to payment of 500*l.* to M., with interest on her marriage or attaining twenty-one; but if she dies before twenty-one or marriage, and there be no children born of B., then the 500*l.* to revert to A. M. died before twenty-one unmarried:—Held, that children born of B. after death of M. entitled. *Hutchinson* v. *Jones*, 2 Madd. 124.

5. Bequest of shares, the profits to be invested and the interest applied in the education of the children of A. and B., in equal shares; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if A. and B. should die without issue. A. and B. had no child at testator's death:—Held, that all the children of A. and B. took, and that the class was not limited to those born when the first attained twenty-one; and, secondly, that the children of A. and B. took *per capita*, and not *per stirpes*. *Armitage* v. *Williams*, 27 Beav. 346.

6. H. by her will gave 100*l.* to each of the children of M. who should attain twenty-one years. At the death of the testatrix M. had no children:—Held, that none of her after-born children, if she had any, could be entitled to the legacy. *Rogers* v. *Mutch*, 10 L. R., Ch. D., 25; 48 L. J., Ch., 133; 27 W. R. 131.

5 Where Distribution Postponed to a Given Age.

(*a*) *In General.*

7. Devise to all the children of A. at the respective ages of twenty-one; a child born after the death of the testatrix shall take. *Congreve* v. *Congreve*, 1 Bro. C. C. 530.

8. Bequest to younger children of testator's son, to be paid at twenty-one:—Held, vested in those born at the time of the testator's death. *Horsley* v. *Chaloner*, 2 Ves. 83.

9. Trust, by will, for all the children of A. when and as they shall severally attain sixteen, with a direction for their maintenance; those born after the eldest attain sixteen were excluded; maintenance was directed without regard to the father's ability. *Hoste* v. *Pratt*, 3 Ves. 730.

10. Bequest to children of A. born or to be born, as many as there might be at twenty-one or marriage, with survivorship, and a limitation over on death of all, etc.:—Held, vested in those living, when one is entitled, to the exclusion of those born afterwards. *Whitbread* v. *St. John (Lord)*, 10 Ves. 152.

11. Bequest of a residue to all the children of A., the daughters' shares to be paid at twenty-one or marriage; the sons at twenty-one, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. The fund shall be divisible when the eldest attains twenty-one, and the division shall be among those then *in esse*. *Andrews* v. *Partington*, 3 Bro. C. C. 401.

12. Testator bequeathed his residuary estate to trustees, upon trust to tranfer the same unto his great-nephews and nieces, the shares of the boys to be transferable to them at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate for them

in the meantime, with benefit of accruer and survivorship; and in case of the death of all the said children except one before their shares became vested, then upon trust to transfer the whole to the survivor at the age or time aforesaid:—Held, that a great-nephew born after the testator's death, but before any of his other great-nephews or nieces attained twenty-one or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 3 Sim. 492.

1. Where there is a gift to children as a class, and a vested interest is given to them, but there is a postponed time of payment, and another child is born before the period of distribution, such child is entitled to claim a share in his own right. *Blease* v. *Burgh*, 2 Beav. 221; 9 L. J., N. S., Ch., 226.

2. Bequest to particular description of persons at a particular time vests in persons answering the description at that time exclusively. *Godfrey* v. *Davis*, 6 Ves. 43.

3. J. S. by his will, dated in 1833, directed his trustees to accumulate the income of his residuary real and personal estate during the term of twenty-one years next after his decease, upon trust, at the expiration of the said term, to assign and transfer the same unto and among all and every his the testator's great-grandchildren being sons and daughters of his grandchildren, John S., Maria S., and Harriet S., equally to be divided between them, if more than one, as tenants in common, and if there should be but one great-grandchild, then to such one, his or her heirs, executors, administrators, and assigns; and in trust in the meantime to pay the whole income of the trust premises unto the respective parents, his said grandchildren, John, Maria, and Harriet respectively, and their respective assigns equally. And in the event of there being no such child or children of his said grandchildren, the testator directed that the whole of the said trust premises and the accumulations should belong to E M. F. absolutely. Testator died in 1837, John S. died in 1848 without leaving issue, and Maria and Harriet S., who were respectively of the age of forty-two and thirty-eight years, although married, had not had any children at the expiration of the period of accumulation. An amicable settlement and compromise of the rights and interests of the various parties claiming to be entitled under the said will, including the said Maria and Harriet S., was subsequently entered into:—Held, that the testator did not intend that at the end of the period of accumulation there should be no longer any continuing trust; and that the two surviving grandchildren were entitled to receive the income of the trust premises during the continuance of their joint lives and the life of the survivor, and that after the death of such survivor the said E. M. F. was entitled (in the event of no great-grandchild being born) to the *corpus* of the accumulated fund. The compromise above referred to declared to be for the benefit of the married ladies, and ordered to be confirmed. *Conduit* v. *Soane*, *Conduit* v. *Preston*, *Conduit* v. *Fowhall*, 6 W. R. 667; 4 Jur., N. S., 502.

4. Bequest to J. (a younger son of A.) as soon as he should attain twenty-one; but in case he should die before attaining twenty-one, then to such of the other children of A. as should attain twenty-one; J. died an infant:—Held, that the words "such, etc., as should attain twenty-one" were equivalent to "at twenty-one," or "when and as they should attain twenty-one," and that on D.'s death the share of a child who had then attained twenty-one became immediately payable, and no after-born child (if any) would be entitled to a share in the fund. *Gillman* v. *Daunt*, 3 K. & J. 48.

5. Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years:—Held, that the children of the testator's daughter living at the testator's death were the only objects of the bequest, and that it was not void for remoteness. *Elliott* v. *Elliott*, 12 Sim. 276; 10 L. J., N. S., Ch, 239.

6. A testator, after devising and bequeathing all his real and personal estates to trustees, on trust from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust that when and as soon as any son of either of his nephews A. and B. should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that thenceforth the said portion or share should be held by trustees upon trust for the person so selecting the same for his life, and after his decease upon trust as to one equal moiety for his eldest son and his heirs, executors, etc.; and as to the other moiety for the rest of his children and their heirs, executors, etc., in equal proportions, and if but one child both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephew's sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate in trust for such one surviving nephew's sons for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had another son born afterwards:—Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews

who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void; and the testator's real estates upon his death became vested in his heir. *Boughton* v. *Boughton*, 1 H. L. Ca. 406. Affirming with a variation, S. C. *nom. Boughton* v. *James*, 1 Colly. 26; 8 Jur. 329.

1. Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:—Held, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five. *Picken* v. *Matthews*, 10 L. R., Ch. D., 264; 48 L. J., Ch., 150; 39 L. T. 531.

After a Life Interest.] 2. After an annuity for life to father of part of dividends, and remainder as to whole dividends subject to father's annuity, gift to children when they attained twenty-one is gift to all living when eldest attains twenty-one. *Curtis* v. *Curtis*, 6 Madd. 14.

3. A fund was given to one for life, remainder to such children of another person as should attain the age of twenty-one. The legatee for life died before the eldest child attained that age.—Held, without argument, that all the children *in esse* when such eldest child did attain twenty-one were entitled to share on attaining that age themselves. *Clarke* v. *Clarke*, 8 Sim. 59; 5 L. J., N. S., Ch., 286.

4. A testator gave real and personal estate to a trustee upon certain trusts for the benefit of his son during his life, and directed that in case his son should die under twenty-one without leaving issue his trustees should convert the same into money, and divide it equally among E. H., the children of M. W., and the children of E. E., and the issue of such of them as should die leaving lawful issue, the issue taking their parents' shares, the shares to be paid to the legatees being sons at twenty-one and being daughters at twenty-one or marriage, the shares during minority to to be invested and the dividends applied for the maintenance and education of the legatees. M. W. had children at the death of the testator, and other children born after the death under twenty-one years of age of the testator's son:—Held, that all the children of M. W. who were born at the time the first of the legatees who attained twenty-one attained that age were entitled to participate in the gift. *Robley* v. *Ridings*, 16 L. J., N. S., Ch., 344; 11 Jur. 813.

5. Testator bequeathed his residuary estate to trustees in trust for his wife for life, and after her decease "to preserve the then remaining part of my estate for the grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of twenty-five years; and when the youngest shall have attained the age of twenty-five years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and brother surviving. Eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards:—Held, that the bequest was not void for remoteness, but that those only of the grandchildren who were in existence at the widow's decease were entitled to share in the testator's residuary estate. *Kevern* v. *Williams*, 5 Sim. 171.

6. Where a testator, after giving certain sums in certain shares among the six children of A., naming them, to be vested and payable at twenty-five, with certain provisions for their maintenance until then, afterwards gives another sum of 6,000*l*., subject to certain life interests, to all the children then born or hereafter to be born, to be vested and payable at twenty-five, and with the like trust for maintenance, and subject to the like provisions and conditions as the legacies before given to the children then born and named:—Held, that the legacy of 6,000*l*. was void for remoteness as to all the children, both those then born and also the unborn. *Comport* v. *Austen*, 12 Sim. 218.

7. A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age with the consent of her mother:—Held, that the class to take must be ascertained when the first member became absolutely entitled to a share. *Dawson* v. *Oliver-Massey*, 2 L. R., Ch. D., 753; 45 L. J., Ch., 519; 24 W. R. 993; 34 L. T., N. S., 551.

8. A testator gave the residue of his property in trust for his mother for life, with remainder to all the younger children of his two sisters, to be vested interests on their attaining twenty-one. There was also a clause of survivorship upon any of the children dying under twenty-one:—Held, that those children were alone entitled who were born previously to the death of the tenant for life. *Berkeley* v. *Swinburne*, 16 Sim. 275; 17 L. J., N. S., Ch., 416; 12 Jur. 571.

9. Testator gave his estates, real and personal, upon trust to convert the personal, and after payment of debts, etc., to invest and to permit H. E. during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of H. E. equally, the shares to be conveyed and paid to them as they should attain twenty-one as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. Testator gave another third part of the estates after the death of H. E. in favour of the children of his sister, and the remaining third part in trust for all and every the children of G., the shares to be conveyed and paid at the ages and times above mentioned, and in case H. E. should die without children, the share given for them was to be divided between his sister's and G.'s children, as the two-thirds given to them. H. E. died a bachelor. At his death, G., a widower, had two children. He married again, and when his eldest child attained twenty-one, he had six children, all of whom lived to attain twenty-one. Another child was born afterwards:—Held, that the six

children, or their legal personal representatives, were entitled to a moiety of the estates. *Berkeley* v. *Swinburne* (16 Sim. 275) explained. *Re Emmet's Estate, Emmet* v. *Emmet*, 13 L. R., Ch. D., 484; 49 L. J., Ch., 295; 42 L. T. 4; 28 W. R. 401. Affirming 49 L. J., Ch., 21; 28 W. R. 301.

(b) Where a Definite Sum is Given to Each Child.

1. Legacy to children of S., he having but one born. Those born after held entitled. *Maddison* v. *Andrews*, 1 Ves. 58.

2. A legacy of 500*l.* apiece "to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship," does not include a child born after the testator's death. *Storrs* v. *Benbow*, 2 Myl. & K. 46; 2 L. J., N. S., Ch., 201.

3. A. bequeathed legacies of "500*l.* apiece to each child that may be born" to either of the children of my brothers:—Held, that the class included only the children coming into *esse* between the date of the will and the death of the testator, and that children born at the date of the will, and those born after his death (unless *in ventre sa mere* at that period) were excluded. *Tornsend* v. *Early*, 28 Beav. 429; 3 De G. F. & J. 1.

4. Where a sum of money is bequeathed to be divided among a class when the eldest attains twenty-one, whether the gift be vested or contingent, all the children who are born before the period of division are admitted to take shares. *Mann* v. *Thompson*, *Perkin* v. *Mann*, 1 Kay 638; 18 Jur. 826; 2 W. R. 582.

When distinct sums of money are given to every individual of the class, but no time is limited for distribution, the persons who answer the description at the death of the testator are alone entitled to take. *Ib.*

The construction is the same if the gift be of a certain sum to each of the children of A. and B. who should attain twenty-one; but in case any of them should die under that age, his share to go to his surviving brothers and sisters, although A. had no children at the date of the will, or at the death of the testator, but had children born after the testator's death. The word "surviving" in such a limitation cannot be read "other," so as to entitle a child to the share of a brother who died before he was born. *Ib.*

5. The testator gave 300*l.* apiece to each of the granddaughters of E. S. H. at twenty-one, or on marriage with consent; and if any of them should die, their shares to be equally divided, etc.:—Held, that granddaughters born after the testator's decease were not included in this bequest. *Peyton* v. *Hughes*, 7 Jur. 311.

6. A limited fund was given to A. B. until some child should attain twenty-one, and 1,000*l.* consols was to be paid thereout to each of his children as they attained twenty-one. The fund was insufficient to provide for all the children. A child attained twenty-one:—Held, that it was, notwithstanding the deficiency, entitled to 1,000*l.* consols. A. B. had issue at the death of the testatrix:—Held, also, that the children born after her death were also entitled. *Evans* v. *Harris*, 5 Beav. 45.

7. Bequest of "the sum of 100*l.* to each of the children of my niece M. who shall live to attain the age of twenty-one years." The niece survived the testatrix, and was still living, but had no children:—Held, applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted,—that no child the niece might have could take under the bequest. *Rogers* v. *Mutch*, 10 L. R., Ch. D., 25; 48 L. J., Ch., 133; 27 W. R. 131.

The rule that a gift of a certain sum to each of a class of objects at a future period is confined to those living at the testator's death, is one of convenience only, to facilitate the more speedy division of the estate. S. C. 27 W. R. 131.

(c) When Youngest Attains Twenty-one.

8. A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attained the age of twenty-one, and to accumulate the surplus; and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them 2,000*l.*; and as soon as all and every the said grandchildren should have attained their ages of twenty-one, to pay and divide the trust fund unto and amongst all and every his said grandchildren —Held, to be a gift for the benefit of all the children of the testator's two sons, born or to be born, not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born. *Mainwaring* v. *Beevor*, 8 Hare 44; 19 L. J., N. S., Ch., 396; 14 Jur. 58.

9. Trust of real and personal estate by will, to apply rents and dividends for maintenance of all and every the children of the testator's daughters (except the eldest son), share and share alike, until the youngest of his said grandchildren should attain the age of twenty-one; and in case of the death of any of his said grandchildren, before the youngest shall be twenty-one, having a child or children, such child, etc., to receive the parent's share; and when the youngest of his said grandchildren living shall have attained twenty-one, one equal share of the capital, real and personal, to the use of such of his said grandchildren as shall then be living; and the children of his said grandchildren in case of the death of any, leaving such issue, to have the share the parent would have been entitled to, if living at the time of distribution; and to the heirs, executors, etc., of such of his grandchildren and great-grandchildren. The division is to be among all the grandchildren living when the youngest attains twenty-one, including those born since the testator's death, and the children of those deceased; but the represen-

tatives of grandchildren dead, not leaving children, are not entitled. *Hughes* v. *Hughes*, 14 Ves. 256; 3 Bro. C. C. 352, 434.

1. A testator, by his will, directed that, after the death of the survivor of his widow and daughter, his trustees should stand possessed of the residue of his personal estate, upon certain trusts, for his granddaughters; then, by a codicil, he revoked the bequest to his granddaughters, and gave the share and interest which they, by his will, would have taken in his personal estate, to all and every the child and children of his said granddaughters, in equal shares, to be paid to such child or children when the youngest or survivor of them should attain the age of twenty-one years:—Held, that these words gave a vested interest to the great-grandchildren who were living at the death of the survivor of the mother and daughter, and that after-born great-grandchildren took nothing. *Smith* v. *Jackson*, 1 L. J., Ch., 231.

2. A. gave real and personal estate to trustees as to his household furniture, to permit his children who should be living at home to have the use of the same until such time as his youngest surviving child should have attained twenty-one, and then for all his children equally; and as to the residue of his real and personal estate, to realise the same, and to stand possessed of the net moneys upon trust, when and as all his children, being sons or a son, should have attained twenty-four, or being daughters or a daughter, should have attained the same age or have married, to divide the capital equally amongst all such children, share and share alike; and he empowered his trustees to apply the whole or any part of the annual income of the capital of his residuary estate, in or towards the maintenance and education, or otherwise, for the benefit of all his children who should continue to live together and form a home, until the time of the divison of the capital, and to accumulate the unapplied income, and add such accumulations to the capital. The will contained a power to advance to any of the sons who should not have attained twenty-one, any sum not exceeding 1,000*l.* out of the share to which such son might be presumptively entitled. And he directed his trustees to pay and allow, to and for the separate use of any daughter who should marry before the capital of his residuary trust fund should be divisible and divided, an annuity. Aud if any of his sons who should have attained twenty-four should be desirous of being married to some person approved of by his trustees, he empowered his trustees to declare in writing that upon such marriage the contingent share of his same son in the capital of his residuary estate should become a vested share, and that in that case, upon such marriage, the same should become vested accordingly; and that for every purpose of his will such son should be deemed to have attained twenty-four. Four of the children having attained twenty-four, filed a bill against the trustees and the other children of the testator who had not attained that age, and claimed to have their shares paid to them immediately:—Held, that the estate was not divisible until the youngest child had attained twenty-four, or married. *Hole* v. *Marsland*, 4 L. T., N. S., 781.

(d) Effect of Gift for Maintenance or Advancement.

3. A testator, having one nephew and one niece, and eight great-nephews and nieces, living at his death, gave one-tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children at twenty-one, and he empowered his trustees to apply all or any part of their respective shares, for their advancement:—Held, that all the great-nephews and nieces born before the eldest attained twenty-one, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 3 Sim. 417.

4. Legacies to all the children of the testator's sister of 2,000*l.* each, payable at twenty-one or marriage of daughters; and until the shares become payable, the interest, etc., thereof respectively to be paid to his sister for her separate use; a fund to be set apart for paying the legacies, to his said sister's children as they became due, and in case he shall die before all her sons shall attain twenty-one, or before all the daughters attain that age or marry, the interest, etc., of the legacies for such sons and daughters as should be under age or unmarried, to be applied towards their education, etc.: all children, including those born after the testator's death, entitled, and an inquiry was directed what would be a proper sum to be set apart to answer the legacies to future children. *Defflis* v. *Goldschmidt*, 19 Ves. 566.

5. Bequest of a share of testator's estate, after conversion to be invested in the names of his executors, for the use of the children of J. J. M. by his (testator's) daughter, Mary Elizabeth M.; the interest thereof to be appropriated to their education, and the principal to be divided amongst them as they should severally attain the age of twenty-one years:—Held, that the bequest was for the benefit of all the children of J. J. M. by M. E. M., born prior to the period of distribution, whether before or after the testator's death. *Mower* v. *Orr*, 7 Hare 473; 18 L. J., N. S., Ch., 361; 13 Jur. 421.

6. Under a bequest in trust for all the sons and daughters of A., B., and C. (who were living) who shall attain twenty-one:—Held, that the class was not to be ascertained on the first of the class attaining twenty-one, in consequence of the will containing a power of maintenance and advancement whether they shall or shall not have attained twenty-one, and notwithstanding the liability of the share to be lessened by the subsequent addition to the class entitled to the entire fund. *Iredell* v. *Iredell*, 25 Beav. 485.

7. A. gave his residue to his wife for her life, to be expended by her in and about the maintenance of herself and her children; and after her decease unto and amongst his children, to be paid to them as they should severally attain the age of twenty-one years, with benefit of survivorship:—Held, that each child, on attaining twenty-one, took a vested interest, but that his presumptive share would not be paid to him with the consent of the mother, as there was a trust for maintenance of the others. Part, however, was paid out, the rest being reserved as security for payment

of the life income. *Berry* v. *Bryant*, 2 Dr. & Sm. 1; 8 Jur., N. S., 69; 10 W. R. 242; 5 L. T., N. S., 818.

1. Bequest of a fund in trust to apply the dividends in the maintenance and education of the children of A. until they should respectively attain twenty-one, and upon their severally attaining that age in trust as to the capital of the fund for all such children in equal shares:—Held, that the class was determined when the eldest child attained twenty-one. *Pridham* v. *Massey*, 20 W. R. 196.

2. Real and personal property was bequeathed on trust for division among such of her grandchildren as should attain twenty-one equally, with power for the trustees, during the minority of any of the children, to raise money for maintenance:—Held, that the objects of the gift were ascertained on the eldest child attaining twenty-one, to the exclusion of after-born children. *Gimblett* v. *Perton*, 40 L. J., Ch., 556; 12 L. R., Eq., 427; 24 L. T., N. S., 793.

3. Gift to one for life, remainder to four persons named, with a proviso that the share of any legatee in remainder, who should die in the lifetime of the tenant for life leaving lawful issue, should be "assigned and transferred to such issue respectively, in equal shares and proportions on their attaining twenty-one; and the dividends and proceeds in the meantime to be applied in or towards their maintenance and education":—Held, that the gift of income, being to an entire class, for maintenance only, was not sufficient to vest the legacy in the issue before twenty-one. *Re Ashmore*, 9 L. R., Eq., 99; 39 L. J., Ch., 202.

(*e*) *Effect of Gift Over in Default of Issue or Death under Age.*

4. Under a disposition by will to the children of A. and B., payable at twenty-one or marriage, with a limitation over, upon failure of issue in the lives of A. and B., it was held, that all the children without restriction were entitled; and an apportionment being directed and the interest ordered to be paid to those who had attained twenty-one; children born afterwards, though entitled to a share of the capital, were not allowed to claim the bygone interest. *Mills* v. *Norris*, 5 Ves. 335.

5. Legacy to the children of A., to be equally divided among them, and if either of them die before twenty-one, their share to go to the survivors; a vested interest in the children living at the testator's death, subject to be devested in the event pointed out; after-born children therefore excluded. *Davidson* v. *Dallas*, 14 Ves. 576.

6. Testator gave 350*l.* to the children of his sister at twenty-one (with interest), and if any died before, to the survivor or survivors. A child born after the testator's death, but during the infancy of the others, is entitled to a share. *Gilmore* v. *Severn*, 1 Bro. C. C. 582.

7. A testator gave the residue to A. for life, with remainder to all the children of B., to be a vested interest on attaining twenty-one; there was a subsequent clause of survivorship on dying under twenty-one:—Held, on this and the general context, that those children were alone entitled who were born previous to the death of the tenant for life. *Berkeley* v. *Swinburne*, 5 L. J., N. S., Ch., 32.

8. The rule that a bequest to a class to be paid at twenty-one takes effect in favour of members of the class coming into existence before the eldest attains twenty-one, applies although the will creates a prior life interest, which determines before any of the class attain twenty-one. *Emmet* v. *Emmet*, *Re Emmet's Estate*, 49 L. J., Ch., 21; 28 W. R. 301. Affirmed 13 L. R., Ch D., 484; 29 L. J., Ch., 295; 42 L. T. 4; 28 W. R. 401.

6. Other Cases.

9. Bequest to testator's daughter, Martha, for life, with power to appoint by will amongst her children: but if she should die without leaving any, then to and amongst "such of his children as should be living at his decease," and if any should die before becoming entitled to receive a share of the fund, leaving issue, the share to be distributed amongst their children: the testator died leaving five children living at his decease; Martha died without issue:—Held, that her personal representatives were entitled to one-fifth of the fund. *Jennings* v. *Newman*, 10 Sim. 219; 3 Jur. 748, 1068. Varying 3 Jur. 748.

10. A residuary bequest to the nephews and nieces of the testatrix, who should be in England at the time of her decease, and the children of such of her nephews and nieces as should be then dead living in England, such children taking only their, his, or her parent or parents' share; and to her great-niece J., and the children of her deceased niece M., such last-mentioned children only to take one of such shares in right of their mother, equally among them:—Held, that two nieces who at the date of the will and at the death of the testatrix were settled in America were excluded, and that two nieces who at the time of the testator's death were in Ireland, one with her husband on duty with his regiment and the other visiting her, were not excluded. *Woods* v. *Townley*, 11 Hare 314.

Held, also, that J. and the children of M. were entitled to take shares as members of the class of children, and also other shares as special legatees. *Ib.*

11. Residuary bequest in trust for A. for life, and after her decease to be distributed "between the testator's brothers and sisters, and such of their children as should be then living, the parents and children to be classed together, and to share in equal proportions":—Held, that those brothers and sisters and children only who survived A. were entitled, and that they took *per capita*. *Turner* v. *Hudson*, 10 Beav. 222; 16 L. J., N. S., Ch., 180.

12. Where a testator by will gave his personalty in trust to pay the dividends to the children and grandchildren of A., who should not from time to time be entitled under a previous devise to the rents of the freeholds, but by a codicil directed that the children of B. and C. living at the death of A. should "take their shares" of the personalty with the representatives of A.:—Held, upon the will and codicil taken together, that the chil-

dren and grandchildren intended were all those who should be living at the death of A., and that the bequest was not too remote. *Harvey* v. *Harvey*, 5 Beav. 131. And see 4 *id.* 215.

1. Testator bequeathed all the stock in the funds which he might die possessed of to trustees upon trust, to pay an annuity to his wife for life, and after her decease upon trust to pay and apply the dividends of the stock to and for the proper use and benefit of E., the eldest daughter of his brother J., and the other children of his said brother, in equal shares for their respective lives. And he directed that the principal stock should be divided and apportioned to and amongst all and every the lawful issue of the said E. and the other children of his brother in equal shares and proportions, and be assigned to them respectively upon their severally attaining the age of twenty-one years, and to the survivors or survivor of them. He left the residue of his estate to his wife. By a codicil he explained that by E., the eldest daughter of his brother, he meant an illegitimate daughter called E. At the date of the testator's will and of his death his brother had three children only, namely, E., M., and J. Of these E. survived the widow, and had a child, who also survived the widow. M. died in the widow's lifetime, leaving a child who survived the widow, and J. died in the widow's lifetime, without leaving issue:—Held, that by the expression "E. and the other children" the testator intended the three children of his brother living at the date of the will; that each of the three children took a life interest only in one-third of the dividends; and, consequently, that upon the death of the widow E. took a life interest in one-third of the dividends, and each of the children of E. and M. took one-third of the capital. *Leach* v. *Leach*, 2 Y. & Coll. C. C. 495; 7 Jur. 243.

2. A. bequeathed to his four daughters, unmarried, 2,000*l.* each on their day of marriage, with the consent of his trustees, with interest, by way of maintenance in the meantime; and if one of his daughters should die without being married, he desired the fortune and legacies of her so being the first to die to go to and be divided equally among such of his married sons and daughters as might have issue at the death of such dying daughter. The four unmarried daughters survived the testator, and one of them died unmarried and without issue:—Held, that her legacy was divisible among the testator's sons and daughters who were married at the date of the will and survived her, and had issue living at the time of her death. *Elliott* v. *Elliott*, 11 Ir. Ch. R. 482.

3. A general gift of the *corpus* of a fund to the children of A., described as her children, after a previous gift of the interest to her for the maintenance of her children, W. and R.:—Held, to be confined to the two before named, and not to include after-born children. *Re Connor*, 8 Ir. Eq. R. 401; 2 J. & L. 456.

4. Residuary disposition to the children of the testator's brothers and sisters as aforesaid (named previously as legatees) who shall be living at his decease, at twenty-five equally; but in case of the decease of any of the aforesaid brothers and sisters having issue, then the child or children to have the same share as if the parent had been living at his decease, with maintenance and survivorship in case of the death of any unmarried and without issue. The first clear designation of nephews and nieces, living at his death, as the sole objects of his bounty, not altered or controlled by the subsequent designation of the brothers and sisters, admitting questions of doubtful construction, as to after-born children. *Barker* v. *Lea*, 3 Ves. & B. 113.

III. GIFTS TO CHILDREN "TO BE BORN" OR "TO BE BEGOTTEN."

5. The words "begotten and to be begotten" are the same as well on construction of wills as settlements. *Cook* v. *Cook*, 2 Vern. 545.

6. Legacy to children of A. lawfully begotten or to be begotten extends only to those born in lifetime of testator. *Sprackling* v. *Ranier*, Dick. 344.

7. Testator devised freehold fee-simple estates in possession to all and every the child and children "begotten and to begotten of his daughter S. M for life; and after the decease of such child and children, to the lawful issue of such child and children, to hold to such issue, his, her, and their heirs as tenants in common; and in default of such issue over to other persons. S. M. had nine children, four born in the testator's life, and five after his decease:—Held, that all the nine took under this devise as tenants in common in tail, with cross-remainders. *Mogg* v. *Mogg*, 1 Meriv. 654.

Testator devised freehold fee-simple estates to trustees during the life of his son J., upon certain trusts, remainder to his son's children and their issue, in the same words as in the above devise to his daughter's children, and in default of such issues to all and every the child and children of his daughter S., etc. (in same words as before):—Held, that only six of the nine children of S. took under this devise, namely, five who were born, and one who was *en ventre* at the death of J. *Id.* 655.

Testator devised freehold fee-simple estates to his widow for life, and after her decease to the same uses as in the devise last stated:—Held, that all the nine children of S. took under this devise, all being born in the widow's life. *Ib.*

8. A testator gave his real estates to trustees, in trust to apply the rents for the benefit of his daughter M. and her children, born and to be born, until her youngest child should attain twenty-one, and on that event to pay her an annuity, and to pay the rents to all the children of his daughter, with benefit of survivorship if no issue, and the issue of any who should die leaving issue, until the death of the longest liver of such children; and on that event he gave his estate at S. to such son of any one of his grandchildren as should then be the eldest living grandson of his daughter; and he directed the residue of his real estate to be then sold, and gave the proceeds unto all his grandchildren, the children of his daughter, except such eldest grandson of his daughter who would be entitled to the S. estate. The testator's daughter had six children living at

his death, and had none born afterwards:—Held, that all the above gifts for the great-grandchildren of the testator were void for remoteness, and that by his grandchildren and children of his daughter, in the gift of the proceeds of the residue of his estate, he meant great-grandchildren. *Gooch* v. *Gooch*, 14 Beav. 565; 21 L. J., N. S., Ch., 238; 15 Jur. 1165; 1 W. R. 397. Affirmed 3 De G. M. & G. 366; 22 L. J., Ch., 1089. See also *Egerton* v. *Brownlow* (*Lord*), 1 Sim., N. S., 464; 20 L. J., N. S., Ch., 645; 16 Jur. 26.

1. Testator gave legacies of 200*l.* to each of the children of his nephews and nieces begotten, or to be begotten, and directed that the legacies should be paid to them at the usual periods:—Held, that the legacies vested on the testator's death, and that the children of the nephews and nieces who were born after the testator's death were not entitled to participate in the legacies. *Butler* v. *Lowe*, 10 Sim. 317; 3 Jur. 1143.

2. Testator, by codicil, gave legacies of 500*l.* each to A., B., C., and D., who, from the other parts of the codicil, and from the will, appeared to be grandchildren of his brother Henry. He added, "Item, I direct my executors to pay out of my personal estate the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to them on his or her attaining the age of twenty-one." At the date of the codicil, and at the testator's death, there were to his knowledge living several grandchildren of his brothers, besides A., B., C., and D., and various children of the brothers of the testator, and the testator was survived by one at least of his brothers — Held, that A., B., C., and D. were not entitled to double legacies. *Early* v. *Benbow*, 2 Colly. 342; 15 L. J., N. S., Ch., 169; 10 Jur. 169.

3. A testator, by a codicil to his will, gave legacies of 500*l.* each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay, out of his personal estate, the sum of 500*l.* apiece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date thereof:—Held, that those children were not entitled to a legacy of 500*l.* each, as the words of the codicil contemplated only children who might be born subsequently to the date of it:—Held, also, on the same will, by Sir John Leach, that a child born after the testator's death was not entitled, and, by Sir J. L. Knight-Bruce, that the four children did not take cumulative legacies. *Early* v. *Middleton*, 14 Beav. 453; 15 Jur. 867.

4. A testator directed his executors to pay "the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that the child of a niece born within eight months after the testator's death was entitled to the legacy, and that the gift was not as to such child void for remoteness. *Storrs* v. *Benbow*, 3 De G. M. & G. 390; 17 Jur. 821; 22 L. J., Ch., 833; 1 W. R. 115, 134, 420.

5. A will directed that all legacies should be paid within six months after death. By a codicil, executed on the day of the testator's death, after giving 500*l.* apiece to five of the grandchildren of his brothers by name, he bequeathed 500*l.* to legatees thus described, "each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that of the children of the brother's children neither those born at the date of the codicil nor those begotten after the testator's death were entitled, but only children *en ventres leur mères* at the date of the codicil and of the testator's death. *Townsend* v. *Early*, 3 De G. F. & J. 1; 28 Beav. 429.

6. The words "to be begotten" in a will are construed as relating to the root of descent, and not to the time of birth. *Almack* v. *Horn*, 1 N. R. 535.

The words "to be begotten," in a will, where the intention of the testator is not otherwise to be collected, will have their strict legal construction. Therefore all the children of a particular person "begotten," or "to be begotten," will be included. S. C. 32 L. J., Ch., 304; 11 W. R. 505; 8 L. T., N. S., 415.

Devise to A. and her daughter, B., for their lives, remainder to all the children of A. and B., to be begotten, as tenants in common in tail. B. being the only daughter of A.:—Held, that B. was entitled in common with her own children to share in the remainder in tail. S. C. 1 Hem. & M. 630.

7. One devises to his son then living, and if he dies under twenty-one, and testator's wife shall be *enceinte* at his death with other child or children, then to such at twenty-one; but if no such, then over to his nephews. Two children were born after the will, in the lifetime of the testator:—Held, to take under the devise. *White* v. *Barber*, Ambl. 701.

8. A bequest in favour of the testator's two children, then born (by name), and the child "of which his wife was then *enceinte*":—Held, on the context, to include, besides the above three, a fourth child, born three years after the date of the will. *Goodfellow* v. *Goodfellow*, 18 Beav. 356; 2 Beav. 360.

A testator in 1831 devised his copyhold messuages to trustees, upon trust to permit his wife to occupy one of them during the minority of his youngest child, and to apply the rents of the others to the maintenance, etc., of his children, Thomas and John, "and the children or child of which his wife was then *enceinte*" during minority, making thereout a provision for his wife. The testator then provided for the advancement of his "said children," the division of the messuages among them at twenty-one, and for benefit of survivorship among them. He also bequeathed his personal estate on the like trusts in favour of his "said children," and in all these cases he added the words "as well the children or child of which my wife is so *enceinte* as those already born;" but in several instances he simply used the words "said children," and in one instance omitted "said." In 1847 the testator made a codicil, disposing of freeholds and copyholds acquired since the date of the will on the same trusts, and confirming the will. The child of which the wife was *enceinte* was afterwards born, and subsequently, in 1835, a fourth child was born:—Held, that the fourth child was entitled to a share. *Ib.*

1. A. devised a term for years to his daughter and her children (she having then three children), "and also to such other children as she should have, and the children of those children." She had other children afterwards. *Per cur.*, the woman and her three children took jointly each a fourth part, and that the after-born children took nothing. *Alcock* v. *Ellen*, 2 Freem. 186. And see *Minshull* v. *Minshull*, 1 Atk. 413.

2. A legacy of 500*l.* is given to the eldest son of A., to be begotten, to place him out apprentice. A. has a son born after the testator's death, who brings a bill for the legacy; and it is decreed to be paid him forthwith, though not born in the testator's lifetime, and though the 500*l.* was given for a particular purpose. *Nevill* v. *Nevill*, 2 Vern. 431.

3. Devise in trust to the use of the testator's son H. for life, and after his decease to the use of J., the son of H., for life, and after the decease of J., to the use of the first and every other son of J. successively in tail, and in default of such issue, to the use of every son of the testator's said son H. thereafter to be born severally and successively in tail:—Held, that on the death of J. without issue, H. having previously died, the second son of H., though born at the date of the will, became entitled to an equitable estate tail in the devised lands. *Harrison* v. *Harrison*, 10 Ir. R., Eq., 290.

4. A testatrix gave her residuary personal estate to trustees in trust as to one-fourth for her granddaughter A., and as to the remaining three-fourths in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered, so that instead of her granddaughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. and the children "now born or hereafter to be born" of her daughter B.:—Held, that A. took one moiety, and the children of B. born in the lifetime of the testatrix, or within nine months after her death, took the other moiety. *Armitage* v. *Ashton*, 20 L. T., N. S., 102.

The will directed the trustees to hold the residuary personal estate in the proportions above mentioned on certain trusts in favour of A., and the children of B., with certain limitations over:—Held, that the codicil merely altered the proportions and did not affect the trusts and limitations. *Ib.*

5. Residue bequeathed to A. and all the other children hereafter to be born of B., at their respective ages of twenty-one; those born after one attains that age are excluded. *Gilbert* v. *Boorman*, 11 Ves. 238.

6. Bequest to all the children of A. "now born or hereafter to be born," who shall attain twenty-one, in equal shares; with powers of maintenance out of and for accumulation of income, and of advancement out of the "presumptive shares":—Held, that on the first child attaining twenty-one the class was ascertained, and that the children afterwards born were excluded. *Bateman* v. *Gray*, 29 Beav. 447.

7. Under a bequest to all the children of A. "now born or hereafter to be born who shall attain twenty-one," in equal shares, with powers of maintenance, accumulation, and advancement out of presumptive shares, the members of each class are not to be ascertained at the time the first of them attains twenty-one, but all the children are to be let in. *Bateman* v. *Gray*, 37 L. J., Ch., 592; 6 L. R., Eq., 215; 16 W. R. 962.

8. Bequest to such of the children of A. as B. shall by will direct, and in default of such direction among the children, share and share alike; B.'s disposition by will in favour of the children living at her death, established against the claim of one born afterwards, under the general words. *Paul* v. *Compton*, 8 Ves. 375.

Bequest to the children of A., vested at the age of twenty-one; therefore, those born after one has attained that age are excluded. *Id.* 380

9. Bequest to children of A., born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, and a limitation over on death of all, etc.:—Held, vested in those living when one is entitled, to the exclusion of those born afterwards. *Whitbread* v. *St. John* (*Lord*,) 10 Ves. 152.

10. A testator devised a real estate to trustees in fee for all the children of his two sisters then born, or thereafter to be born, who should have attained, or should afterwards attain twenty-one, in equal shares. And he directed that, as the same should respectively become vested, the trustees should convey the same accordingly:—Held, that the children born after the testator's death took a share. *Eddowes* v. *Eddowes*, 30 Beav. 603.

11. Gift to A. for life, and after her decease to all the children of B. who should be living at the testator's death, or be born afterwards, who should attain twenty-one, with a direction that no child should be excluded in consequence of any other child having attained a vested interest:—Held, that the class was to be ascertained upon the latter of these two events, viz., a child of B. attaining twenty-one at the death of A., and that a child born after that period was excluded. *Parsons* v. *Justice*, 34 Beav. 598.

12. After the death of the annuitant, the testator directed that "the principal from which such annuity was derived should be equally divided between her five daughters, then in existence, and any other children, whether male or female, that might yet be born":—Held, that the five daughters, and all the after-born children of the annuitant, were entitled to the fund producing the full annuity, in equal shares. *Attwater* v. *Attwater*, 18 Beav. 330; 18 Jur. 50; 23 L. J., Ch., 692; 2 W. R. 81.

13. Testator devised estates to F. S. and M. his wife, for their joint lives and the life of the survivor, he assuming the name and arms of testator; remainder to trustees to preserve contingent remainders, and after the decease of F. S. and M., unto all the children of F. S. and M. then already or thereafter to be born of their bodies, male or female, for and during their joint lives and the life of the survivor of them; but all the sons to take the name and arms of the testator in addition to their own; remainder to trustees to preserve contingent remainders, in trust nevertheless to permit all the said children to receive the rents of the property in equal shares during their lives, and from and after their several deceases unto and equally between all their

issue, male and female, and for want of such issue over:—Held, 1. That the name and arms clause was not a condition precedent to the vesting of the estates in the children of F. S. and M. 2. Only children of F. S. and M. living at testator's death were included under the gift to children "now already or hereafter to be born." 3. Notwithstanding the words implying a tenancy in common amongst the issue of the children of F. S. and M., the children of F. S. and M. took as tenants in common in tail, with cross-remainders between them in tail. *Woodhouse* v. *Herrick*, 3 W. R. 303; 1 Kay & J. 352; 3 Eq. Rep. 817; 24 L. J., Ch., 649.

1. A testator gave the accumulation of the rents and profits of real and personal estate at the expiration of twenty years after his decease to such of his grandchildren, "now born or hereafter to be born during the lifetime of their respective parents," as should attain twenty-one or marry with consent, and whether born or unborn when any other of them should attain the age aforesaid. At the expiration of the twenty years there were several grandchildren who had attained twenty-one, but two of the testator's children were still living:—Held, that the shares of the grandchildren who had attained twenty-one were vested, subject to open and let in the claim of any other grandchildren who might attain the same age, and in the meanwhile the interest only of the vested shares was to be paid. *Scott* v. *Scarborough* (*Earl*), 1 Beav. 154; 8 L. J., N. S., Ch., 65.

2. The testator devised an estate to his six grandsons (of whom the appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male." By a proviso at the end of the will, the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof, I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male." Two out of the six grandsons died without issue. The eldest son of the appellant was born before the date of the will, and by a disentailing deed executed after the testator's death conveyed to the appellant his share and interest in the said estate in fee. In a suit for declaration of title and consequent relief.—Held, that the appellant was entitled to an estate in fee simple in one-fourth part of the hereditaments and premises, the subject of the suit. The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity. Consequently, the gift of an estate tail to the appellant's eldest son, who was born before the date of the will, was not revoked. *Gibbons* v. *Gibbons*, 6 L. R., App. Cas., 471; 50 L. J., P. C., 45; 45 L. T. 177.

Illegitimate Children.] See XXV. *ante.*

IV. GIFTS TO CHILDREN "BORN" OR "BEGOTTEN."

3. Gift to all and every the children of nephews and nieces lawfully begotten, includes after-born children. *Browne* v. *Groombridge*, 4 Madd. 495.

4. The testator gave to A. B's children, 50*l* to every child he hath by his wife, to be paid them as they come of age; there were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator are entitled to their legacies, but not those born afterwards. *Ringrose* v. *Bramham*, 2 Cox 384.

5. Devise of real estate to A. for life, and after her death to all the children of A. born at the time of her death. A. had two children, both of whom died in her lifetime:—Held, that the shares in the real estate vested in them indefeasibly at their births. *Paterson* v. *Mills*, 18 L. J., N. S., Ch., 449; 14 Jur. 126.

6. Gift after a previous life estate to C. to the children of W. who should be living at the death of testator and C.:—Held, that a child of W. who was born after the death of testator and survived C., was included in the class and took a share. *Fox* v. *Garrett*, 28 Beav. 19.

7. The fiction or indulgence of the law which treats a child *en ventre sa mère* as actually born, applies only for the purpose of enabling such child to take a benefit to which, if actually born, it would have been entitled; in all other cases the word "born" must have its natural interpretation. *Blasson* v. *Blasson*, 10 Jur., N. S., 1113; 34 L. J., Ch., 18; 11 L. T., N. S., 353; 13 W. R. 112; 5 N. R. 65; 2 De G. J. & S. 665. And see S. C. 3 N. R. 407.

Illegitimate Children.] See XXV. *ante.*

V. CHILDREN EN VENTRE SA MÈRE.

1. The law is clear that a devise to an infant *en ventre sa mère* is good, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. *Anon.*, 1 Freem. 293. S. P. *Taylor* v. *Bydall*, *id.* 243.

2. One devises, in case he have no son at the time of his death, to S. The testator dies, leaving his wife *privement enceinte* with a son; this posthumous son is a son living at the testator's death, and S. not entitled. *Burdet* v. *Hopegood*, 1 P. W. 486

3. Infant *en ventre* shall not take under a bequest to the children of A. living at the death of testator. *Cooper* v. *Forbes*, 2 Bro. C. C. 63, *sed quære.*

4. Bequest to all children "born in the lifetime of testator," includes child of which the feme was *enceinte* at death of testator. *Trower* v. *Butts*, 1 Sim. & S. 181; 1 L. J., Ch., 115.

5. The description of children of A. does not extend to a child *en ventre sa mère*. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201.n. S. C. *id.* 226.

6. Testator gave to each and every of his children born or thereafter to be born, and who should be living at the time of his death, 5,000*l.* apiece, to be paid at their ages of twenty-one, etc., with interest from the day of his death. A child *en ventre sa mère* is entitled to a legacy of 5,000*l.*, but the interest is to be computed only from the birth. *Rawlins* v. *Rawlins*, 2 Cox 425

7. One devises the surplus of his estate to his grandchildren living at his death, grandchildren born after his decease shall not take. *Musgrave* v. *Parry*, 2 Vern. 710.

8. An infant *en ventre sa mère*, under a devise to heirs of the body of the devisor begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse* v. *Yerworth*, 3 Swan. 608.

9. One devises the surplus of his estate to his children and grandchildren; a grandchild *en ventre sa mère* at the testator's death shall not take; *secus*, had it been to the children and grandchildren living at his death. *Northey* v. *Strange*, 1 P. W. 342; Pre. Ch. 470; Gilb. Eq. Rep. 136.

10. Under a devise to all the children of A. except B., a posthumous child is entitled. *Clarke* v. *Blake*, 2 Ves. J. 672.

11. Testator devised freehold fee-simple estates in possession to all and every the child and children of his daughter S. for life, and after the decease of such child and children to the lawful issue of such child or children to hold to such issue, his, her, and their heirs, as tenants in common, and in default of such issue over. S. had nine children, four in testator's life and five after:—Held, the nine took under this devise as tenants in tail with cross-remainders. *Mogg* v. *Mogg*, 1 Meriv. 654.

Testator devised freehold fee-simple estates to trustees during the life of his son J., upon certain trusts, remainder to his son's children, and their issue, in the same words as in the above devise to his daughter's children, and in default of such issue to all and every the child and children of his daughter S., etc. (in the same words as before):—Held, that only six of the nine children of S. took under the devise; namely, five who were born, and one who was *en ventre* at the death of J. *Id.* 655.

12. Where a testator makes a bequest to a person and his children if there are any children *in esse* at the date of the will, they take jointly with the parent; but if words are superadded showing an intention to settle the property the parent only takes a life interest. And for this purpose a child *en ventre sa mère* is considered to be *in esse*. *Mason* v. *Clarke*, 1 W. R. 297; 17 Jur. 479; 17 Beav. 126; 22 L. J., Ch., 956.

13. In construing a will a child *en ventre sa mère* is treated as living where the effect is to leave to the child an interest vested or contingent which any other construction would take away from it, unless there is a clear contrary intention. *Pearce* v. *Carrington*, 8 L. R., Ch., 969; 42 L. J., Ch., 900; 22 W. R. 41. Affirming 42 L. J., Ch., 516; 21 W. R. 729; 28 L. T., N. S., 659.

A husband gave a fund to his wife for life, then to his daughter (a married woman) for life, and after her death to her children who being sons should attain twenty-one, or being daughters attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, the fund should be at once divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of the testator's widow:—Held, that as the daughter had a child *en ventre sa mère* within five years after the death of the widow the gift over had not taken effect. *Ib.*

14. A testatrix by will bequeathed residuary personal estate unto and equally between all her brothers and sisters, share and share alike. She directed that the shares of her brothers respectively should not vest in them respectively until they should respectively attain twenty-one, and that the shares of her sisters should not vest in them respectively until they should respectively attain that age or marry:—Held, that the brothers and sisters formed one class only of persons; and that a brother not born, though *en ventre sa mère* when the eldest of the brothers and sisters who attained twenty-one came of age, was excluded; although he was born before the eldest of the brothers only who attained twenty-one came of age. *Re Gardiner, Garratt* v. *Weeks*, 20 L. R., Eq, 647; 45 L. J., Ch., 193.

15. Testator gave his estates to trustees to apply the profits for the use of the child with which his wife was then pregnant, during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was still-born. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death his widow was brought to bed of a son; this son cannot take the estate, though

found to be legitimate, but it shall go to the devisees over. *Foster* v. *Cook*, 3 Bro. C. C. 347.

1. A. testatrix, who died in November 1874, by her will in January 1874 bequeathed to each of the three children of her niece 1,000*l.*; and if any of the said three children should die before attaining the age of twenty-one the legacy was to be divided between the survivors of the said three children. There was a codicil in June 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, and a fourth child, *en ventre sa mère* at tae time, and born in July 1874, claimed a legacy of 1,000*l.*:—Held, that the three children born at the date of the will only were entitled to legacies. *Re Emery, Jones* v. *Emery*, 3 L. R., Ch. D., 300; 24 W. R. 917; 34 L. T., N. S., 846.

2. A testator devised his estates to trustees, in trust, after C.'s decease, "in case she should leave only one child which should survive her," to pay 200*l.* a year for his maintenance until he should attain twenty-five, and from and after such only child should attain that age to raise 10,000*l.* and pay the same to him at that age. Or, in case C. should, at her decease, have two or more children, then to raise an annuity for their maintenance until they should respectively attain twenty-five, and when they respectively attained that age, to pay each an equal share of the 10,000*l.* The plaintiff was *en ventre sa mère* at the testator's death, and was the only child of C. who survived her:—Held, that the bequest of the 10,000*l.* was too remote. *Merlin* v. *Blagrave*, 25 Beav. 125.

3. A father directed the income of one-half of his residuary estate to be paid to his son during his life and afterwards to his lawful issue; one of the issue was *en ventre sa mère* at the date of the death of the tenant for life, but his parents were not married till after that date, though before the birth of the child:—Held, that such child was not entitled to share in the distribution of the half of the residue. *Re Corlass*, 1 L. R., Ch. D., 460; 45 L. J., Ch., 118; 33 L. T. 630; 24 W. R. 204.

4. 20,000*l.* left to executors in trust to dispose of in such proportions, etc., as they should think fit amongst such of the testator's relations as should not be worth 2,000*l.*, and should apply within two years after the testator's death. One within the description applied and had a sum ordered her, but died before it was paid:—Held, her representative entitled to it. A child born after the death of the testator, who was of consanguinity, claimed and died without issue:—Held, not within the description, though *en ventre sa mère* at testator's death. *Bennett* v. *Honywood*, Ambl. 708.

5. A testatrix directed that a fund should be accumulated, and that when the youngest of the children of her nephew and nieces, A., B., and C., who should have been born and living at the time of her decease, should attain twenty-one, the accumulated fund should be divided equally among all such children of A., B., and C., as should then be living, with a provision that if at the period of division any children should not personally claim their shares within twelve months their shares should go over to the others. There were children born in the lifetime of the testatrix, and others born after her death, two of whom were *en ventre sa mère*:—Held, that the clause as to personal claim was not sufficient to restrict the preceding gift to children who attained twenty-one before the period of division, and that all children living at the period of division, whether born before or after the death of the testatrix, were entitled. *Blasson* v. *Blasson*, 2 De G. J. & S. 665; 10 Jur., N. S., 1113; 34 L. J., Ch., 18; 13 W. R. 113; 11 L. T., N. S., 353; 5 N. R. 65. And see S. C. 3 N. R. 407.

Held, also, that a child *en ventre sa mère* is only to be treated as born where such construction is necessary for the benefit of that child, and that, therefore, the distribution was not postponed till the youngest child *en ventre sa mère* at the death of the testatrix attained twenty one. *Ib.*

Held, also, that the words "born and living" were used for the purpose only of ascertaining a period of time, and were not a description of children as objects of the bequest, and therefore children *in utero* were not included. *Ib.*

Illegitimate Children.] See XXV. IV. *ante*. *See also* POSTHUMOUS CHILDREN.

VI. GIFTS TO A CLASS FROM A. DOWNWARDS.

6. A gift to a class "from A. downwards" was held to be inclusive of A., and entitled her to share in the gift. *Lett* v. *Osborn*, 51 L. J., Ch., 910; 47 L. T. 40.

XXXIII. Distribution Per Stirpes or Per Capita.

I. DISTRIBUTION PER CAPITA.

See also following Subdivisions.

1. Gift to the Children of A. and B., or to the Children of A. and the Children of B.

1. One devises the surplus of his personal estate to the children of A. and B.; neither of them has a child at the making of the will or the death of testator; the devise is executory, and shall extend to any children that A. and B. shall afterwards have; and the children of each shall take *per capita*, and not *per stirpes*. *Weld* v. *Bradbury*, 2 Vern. 705.

2. Bequest of stock to testator's wife for life, and then as she should by will direct amongst A., B., and C. and their respective children, and in default of appointment the same at his wife's death to go amongst all the said children equally. No appointment was made:—Held, first, that A., B., and C. took nothing; secondly, that the children of A., B., and C. took *per capita*. *Pattison* v. *Pattison*, 19 Beav. 638.

3. Testator gave the residue among his five grandchildren, A., B., C., D., and F., his grandson A.'s two children, and the two children of his niece, one of them a son, the other a daughter; and in case any of the said last-mentioned children should die before twenty-one, and should leave no lawful issue, then the survivors were to have his or her share. One of the children of A. died under twenty-one without issue:—Held, that his share was divisible among all the surviving legatees, children and grandchildren. *Walker* v. *Moore*, 1 Beav. 607; 8 L. J., N. S., Ch., 333.

4. Bequest of shares, the profits to be invested, and the interest applied in the education of the children of A. and B. in equal shares; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if A. and B. should die without issue. A. and B. had no child at testator's death:—Held, that all the children of A. and B. took, and that the class was not limited to those born when the first attained twenty-one; and, secondly, that the children of A. and B. took *per capita*, and not *per stirpes*. *Armitage* v. *Williams*, 27 Beav. 346.

5. Bequest of one-fourth to the children of A., and one other fourth among children of B.:—Held, distributable *per capita*. *Lincoln* (*Lady*) v. *Pelham*, 10 Ves. 167.

6. On construing an appointment of stock in these words, "unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares and proportions," it was held, that the qualification of living at the death of his wife attached only to the nephews and nieces, the last antecendent. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. The legatees took *per capita*. *Baker* v. *Baker*, 6 Hare 269; 11 Jur. 585.

7. Testatrix gave 200*l.* to her brother R., and in case of his dying before her, the 200*l.* to go to his children; and 200*l.* to her sister M., to go to her children in the event of her predeceasing the testatrix. The testatrix, after sundry other pecuniary gifts to other parties, gave all her residue "to all the children of my brother R. and my sister M. equally." R. had five children and M. two children at the date of the will, and also at the decease of the testatrix:—Held, that all these seven children took equally as tenants in common. *Re Lloyd*, 2 Jur., N. S., 539.

8. Testator directed the residue of his personal estate, after the death of his wife, who was tenant for life, to be divided as follows:—To his five nephews and nieces, A., B., C., D., and E., two shares each, and to their children one share each. The nephews and nieces survived the testator:—Held, that the residue vested in the nephews and nieces and their children living at the testator's death or born in the lifetime of the tenant for life, the children taking *per capita*, but the shares of each of the nephews and nieces being double that of each child. *Cooke* v. *Bowen*, 4 Y. & Coll., Exch. Eq, 244.

2. Gift to A. and the Children of B.

9. Bequest "to A. and to the children of B., to be equally divided":—Held, that they took *per capita*. *Dowding* v. *Smith*, 3 Beav. 541; 10 L. J., N. S., Ch., 235.

10. Gift of a legacy to A. for life, with remainder to B. for life, and after the death of the survivor upon trust to pay it "to, between, or amongst C., if then living, but if then dead, to, between, and amongst C.'s children and the children of B. then living, equally, etc.":—Held, that C. and the children of B. took *per capita*. *Rickabe* v. *Garwood*, 8 Beav. 579.

11. J. H. gave all his residuary real and personal estate to trustees upon trusts for conversion, and directed the trustees to divide the proceeds amongst the brothers and sisters of S., and the nephews and nieces of C. and "my late housekeeper H." On the question whether this was a gift in equal third parts to the classes, or a gift *per capita* to all the individual members of the three classes:—Held, to be a gift *per capita* to all the individual members of the classes. *Amson* v. *Harris*, 19 Beav. 210.

12. Legacy to A. and B. and the children of C., equally; they take *per capita*. Legacy to the descendants of A. and B. equally; all descendants (children and grandchildren) take *per capita*. *Butler* v. *Stratton*, 3 Bro. C. C. 367.

13. Gift in equal shares to Mrs. M., Mr. and Mrs. W. and children, likewise H. H.:—Held, that Mrs. W. was entitled to an equal share as tenant in common with her husband and her children, and with Mrs. M. and H. H. *Paine* v. *Wagner*, 12 Sim. 184.

14. One having had five children, A., B., C., D., and E.; B. is dead, leaving several children, and by will the testator devises the residue of his personal estate to his son A., and to B.'s children, and to his daughter C., and D.'s children, and to his daughter E.; D. is living, and has children:—Decreed, the children of B. and the children of D. shall take *per capita*, and not *per stirpes*, as if all named. *Blackler* v. *Webb*, 2 P. W. 383.

15. Testatrix bequeathed residue to one for life, and then to be equally divided between her two nieces A. and B., and C., a third niece,

and her children. C. had eight children at the death of the testatrix, and one born afterwards, during the life of tenant for life:—Held, that all the children, including this one, took equally *per capita* with the nieces. *Lenden* v. *Blackmore*, 10 Sim. 626.

1. Bequest of the residue to executors, in trust to invest and pay the interest, dividends, and premiums, as the same shall be received, "to my living brothers and sisters, and the children of my brothers and sisters who have deceased, or who may die before me, share and share alike":—Held, to be a gift *per capita*. *Hyde* v. *Cullen*, 1 Jur. 100.

2 A testator gives 400*l*. to his executors, to divide equally between his son P., and the children of his son R. P. and the children take equal shares *per capita*. *Williams* v. *Yates*, C. P. C. 177; 1 Jur. 510.

3. Testator directed his residuary, real, and personal estate to be divided by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B., and C., and his other nephews and nieces, sons and daughters of his late sisters, T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and H., living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., *per capita*. *Tomlin* v. *Hatfield*, 12 Sim. 167.

4. A testator had a son and two daughters (A. and C.) living, another daughter (B.) was dead, having left five daughters. He bequeathed 15,000*l*., as to 5,000*l*. for A. for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter A., the five daughters of B., and his daughter C., to be settled as he had directed the three sums of 5,000*l*. upon them and their issue":—Held, that the five daughters of B. took *per capita*, so that each was entitled to one-eighth of the residue. *Tyndale* v. *Wilkinson*, 23 Beav. 74; 2 Jur., N. S., 963; 4 W. R. 695.

5. A father gave his residuary estate to his children, A., B., C., D., E., "and to the children of" his daughter F., deceased, "and the children of" his daughter C., deceased, "to be divided amongst them in equal shares and proportions".—Held, that the grandchildren took *per capita*, and not *per stirpes*. *Payne* v. *Webb*, 22 W. R. 43; 31 L. T., N. S., 637.

3. Gift to A. and B. (or a Class) and their Children.

6. A testator gave his property (all being personalty) to trustees, upon trust to pay his debts, and he gave certain legacies and three annuities to three ladies, and he gave the residue of the dividends arising during the lives of the three annuitants to H. S. and A. C., married ladies, for their lives; and after the deaths of the three annuitants, as to all the rest of his estate, he bequeathed the same to the said H. S. and A. C. and their several children, to be divided between them in equal shares:—Held, first, that there was an intestacy as to the surplus income from the death of the survivor of H. S. and A. C. until the death of the survivor of the three annuitants; held, secondly, that the gift to H S and A. C., and their several children, was a gift *per capita*, and not *per stirpes*. *Cunningham* v. *Murray*, 1 De G. & Sm. 366; 16 L. J., N. S., Ch., 484; 11 Jur. 814. But this was reversed on appeal as to the first point, the Lord Chancellor holding that the surplus income was not undisposed of, but passed by the residuary bequest. S. C. 17 L. J, N. S, Ch, 407; 12 Jur. 547.

7. Bequest of residue, in moieties, in trust for two tenants for life, and at death of each in trust, as to her moiety, to the children of the two who should be living at the death of the deceased tenant for life, and the issue of such of the children who should then be dead:—Held, to take effect *per capita*. *Abbay* v. *Howe*, 1 De G. & Sm. 470; 16 L. J., N. S., Ch, 437; 11 Jur. 765.

8. Under a disposition by will to A.'s and B.'s families, the children are entitled, exclusively of their parents, and *per capita*. *Barnes* v. *Patch*, 8 Ves. 604.

9 Residuary bequest in trust for A. for life, and after her decease to be distributed "between the testator's brothers and sisters and such of their children as should be then living, the parents and children to be classed together and to share in equal proportions":—Held, that those brothers and sisters and children only who survived A. were entitled, and that they took *per capita*. *Turner* v. *Hudson*, 10 Beav. 222; 16 L. J., N. S, Ch., 180.

10. A testator devised "one-half of the freehold houses and property to his brothers and sisters for their life and then to come to their children, and in the same manner to his wife's brother and brothers' children and grandchildren." He had but one brother alive at the date of the will, and left no brother or sister surviving him, and only one brother of the testator's wife was alive at the date of the will, but he survived the testator:—Held, that under these circumstances all the children living at the testator's death of all his brothers and sisters took *per stirpes* shares in one moiety, and that, subject to the life interest of the wife's surviving brother, the other moiety was divisible amongst all the children and grandchildren living at his death or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers, who left children or grandchildren, the families taking *per stirpes* and the children and grandchildren of such family *per capita*. *Barnaby* v. *Tassell*, 11 L. R., Eq., 363; 24 L. T. 221; 19 W. R. 323.

11. A testator gives all his property to trustees upon trust for his wife for life, and at her death upon trust to sell and pay debts and legacies, and after payment thereof he gave the residue of the money to his sister E., his sister H., H. D. daughter of his late sister M. D., and to the children of his said two sisters E. and H. as should be living at the death of his wife, to be equally divided between them his said niece H. D, his sisters E. and H., and the respective children of them his said sisters, share and share alike. The sisters and niece died in the lifetime of the tenant for life, the wife, one sister leaving three children:—

Held, that the three children and the representatives of the deceased niece and sisters took equally *per capita*. *Boughen* v. *Farrer*, 3 W. R. 495.

1. A testator gave real estate to his daughter for life, remainder to his "children and issue, and if but "one such child" that child to take the whole, and if she died without leaving "such issue," then over. He gave the residue of his personal estate to his daughter for life and her children and issue; and if she died without leaving such children or issue, then over —Held, that the children of the daughter and their children took *pari passu*. *Cancellor* v. *Cancellor*, or *Chancellor* v. *Chancellor*, 2 Dr. & Sm. 194; 8 Jur, N. S., 1146; 31 L. J., Ch., 17; 11 W. R. 16; 7 L. T., N. S., 307; 1 N. R. 12. And see *Shailer* v. *Groves*, 11 Jur. 485; 16 L. J., Ch., 367; 6 Hare 162. And see as to this case 2 Jarm., 4th edn., p. 737. n.

2. A testator by his will, after giving life estates to his widow and his sister successively, directed that after the death of his sister his residuary personal estate should go to his surviving brothers and their children to be divided equally between them. The widow survived her sister-in-law, as also her brothers-in-law, two of whom only left issue surviving the widow:—Held, that the class was to be ascertained at the death of the widow, and that the surviving children of the two brothers took *per capita*. *Re Fox*, 6 N. R. 374; 11 Jur., N. S., 735; 13 W. R. 1013; 35 Beav. 163.

II. DISTRIBUTION PER STIRPES.

3. A bequest of a fund to be divided among the children of A, the children of B., the children of C., the children of D., and to E. if he should be then living, and if not E.'s share to be divided into four parts and paid to the children of A., B., C., and D. "in manner aforesaid":—Held, that the fund was divisible among the children *per stirpes*, and not *per capita*. *Nettleton* v. *Stephenson*, 18 L. J., N. S., Ch., 191; 13 Jur. 618.

4. Bequest of 1,200*l.* to A. and B., upon trust to appropriate and apply in two equal shares to and for the benefit of all their children respectively:—Held, on the context, to give legacies of 600*l.* to each family severally. *Overton* v. *Banister*, 4 Beav. 205.

5. A legacy to three families equally. The children of the families shall take *per stirpes*, and not *per capita*. *Alexander* v. *Douglas*, Romilly's Notes of Cases, 93.

6. A testator bequeathed 800*l.* to trustees upon trust to pay the income to A. for her life; and after her decease he gave the principal to her children and their representatives in equal shares, with a gift over in the event of A. dying without issue of the representatives of such issue. A. left one child surviving her, and children and grandchildren of another child of A; and A. had also had other children, who died without issue:—Held, that the surviving child of A. was entitled to one moiety of the trust fund, and that the other moiety was to be equally divided among the children of the deceased child of A. *Alker* v. *Barton*, 12 L. J., N. S., Ch., 16.

7. Money bequeathed to A. for life, and if she died in the life of her husband to go to the children of her sister B. in such shares as A. should advise. Some of the children of B. died, leaving issue, and then A. dies in the life of her husband, making no appointment:—Decreed, the money to be distributed among the children of B. and their representatives *per stirpes*, and not *per capita*. *Crook* v *Brooking*, 2 Vern. 50.

8. Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins deceased partake in equal shares and proportions with my first cousins now alive." The residue is divisible *per stirpes* amongst the first cousins who were living at the testator's death, and such of the descendants of his first cousins who died before him, as were next of kin of the deceased first cousins, and living at the time of the death of the testator. *Humphreys* v. *Humphreys*, 2 Cox 187.

9. A., by will, bequeathed property in trust for all his grandchildren (the children of his son and daughter) who should be living at his decease equally to be divided between them, such shares to be vested in possession in the grandsons at twenty-one, and the granddaughters at twenty-one or marriage, with a gift over, in case any of the grandchildren should die before attaining a vested interest in possession, to the surviving brothers and sisters of the deceased grandchild. By a codicil he gave a sum of money to his executors to be invested, and directed the interest to be paid in equal moieties to his son and daughter during their lives, and at their decease the same to be for the benefit of his grandchildren, agreeably to the instructions contained in the will:—Held, that the effect of the codicil was to create a tenancy in common between the son and daughter during their lives in the fund directed to be invested, and that on the death of the son one moiety of the fund became divisible among his children, the grandchildren taking their shares under the will and codicil *per stirpes*, and not *per capita*. *Archer* v. *Legg*, 10 W. R. 703; 31 Beav. 187.

10. Gift of personal estate, to divide the principal and interest among the children of A. and B. living at the time of the respective deceases of A. and B., with a proviso that the share of any such child or children dying under twenty-five, without issue, should go over to the survivors and survivor of them equally:—Held, that this was a gift to the children of A. living at his decease, and to the children of B. living at his decease, and that the fund was divisible *per stirpes* in moieties. *Ayscough* v. *Savage*, 13 W. R. 378.

11. A testator directed his residuary estate to be equally divided between his two sisters and the lawful issue of his two deceased sisters, in equal shares if more than one of such respective lawful issue:—Held, that it was divisible not *per capita* but into four parts, each surviving sister taking one part, and the issue of each deceased sister taking another part, as tenants in common. *Davis* v. *Bennet*, 4 De G. F. & J. 327.

Gift of residue to be equally divided between the testator's sisters J. and M., and the lawful issue of his deceased sisters E. and

A., in equal shares, if more than one of such respective lawful issue. There were living at the testator's decease children, grandchildren, and great-grandchildren of one of the deceased sisters:—Held, that J. and M. were entitled to two equal fourth parts, the issue of E. were entitled to another equal fourth part as tenants in common, and the issue of A. to the remaining equal fourth part as tenants in common. S. C. *nom Davis* v. *Bennett*, 8 Jur., N. S., 269; 31 L. J., Ch., 337; 10 W. R. 275; 5 L. T., N. S, 815.

1. A testatrix directed her trustees to divide the rents, etc., of her real estate equally between A, B., C., and D. the widow of E, until E.'s children attained twenty-one; and upon their attaining twenty-one, the trustees were to sell and divide the produce between A., B, C., and the children of E., "in equal shares and proportions as tenants in common; but if D. married, her part of the income was to be applied to the maintenance of E.'s children; and she gave the residue of her real and personal estate "equally between A., B., C., and the children of E. who attained twenty-one. There were four children of E. who attained twenty-one:—Held, that they did not take the property *per capita* with A., B., and C., but one-fourth only between them. *Brett* v. *Horton*, 4 Beav. 239; 10 L. J., N. S., Ch., 371; 5 Jur. 696.

2. A testator gave his real and personal estate to trustees on trust, to sell and convert the same and pay the interest and annual produce to his ten nephews and nieces *nominatim* for their respective lives, and after their respective deceases the share of such nephew or niece so dying "to be held in trust for all and every the children or child of my nephews and nieces, who being a son or sons should attain the age of twenty-one, or being a daughter or daughters should attain that age or marry, to be divided between and amongst such last children, if more than one, in equal shares and proportions; and if any one or more of them my nephews and nieces shall not have any child, who being a son shall attain twenty-one, or being a daughter shall attain that age or marry under it, then and in each or any such case, as well the original share or shares of, as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece and his or her child or children, or to such child or children only in possession or expectancy, etc., shall go and accrue to and vest in the survivors or survivor or others or other of them my nephews and nieces and their respective children, at and in such and the same times, shares and proportions, and manner as are hereinbefore expressed of and concerning their respective original shares," etc. One of the nephews having died, leaving an only child, an infant:—Held, that such only child exclusively became presumptively entitled to his father's share, subject to its going over as provided by the will in the event of his dying under twenty-one without children. *Hunt* v. *Dorsett*, 5 De G. M. & G. 570; 1 Jur., N. S., 1053. Reversing 3 W. R. 531.

3. The testator gave a residuary fund to his brothers and sisters for life, and from and after the decease of the survivor to pay the principal to their issue who should live to attain twenty-one, or the issue of such of them as should be then deceased, such class of issue, whether in first or second degree, to take only as amongst themselves the shares which their parents would have been entitled to if living:—Held, that the children of the brothers and sisters took *per stirpes*, and that the children of one of the testator's nephews who died in the testator's lifetime took with their uncles and aunts the share which their father would have taken if living. *Shand* v. *Kidd*, 19 Beav. 310.

4. Testator gave one-third of his residue to his niece, which he desired might be settled by his executors on her for her separate use for her life, but to devolve to her issue at her death; and failing issue, then to revert to his nephew. The Court directed the third to be settled in trust for the niece for her separate use for life, and after her death in trust for her issue then living, and if there should be no such issue then in trust for the nephew. *Stonor* v. *Curwen*, 5 Sim. 264.

5. A testator gave his personal estate to A. for life, and after the decease of A. he directed his executors to divide it among the six children of his late sister, A. J. (naming them), "who should be living at the time of his decease, and the issue of such of them as should be living at the time of his decease, and the issue of such of them as should then be dead leaving issue then living; the issue to take only such part or share as their parents, if then living, would have taken." If any of the children should die without leaving issue, his or her share was to go over to the others; and if any of the children should die leaving issue, they were to take as therein mentioned. All the six children of A. J. survived the testator and the tenant for life, and some of them had issue:—Held, that the six children were entitled to the fund absolutely, and that in the events which had happened their issue took nothing. *Johnson* v. *Cope*, 17 Beav. 561.

6. A testator by his will gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S., during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive his daughter, then in trust for H., F., E., A., and W., his five sons and their respective issue (if any), to be divided among them in equal shares and proportions, such issue to take *per stirpes*, and not *per capita;* he also gave the residue of his personal estate to his sons H., F., E., A., and W., "and their respective issue (if any), such issue to take *per stirpes*, and not *per capita*, to be divided among them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one years to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively attain that age":—Declared that, S. dying in the lifetime of G., the sons of the testator living at such event would be absolutely entitled to the stock in equal shares, but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund which their parents would have

been entitled to if living, such issue to take such shares equally among them, and adjudged that the sons living at the death of the testator took an absolute interest in the residue. *Dict.* that if any of the sons that had died in the lifetime of the testator, his children living at the death of the testator would have taken, by substitution, the share of the parent. Whether grandchildren or more remote descendants would take as issue, and in what proportions, *quære*. *Pearson* v. *Stephen*, 5 Bli N. S. 203; 2 Dow & Cl. 328.

1 A direction in a will for trustees to apply the whole, or so much as they should think necessary of the income of property, until the period of distribution, towards the maintenance, education, and advancement of the testator's grandchildren, *per stirpes*.—Held, not to afford ground for presuming that he intended a division *per stirpes* of the capital. *Nockolds* v. *Locke*, 3 Kay & J 6; 5 W. R. 3; 2 Jur., N.S., 1064.

Whether Distribution will be per stirpes throughout.] 2. Testator bequeathed to G. two sums of stock, and in case of his death in the testator's lifetime without issue, the two sums were to be equally divided amongst the testator's nieces thereinafter named, under the same conditions and restrictions as were thereinafter mentioned respecting the several bequests thereinafter to them respectively given. The testator then gave 12,000*l.* stock to trustees, upon trust to pay the dividends (in thirds) to the testator's three nieces, A., B., and C, for their lives, and after their respective deaths to transfer the capital (in thirds) to the children of the nieces, with limitations over in the nature of cross-remainders, in the event of any of the nieces dying without leaving children, with an ultimate limitation, in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G. died without issue in the testator's lifetime. The nieces had children:—Held, that the children took the same interest in the stock given to G. as they did in the 12,000*l.* consols. *Ross* v. *Ross*, 2 Colly. 269; 9 Jur. 795.

3. A testator, in an obscure will, gave a life interest to A., with remainder to his children, and in the event of A. dying without leaving a child who should attain twenty-one, directed his estates to be converted, and the moneys arising therefrom to be divided, "share and share alike, amongst the children of X., Y., and Z., each and every of the persons so to be benefited, then living, to have an equal share one with the other; and if any of the persons so intended to be benefited shall be then dead, and leave a child or children, grandchild or grandchildren, such child or children, grandchild or grandchildren, is and are to be entitled to the same share as their father, mother, grandfather, or grandmother, as the case might be, would have been entitled to had each such person thereby intended to be benefited been then living." A. died a bachelor:—Held, first, that the children of X., Y., and Z., who were living at A.'s death, were alone, of the first class of takers, entitled to a share. *Palmer* v. *Crutwell*, 8 Jur., N. S., 479.

Held, secondly, that the children or grandchildren of the first takers, dying in the lifetime of the tenant for life, must themselves be living at A.'s decease to be entitled to a share. *Ib.*

Held, thirdly, that such last-named children or grandchildren took *per stirpes*, and not *per capita*. *Ib.*

Held, fourthly, that as between such children or grandchildren no grandchild would be entitled when there was any child of the same ancestor living. *Ib.*

4. Real estate was devised upon trust (after the death of the tenant for life) to sell and divide the proceeds "equally among such of the testator's five daughters as should be living at the decease of the life tenant, and the children, grandchildren, and issue respectively to take and have equally amongst them, if more than one, the part or share which their, his, or her parent respectively would have been entitled to had such parent been then living." One of the daughters, whose share was now in question, died before the tenant for life, having had ten children, of whom three survived the period of distribution, the other seven having died before that period, some with, others without, issue:—Held, that the gift to the children, grandchildren, and issue was an original gift, and that the share was divisible into tenths, and that one-tenth went to each stock, irrespectively of the objects of gift surviving the mother or the period of distribution. *Re Orton*, 36 L. J, Ch., 279; 3 L. R., Eq., 375; 15 W. R. 251; 16 L. T., N. S., 146.

Held, also, that the gift was *per stirpes*, and not *per capita*. *Ib.*

5. P. gave all the residue of his real and personal estate to trustees "upon trust for all my brothers and sisters who shall be living at the time of the death of my wife and the children and issue of such of them as shall be then dead leaving children or issue, nevertheless such children or issue of any of my deceased brothers and sisters to have and take among them in equal shares such proportions of my residuary real and personal estate as such deceased brother or sister would have taken and been entitled to had he or she been living at the death of my wife." Nine of the testator's brothers and sisters survived him, but predeceased the wife, who died in 1869, some of them leaving children, and some of them also issue:—Held, that the children and issue of the testator's deceased brothers and sisters did not take concurrently with their parents, but took *per stirpes* the shares to which their respective parents would have been entitled. *Powell* v. *Powell*, 21 W. R. 725 28 L. T., N. S., 730.

6. A testator gave the interest of 400*l.* during the life of J., his daughter, and after her decease, in case she should die without issue, the principal to his other eight children, then living, equally; and if any should be then dead, his or her issue (if any) should be entitled to the shares or share of him or her then dead; but if J. should happen to leave any issue surviving, then the 400*l.* to be divided into nine equal shares, one to go to such her issue, and the other eight to be divided in such manner as the whole was directed to be divided in case of her dying without issue. J. died unmarried, the eight other children having survived the testator, but died in her lifetime, leaving issue:—Held, that the

legacy should be divided into eighths, and go to the grandchildren and remoter issue living at the death of J. *Southam* v. *Blake*, 2 W. R. 446.

1. N. gave to trustees all his real estates in trust, after payment of debts, for the benefit of his wife and daughter for their lives; and in the event of his wife dying in the lifetime of the daughter (which happened), then he directed the trustees after the death of the daughter to convey the fee-simple of the estates unto and equally between A., B., C, and D., share and share alike, or unto such of them as should be then living, and the issue of such of them as should be then dead leaving lawful issue, and to his, her, and their heirs, executors, administrators, and assigns for ever. But in case any one of them should happen to die in the lifetime of his wife or daughter leaving issue, such issue then living should be entitled equally among them to the share only which his, her, or their parent or parents would have been entitled to if living. N. died in 1834. A. died in 1840, leaving three children, X., Y., Z., all of whom died in the the lifetime of the testator's widow and daughter, and all of whom left children surviving, viz, X. four, Y. one, and Z. six children.—Held, that the grandchildren of A. took his share of the property *per capita*, and not *per stirpes*. *Birdsall* v. *York*, 5 Jur, N. S, 1237.

2. Under a bequest to a daughter for life, and after her death to her children; but if she died without issue, then to her two sisters if then living; but if either sister should be then dead, the testator gave her share to her issue equally divided among them:—Held, that under the last bequest children, grandchildren, and remoter issue took *per capita*. *Weldon* v. *Hoyland*, 4 De G. F. & J. 564.

III. EFFECT OF WORDS "PER STIRPES."

3. The words *per stirpes* held to import not only distribution, but succession or some species of representation. *Dick* v. *Lacy*, 8 Beav. 214; 9 Jur. 21. S. C. *nom. Dick* v. *De Lacy*, 14 L. J., N. S., Ch, 150.

Upon a gift over, after an estate for life of residue real and personal, to "daughters of B., and their descendants, *per stirpes*, to hold to them, their heirs and assigns, for ever," paying an annuity to L. for her life. B. left three daughters, one of whom survived the testator, and died in the lifetime of the tenant for life without ever having had issue:—Held, that the residuary estate belonged to the two surviving daughters. The words *per stirpes* are to be taken in a distributive sense, and "descendants *per stirpes*" to be considered as words of purchase, giving an absolute estate to the children, who took not concurrently with their parents, but by substitution. *Ib.*

4. Bequest to the brothers and sisters of A. living at the testator's death, "such descendants to take as tenants in common *per stirpes*, and not *per capita*":—Held, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of A. of whom any descendant was living at the testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of A. respectively living at the testator's death, or having died and left any descendant then living; that the same principle was to be applied to every subdivision, and that no descendant was entitled to any share concurrently with a living ancestor. *Gibson* v. *Fisher*. 5 L. R., Eq, 51.

5. A testator directed his property to be divided and paid "to the persons being such descendants as next hereinafter mentioned in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters of my late grandfather as have died leaving lawful descendants, such descendants respectively to be entitled to share the same moneys in a course of distribution *per stirpes*, and not *per capita*":—Held, that the words *per stirpes* and not *per capita* were applicable to the descendants, who were to be classified *secundum stirpes*, or according to their families, and that the property was to be divided into as many shares as there were *stirpes* or families, each *stirps* or family taking an equal share. *Robinson* v. *Shepherd*, 4 De G. J. & S. 129.

6. Effect of words *per stirpes*. See *Selby* v. *Whittaker*, 26 W. R. 117; 6 L. R., Ch., D, 239; 37 L. T., N. S, 514; 47 L. J., Ch., 121.

IV. GIFT TO A. AND B. FOR THEIR LIVES, REMAINDER TO THEIR CHILDREN.

7. On the construction of a will:—Held, that the children of the testator's two sons took interests in the residue *per stirpes*. *Flinn* v. *Jenkins*, 1 Colly. 365; 8 Jur. 661.

8. Bequest to testator's wife of the use and usage of all his effects for her life, and at her death bequest of the same to four nieces by name, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children:—Held, to give the respective children their parents' shares only. *Arrow* v. *Mellish*, 1 De G. & Sm. 355.

9. Legacy of 600*l.* to F., and at her death to two daughters in equal shares, and at their death to their children. One daughter having died without issue—Held, that children of other did not take her share. *Taniere* v. *Pearkes*, 2 Sim. & S. 383; 4 L. J, Ch., 81.

10. Gift in trust to be equally divided between A, B, and C., separate from "their" husbands, and for "their" sole use, and at their decease to be divided amongst "their" daughters:—Held, that A, B, and C. each took one-third for life, with remainder as to her one-third to her daughters. *Wills* v. *Douglas*, 10 Beav. 47; 11 Jur. 702.

11. An annuity to wife, and after her death "the annuity to be equally divided between my two sons, but not the principal: that I bequeath to their children, to be equally divided between them at the death of my sons":—Held, that upon the death of either of the sons, his children took their parent's share. *Turner* v. *Whittaker*, 2 Jur., N. S., 848; 4 W. R. 689; 23 Beav. 196.

12. Bequest of a moiety of a residue to A. for life, and of the other moiety to B. for life, "and from and immediately after the decease of A. and B." to stand possessed "of all my personal estate" in trust for eight grandchildren. A. died, and B. was living:—

Held, that the moiety enjoyed by A. became immediately divisible amongst the grandchildren. *Sarel* v. *Sarel*, 23 Beav. 87.

1. A testator by will, made in 1822, declared that his trustees should stand possessed of the trust moneys arising from the sale of his real and personal estate, upon trust for investment, and to pay the interest and proceeds unto his wife during her life, if she should so long remain his widow; but if she should marry again, then upon trust to pay one equal half of such interest and proceeds, and from and immediately after her decease to pay the whole, unto his brother and sister of the half blood, B and A., during their joint lives, to be equally divided; and from and immediately after the decease of either of them, B. and A., then upon trust to pay the whole to the survivor of them during his or her life; and from and immediately after the decease of every of them, his wife, brother, and sister, then to hold the same in trust for all the children, in equal shares, of his brother B. In 1824 the testator died without issue. B. died in 1826, leaving a son. In 1828 the testator's widow married again. In 1853 A. died. On a bill filed for the administration of the testator's estate, the question arose, who was entitled to the interest and dividends of the moiety bequeathed to B. and A. which accrued between the death of the latter and the death of the testator's widow:—Held, that it was divisible amongst the parties entitled to the capital, in proportion to their respective interests in such capital. *Brown* v. *Jarvis*, 6 Jur., N. S., 789; 29 L. J., Ch., 595; 8 W. R. 544; 2 De G. F. & J. 168

2. A testator bequeathed renewable leaseholds and copyholds to the four grandchildren equally, and after their death "for such children as they, or any or either of them, should have her or him surviving":—Held, that on the death of each grandchild his "children" then surviving took as tenants in common. *Waldron* v. *Boulter*, 22 Beav. 284.

3. Gift to A. and B. equally for life, and after their death in trust for and to the use of all and every the child or children of A. and B., both or either of them, if more than one, share and share alike, and until the youngest should attain twenty-one:—Held, on the death of A. that his children living at his death were entitled in equal shares to his moiety of the rents and profits until the youngest of the children of A. and B. had attained twenty-one. *Prankerd* v. *Baker*, 14 L. T., N. S., 11.

4. A testator gave certain leaseholds for 999 years, and a share in the R. Waterworks, and all his estate and interest therein to M. and A. and their assigns during the term of their respective natural lives, as tenants in common, and not as joint tenants, and from and immediately after the decease of them, the said M. and A., he gave the same unto all and every the lawful child and children of the said M. and A. equally as tenants in common, and not as joint tenants, and their respective executors, administrators, and assigns for all the residue unexpired of the term of 999 years, or during all his estate and interest therein, subject to the payment of the rent and the performance of the covenants, with a gift of the residue to M., A., and others. M. and A. both survived the testator; M. had seven children, A. died leaving two children surviving. M. was in possession of the estate; and upon the question, what was the effect of the gift to M. and A. and their children:—Held, that the estate was given in equal moieties to M. and her children on the one hand, and A. and her children on the other, and that on the death of A. her share was divisible amongst her children. *Milnes* v. *Aked*, 6 W. R. 430.

5. A testator devised "one half of the freehold houses and property to his brothers and sisters for their life and then to come to their children, and in the same manner to his wife's brother and brother's children and grandchildren." He had but one brother alive at the date of the will, and left no brother or sister surviving him, and only one brother of the testator's wife was alive at the date of the will, but he survived the testator:—Held, that under these circumstances all the children living at the testator's death of all his brothers and sisters took *per stirpes* shares in one moiety, and that, subject to the life interest of the wife's surviving brother, the other moiety was divisible amongst all the children and grandchildren, living at his death or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers, who left children or grandchildren, the families taking *per stirpes*, and the children and grandchildren of each family *per capita*. *Barnaby* v. *Tassell*, 19 W. R. 323; 11 L. R., Eq., 363; 24 L. T., N. S., 221.

6. Bequest of a legacy "to be equally divided between A. and B., after which to be equally divided between their children, that is to say, the children of A. and B. above named":—Held, that the children of A. and B. took *per capita*, and that on the death of A. and his wife a moiety became divisible, equally, amongst the children of A. and B. *Abrey* v. *Newman*, 16 Beav. 431; 17 Jur. 153; 22 L. J., Ch., 627; 1 W. R. 156.

7. Devise to trustees to pay the rents to and amongst testator's four daughters, share and share alike, during their lives; and in case either should die leaving issue, the share of her so dying to be paid to the child or children of each daughter so dying; but in case either of the daughters should die without leaving issue, then her share was to be paid to A. and B.:—Held, first, an estate tail in the daughters in remainder after the life estates of them and their children; secondly, the children of the daughters took their life estates *per stirpes*. *Coles* v. *Witt*, 2 Jur., N. S., 1226.

8. A testator, after certain legacies and bequests as to 400*l.*, directed his executors to invest, raise, and pay the dividends to his son Richard for life, "and after his decease upon further trust to pay or assign the principal sum of 400*l.*, with the accruing dividends or interest on the securities in which the same had been invested, unto his sons John, William, and James Blackwell, and his daughter Mary Garner, to be equally divided between them, share and share alike, or such of them as should be living at the time of the decease of the said Richard, and the issue of such of them as should be then dead leaving issue; such issue to take no greater or other

share or shares than his, her, or their respective parent or parents would have been entitled to if living." The three sons and the daughter died before the tenant for life. He died on the 6th April 1863. Each of the sons left children. The daughter died without issue:—Held, that the legacy vested in fourths; that the children of the three sons took one-third each as joint tenants, and the personal representatives of the daughter took the other fourth. *Re Blackwell*, 11 L. T., N. S., 335.

1. Under a gift to three persons by name for their respective lives, and subject thereto for their respective children as tenants in common, the life tenants are tenants in common, and the children take *per stirpes*. *Sutcliffe* v. *Howard*, 38 L. J., Ch., 472; 17 W. R. 819.

2. Gift of the income to arise from residue to A. and B. for their lives, share and share alike, and, after their death, of the principal to the children of A. and the children of B., to be divided between them, share and share alike:—Held, that the children of A. and the children of B. took *per stirpes*. *Re Notts*, 20 W. R. 569; 26 L. T., N. S., 679.

3. A testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them the principal of the fund to the interest of which such niece was entitled should be held in trust for the benefit of all and every the lawful children of her or of them so dying, and of the survivors or survivor of the testator's other nieces thereinbefore named, in equal shares. One of the nieces died leaving two children, and then another niece having died without having had a child:—Held, that the children of the former niece were entitled to participate in the fund of which the latter had been tenant for life. *Peacock* v. *Stockford*, 7 De G. M. & G. 129.

4. Bequest to executors of 4,000*l.* in trust to pay one-half of the interest to A., and the other half to B., during their lives; "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided among their children, when they shall severally attain twenty-one." A. died without issue; the entire principal vests in the children of B., on their severally attaining twenty-one. *Smith* v. *Streatfield*, 1 Mcriv. 358.

5. J. L. "gave and bequeathed unto his niece C. B. and his nephew J. T. all his houses situate at W., each to have one-half, to be share and share alike; and what debts he should owe at his decease, they should pay both of them a like share of the same; all the above premises he gave, devised, and bequeathed unto his niece C. B. and his nephew J. T., each to enjoy one-half during their lives, and at their decease the said premises to go to their children." J. L. died in 1786. J. T. died in 1804, without children and intestate, leaving C. B. his heiress-at-law, and the heiress-at-law of J. L. C. B. had thirteen children, six of whom survived her. (Part of the premises was taken by the commissioners under the Whitby Improvement Act, and the purchase money paid into court.) C. B. devised all her estate, right, title, and interest in and to the premises and the purchase money unto her daughter J. B.:—Held, that C. B. and J. T. each took an estate for life in a moiety of the property; that upon the decease of C. B. and J. T. their children took their parents' moieties respectively as joint tenants in fee; but that as J. T. had no children, C. B. took his moiety as his heiress-at-law, and that that moiety passed to her devisee. *Re Laverick's Estate*, 18 Jur. 304; 2 W. R. 113.

6. A bequest of the interest of one property to two sisters, and of another property to a female cousin, and "in case of the death of the above three females," over:—Held, that the gift over took effect as each fund was liberated by the deaths of the tenants for life thereof respectively. *Swan* v. *Holmes*, 19 Beav. 471.

A testator having three species of property, viz., his own property, property derived from his wife, and a reversion in 10,000*l.* consols, bequeathed his own property to his two sisters, with benefit of survivorship, his wife's property to his cousin Margaret, and he proceeded thus: "In case of the death of the above three females, the interest to be divided amongst my cousins (naming four) for their lives," and the property, including the 10,000*l.* trust money, "to devolve" to the children of three of those cousins (naming them) in equal proportions:—Held, that Margaret was not, by implication or otherwise, entitled to more than the wife's property. *Ib.*

Held, secondly, that there was no intestacy between the death of the surviving sister and that of Margaret, but that the different portions of the property went over, from time to time, as they were liberated by the respective deaths of the tenants for life thereof respectively. *Ib.*

Held, thirdly, that the four cousins took life interests in the trust fund, as tenants in common, and that on the death of each their shares, then set free, went over to the children of the three cousins *per capita*, and not *per stirpes*. *Ib.*

7. By a will the residue was given to seven persons as tenants in common for life, and on the death of the survivor was to be divided amongst their children then living *per stirpes*. By a codicil the gift to the children was revoked, and the residue was to be divided from and after the several deceases of the seven, and after the decease of the survivor of them, amongst their children *per capita*:—Held, that the words "from and after," etc., were to be read disjunctively, and that, on the death of any of the seven, one-seventh was divisible amongst children of the seven *per capita*. *Cope* v. *Henshaw*, 35 Beav. 420.

8. B. devised copyholds to his sons, G., J., and F., upon certain trusts during the life of his wife, and after her death upon trust to pay the rents equally between his three daughters, R., M., and H., or to sell the same and invest the produce as therein mentioned, and to pay it to his three daughters during their lives for their separate use, and upon further trust "that in case my daughters shall depart this life leaving lawful issue," then the trustees should appropriate "the share of such daughter or daughters to the maintenance and education of such child or children until the age of twenty-one," and directed that his copyhold estates or their produce should be

divided amongst "the whole of my grandchildren, share and share alike, in case there should be no lawful issue but of one of my daughters, that is, the children of George, James, and Frederick, with the child or children of only one of my daughters, share and share alike," and directed that his trustees should then sell if they had not before done so, the produce to be divided amongst such grandchildren, share and share alike, and as they should respectively attain the age of twenty-one, but should he have no grandchildren or not one who should attain the age of twenty-one, then the estate was to go to K.; and as to all the rest, residue, and remainder of his estate and effects, he devised and bequeathed the same to his wife for her own use. All the daughters survived their father; R. died without leaving children, H. died leaving children, M. died having survived her children, but leaving grandchildren:—Held, that the word "issue" was to be read in its widest sense, and would include grandchildren, and that the respective issue of M. and H. took their respective shares by implication, and that they took *per capita*. *Mitchison* v. *Buckton*, 32 L. T. 11; 23 W. R. 480.

1. A testator gave a residue upon trust to pay the produce thereof between his grandchildren A. and B., during their respective lives, in equal shares, and after the death of A. and B. to transfer the capital unto and amongst the children of A. and B. in equal shares, and if there should be no children living at their decease, then upon trust for his personal representatives. A. died, leaving children, in the lifetime of B.:—Held, that B. was entitled to the whole for life, and that the capital was to be divided *per capita* among the children of A. and B. who might be living at B.'s death. *Pearce* v. *Edmeades*, 3 Y. & Coll. 246; 8 L. J., N. S., Exch. Eq., 61; 6 Jur. 245.

2. By his will a testator gave all the residue of his property (after payment of debts and legacies) to trustees, to get in, convert, and invest, and declared the trusts to be, as to one-third of the annual proceeds, for his daughter A. for life, to her separate use; and after her decease the trustees were to apply, for the maintenance, education, and advancement of her children, such one-third of the income, or so much thereof as the trustees should in their judgment think fit, until the decease of the survivor of his three daughters A., E., and M.; and as to another one-third of the income, for his daughter E. and her children; and as to the remaining one-third of the income, for his remaining daughter M. and her children; and on the decease of the survivor of A., E., and M., the whole of the principal moneys, and all such income as should happen to be due and unapplied as aforesaid, was to be divided among all and every the children and child of A., E., and M. in equal shares. A. had one child, E. had four, and M. had seven children:—Held, that on the decease of the survivor the whole residue was to be divided *per capita*, and not *per stirpes*, among the testator's grandchildren. *Nockolds* v. *Locke*, 2 Jur., N. S., 1064; 3 Kay & J. 6; 5 W. R. 3.

Held, that there was in the will no gift of the income of each one-third share to the children of any one daughter; but that the whole, or so much as should be unapplied at the decease of the survivor of the daughters, fell into the residue. *Ib.*

The direction as to maintenance of the grandchildren:—Held, not to afford grounds for presuming that the testator intended a division *per stirpes* of the capital. *Ib.*

3. Bequest of stock after previous life estates to T. P. and J. S. during the term of their natural lives, and from and after their decease to the surviving children of J. S. and T. P., share and share alike:—Held, that the survivorship must be referred to the death of the last tenant for life, which is the period for distribution; and that the persons then taking took *per capita*, not *per stirpes*. *Stevenson* v. *Gullan*, 18 Beav. 590.

4. A mother gave the income of one moiety of her residuary estate to her daughter Margaret for life, and the income of the other moiety to her daughter Mary Ann for life, and then directed her trustees to stand possessed of one moiety of her estate from and after the death of Margaret, and of the other moiety from and after the death of Mary Ann, to pay, transfer, and assign the same unto and amongst all the children of Margaret living at her decease, and the issue then living of any children of hers who should have died in her lifetime, and all the children of Mary Ann who should be living at her decease, and the issue then living of any children of hers who should have died in her lifetime, to be equally divided between or among them if more than one, and if there should be but one such child and no issue of any deceased child, or no such child and only one grandchild or such other issue, then the whole to such one child, grandchild, or other issue; the issue of a deceased child taking their parents' share:—Held, that the full and elaborate language of the will, which clearly imputed a distribution of the whole fund *per capita* among the children of both daughters, could not be controlled on the ground of the inconvenience of keeping a moiety of the fund in suspense from the death of one daughter till the death of the other, though in some cases, where the language was very concise and obscure, the Court had held the share of each of the tenants for life divisible on his death among his own children exclusively. *Swabey* v. *Goldie*, 1 L. R., Ch. D., 380; 33 L. T., N. S., 306.

5. A testator gave real and personal estate to trustees during the lives of eight nephews and nieces whom he named, and the survivors and survivor of them, upon trust to pay one-eighth of the rents to each during their respective natural lives; and directed that in case any should die without leaving issue, the share of him, her, or them so dying should go among the survivors in the same manner as their original shares; and in case any of the eight legatees should die leaving issue, the share original and accruing of him, her, or them, so dying, should be paid to and equally among such issue; and after the decease of the survivor of the eight legatees, the testator devised such real and personal estate unto the issue then living of the eight legatees and their heirs; the share of the issue in the fee-simple to be in the same proportion as the rents and profits he or they might then be in receipt of:

—Held, that on the death of the survivor of the eight legatees who had died and left children, such children to take *per stirpes*, but the members of each *stirps* to take equally. *Bradshaw* v. *Melling*, 23 L J., Ch., 603.

1. A testatrix bequeathed personalty in trust for A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R S share and share alike, "and after the decease of the said F. H. S and R. S. to their children share and share alike, and to their heirs for ever" F. H. S. died without having had issue, R. S. survived him and died leaving children, and A. B., who survived them both, died without issue. Upon a petition by the children of R. S. for payment out of a portion of the trust fund which was in court: —Held, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of F. H. S. and R. S. to their respective children, and that there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F. H. S. and the children of R. S. *Re Hutchinson's Trusts*, 21 L. R., Ch. D., 811; 51 L. J., Ch., 924; 47 L. T. 573.

V. WHEN GIFT TO CHILDREN SUBSTITUTIONARY.

2. Bequest to executors in trust, that they shall pay, etc., unto and amongst the testator's two brothers and his sisters, or their children, in such shares, etc., as the trustees or the major part of them, or the survivor, his executors, etc., shall think fit. All the children living at the death of the testator held entitled with the parents, *per capita*, the Court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

3. Bequest (in effect) to A. for life, and in default of her appointment equally amongst "her sisters, or their children, living at her decease":—Held, first, that the children took by substitution, and therefore that the children of a sister who was dead at the date of the will could not take; and, secondly, that such of the children as were entitled took *per stirpes*. *Congreve* v. *Palmer*, 16 Beav. 435; 23 L. J., Ch., 54; 1 W. R. 156.

Distinction between a gift to several, with remainder to their children, and one to several with a substitutionary gift to their children, in respect to the children taking *per stirpes* or *per capita*. *Ib.*

4. On a bequest of stock to the wife for life, and afterwards a moiety to be received and divided equally amongst the testator's brothers and sisters, and their issue:—Held, that the brothers and sisters living at the testator's death took vested interests, liable to be divested by their dying, leaving issue, before the period of division, and that the issue took by substitution. *Shailer* v. *Groves*, 6 Hare 162. But see this case as reported in 16 L. J., N. S., Ch. 367; 11 Jur. 485. See also 2 Jur, 4th ed., page 737, n.

5. A testater gave, devised, and bequeathed the residue of his estate unto all and every his brothers and sisters, or their issue, to be equally divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and to their respective heirs, executors, administrators, and assigns. The testator had four brothers and three sisters. All the brothers died several years before the date of the will. Two of the sisters survived the testator, and three of the brothers and the deceased sister left issue:— Held, that the residue was divisible into six equal shares, the surviving sisters each to take one share, and the issue of each deceased brother who left issue and of the deceased sister to take respectively one share, the issue of each *stirps*, of whatever degree, to take *inter se* equally *per capita*. *Gowling* v. *Thompson*, 16 W. R 1131; 19 L. T., N. S, 242.

6. Bequest of residue upon trust for A. for life, and then to divide unto and equally between all the children of A. living at his death except B., and amongst the issue of any children of A. who should be then dead, and also among the issue of B., such issue taking their respective parent's share:— Held, that the issue of B. took *per stirpes*, as though a share had been given to B. with the other children of A, and B.'s issue were taking such share by substitution. *Minchell* v. *Lee*, 17 Jur. 727.

7. A testator bequeathed to his daughter a perpetual annuity of 250*l.* a year. By a codicil he directed, that instead of the money being paid to her it should be paid to trustees for her, and he proceeded thus: "After my daughter C.'s death, I give the above money to be divided as follows: to her sister A. 100*l.* a year, and all the rest to be equally divided between her other brothers and sister or their children." All her brothers and sisters predeceased C.:—Held, first, that A. was entitled to a capital sum sufficient to produce 100*l.* a year; secondly, that the grandchildren who survived their parents took by substitution; and, thirdly, that they took *per stirpes*. *Timins* v. *Stackhouse*, 27 Beav. 434.

8 A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares *per capita*." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life:—Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares. *Re Sibley*, 5 L. R., Ch. D., 494; 46 L. J., Ch., 387; 37 L. T., N. S., 180.

9. Bequest to A. for life, and after her decease to the testator's four children, the survivor or survivors of them, equally, or their heirs lawfully begotten. One of the four children died in the life of A.:—Held, that his children took one-fourth by substitution. *Price* v. *Lockley*, 6 Beav. 180; 7 Jur. 143. And see *Armstrong* v. *Stockham*, 7 Jur. 231.

10. A testator gave a legacy of 200*l.* to each of his twelve first cousins, *nominatim*, and then, noticing that one was dead, he gave the legacy intended for him to his children. He gave his wife a life interest in his residuary and personal estate, to be enjoyed in specie; and, from and immediately after his wife's decease,

he gave his executors full power to collect all his property together, and sell the houses and other estates, and to convert into money all his funded property, and then to pay first certain legacies, and then the whole of the remainder of his property was to be divided, share and share alike, among his aforesaid twelve first cousins and their children. By a codicil he took away the legacy given by his will to his cousin, Mrs. B., but expressed his intention not to exclude her children from the benefit she might thereafter possess in the final division of his property after his wife's decease:—Held, that the cousins who survived the testator took vested interests absolutely, subject, as to those who died leaving issue, to be divested for the benefit of their children, by way of substitution. And that the children of the cousin alluded to by the testator as already dead were entitled to a twelfth share of the residuary estate, as representing such deceased cousin. *Burrell* v. *Baskerfield*, 13 Jur. 311; 18 L. J., N. S., Ch., 422; 11 Beav. 525.

1. Bequest to the testator's two sisters for their lives, and after the death of the survivor "to be equally divided between the testator's surviving brothers and sisters, or their children equally." The brothers and sisters having all died in the life of the last tenant for life.—Held, that those children only who survived the tenant for life participated, and that they took *per capita*. *Atkinson* v. *Bartrum*, 28 Beav. 219; 9 W. R. 885.

Survivorship held to apply not only to the original, but to the substituted class. *Ib.*

VI. GIFT TO A. AND B.'S CHILDREN, OR TO A. AND CLASS B. INTEREST TAKEN BY A.

2. Bequest between and amongst all and every the child or children of Thomas T. deceased, and Henry T., in equal shares:—Held, that all the children of Thomas and Henry took equally, *per capita*, and not *per stirpes*, and that Henry himself took nothing. *Re Davies*, 29 Beav. 93; 7 Jur., N. S., 118; 9 W. R. 131.

3. A testator devised and bequeathed his real and personal estate to trustees absolutely, upon trust, as to one moiety of the personalty, to pay and divide the residue equally between and amongst his nephew John and his niece Hannah (whom he described as the children of his late brother Joseph), "and all and every the children of my late nephew Mark Ingle and my niece Eliza Wheelwright," share and share alike. He then desired his trustees to stand possessed of a moiety of the proceeds of the sale of his realty, upon trust to divide the same as before mentioned. In a codicil he referred to the "legacy left and apportioned to my niece Eliza." Some years before the date of the will a brother of the testator, named Mark, had died, leaving three sons, and a third son named Mark. The evidence showed that, at the testator's death, the nephew Mark, who had had a son born to him in England, and had emigrated to America, where he had another child, was still living; also, that the testator knew of the birth in England of the child of Mark, and of his emigration to America, and that from such circumstances he (the testator) had, shortly before the date of the will, been led to suppose that Mark might be dead:—Held, that by the words "and my niece Eliza" the testator intended a gift to Eliza, and not a gift to the children of Eliza. *Re Ingle*, 11 L. R., Eq., 578; 40 L. J., Ch., 310; 24 L. T., N. S., 315; 19 W. R. 676.

4. A bequest of a residue to be divided equally "amongst all the children of my late cousin E., and my cousin P., and their lawful representatives," is a bequest to the children of E. and to P. himself, and not to the children of P. *Lugar* v. *Harman*, 1 Cox 250; 2 Bro. C. C. 85.

5. A testator directed some property to be divided at a future period amongst the then surviving children of John and Sarah Worn, and Catherine Hales. Sarah was a sister of the testator, but Catherine was a stranger, and Sarah had children, but Catherine was a spinster at the date of the will:—Held, that Catherine, personally, and not her children, was entitled to participate. *Lugar* v. *Harman* (1 Cox 250) followed. *Stummvoll* v. *Hales*, *Re Johnstone*, 34 Beav. 124; 10 Jur., N. S., 716; 12 W. R. 1137; 10 L. T., N. S., 807; 4 N. R. 473.

6. A testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that, upon the decease of any or either of them, the principal of the fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died, leaving two children:—Held, that her fund was divisible among these children, and among the children of the three other nieces, it being proper to give some force to the word "of," and that word being referable to the word "children" as the last antecedent. *Peacock* v. *Stockford*, 3 De G. M. & G. 73.

7. A bequest of residue "to all the children of my brother R. and my sister M., to be equally divided between them, share and share alike." R. and M. having equal legacies in a former part of the will, and there being nothing in the context from which an intention could be inferred that M. was personally to take an equal share in the residue with the children of R, this construction was rejected, and the gift was held to pass the residue to the children of R. and the children of M. in equal shares. *Mason* v. *Baker*, 2 K. & J. 567.

8. A testator gave his real estate to trustees upon trust to sell, the proceeds to be subject to the disposition of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto "unto and equally amongst all the children of my said brother-in-law, Dr. J. D., and the said R. A., of C., and I direct that the same shall be vested legacies at the time of my decease":—Held, first, that the gift was to the children of Dr. J. D. and R. A. himself. *Re Featherstone's Trusts*, 22 L. R., Ch. D., 111; 47 L. T. 538; 31 W. R. 89; 52 L. J., Ch., 75.

Held, secondly, that R. A. having died during the lifetime of the testator, the words "and I direct that the same shall be vested legacies at the time of my decease" indicated the testator's intention to give the whole of

the residue to such only of the residuary legatees as should be living at his death. *Ib.*

1. Testator bequeathed to J. W. 1,000*l.*; to his sister M. W. 200*l.*; to their mother 200*l.*; and to the three aunts of J. W. and his sister M. W. 100*l.* each :—Held, that under the last bequest the aunts only, and not the sister, took. *Trail* v. *Kibblewhite*, 12 Sim. 5; 10 L. J., N. S., Ch., 200; 5 Jur. 501.

2. A testatrix, after giving a specific bequest to A. B., who was her husband's niece, but whom she there described as "my niece A. B.," afterwards gave the residue of her property thus, "unto all my nephews and nieces":—Held, that the nephews and nieces by blood of the testatrix were entitled to the residue, to the exclusion of A. B. *Wells* v. *Wells*, 18 L. R., Eq, 504; 43 L. J., Ch., 681; 31 L. T. 16; 22 W. R. 893.

3. Real and personal property was devised and bequeathed to trustees on trust to pay a moiety of the income to J. for her life, and the other moiety of the income to E. for her life; and on the death of "either" the property was to be held in trust for all the children of "each" who should be living at her decease when and as they should respectively attain the age of twenty-three years, or, being daughters, should marry under that age, in equal shares:—Held, that on the death of J., who died first, her children took the moiety held in trust for her of the property in exclusion of the children of E. *England* v. *England*, 17 W. R. 719; 20 L. T., N. S., 648.

Held, also, that the gifts to the children of J. and E. were not void on the ground of remoteness. *Ib.*

XXXIV. What may be Devised or Bequeathed.

I. CONTINGENT AND EXECUTORY INTERESTS.

4. Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Moor* v. *Hawkins*, 2 Eden 342.

5. A possibility is devisable. *Perry* v. *Phelips*, 1 Ves. J. 254, 255.

6. Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller* v. *Faure*, 1 Ves. 85.

7. A. devises a term for years to B. for life, remainder to C.; C., in the life of B., devises his remainder. This is good, and amounts to C.'s declaring by his will that his executor shall stand possessed of the term in trust for the devisee. *Wind* v. *Jekyl*, 1 P. W. 572.

8. A contingent estate in fee under a shifting clause may be devised both by the old and new law. *Ingilby* v. *Amcotts*, 21 Beav. 585; 2 Jur., N. S., 410, 556; 25 L. J., Ch., 769; 4 W. R. 433.

Devise of estate X. to A. in fee, with an executory shifting limitation to B. and her heirs, in the event of A. becoming entitled to another estate, Y. B. died first, and her estate descended on C., her heir, who by his will in 1851 made a general devise of his real estate. Some months after his death, the event took place on which the X. estate was to shift from A. to B :—Held, that the estate X. passed by C.'s will, and did not descend either to the heir of B. or of C. *Ib.*

II. EQUITABLE INTERESTS.

9. A tenant in tail of an equity of redemption may devise it for the payment of debts. *Turner* v. *Gwinn*, 1 Vern. 41.

10. Any equitable interest is devisable. *Terry* v. *Phelips*, 1 Ves. J. 254.

Testator cannot by any words devise lands, either under the statute or at common law, which he had not at the time of making the will. *Ib.*

An equitable lien is an equitable obligation to do according to conscience; and a devise of it good in equity. *Id.* 255.

11. A covenant to settle on particular persons all the covenantor's personal estate, subject, nevertheless, to any disposition or changes he might make by will:—Held, only to amount to a provision in case of intestacy, and not preventing the party from disposing of the property by will to other persons. *Stocken* v. *Stocken*, 4 Myl. & C. 95; 7 L. J., N. S., Ch., 305; 2 Jur. 693. And see S. C. 2 Myl. & K. 489; 4 Sim. 152.

See also following Subdivisions, and XXXV. III. *post.*

III. RIGHTS OF ACTION.

12. A right to set aside a release may be devised *Drew* v. *Merry*, 1 Eq. Abr. 175.

13. The right to set aside a conveyance improperly obtained by a solicitor from his client, is devisable. *Uppington* v. *Bullen*, 2 Dr. & War. 184; 1 Con & L. 291.

14. A right to sue is a devisable interest. *Gresley* v. *Mousley*, 5 Jur., N. S, 583; 28 L. J., Ch., 620.

Property, which has been made the subject of a voidable conveyance, is capable of being devised, and the devisee is entitled to sue for the purpose of setting aside such conveyance. *Ib.*

A person, who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of the 7 Will. 4 & 1 Vict., c. 26. S. C. 4 De G. & J. 78; 5 Jur., N. S., 583.

IV. DEVISE BY PURCHASER AFTER CONTRACT TO PURCHASE.

1. *Where Contract not Completed,* 7789.
2. *Effect of Subsequent Conveyance as a Revocation.* See V. VII. 5 *ante.*
3. *Where Option to Purchase.* See CONVERSION, I. II. 2.

1. Where Contract not Completed.

1. A. articles to purchase lands in trust for B., and before any conveyance made by B., by will directed all his freehold estate to be settled on C., and his first son, etc. The lands articled for will pass by the will. *Greenhill* v. *Greenhill*, 2 Vern. 679; Pre. Ch. 320; Gilb. Eq. Rep. 77.

2. Estate contracted for will pass by a subsequent devise of all lands, the devisor being equitable owner under the contract. *Capel* v. *Girdler*, 9 Ves. 510.

3. Bequest of "the whole of my property of whatever description, freehold, leasehold, etc., of which I may be possessed at death":—Held, to pass real estate, agreed to be purchased by testator. *Holmes* v. *Barker*, 2 Madd. 462.

4. If A. articles to purchase lands, but before the conveyance devises all his land to be sold to pay debts and legacies, the lands will pass, though he was not seised at the making of his will, neither did he republish it. So, if A. devises all his lands for payment of his debts, and then purchases land, equity will decree a sale of that land, though there were no precedent articles. *Prideaux* v. *Gibbon*, 2 Ch. Ca. 144.

5. From the execution of the contract, the estate is in equity the property of the vendee, will descend, and is devisable as such. *Seton* v. *Slade*, 7 Ves. 274.

6. If A. buys copyhold lands, and dies before admittance, having first devised all his copyholds to T. S., the copyhold lands contracted for will pass by the will; or in any case, if there are articles for a purchase, and the purchaser makes his will and dies before conveyance, the lands shall pass in equity. *Davie* v. *Beardsham*, 1 Ch. Ca. 39.

7. Lands agreed to be purchased pass by general words in a will, such as, "or elsewhere." Republication by a codicil. *Potter* v. *Potter*, 1 Ves. 437; 3 Atk. 719; Ambl. 98 upon other points.

8. One articles to buy certain lands; he thereby becomes seised thereof in equity. But where A. devised all his real and personal estate, and afterwards articled to purchase lands, and then died, the heir at law was held to be entitled to this estate, as not passing by the will: *secus*, had the articles for the purchase been before the will; for then the estate would have passed. *Langford* v. *Pitt*, 2 P. W. 629.

9. A., having agreed to purchase a real estate, the purchase money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons all his goods, cattle, chattels, personal estate, and effects whatsoever; and in case they died without issue, etc., he gave the children's share of the personal estate and effects over: testator dying before the purchase could be completed:—Held, that the agreement ought to be specifically performed, and that, the words of the will being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, etc. *Cane* v. *Cane*, 2 Eden 139.

10. By general devise, an estate in which devisor has acquired an equitable title passes. *Broome* v. *Monck*, 10 Ves. 605.

Contract for purchase generally; by a devise of real estate before the purchase is complete, the money will pass. *Id.* 613.

Devisee claiming benefit of contract for purchase of estate, directed to go to uses of will, the title proving defective, has no claim upon personal estate, either to have purchase money or another estate purchased, or the purchase completed notwithstanding defects. *Id.* 597.

Estate contracted for after general devise will pass by republication, and must be paid out of personal estate. *Id.* 605.

11. Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract is dissolved, yet the purchase money shall not be sunk into his personal estate, but shall be laid out in other lands to the same uses as he had devised the land contracted for. *Whitaker* v. *Whitaker*, 4 Bro. C. C. 31

12. Decree, upon the answer admitting a contract and a letter offering to sell at a valuation, for a conveyance on payment of the purchase money into the bank by the plaintiff on a certain day, in default of payment the bill to be dismissed with costs. No binding contract until payment: the estate, therefore, did not pass by a previous devise, but descended to the heir. *Gascarth* v. *Lowther*, 12 Ves. 107.

13. A vendor and a purchaser being in treaty for the sale and purchase of an estate, the vendor wrote to his solicitor, stating that the purchaser had agreed to purchase his estate for 60,000*l.*, and requested him to settle an agreement on that basis for them to sign, adding that he had given to the purchaser a copy of this letter, not signed, as a memorandum. The purchaser subsequently wrote to the vendor's solicitor, inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject matter of the treaty to trustees upon certain trusts:—Held, that, at the date of his will, the purchaser had a devisable interest in the estate. *Morgan* v. *Holford*, 1 Sm. & G. 101; 17 Jur. 225; 1 W. R. 101.

14. In 1874 the plaintiff entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee:—Held, that the real estate contracted to be purchased by the

plaintiff passed to H. under the devise of trust estates. *Lysaght* v. *Edwards*, 2 L. R., Ch. D., 499; 45 L. J., Ch., 554; 24 W. R. 778; 34 L. T., N. S., 787.

XXXV. Devise of Copyholds.

I. FORMALITIES OF WILL.

1. Copyhold surrendered to the use of a will shall pass by a will attested by one or two witnesses only. *Wagstaffe* v. *Wagstaffe*, 2 P. W. 258. *Appleyard* v. *Wood*, Sel. Ch. Ca. 42.

Though, where a copyhold is surrendered to the use of a will, there need not be three witnesses to such will, because the copyhold passes by surrender and not by the will, yet a trust, or equity of redemption of a copyhold, cannot pass by a will unless attested by three witnesses. *Id.* 261.

2. A devise of a copyhold, surrendered, etc., signed only by the testator, is sufficient. *Fenwulet* v. *Pasavant*, 2 Ken. Ch. 109.

3. Where the legal estate is in trustees, so that the *cestui que trust* cannot surrender it, it will pass by his will, though unattested; for *equitas sequitur legem*. *Tuffnell* v. *Page*, 2 Atk. 37; Barnard. 91. *Carr* v. *Ellison*, 3 Atk. 75.

So also copyhold estate surrendered to use of will. S. C. Dick. 76.

4. J. surrendered to the use of his will, to be published in the presence of three or more credible witnesses. He made his will and devised the copyholds, but the will not being attested by any witness:—Held, the copyholds did not pass. *Godwin* v. *Kilsha*, Ambl. 684.

5. Testator devised to a charity his copyhold lands, which he had previously surrendered to his will. His will consisted of eleven sheets, two of which he signed *in extremis*, and then died. There were no witnesses; yet held a good appointment under 43 Eliz., c. 4. *Att.-Gen.* v. *Sawtell*, 2 Atk. 497.

6. Copyhold lands are not devisable by will, but the devisee may come and be admitted, as though his name were inserted in the surrender. Devise of customary freeholds, where there is no custom to surrender to use of will, must be according to the Statute of Frauds. *Hussey* v. *Grills*, Ambl. 300, 301.

7. By the custom of the manor of Shap, the legal interest in land of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words are "bargain, sale, and surrender," and on the presentment or production of which admittance is granted to the alienee; but an equitable interest in such customary lands is capable of being passed by devise, without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them, by a deed of bargain, sale, and surrender, to a trustee, upon trust, for such person as the tenant, by any deed, instrument in writing, or by his last will, or any codicil thereto, or any instrument in the nature of a last will or codicil to be by him legally executed, should appoint or devise the same; and under his conveyance the trustee was admitted:—Held, that the equitable interest in the lands would not pass by an unattested codicil of the tenant. *Willan* v. *Lancaster*, 3 Russ. 108.

8. C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter, L.: he then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared the testator died: these minutes were proved in the Spiritual Court as a testamentary paper:—Held, this paper being proved in the Spiritual Court was insufficient to pass the copyhold estate. *Carey* v. *Askew*, 2 Bro. C. C. 58; 1 Cox, 241. And see 8 Ves. 492, 498, 499.

Probate as Evidence.] See PRACTICE (EVIDENCE).

II. SURRENDER WHEN NECESSARY, AND EFFECTS.

9. Where the legal estate is in trustees, copyhold lands will pass under the will of *cestui que trust*, without surrender before the statute. *Gibson* v. *Rogers*, Ambl. 94; 1 Ves. 485; 4 Ves. 288. n.

10. Devise of copyhold by mortgagor or *cestui que trust* would be good without surrender of copyhold. *Gibson* v. *Styles*, 9 Mod. 267.

11. An equity of redemption in copyholds passes by will without surrender. *Macnamara* v. *Jones*, 1 Bro. C. C. 481.

12. The trust of a copyhold not necessary to be surrendered. *Macey* v. *Shurmer*, 1 Atk. 390.

13. Copyhold estates pass by the surrender, not by the will, which operates as a declaration of uses. *Att.-Gen.* v. *Vigor*, 8 Ves. 286.

14. Devise of copyhold, good without mention of surrender. *Manwood's case*, Cary, 25.

15. Copyhold estates surrendered to the use of mortgagees, but they had not been admitted; the mortgagor devising them must surrender to the use of his will. *Kenebel* v. *Scrafton*, 8 Ves. 30.

16. Surrender of copyhold to such uses as he shall by will appoint, does not give effect to a will made before. *Warde* v. *Warde*, Ambl. 299.

17. Whatever words there may be in a will relative to copyhold lands, they can have no effect if there were no surrender; for nothing

can pass a legal estate, but what will pass it in law. *Trodd* v. *Downs*, 2 Atk. 304; 9 Mod. 202.

1. Testator by his will taking notice that he had not surrendered copyhold estates which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds are not devisable by custom, yet the surrenders decreed to be made. *Wardell* v. *Wardell*, 3 Bro. C. C. 116.

2. A testator, being absolute owner of some copyholds of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor to which he had not been admitted, but subject to trusts under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered, to the use of his will, all his copyholds holden of that manor, or which he was seised of, or entitled to, in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainder over:—Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the devisor was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts to which some of the copyholds were subject. *Abdy* v. *Gordon*, 3 Russ. 278.

3. In two manors in Durham there is no custom for surrendering to the uses of the will, but the tenant devests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator, R. N., being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N., in fee. The widow being alive at the time the testator R. N. made his will, and died, it was held that the copyholds in the manor of Houghton passed by his will. With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator, R. N.:—Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor:—Held, also, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they, taking benefits under the will, were bound to elect. *Nicholson* v. *Nicholson*, Taml. 319.

4. A., seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted, for A., and after his death for the purposes of his will; but B. executed no declaration of trust. A. made a general devise of all his real estates, and after A.'s death B. was admitted:—Held, that he was a trustee for the devisees, and not for A.'s customary heir. *Wilson* v. *Dent*, 3 Sim. 385.

5. A testator being entitled to a reversion in fee in copyhold property, which he had not surrendered to the use of his will, and being also entitled to certain freeholds in fee simple in possession, made a will in 1804, by which he affected to devise these copyholds, and all other his freehold, leasehold, and copyhold estates, to his wife for life, with remainder to his three younger children, Thomas, John, and Eliza. In 1807 he made another will, commencing with the words, "This is the last will and testament of me," etc.; and thereby after reciting, that on his death his eldest son, Edward, would become entitled to all his freehold estates, the testator gave all his real and personal estates to his wife for life, and after her death all his "property" and effects to all his children, except Edward, equally, share and share alike. The testator died in 1807, leaving his said four children, and also two others born since the date of the former will. In 1851 the reversion of the copyholds fell into possession:—Held, that the Court would, if necessary, supply a surrender in favour of the objects to whom the first will expressly devised the copyholds. Held, also, that as there was freehold property upon which the general devise in the second will could operate, there was no ground for deciding that it revoked the intended devise of the copyholds by the former will. Held, further, that it was impossible to consider the intention to devise the copyholds expressed in the first will to be a reason for supplying a surrender to the uses of the testator's will generally, and thus to make the general devise in the second will operate to pass the copyholds, by revoking the former will, except so far as it expressed that intention, because the intention expressed by the first will was to give all the copyholds to three only of the five objects to whom the general devise in the second will was made, and therefore that intention could not apply to the second will. Held, further, that though the words of the second will did not sufficiently express an intention to pass the copyholds to enable the Court to supply a surrender to the uses of that will, yet if a surrender were supplied generally to the use of the testator's will, the general devise in the second will would pass the surrendered copyholds. *Freeman* v. *Freeman*, 1 Kay, 479; 2 Eq. Rep. 522. Affirmed 23 L. J., Ch., 838; 2 W. R. 658.

Whether in the absence of a special custom it is necessary to surrender a reversion or remainder in copyhold property to the use of a will. *Quære. Ib.*

A will so called of copyholds does not operate strictly as a devise, but rather as a designation of the person to take under the previous surrender, analogous in some respects to the

appointment of a use under a power created by deed. *Ib.*

Supplying Surrender.] See COPYHOLDS.

III. DEVISE BEFORE ADMITTANCE.

1. Devisee of a copyhold, who has not been admitted, cannot devise the same. *Wainewright* v. *Elwell*, 1 Madd. 627.

2. When a testator, at the making of his will, has the legal seisin of a copyhold, and devises it, and the devisee is not admitted, nothing passes by the will of the devisee, and an admittance of the devisee subsequent to his will will not alter the case. But where the testator has only an equitable interest in a copyhold and devises it, the equitable interest will pass to the devisee, and the devisee, though never admitted, may devise such equitable interest. *Phillips* v. *Phillips*, 1 Myl. & K. 649; 1 L. J., N. S., Ch., 214.

3. The right of the equitable owner of a copyhold estate to dispose of his equitable interest by will, cannot be controlled by the custom of a manor. *Lewis* v. *Lane*, 2 Myl. & K. 449.

4. A copyhold estate will not pass by the will of a devisor who dies before admittance. *King* v. *Turner*, 2 Sim. 545. Reversed, 1 Myl. & K. 456; Coop. *temp.* Brough. 64.

5. A testator seised in fee of a copyhold estate, devised it to his wife for life; and after her decease he (without giving any estate to his executors) directed them to sell the copyholds, and then divide the proceeds. The testator's widow was admitted for life; and after her decease the executors sold the estate, and executed a bargain and sale to a purchaser, and he, without having been admitted, made his will, and devised the estate to his wife; he was subsequently admitted to the copyhold estate, and died. Upon a suit to administer the estate of the purchaser's wife:—Held, that the admission of the wife of the first testator inured for the benefit of the purchaser under the executors; that the customary heir of the purchaser took no estate in the copyholds, but that they passed to the wife as devisee. *Seaman* v. *Woods*, 24 Beav. 372; 4 Jur., N. S., 725; 27 L. J., Ch., 538.

IV. AFTER-ACQUIRED COPYHOLDS.

6. One by will, reciting that he was seised of a copyhold, devises all his real estate, not being seised of any copyholds, but being seised of freehold estates at the time; he afterwards bought a copyhold:—Held, it did not pass. *Warde* v. *Warde*, Ambl. 299.

7. Copyhold estates purchased and surrendered to uses declared or to be declared by will concerning the same, passed according to a will previous to the purchase, devising all copyholds generally; and, therefore, containing a description applicable to them. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

8. After-purchased copyholds would pass by a previous will, if surrendered to the uses of that will. *Heylyn* v. *Heylyn*, Cowp. 130; *Spring* d. *Titcher* v. *Biles*, 1 T. R. 435. n.

9. The lord of a manor before the Wills Act devised all his real estates; subsequently he purchased freeholds held of his manor:—Held, that the freeholds did not pass by his will. Distinction between escheat and purchase explained. *Delacherois* v. *Delacherois*, 4 N. R. 501; 10 Jur., N. S., 886; 10 L. T., N. S., 884; 11 H. L. Ca. 62; 13 W. R. 24.

V. BY GENERAL DEVISE.

10. Where a man devises all his estate, real and personal, to a wife or child, and has no other real estate but the copyhold, it shall pass by those general words. *Smith* v. *Baker*, 1 Atk. 386.

11. C. gave all his messuages, lands, tenements, and hereditaments in A. and elsewhere, and all other his real estates, to trustees for 500 years, and after the determination of the term he gave all the premises to his wife for life, sans waste. All the estates having come originally from the wife, testator could not mean to sever the copyhold from the freehold; therefore, by the general words of the will, the copyhold passed. *Carr* v. *Ellison*, 3 Atk. 73.

12. By a devise of all lands and tenements, only freeholds will pass; yet, if the testator had nothing but copyholds, they shall pass; and leaseholds, if there are no other, will pass by these words. *Exp. Caswall*, 1 Atk. 560.

13. Copyhold surrendered to use of a will will pass by a general devise of lands, notwithstanding there are freeholds. *Tendril* v. *Smith*, 2 Atk. 85.

14. Devise of "all lands, messuages etc.," will pass copyholds, where the introductory words show testator's intent to dispose of all his estate. *Goodwyn* v. *Goodwyn*, 1 Ves. 226

15. Whether by words "all the rest of my estate and fortune" in a will, copyhold estate as well as freehold passed, *quære*. *Dod* v. *Dod*, Ambl 275.

16. Testator gave to his executors "all his goods, estates, bonds, debts, to be sold," etc. The word "estates" will pass a copyhold which was surrendered to the use of the will. *Jongsma* v. *Jongsma*, 1 Cox, 362.

17. Estate held by copy of court roll according to custom of manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold.—Held, to pass under a residuary bequest of personal estate, and not with copyhold messuages, etc., with limitations in strict settlement, upon whole will and circumstances. *Watkins* v. *Lea*, 6 Ves. 633.

18. Copyhold estate shall not pass by general description, where there is freehold to satisfy the words, though it had been supposed to be freehold; and the first devise was for payment of debts, and then given to a younger child, otherwise provided for. *Lindopp* v. *Eborall*, 3 Bro. C. C. 188.

19. Under a devise of "all my property," copyhold estate passed to the devisee and his heirs. *Nicholls* v. *Butcher*, 18 Ves. 193.

20. A testator seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever":—Held, that the copyholds and leaseholds

for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall* v. *Brome*, 6 Sim. 99.

1. If I devise all my lands and hereditaments in Dale, and have a manor in Dale, the manor, as it is an hereditament in Dale, will pass; but if I have the manor in Dale, and also land there, not parcel of the manor, it is a question whether the manor will pass by devise of all my lands. *Haslewood* v. *Pope*, 3 P. W. 322.

If I have a freehold and copyhold lands in Dale, and devise all my lands and hereditaments in Dale to pay my debts, only my freehold shall pass if that be sufficient; *secus*, if I have surrendered the copyhold to the use of my will. *Ib.*

2. Copyholds held not to pass under a devise of "all and every my freehold hereditaments and estate in the county of Surrey," although the freeholds and copyholds were to some extent intermixed, and usually let together. *Quennell* v. *Turner*, 13 Beav. 240; 20 L. J., N. S., Ch., 237; 15 Jur. 547.

3. Devise and bequest of freehold, leasehold, copyhold, and 1,000*l.* stock to A. B., and C., *tenendum*, the said last-mentioned freehold and leasehold messuages, tenements, estates, and premises, and the 1,000*l.*, upon trust for A.:—Held, that A. was not interested in the copyholds, which descended to the customary heir. *Jackson* v. *Noble*, 2 Keen, 590; 7 L. J., N. S., Ch., 133; 2 Jur. 251.

4. A testator gave and devised "all the rest, residue, and remainder of my property, whether freehold or personal, and wheresoever situate, to my wife, her heirs and assigns for ever, being fully satisfied that she will dispose of the same, by will or otherwise, in a fair and equitable manner, to our united relatives, bearing in mind that my relatives are generally in better worldly circumstances than hers are." The testator died seised of copyhold as well as freehold estates:—Held, first, that no trust was created by the will, but that the wife was entitled to the property absolutely. Held, also, that, looking to the whole scope and object of the will, the copyholds passed under the general devise. *Reeves* v. *Baker*, 18 Jur. 588; 23 L. J., Ch., 599; 2 W. R. 354; 2 Eq. Rep. 476; 18 Beav. 372.

5. A gift of "all my freehold estate and effects wheresoever situate," does not include copyholds. *Re Ballard*, 22 W. R. 433.

VI. BY GENERAL DEVISE (WHEN UNSURRENDERED).

6. Devise of all testator's "real and personal estate subject to debts," affects copyhold land unsurrendered, for the benefit of the creditors, there being no freehold lands; if there had been, it would have been otherwise. *Ithell* v. *Beane*, 1 Ves. 215; Dick. 132.

7. Devise of "all freehold and copyhold lands, the copyhold part whereof I have surrendered to the use of my will, subject to debts"; some were surrendered, others not: the latter did not pass. A person entitled under a will, and also paramount and against it, must elect. *Wilson* v. *Mount*, 3 Ves. 191.

8. Devise of copyhold estates in general terms unrestrained, to a child, passes all copyholds surrendered and not surrendered to use of will. *Blunt* v. *Clitherow*, 10 Ves. 589.

9. Where there is a surrender of copyhold lands to the use of the will, they will not pass by a general devise of lands. *Hawkins* v. *Leigh*, 1 Atk. 387. See 1 P. W. 60.

10. Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts will include copyholds, if required; and the want of a surrender will be supplied. *Kidney* v. *Coussmaker*, 12 Ves. 136.

11. Copyholds not intended to be comprehended in a devise to the wife in the general terms, "real and personal estate," so as to entitle her to have the surrender supplied. *Church* v. *Mundy*, 12 Ves. 426.

Upon appeal, the Lord Chancellor's opinion being that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate: inquiries were directed to ascertain that fact, and also whether there was any custom of surrendering a vested interest in reversion or remainder expectant upon an estate tail. S. C. 15 Ves. 396.

12. Construction of a residuary devise as including under the general words, "estate and effects," a copyhold, not surrendered in favour of a younger son, subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington* v. *Pennington*, 1 Ves. & B. 406.

13. Testator, having surrendered some only of his copyholds to use of will, devised all his copyhold messuages, etc., whatsoever and wheresoever, and which he had surrendered to use of his will:—Held, that surrendered and unsurrendered passed equally. *Strutt* v. *Finch*, 2 Sim. & S. 229.

14. A devise of "all my real esate" will carry copyhold surrendered, and, if no freehold, will for favoured objects carry copyhold not surrendered. *Wentworth* v. *Cox*, 6 Madd. 363.

15. Devise of "all my freehold messuages, etc., the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered as well as surrendered copyholds. *Oxenforth* v. *Cawkwell*, 2 Sim. & S. 558.

16. Testator, seised of freehold and copyhold estates in the counties of H. and C., devises all his lands, tenements, and messuages and hereditaments in those counties, to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, having, in the beginning of the will, declared that as to all his worldly estate he disposed thereof as therein followed; but not having surrendered the copyhold to the use of his will, the Court would not supply the want of a surrender, there being freehold estates to answer the words of the devise. *Milbourne* v. *Milbourne*, 1 Cox, 247; 2 Bro. C. C. 64.

17. A., by will, gave all his real estate, except certain copyholds, which he was about to settle on similar trusts as had been declared by a former settlement, in favour of his wife and children, but, so far as the same should be subject to the trusts of his will, he devised

them upon trust for his wife and children. By a voluntary settlement subsequently executed, he covenanted to surrender the copyholds to trustees, to be held upon other trusts in favour of his wife and children. He died without having surrendered the copyholds to the trustees:—Held, that they passed under and were subject to the trusts of the will. *Tatham* v. *Vernon*, 7 Jur., N. S., 815; 9 W. R. 822; 4 L. T., N. S., 531.

1. A testator was in 1792 possessed of freehold lands, and of an equitable fee in copyhold estate. He made a will, by which he subjected his real estate in aid of his personalty to the payment of his debts, and, subject thereto, he gave all his "messuages, tenements, lands, hereditaments, and premises, with the buildings, mines, etc.," thereon and therein, over which he had a disposing power, to trustees, for 500 years, out of the rents, etc., or by assignment, etc., of the term, to raise money, to pay his debts, legacies, and after payment thereof to apply the rents, etc., or the remainder of the estate to the use of his grandson W. C. on his attaining twenty-three, and to raise 1,000*l.* to pay to his other grandson R. C. on his attaining twenty-three, and in order that these grandsons might be properly educated, the testator directed that 200*l.*, until W. C. should attain twenty-three, and 100*l.* afterwards, and till R. C. should attain twenty-three, should be raised for that purpose. By the custom of the manor, the copyholds which the testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. The testator had not made any surrender of them to the use of the will. When he died in 1799, his only daughter (the mother of W. C. and R. C.), was his customary heir, and on her death they became her customary heirs:—Held, that the testator's copyhold interest did not pass by the will, but descended to his customary heir. *Torre* v. *Browne*, 5 H. L. Ca. 555; 24 L. J., Ch., 757.

The annuities created for the maintenance of the grandsons had fallen into arrear:—Held, that they were charged on the real estate itself, and not merely on the annual rents and profits; held, also, that the annuities did not carry interest. *Ib.*

Before the statute 55 Geo 3, c. 192, general words of devise included a legal estate in copyholds surrendered to the uses of the will by force of the intention shown by the surrender that such general words should include it; and where the question is of an equitable estate, some intention must be shown that such general words should include it *ultra* the words themselves. *Ib.*

VII. BY PARTICULAR WORDS OF DESCRIPTION.

2. Devise of copyhold estate by the description of copyhold ground-rent good. *Walker* v. *Shore*, 19 Ves. 387.

3. Copyholds held to pass under a will by the words, "moneys, property, and effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

A will commenced with a statement that it was the disposition of the testatrix's "estates, property, and effects." She then gave and "bequeathed" her "moneys, property, and effects" to her daughters, with an ultimate limitation to her own next-of-kin. The disposition pointed to personal estate. There was a direction to invest. The words "devise" and "heirs" were not used, and the expressions, "legacy," "capital," and "principal" were applied to the gift; there being a trust for conversion:—Held, that the copyholds passed under the gift to the children. *Ib.*

4. J. G., by his will, declared his daughter M. A. to be his sole residuary legatee. J. G. at his death was entitled to certain copyhold estates, which were not specifically mentioned in his will:—Held, that the copyholds did not pass under the will to M. A. *Lea* v. *Grundy*, 1 Jur., N. S., 951.

VIII. OTHER CASES

5 Case in which copyholds were not included in a power of sale given by will to trustees, and the beneficial interest therein was not disposed of by the will. *Fitzroy* v. *Fitzroy*, 2 L. J., Ch, 185.

6. Testator, after expressing an intention to dispose of all his property, directed his just debts and funeral expenses to be paid by his executor thereinafter named, and then, after giving several pecuniary legacies, devised all his copyholds, which were his only real estates, to his son J., without words of inheritance, and left all the rest and residue of his estate and effects to his said son, whom he appointed sole executor and residuary legatee, such son being also his heir:—Held, that the will was sufficient to pass the fee in the copyholds, and that it charged them with the debts. *Dover* v. *Gregory*, 10 Sim. 393; 9 L. J. N. S., Ch., 81.

7. Testator devised all the residue of his estates, as well copyhold as freehold, "the copyhold part thereof having been previously surrendered to the use of my will," upon several trusts, in favour of his wife and children. The only trust for his eldest son and heir was an annuity of 300*l.* for life, remainder to his wife and children. The testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity while abroad. *Rumbold* v. *Rumbold*, 3 Ves. 65.

8. A testator, by his will, devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A., B., and C. his residuary legatees:—Held, that A., B., and C. were entitled to the surplus produce of the copyhold estates. *Wildes* v. *Davies*, 22 L. J., Ch., 495: 1 Sm. & G. 475.

9. A., seised of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to P. in fee, in trust, as B. admitted, for A. and, after his death, for the purposes of his

will; but B. executed no declaration of trust. A. made a general devise of all his real estates; and after A.'s death B. was admitted:—Held, that he was a trustee for the devisees, and not for A.'s contemporary heir. *Wilson* v. *Dent*, 3 Sim. 385.

1. By the custom of the manors of Y., P., and S., the tenant of a copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees, to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiff. By a codicil the testator, after reciting that he had ascertained that his "copyhold estates" were held of the manors of P. and S., directed that "all his copyhold estates within the manors of P. and S." should be held by his trustees to the uses and upon the trusts in his will declared, if and so far as the custom of the respective manors would warrant or authorize; and if the custom of the manors or either of them did not warrant or authorize the entail created by his will, then and in that case his grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly:—Held, first, that the trustees took the legal estate in the copyholds held of the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. *Allen* v. *Bewsey*, 7 L. R., Ch. D., 453; 37 L. T., N. S., 688.

Held, secondly, that the codicil had no reference to the copyholds held of the manor of Y.; and that even if it did refer to them, it did not revoke the equitable limitations of the will. *Ib.*

Held, thirdly, that although by the custom of the manor the tenements were only held for life with power of nominating a successor, the testator had power to dispose of the equitable inheritance by giving successive equitable interests. *Ib.*

XXXVI. Devise by Mortgagor or Mortgagee and of Trust Estates.

I. *Legal Estate of Mortgagee Pass*, 7795.
II. *Beneficial Interest Pass*, 7797.
III. *Equity of Redemption Pass*, 7798.
IV. *Gift of Money Due on Mortgage. What Passes.* See XXXVIII. XIX. 6 *post.*
V. *Trusts Estates Pass.* See TRUSTS, XII.

I. LEGAL ESTATE OF MORTGAGEE PASS.

1. *By General Devise*, 7795.
2. *By Words Security for Money. Money on Security*, 7796.

1. By General Devise.

2. A man, seised in fee of divers lands, and having also lands mortgaged to him, devises all his lands to A. and his heirs; the mortgaged lands did not pass. *Winn* v. *Littleton*, 1 Vern. 3; 2 Vent. 351; 2 Ch. Ca. 51.

3. Testator, having real estates in A. and B., and a mortgage in C., and a statute extended in D., devises all his credits and mortgages to his executors, and then devises all his real estates whatsoever, in A., B., C., and D., to S. for life, and after his decease to his heirs and their heirs for ever:—Held, that mortgage in C., and extent in D., went to executors. *Davis* v. *Gibbs*, Fitzg. 116; 3 P. W. 26; Mos. 269.

4. Under a general devise of all the rest, residue, and remainder of and in all and singular the property, estate, and effects which the testator should be possessed of or entitled to, or over which he should have a disposing power at his decease, of whatsoever kind, etc., the same might be:—Held, that the legal estate in mortgaged premises did not pass, but descended to the testator's heir-at-law. *Re Horsfall*, M'Clel. & Y. 292.

5. The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Leeds (Duke)* v. *Munday*, 3 Ves. 348.

6. S., in 1849, devised all his freehold and copyhold mansions, messuages, farms, and hereditaments, situate in the county of N., or elsewhere, to four persons, in trust. In 1843, S., being mortgagee of certain lands, with a power of sale, conveyed them to A., and he, in 1845, by deed, declared himself to be a trustee for S., who from that time held undisputed possession of them:—Held, that as between the parties beneficially interested under the will, the mortgaged lands passed under the above general devise. *Burdus* v. *Dixon*, 4 Jur., N. S., 967; 6 W. R. 427.

7. A., in 1860, gave all the residue of his real and personal estate to all his nephews and nieces as tenants in common, after specifically devising certain lands, not including any lands vested in him as mortgagee or trustee, and bequeathing annuities and legacies:—Held, that the estates on trust and mortgage did not pass to the unascertained class, but to the heir-at-law as trustee; and the Court directed the same to be vested in the executors upon the trusts of the will. *Re Finney*, 8 Jur., N. S., 965; 3 Giff. 465; 6 L. T., N. S., 745.

8. A testator who was mortgagee in fee with a partial beneficial interest in the equity of redemption, devised to trustees all his real and personal estate upon trust, first, to pay his debts and funeral and testamentary expenses, and then, upon certain trusts, for his wife and children; and he gave to his trustees powers to sell or mortgage any part of his estate. The will contained no devise of trust or mortgaged estates:—Held, that the legal estate in the mortgaged property did not pass under the will. *Re Packman and Moss*, 1 L. R., Ch. D.,

214; 45 L. J., Ch., 54; 24 W. R. 170; 34 L. T., N. S., 110. But see *Re Brown*, 3 L. R., Ch. D., 156.

1. A testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of by will, as follows:—One moiety to be equally divided between her two daughters, and the other moiety she gave to a trustee to be paid in equal shares to her two sons at twenty-five, the shares of children dying under age to go to the survivors, and the trustee to have power to vary the securities and to apply part of the income for the maintenance and education of the children. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and the purchaser required that the residuary devisee should join in the conveyance:—Held, that the legal estate in the mortgaged property passed to the heir-at-law of the mortgagee. *Martin* v. *Laverton*, 9 L. R., Eq., 563; 39 L. J., Ch., 166; 18 W. R. 561; 22 L. T., N. S., 700.

Where Trust for Sale.] 2. A., being seised of the equity of redemption of lands in N., which he had mortgaged to his father, and also of the legal estate in them as heir to his father, the mortgage being still unsatisfied, devised all his lands in N. and elsewhere in trust to sell:—Held, that the legal estate did not pass by the will. *Exp. Marshall*, 9 Sim. 555; 8 L. J., N. S., Ch., 187; 3 Jur. 196.

3. A testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the rest, residue, and remainder of her real and personal estate and effects to T, for her own absolute use and benefit.—Held, that although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise. *Re Stevens*, 6 L. R., Eq., 597; 41 L. J., Ch., 537.

4. A husband, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators, and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof for her life; and, subject as aforesaid, such residue to remain in trust for C. There was no express devise of trust or mortgaged estates:—Held, that the legal estate in the mortgaged property did not pass under the will. *Re Smith*, 4 L. R., Ch. D., 70; 25 W. R. 294; 35 L. T., N. S., 890.

2. By Words Security for Money. Money on Security.

Security for Money.] 5. Devise of all testator's freehold estates and all his farming stock, ready money, bills, bonds, notes, and other securities for money, and all the residue of his personal estate to trustees, their heirs, executors, etc., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, will pass a mortgage in fee. *Exp. Barber, Re Tyas*, 5 Sim. 451.

6. A testator, after several devises and bequests, gave, devised, and bequeathed all his messuages, chattels real, ready money, securities for money, debts, and personal estate to A. and B, their heirs, executors, administrators, and assigns, upon certain trusts:—Held, that the legal estate in the premises mortgaged to the testator in fee passed to A. and B., the trusts declared not being repugnant to that construction. *Mather* v. *Thomas*, 6 Sim. 115. And see S. C. 10 Bing. 44; 3 Moore 684; 2 L. J., N. S., C. P., 234.

7. A testator, being a mortgagee of lands in fee, gave all his moneys, "securities for money," and all his personal estate and effects, to his wife, her executors, administrators, and assigns absolutely, she paying thereout all his debts; and he appointed his wife executrix. The testator's heir-at-law was an infant. The mortgagor sold the estate. The mortgagor and the executrix of the mortgagee petitioned the Court, asking that the mortgaged lands might be legally vested in the executrix, to enable her to convey in the place of the infant heir:—Held, that the legal estate passed to the executrix by the will, and the Court declined to make the order asked. *Re King's Mortgage*, 5 De G. & Sm. 644. S. C. *nom. Re King's Estate*, 16 Jur. 1153; 21 L. J., Ch., 673.

Security for Money where Charge of Debts.]

8. On construction of devise:—Held, that although words of devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises which may be so devised; yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention of the testator that the legal estate therein should pass; and that therefore heir-at-law is a necessary party to re-conveyance on paying off mortgage. *Silvester* v. *Jarman*, 10 Price 78.

9. A residuary devise of all the testator's estate, personal and real, although made subject to the payment of his debts, passes the legal estate in premises of which the testator was mortgagee in fee, notwithstanding the case of *Silvester* v. *Jurman* (10 Price 78). *Re Field's Mortgage*, 9 Hare 414; 15 Jur. 1001; 21 L. J., Ch., 175.

A mortgagee in fee of lands of gavelkind tenure gave and devised all the residue of his personal estate and real property, moneys, and securities, and all other effects, which should remain after paying his just debts, funeral and testamentary expenses, to his wife, for her own use and benefit:—Held, that in consequence of the devise by the will, no estate in the mortgage premises remained vested in the infant co-heirs in gavelkind of the mortgagee; and an order was therefore refused, upon a petition presented under the Trustee Act 1850, praying an order vesting the infant's estate in the petitioner. *Ib.*

10. A testator, by his will in 1832, gave all his money, securities for money, household furniture, etc., and all other the rest and

residue of his personal estate and effects, subject to the payment of debts and legacies, to his wife, her executors, administrators, and assigns absolutely:—Held, that the legal estate of mortgaged hereditaments, which was vested in the testator at the date of his will, passed under the term "securities for money;" and that the concurrence of the testator's heir was not necessary to make an effectual conveyance of the mortgaged premises to a purchaser. *Knight* v. *Robinson*, 2 Kay & J. 563.

The case of *Galliers* v. *Moss* (9 B. & C. 267) must be treated as overruled by subsequent decisions. *Ib.*

1. A testator, a mortgagee in fee of real estate, gave and bequeathed to A. and B. all and singular his household furniture, goods, plate, linen, and utensils whatsoever, and all and every other his goods and chattels, stock-in-trade, moneys, debts, and securities for moneys, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts, and to sell his personal estate, and hand the money arising therefrom upon trust therein mentioned:—Held, that, under these words, the legal estate in the mortgaged property passed to the trustees. *Re Walker's Estate*, 21 L. J., Ch., 674.

Money on Security.] 2. The gift by the will of a mortgagee in fee of estates on trust for sale, and of money on securities, does not carry the legal estate in the mortgaged property. *Re Cautley*, 17 Jur. 124; 22 L. J., Ch., 391.

The words "money in the funds and on securities" do not pass the legal estate in mortgaged premises. S. C. *nom. Exp. Cautley*, 1 W. R. 158.

3. A., who was mortgagee of real estate, gave by will all his real and personal estate to B., upon trust, after payment of his debts, to permit and suffer his wife to receive the rents of his real estate, and the interest of all sums of money that might be due to him on mortgage, bond, note, or other security, for her life, and at her death to get in all the debts owing to him on any security or on simple contact, and to pay the same as in his will mentioned. B. died intestate, leaving an eldest son, who was an infant, and of unsound mind, but he had not been found lunatic by inquisition. Upon a petition by the parties beneficially interested:—Held, that the legal estate in the premises mortgaged to the testator passed to B. *Re Arrowsmith*, 4 Jur., N. S., 1123; 27 L. J., Ch., 704; 6 W. R. 642.

4. Will of mortgagee disposing of the money carries his interest in the land. *Silberschildt* v. *Schiott*, 3 Ves. & B. 45.

5. Gift of a mortgage security for money will pass the fee, if the estate be mortgaged in fee. *Renvoize* v. *Cooper*, 6 Madd. 371.

II. BENEFICIAL INTEREST PASS.

1. By General Devise.

6. J. W., being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of H.; and in possession, as mortgagee, of certain leasehold houses at K., in the county of M.; but having no other property in the said county of M., and having other estates vested in him as mortgagee, besides those at K., makes his will, devising "all his freehold, copyhold, and leasehold messuages, etc., in the county of H., and in the town of K.," to A. W. for life, and after her death "all and singular other his freehold, copyhold, and leasehold messuages," etc., in the counties of H. and M. or elsewhere to E. W. and A. T. for their joint lives, and after their several deceases "all the said freehold, leasehold, and copyhold messuages," etc., unto and equally among their children; and gives to A. W. "all the residue of his real estate, not before disposed of, and all other his estates and interests whatsoever, vested in him as mortgagee or trustee," etc., "and all the residue of his personal estate, ready money, and securities for money," etc., subject to the payment of debts and legacies:—Held, that the mortgaged premises at K. passed under the devise of all the freehold, copyhold, and leasehold messuages, etc., in the county of H. and in the town of K. *Woodhouse* v. *Meredith*, 1 Meriv. 450.

7. Bequest: "to my son W. G. I give all my interest and claim on household property in P. Court, belonging to J. H., on which I have a mortgage for 1,500*l.*":—Held, that this passed arrears of interest due on the mortgage at the time of the testator's death, as well as the principal. *Gibbon* v. *Gibbon*, 17 Jur. 416; 22 L. J., C. P., 131.

The testator was mortgagee in possession, and repairs had been done to the mortgaged property during his lifetime, by his orders:—Held, that the amount of the repairs was a debt payable by the executrix, out of the general estate, and not chargeable to the legatee of the mortgage. *Ib.*

8. The lessee for a term of years of four houses assigned the term, by way of mortgage, to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses," mentioning the numbers of the houses in the street where they were situated; and he was in possession as mortgagee at the time of his death:—Held, that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. *Bowen* v. *Barlow*, 11 L. R., Eq., 454; 40 L. J., Ch., 373; 24 L. T., N. S., 461; 19 W. R. 578. Affirmed 21 W. R. 149; 8 L. R., Ch., 171; 42 L. J., Ch., 82; 27 L. T., N. S., 733.

2. Effect of Subsequent Foreclosure, or when Equity of Redemption Barred.

9. Devise of all lands does not pass land held in mortgage, as it continues personal estate, till final order of foreclosure; and devise of lands held in mortgage at time of will does not pass that land, if testator obtains final order of foreclosure before death. *Thompson* v. *Grant*, 4 Madd. 438.

1. Construction of will passing an estate originally on mortgage, but foreclosed, the testator's intent being to dispose of all his interest, though inaccurately mentioned both as land mortgaged, and as money due on mortgage. *Silberschildt* v. *Schiott*, 3 Ves. & B. 45.

2. Mortgages in fee, though forfeited, will not pass by a general devise, of "all my lands, tenements, and hereditaments;" nor will they pass by such a general devise, though the equity of redemption is afterwards foreclosed or released. *Strode* v. *Russel*, 2 Vern. 621; 3 Ch. Rep. 169.

3. If a testator, after devising all "his lands, tenements, and hereditaments," foreclose an equity of redemption of a mortgage in fee, such estate will not pass by these general words, because a foreclosure is considered as a new purchase of the land. *Casborne* v. *Scarfe*, 1 Atk. 605.

4. Lands originally held under old mortgages pass by general devise, though no release of equity of redemption appears. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714. And see S. C. further, 5 Ves. 300.

5. Lands originally held under old mortgages passed by a general disposition by will as the testator's estate, though no release of the equity of redemption appeared. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

6. Testator, having a foreclosed mortgage in fee, of certain farms in Lancashire, gave, amongst other things, to his wife for life, "the interest or proceeds of certain farms, in the county of Lancaster, mortgaged to me for 2,500*l.*;" and after her decease "one-third part of the sum of 2,500*l.* principal money disposed of in mortgage of the farms aforesaid" to his daughter Harriet; and he declared that upon his wife's decease, his daughter Elizabeth should inherit and enjoy the bequests aforesaid in the same proportion as her sister Harriet; and that his son should in like manner inherit and enjoy one-third part of the aforesaid bequests upon the same condition as his daughters:—Held, that the farms passed as real estate, to the testator's wife for life, with remainder to his son and daughters, as tenants in common in fee. *Le Gros* v. *Cockerell*, 5 Sim. 384.

III EQUITY OF REDEMPTION PASS

7. By a devise of land mortgaged in fee, the equity of redemption alone passes; if for years, the reversion and equity of redemption pass. *Forrester* v. *Leigh*, Ambl. 174.

8. Tenant in tail, with remainders in tail, the reversion in fee to tenant in tail, the land having been mortgaged for a term of years by donor, previous to those estates, and so every of them having an equity of redemption incident to it. Tenant in tail by will appoints the mortgage to be paid off, and then mortgaged term to be assigned to his mother, and by same will (being seised in fee of other lands) devises all lands to W. and his heirs, by which reversion of mortgaged premises passes, on the estate tail and remainder in tail being spent:—Held, that the equity of redemption, which was incident to the reversion in fee of tenant in tail, did not pass to the mother by the will, and was, therefore, not severed from the reversion. *Amhurst* v. *Litton*, Fitzg. 99. Affirmed 5 Bro. P. C. 254.

9. An equity of redemption in copyholds passes by will without surrender. *Macnamara* v. *Jones*, 1 Bro. C. C. 481.

10 Neither the words "I give and bequeath all my effects (after paying of every due demand)," though immediately preceded by directions touching the rents of a copyhold estate, nor the words "what title I have left to call my own," will include the equity of redemption of that copyhold. *Henderson* v. *Farbridge*. 1 Russ. 479; 4 L. J., Ch., 209.

See also II. 2 *supra*.

XXXVII. Real Estate, Words which Pass.

See also XXXV. *ante*.

I. EFFECTS.

11. A gift, in a will, of "moneys and effects":—Held, under particular circumstances, sufficient to pass real estates. *Titchfield* (*Marquis*) v. *Horncastle*, 7 L. J., N. S., Ch., 279; 2 Jur. 610.

12. The word "effects" in a will equivalent to "property" or "worldly substance." *Campbell* v. *Prescott*, 15 Ves. 507.

13. Under a devise of all the residue of the testator's effects, whatsoever and wheresoever, of what nature or kind soever, to trustees, upon trusts applicable only to personal property:—Held, that a real estate passed, with a resulting trust for the heir. *Dunnage* v. *White*, 1 Jac. & Walk. 583.

14. A testator, by a will prior to the 7 Will. 4, and 1 Vict., c. 26, gave all the rents of his lands to three persons, to be equally divided between them according to value, but without any words of inheritance; and then accurately enumerating his real estate, proceeded to give his "stock-in-trade," money, book debts, and effects not included in the above statement" to two of such persons, also without words of inheritance:—Held, first, that the direction in the first part of the will, that the rents were to be divided "according to value," did not

amount to a direction to sell, and that the three first donees only took for life; secondly, that the word "effects" carried the reversion in the lands to the second set of donees in fee, subject to the life estate of the three first donees. *Milsome* v. *Long*, 3 Jur., N. S., 1073.

1. A testator gave, devised, and bequeathed his household goods, etc., "and everything he should die possessed of," to A., for life, and after her death, he gave, devised, and bequeathed "the whole of his effects which might be then remaining, unto and to the use of P.":—Held, that the real estate passed. *Phillips* v. *Beal*, 25 Beav. 25.

2. Copyholds held to pass under a will by the words "moneys, property, or effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

3. Effects held to be *ejusdem generis*, and not to apply to real estate. *Cross* v. *Wilkes*, 35 Beav. 562.

See also following Subdivisions.

II. ESTATE UNQUALIFIED BY OTHER WORDS.

4. The word estate, when used in a will, is *genus generalissimum*, and will, of its own proper force, without any proof *aliunde* of an intention to aid the construction, carry realty as well as personalty, and is not to be confined and restrained to personalty only unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will, or from the way in which the word is used in the particular part of the will where the contested use of it arises. *Hamilton (Mayor)* v. *Hodsdon*, 6 Moo. P. C. 76; 11 Jur. 193.

Testator, by his will, devised to J. (his heir-at-law) part of his estate in fee, and also a life-estate, in another portion of his estate, named P.; and also gave to F. (his wife) a life-estate in part of P., during her viduity, with remainder to his other son N. in tail, remainder to his (the testator's) daughters for life; and after giving certain specific chattels to F., the will proceeded as follows: "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F., and it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together under the direction of my wife F." N. died without issue, and F., the widow, also died unmarried and intestate. The heirs-at-law of J. sold the estate P. to the appellants, subject to the life-estate of the daughters. In a suit by the appellants, against the daughters of the testator, the co-heiresses of F., for a partition:—Held, by the Judicial Committee, affirming the decree of the Court in Bermuda, that the remainder in fee in the estate "P." passed to F., under the residuary clause, there being nothing in the context of the will to confine the natural and legal meaning of the word "estate" to personalty only. *Ib.*

5. The word "estate" in will, unless qualified, passes both real and personal estate. *Barnes* v. *Patch*, 8 Ves. 604.

6. Under general word "estate" in will, real estate passes unless restrained by apparent contrary intent. *Woollam* v. *Kenworthy*, 9 Ves. 137.

7. Word "estate," when used generally, includes not only the lands or thing, but also the estate or interest. So, if "in or at" such a place is added; but if it is further added "in the occupations of particular tenants," *quære*. *Goodwin* v. *Goodwin*, 1 Ves. 228.

8. Under a devise to trustees during life of A., of all testator's estates and farms:—Held, word "estate" referred only to the thing and the interest in it. *Sayer* v. *Masterman*, Ambl. 345.

9. A testator gave and bequeathed the "residue of his estate, after taking out 1,000*l.*," to his uncle:—Held, that the residuary real and personal estate passed, the testator having previously made pecuniary gifts out of "his freehold and personal estate." *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

10. The word "estate" in a will, will *primâ facie* pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 210; 1 W. R. 423.

III. ESTATE, OR PROPERTY, COUPLED WITH OTHER WORDS.

11. The words "worldly estates:"—Held, to pass real and personal estate. *Muddle* v. *Fry*, 6 Madd. 270.

12. Devise of all "estate and effects that I shall die possessed of" carries after-purchased lands. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

13. Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in a will as would pass land, as "all my estates, etc., whatsoever and wheresoever." *Rashleigh* v. *Master*, 1 Ves. J. 201; 3 Bro. C. C. 99.

14. A bequest of "all my goods, chattels, estate, and estates whatsoever," will pass real as well as personal property. *Churchill* v. *Dibben*, 9 Sim. 447. n.

15. "All my freehold lands in tenure of L., and the residue of my estate, consisting of ready money, plate, jewels, leases, judgments, mortgages, etc., or in any other thing whatsoever and wheresoever, I give to A. or her assigns for ever." The Court will intend an intestacy in favour of the heir-at-law, unless there is a clear intention to pass the real estate. *Timewell* v. *Perkins*, 2 Atk. 102.

Devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and goldsmith's notes and bank-bills do not pass by those words. *Ib.*

16. Testator gave to his executors "all his goods, estates, bonds, debts, to be sold," etc. The word "estates" will pass a copyhold which was surrendered to the use of the will. *Jongsma* v. *Jongsma*, 1 Cox 362.

17. One devises all his goods, chattels, and estate whatsoever, on condition to pay his debts and legacies; these words pass his real estate, he having by will devised a considerable legacy to his eldest son, and other legacies and the surplus of his estate after his wife's death, to be equally divided between his four children. *Lumley* v. *May*, Pre. Ch. 37.

1. It has been held that, where "estate" is mentioned generally, accompanied with personal things, it should be restrained to personal, but never where real estate is mentioned; for then the personal things mentioned shall be considered only as an enumeration of those specific things. *Bailis* v. *Gale*, 2 Ves. 51. And see *Ridout* v. *Pain*, 3 Atk. 485.

2. A testator gave to his wife all his money, goods, chattels, estates, and effects, of what nature or kind soever, and wheresoever the same might be found at the time of his decease, for her life; and at her decease all his property, of goods, money, chattels, estate, or effects whatsoever, to be equally divided between all his children, etc.:—Held, that the testator's real estate passed. *Midland Counties Railway Co.* v. *Oswin*, 1 Colly. 74; 3 Rail. Ca. 497; 13 L. J., N. S., Ch., 209; 8 Jur. 138.

3. A testator, after devising a freehold to two others and the survivor, her heirs, executors, administrators, and assigns for ever, proceeded, "And I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be, at the time of my decease, unto R. and S., their executors, administrators, and assigns in trust." He afterwards specifically bequeathed his ready money and various chattels:—Held, by the Court of Exchequer, that the word "estate," thus circumstanced, did not pass real estate; but this Court, not being satisfied, directed a case to the Common Pleas. *Sanderson* v. *Dobson*, 10 Beav. 478. And see S. C. at law, 1 Exch. Rep. 141.

4. A testator gave to his wife, for her use and benefit, "his leases, moneys, goods, furniture, plate, book-debts, securities for money, and all other property, of every description, that he might be possessed of":—Held, that the real estate passed. *Re Greenwich Hospital Improvement Act*, 20 Beav. 458.

5. T. A. H. by will gave all the residue of his "estate and effects" to trustees upon trust to invest the same in 3 per cents., and with power to alter, or vary, or transpose, at their discretion, and to pay the interest and dividends to D. for life, and after to her children. The testator acquired real estate after the date of his will, but left no heir; and on the question, as between the residuary legatee and the Crown, whether the real estate passed:—Held, that it did. *D'Almaine* v. *Moseley*, 1 W. R. 475; 1 Eq. Rep. 252; 1 Drew. 629; 17 Jur. 872; 22 L. J., Ch, 971.

6. The word "estate," in a will, will *primâ facie* pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 210.

A testatrix, after giving certain legacies to charities, and directing that they should be paid out of her personal estate, bequeathed her pictures, furniture, books, etc., to her daughters. And as to all the rest and residue of her estate and effects whatsoever, and all her diamonds and other jewels, not thereinbefore disposed of, she gave the same to trustees, their executors and administrators, upon trust, to sell the same and hold the money upon certain trusts:—Held, that her real estate passed under the word "estate." S. C. 1 W. R. 423.

7. A testator gave "all his estate, effects, and property whatsoever and wheresoever," which he was or might be possessed of or entitled to, "to his three executors, their executors and administrators," upon trust to stand possessed thereof, and the proceeds thereof, upon certain trusts for children and grandchildren:—Held, that this, by itself, would pass real estate, but, upon the subsequent expressions, and the general scope and object of the will, the contrary was held. *Coard* v. *Holderness*, 20 Beav 147; 1 Jur., N. S., 316; 24 L. J., Ch, 388; 3 W. R 311.

The Court principally relied on the absence of the words "heirs," "devise," and "rent," and the use of the expressions "possession," "executors and administrators," "principal, the balance, the principal of the said legacies," the direction to claim a share from his personal representatives, and the power to appoint new trustees, applicable to "executors," and not to "heirs." *Ib.*

8. A testator devised his real estate (subject to charges) in strict settlement, and gave all his "railway, canal, and navigation shares . . . and personal estate" to his executor, to pay his debts and legacies, and his residuary personal estate and effects to M. He was possessed of two navigation shares, which by the Act creating them were made of the nature of real estate. Before his death, the undertaking to which the shares belonged became vested in a railway company, by an act which provided for the extinguishment of the freehold rights in the shares, upon their conveyance to the railway company. The shares were never conveyed to the railway company:—Held, that by the railway company's Act, or if not, by the will, they were converted into personal estate, and went to the residuary legatee under the gift of his personal estate and effects. *Cadman* v *Cadman*, 14 L. J., Ch., 468; 13 L. R., Eq, 470; 20 W. R. 356.

9. A testator, after giving a specific legacy and an annuity, gave all his property to trustees, upon trusts for his granddaughter and her issue, with provisions for their benefit, and for the religious education of the granddaughter, who was a minor. The legatee and annuitant died soon after the making of the will. After this the testator, by codicil, gave and bequeathed "the whole of my estate, and all my household goods and furniture, linen, china, watches, and all other my personal property and effects that I may be possessed of at the time of my death," to his servant R., free from legacy duty, such gift not to prejudice any claim R might have for wages; and the testator in all other respects ratified and confirmed his will. The grandchild was still living, and a minor:—Held, by the Vice-Chancellor of Lancaster, that the testator's real estate was unaffected by the codicil. *Molyneux* v. *Rowe*, 2 Jur., N. S., 769; 25 L. J., Ch., 570; 4 W. R. 539.

Semble, this decision was right, for that on the whole context of the two instruments, the testator only meant by the codicil to dispose of articles *ejusdem generis* with those specifically mentioned therein. Knight Bruce, L. J. *Ib.*

The codicil revoked the disposition of the real estate made by the will, for that the words of description in the codicil, following the words "the whole of my estate," comprised the

whole personal estate, and the above words must therefore apply to the real estate. Turner, L. J. *Ib.*

1. F. possessing, as far as appeared, personalty only, by his will, *inter alia*, left all the rest, etc., of his estate and effects to trustees upon trust to invest in the public funds or upon Government or real securities, with power to vary the same. After a suit had been instituted and reference ordered, it was discovered that two chapel shares were real estate, and upon the question whether the above words passed real estate:—Held, that they did, according to the present law, which varied from the earlier cases; and a sale directed. *Fullerton* v. *Martin*, 1 W. R. 379; 1 Drew. 238; 1 Eq. Rep. 224.

2. A testator, after specific gifts of freeholds, leaseholds, and chattels, gave "all the rest of his household furniture, books, linen, and china (except as thereinafter mentioned), goods, chattels, estate, and effects to R. and S, their executors, administrators, and assigns," on trust. The testator then disposed of his ready money, moneys to arise from a certain sale, securities for money and moneys owing, and made certain specific bequests.—Held, that the whole of the residuary estate, real and personal, passed to R. and S. by force of the word "estate." *Dobson* v. *Bowness*, 37 L. J., Ch., 309; 5 L. R., Eq., 404; 16 W. R. 640; 17 Jur. 778; 22 L. J., Ch., 893.

3. The word "estate" and other similar words which, when used in a will, are of themselves sufficient to pass real as well as personal estate, will not be cut down and confined to the latter merely because the accompanying expressions and the limitations and trusts of the will are applicable to personal estate only. *Stein* v. *Rutherdon*, 37 L. J., Ch., 369; 19 L. T., N. S., 184; 16 W. R. 477.

Therefore, where a testator in 1866, after specific bequests of pure personalty, bequeathed all the rest and residue of his estate and effects to trustees, their executors, administrators and assigns, upon trusts applicable to personalty only, with an ultimate limitation to the next-of-kin:—Held, that a freehold house which belonged to the testator passed under the residuary gift to the trustees. *Ib.*

See also next Subdivision.

IV. ESTATE, OR PROPERTY, WHERE TRUSTS AS DECLARED ARE APPLICABLE TO PERSONAL ESTATE.

4. Under a devise of all the residue of the testator's estate and effects whatsoever and wheresoever, of what nature or kind soever, to trustees upon trusts applicable only to personal property:—Held, that the real estate passed, with a resulting trust for the heir. *Dunnage* v. *White*, 1 Jac. & Walk. 583.

5. Testator having given to his eldest son a particular estate, without words of limitation, proceeded to settle the residue of his property upon certain trusts between such son and his two sisters and their families, using words in the course of such devise more properly applicable to personal estate, as that his son's share (which in another place was called a portion) was to be placed in the names of trustees, and that in certain cases some of the capital might be advanced; the son's interest, too, in the residue was only for life:—Held, nevertheless, that the reversion in fee of the particular estate passed by the residuary clause. *Saumarez* v. *Saumarez*, 4 Myl. & C. 331.

6. A will made after the Wills Act, 1 Vict., c. 26, whereby the testator gave, devised, and bequeathed all his estates and effects whatsoever and wheresoever, and of what nature or kind soever to be paid, assigned, or transferred to him on his attaining twenty-one:—Held, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will that in the meantime the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof as they should think necessary in the maintenance, education, and putting forth of A. in the world, and should invest the said estates and effects on real or personal security at their discretion. The directions applicable only to personal estate may in such a case be construed, as referring not to the whole subject-matter of the gifts, but to such portions of the estate as may consist of personalty to which such directions may be fitly applied. *Stokes* v. *Salomons*, 9 Hare 75.

7. The word "estate," in a will, will *primâ facie* pass real estate, and the burden of proof lies on those who contend the contrary. *Patterson* v. *Huddart*, 17 Beav. 120; 1 W. R. 423.

A testatrix after giving pecuniary and specific legacies, and after directing her charity legacies to be paid out of her personal estate, "gave and bequeathed" all the rest "of her estate and effects, whatsoever and wheresoever, and all her diamonds and other jewels," to trustees, their "executors and administrators," upon trust to sell and divide:—Held, that the real estate passed to them. *Ib.*

8. A testator gave real estate and personal estate in trust to sell and invest in "stocks, funds, and securities," and hold the residue thereof upon the trusts declared by any codicil. By a codicil he gave "the trust moneys, stocks, funds, and securities" by the will bequeathed to charitable purposes:—Held, that the residuary real estate passed. *Whicker* v. *Hume*, 14 Beav. 509. And see 1 De G. M. & G. 506; 16 Jur. 391; 21 L. J., Ch., 406; 14 Beav. 518.

9. A gift of all the residue of my estate and effects to A., B., and C., upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, etc., to persons beneficially entitled; A. and B. being also executors:—Held, to pass real estate. *D'Almaine* v. *Moseley*, 1 Drew. 629; 17 Jur. 872; 22 L. J., Ch., 971; 1 W. R. 474; 1 Eq. Rep. 252.

10. A specific devise of real estate was followed by a devise and bequest of all the testator's other property whatsoever and wheresoever to trustees upon trusts which were expressed in terms more appropriate to personalty than to realty. The testator was not, at the date of his will, entitled to any real estate other than that specifically devised, but he subsequently became entitled to real estate of great value:—Held, that such subse-

quently acquired real estate passed by the will. *Lloyd* v. *Lloyd*, 7 L. R., Eq., 458; 17 W. R. 702; 20 L. T., N. S., 898; 38 L. J., Ch., 458.

1. A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects, to invest the same in Government or real securities, and to stand possessed of such investments for benefit of his widow and children and his brothers and sisters:—Held, that the real estate passed to the trustees, but that the beneficial interest therein was undisposed of by the will, and consequently resulted to the heir. *Longley* v. *Longley*, 13 L. R., Eq., 133; 41 L. J., Ch., 168; 20 W. R. 227; 25 L. T., N. S., 736.

See also preceding Subdivisions.

V. PERSONAL ESTATE OR PROPERTY.

2. Gift of "personal estate and property whatsoever and wheresoever," held not to pass real estate. *Buchanan* v. *Harrison*, 8 Jur., N. S., 965; 31 L. J., Ch., 74; 10 W. R. 118.

3. A bequest of "the whole of my personal property, estate, and effects, of every and whatsoever kind they may be," will not carry real estate. *Belaney* v. *Belaney*, 36 L. J., Ch., 265; 15 W. R. 369; 16 L. T., N. S., 269; 2 L. R., Ch., 138.

The assignee of a term of years afterwards purchased the reversion, which was conveyed to a trustee for him in fee. In the deed of conveyance was contained a recital of the purchaser's desire that the term should not merge. The purchaser afterwards made a will bequeathing all his personal estate:—Held, that the term passed by the bequest. *Ib.*

4. A testator gave to his wife all his household furniture, personal effects, and properties of every description that he might be possessed of at his death, and also all moneys which might then be in his possession or due to him:—Held, that the gift did not include his realty. *Exp. Yates*, 17 W. R. 872; 20 L. T., N. S., 940.

5. A testator gave his personal estate to his executors, with a direction to collect the rents of his freeholds, leaseholds, and copyholds, and thereout pay annuities. He gave his residuary legatee all his personal estate and effects:—Held, that by reference to the former part of the will the residuary real estate passed. *Lines* v. *Lines*, 17 W. R. 1004; 22 L. T., N. S., 400.

VI. PROPERTY.

6. The word "property" has the most extensive meaning, when used in a will. *Jones* v. *Skinner*, 5 L. J., N. S., Ch., 87.

7. A testator, by his will, devised his "property," and referred to the income by the words "dividends" and "interest":—Held, that his real estate was included in the word "property," notwithstanding the use of the other words. *Morrison* v. *Hoppe*, 15 Jur. 737; 4 De G. & Sm. 234.

8. Under the word property, reversionary interest in realty does not pass. *Buchanan* v. *Harrison*, 10 W. R. 118; 8 Jur., N. S., 965; 31 L. J., Ch., 74.

VII. RENTS AND PROFITS.

9. Devise of profits is a devise of land. *Johnson* v. *Arnold*, 1 Ves. 171.

10. Devise of profits will pass land. *Allan* v. *Backhouse*, 2 Ves. & B. 74. Affirmed Jac. 631.

11. A testator resident in Jamaica devised the rents, issues, and profits of his estate called Islington and Cove's Pen in that island to A. B.:—Held, that the estate, and the slaves, mules, cattle, and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398. See *Exp. Rucker*, 3 Dea. & Ch. 704.

Devise of "one moiety of the rents, issues, and profits of my estate, named T., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to R. and his heirs":—Held, that the grandchildren take the fee as tenants in common in a moiety of the estate. *Id.* 3 Sim. 398.

12. A sale directed on the words "rents and profits" alone, though generally contrary to testator's intention, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legatees, upon the addition of the words "as the rents and profits, etc., should advance the money." *Baines* v. *Dixon*, 1 Ves. 41.

As to Words passing the Fee Simple.] See XLIII. v. *post.*

VIII. RESIDUARY LEGATEE.

13. The term "residuary legatee" is not of an invariable nature; it must be fashioned and moulded by the context of the will. *Singleton* v. *Tomlinson*, 3 L. R., App. Cas., 404; 38 L. T., N. S., 653; 26 W. R. 722.

Realty Pass.] 14. Estate held by copy of court roll, according to custom of manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold:—Held, to pass under a residuary bequest of personal estate, and not with copyhold messuages, etc., with limitations in strict settlement, upon whole will and circumstances. *Watkins* v. *Lea*, 6 Ves. 633.

15. Testator gave all his real and personal estate to his brother James and his nephew Malcolm, their heirs, executors, etc., in trust, by or out of his personal estate, or by sale, mortgage, or other disposition of his real estate or any part thereof, to pay his sister 1,500*l.*, and after giving 1,000*l.* to his brother James, he left to his brother Donald 2,000*l.*, and added, "and also to be my residuary legatee;" after which he gave 200*l.* to another of his sisters:—Held, that Donald was the testator's residuary devisee as well as legatee. *Evans* v. *Crosbie*, 15 Sim. 600; 16 L. J., N. S., Ch., 494; 11 Jur. 510.

1. A testator by his will devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A., B., and C. his residuary legatees:—Held, that A., B., and C., were entitled to the surplus produce of the copyhold estates. *Wildes* v. *Davies*, 22 L. J., Ch., 495; 1 Sm. & G. 475; 1 W. R. 253.

2. A testator, by his will, devised all his estates to three trustees, whom he also named his executors, and charged same with various annuities and pecuniary legacies, and concluded thus: "I give, devise, and bequeath unto my said trustees, to be equally divided between them, share and share alike, all the rest, residue, and remainder of my property not herein disposed of, to answer any contingency that may arise or happen with respect to the trusts of this my will, or in case of non-payment of my rents, as also to answer the several legacies and bequests herein mentioned, and to pay the expense of agency." By codicil to this will the testator made some alterations in the bequests of the annuities given by the will, and proceeded thus: "I leave my brother-in-law, P. N. (one of the trustees named in the will), residuary legatee to all my property; and I hereby empower him to keep clerks, agents, etc., in any manner he thinks proper, and also to fee one of the first lawyers upon any question he may think fit to consult for advice, and to do all other acts he may think proper, with or without the consent of my other trustees or executors":—Held, that all the real estate of the testator, not previously disposed of, passed to P. N., and that he took beneficial interest therein. *Warren* v. *Newton*, Dr. 464.

3. Testator gave a freehold house to his wife for her sole use and benefit, and another freehold house to her for her life; he also gave to her all his household goods, plate, etc.; but, if she married again, the whole of the above property was to become the property of his daughter; and, in case his wife should remain unmarried, then he gave the second mentioned house to his daughter for her life, and to her children after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease":—Held, that the fee simple in the first-mentioned house passed to the wife. *Day* v. *Daveron*, 12 Sim. 200; 10 L. J., N. S., Ch., 349.

4. Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, M. and C. He then gave to his wife for her life the possession of his house, together with the use of his plate, furniture, etc., and the interest of his stock in the funds during her life, "save and except the clauses in favour of my daughters as already mentioned; at her decease, it is my will and pleasure, that M. and C. shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others":—Held, that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee commencing on the widow's decease, in the estates in H. and L., and that the widow did not take a life interest by implication in those estates, but that the heir took them by descent during her life. *Davenport* v. *Coltman*, 12 Sim. 588; 11 L. J., N. S., Ch., 262; 6 Jur. 381. And see S. C. at law, 9 Mees. & Welsh. 481; 11 L. J., N. S., Exch., 114.

5. E. by her will, after a specific devise of real estate to S., and pecuniary legacies of 50*l.* and 200*l.*, bequeathed three other pecuniary legacies of 100*l.* each, with the proviso that "if her estate would not produce these sums of 100*l.* each, after the previous legacies were paid," then these sums were to abate; and she appointed S. her "residuary legatee." E. left real estate not specifically devised:—Held, that the real estate not specifically devised passed to S., as residuary devise as well as legatee. *Re Salter*, *Farrant* v. *Carter*, 44 L. T. 603.

6. A testator commenced his will by saying, "As to my estate which God has been pleased in His good providence to bestow upon me, I do make and ordain this my last will and testament, as follows." He then made separate dispositions of two specified farms, then gave several pecuniary legacies, then bequeathed his shares in a quarry, then gave some further pecuniary legacies, and concluded with "and I make M. P., R. H., and O. P. my residuary legatees":—Held, that the testator's freehold estate not specifically mentioned in the will passed to these residuary legatees. *Hughes* v. *Pritchard*, 6 L. R., Ch. D., 24; 25 W. R. 761; 37 L. T., N. S., 259; 46 L. J., Ch., 840.

7. A testatrix, by her will, dated in 1854, gave as follows: "I commit to paper my wishes respecting the disposal of my property. . . . Everything I am possessed of I leave to my sister for her life, after her decease I give and devise as here annexed." Then followed a number of legacies, and the will proceeded: "My two nephews, H. H. M. and F. P. M., I leave my executors, and the latter residuary legatee after the demise of my sister." She also executed a codicil, but she had no real estate either at the date of the will or codicil. She afterwards purchased some freehold property, which she held at her death. F. P. M. contracted for the sale of part of the real estate as absolute owner, and an objection having been taken by the purchaser that he had not title:—Held, that there was not sufficient context in the will to enable the Court to read the words "residuary legatee," as "residuary devisee," and that consequently the real estate did not pass to F. P. M. *Hughes* v. *Pritchard* (6 L. R., Ch. D., 24) distinguished. *Re Methuen and Blore's Contract*, 16 L. R., Ch. D., 696; 50 L. J., Ch., 464; 44 L. T. 332; 29 W. R. 656.

Realty not Pass.] 8. In a will, the words "I constitute A. and B. my residuary legatees," will not pass real estate. *Windus* v. *Windus*, 21 Beav. 373; 2 Jur., N. S., 269. Affirmed 2 Jur., N. S., 1101; 6 De G. M. & G. 549; 26 L. J., Ch., 185.

A testator, after having given legacies to his children, amongst whom were two of his younger sons, Ansley and Eric, gave all his freehold, leasehold, and copyhold estates unto

and to the use of his sons Thomas and Ansley equally, as tenants in common; and he also gave all the rest, residue, and remainder of his personal estate and effects, after payment of legacies, to his sons Thomas and Ansley equally, and he appointed them and a nephew executors of his will. Thomas died in the lifetime of the testator, and afterwards the testator made a codicil, by which, after noticing the death of Thomas, the testator, "in the place and stead of him," constituted and appointed his son Eric jointly with Ansley and his daughter as an executrix in the room of his nephew, and proceeded in these words: "I also revoke the legacies to my sons Ansley and Eric, and appoint them residuary legatees, share and share alike":—Held, that Eric did not take any portion of the freehold or copyhold estates under this devise, but that the moiety given by the will to Thomas was undisposed of. *Ib.*

The word "legacy," *primâ facie*, has reference to personal estate only, unless the context clearly shows that the testator intended to apply it to real estate. *Ib.*

1. J. G., by his will, declared his daughter M. A. to be his sole residuary legatee. J. G. at his death was entitled to certain copyhold estates, which were not specifically mentioned in his will:—Held, that the copyholds did not pass under the will to M. A. *Lea* v. *Grundy*, 1 Jur., N. S., 951.

2. A testator concluded his will in these words: "As to all my personal estate, etc., subject however to my debts and legacies hereinbefore bequeathed, I give the same to W. R. W., whom I appoint executor of this my will, and also in case of any residue I appoint him my residuary legatee":—Held, that the residuary clause was confined to personal estate, and that under it certain rents undisposed of during the life of W. R. W. did not pass to him for life. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

3. A feme coverte having power to dispose by will of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses:—Held, that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk* v. *Mawdsley*, 1 Sim. 286; 5 L. J., Ch., 149.

4. In December 1867, J. devised her moiety of the freehold lands of B. to her sister L., for life, to whom she also left certain personalty absolutely, and appointed her "residuary legatee." The testatrix then proceeded, subject to L.'s life estate, to declare a trust for the sale of the premises, and out of the proceeds gave two effectual legacies, and several charitable bequests which subsequently failed from her dying within three months of the date of her will. In July 1868, L. devised the other moiety of the lands to trustees to sell, and out of the proceeds to pay certain pecuniary legacies, and she gave "whatever residue" there might be after such payment to certain charities. She then directed her railway shares to be sold, and, after charging her debts and some more legacies on the produce, she gave the residue to W., to whom, with others, she subsequently bequeathed several specific chattels. L. having died in July 1869:—Held, that the words "residuary legatee" referring *primâ facie* to personalty, there was nothing in the context of J.'s will to enlarge their operation into a gift of real estate, and that, consequently, her heir-at-law took the realty or its proceeds, which became undisposed of from the failure of the charitable bequests charged thereon; but that, since the purpose for which a conversion had been directed had not wholly failed, he took such real estate as personalty. *Hamilton* v. *Foot*, 6 Ir. R., Eq., 572.

IX. WHAT I DIE POSSESSED OF.

5. A feme coverte having power to dispose by will of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses:—Held, that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk* v. *Mawdsley*, 1 Sim. 286; 5 L. J., Ch., 149.

6. A testator, possessed only of personalty, by the residuary clause of his will bequeathed the same to his wife for life, and after her decease to his children in certain proportions. Having subsequently acquired real estate, he made a codicil, by which he left certain shares to his wife, "on the same terms as I have everything else (everything I possess I leave her)":—Held, that the words showed a present intention, and passed the real estate. *Warner* v. *Warner*, 20 L. J., N. S., Ch., 273; 15 Jur. 1 1.

7. Devise of all "estate and effects that I shall die possessed of" carries after-purchased lands. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

8. By will testator nominated wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," etc.:—Held, she is entitled, though not as executrix, to all his property that such a will could pass. *Noel* v. *Hoy*, 5 Madd. 38.

9. Devise of "all I am worth" will pass real estate. *Huxstep* v. *Brooman*, 1 Bro. C. C. 437.

10. A gift to A. and B., "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or matter it may be," will pass the fee simple of real estate. *Thomas* v. *Phelps*, 4 Russ. 348; 6 L. J., Ch., 110.

11. A testator gave, devised, and bequeathed his household goods, etc., "and everything he should die possessed of," to A., for life, and after her death, he gave, devised, and bequeathed "the whole of his effects which might be then remaining, unto and to the use of" P.;

—Held, that the real estate passed. *Phillips* v. *Beal*, 25 Beav. 25.

See also III. and VIII. *supra.*

X. ALL THE REST.

1. A testatrix, after a gift of her house and garden (which were leasehold, though not so described) and several pecuniary legacies, directed that "all the rest" should be divided between the persons in her will named:—Held, that the words included realty as well as personalty. *Attree* v. *Attree*, 11 L. R., Eq., 280; 40 L. J., Ch., 192; 24 L. T., N. S., 121; 19 W. R. 464.

2. Whether by words "all the rest of my estate and fortune" in a will, copyhold estate as well as freehold passed, *quære*. *Dod* v. *Dod*, Ambl. 275.

3. A testator gave two pecuniary legacies, and then continued: "And lastly, I give my sheep and the rest, residue, and all moneys, chattels, and all other my effects, to be equally divided among my brothers," whom he appointed his executors.—Held, that all the freehold as well as personal estate of the testator passed under these words. *Smyth* v. *Smyth*, 8 L. R., Ch. D., 561; 26 W. R. 736; 38 L. T, N. S., 633.

4. A testatrix proceeded thus: "And in respect of my real and personal estate," I direct the tenant to be continued, "and as to the rest, residue, and remainder of my estate, including moneys and securities for money," I direct that it shall be divided, etc.:—Held, that the real estate passed. *Meeds* v. *Wood*, 19 Beav. 215.

5. A, having settled all his estates of inheritance upon his wife for life as a jointure, by will says, "all the rest and residue of my estate, chattels, real and personal, I give to my wife, whom I make sole executrix:—Held, that the reversion of the jointure lands did not pass by this devise, but the personal estate only. *Marhant* v. *Twisden*, Gilb. Eq. Rep. 30. Lord Keeper said, that this case differed from *Murry* v. *Wise*, 2 Vern. 564; and that no resolution was ever carried so far as to construe these words to pass a fee.

See also III. *supra.*

XI. OTHER WORDS.

6. A testator gave real estate and personal estate in trust to sell and invest in "stocks, funds, and securities," and hold the residue thereof upon the trusts declared by any codicil. By a codicil he gave "the trust moneys, stocks, funds and securities," by the will bequeathed, to charitable purposes:—Held, that the residuary real estate passed. *Whicker* v. *Hume*, 14 Beav. 509. Affirmed 1 De G. M. & G. 506; 21 L. J., N. S., Ch., 406; 16 Jur. 391.

The word "bequeath" is large enough to carry real estate, if distinctly applied to it. S. C. 14 Beav. 518.

7. A. devises to her niece thus: "I make my niece G. executrix of all my goods, lands, and chattels," and dies, not having any leasehold interest, yet her lands of inheritance pass not by these words. *Piggot* v. *Penrice*, Pre. Ch. 471.

8. Devise of "all I am worth" will pass real estate. *Huxstep* v. *Brooman*, 1 Bro. C. C. 437.

9. The word "legacy" *primâ facie* has reference to personal estate only. *Windus* v. *Windus*, 6 De G. M. & G. 549; 26 L. J., Ch., 185; 2 Jur., N. S., 269, 1101; 21 Beav. 373.

Worldly Goods.] 10. A testator made his will in part in the following words: "I give to (trustees) all my worldly goods of what nature and kind soever, and wheresoever they might be found, upon trust to perform the trusts and conditions under-mentioned; my wife to have possession of all while she lives; but if she marries, to quit possession; all my debts and legacies to be paid out of my personal estate and Westwood Close. To my son J. W., his heirs and assigns for ever, 20*l.* and Honey Close; to W. E. and T. my children, and to the child or children that my wife may be *enceinte* with at the time of my decease, the rest of my worldly goods; all my debts to be paid at my decease":—Held, that the words "all my worldly goods of what nature or kind soever and wheresoever they might be found" included the whole of the real and personal estate of the testator; and the words "the rest of all my worldly goods" carried the residuary real and personal estate, which passed to the children named in the will, and R. W. born in due time after the testator's decease. *Wright* v. *Shelton*, 18 Jur. 445.

Business.] 11. A testator devised and bequeathed his whole property to trustees upon trust to invest such part as they should think fit in his business, and carry on the same till his son should attain the age of twenty-one years, and out of the profits to pay his widow the yearly sum of 200*l.* so long as she should remain a widow; and he directed the trustees, when his son should attain twenty-one, to transfer the business to the son. He then gave certain legacies to his other children, and provided that all his personal estate not required for the business should be continued in its then state of investment or altered at the discretion of the trustees, and the proceeds applied for the same purposes as the capital employed in the business. The business was carried on in a freehold shop:—Held, that the direction to transfer the business did not pass the freehold shop, and that the residuary gift carried the surplus profits of the business during the minority of her son. *Re Henton*, *Henton* v. *Henton*, 30 W. R. 702.

Moneys.] 12. A husband directed the income arising from his principal money to be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them. The testator had but little money strictly so called, but he had large personal property, and some freehold property:—Held, that the whole of the personal property passed, including leaseholds; but not the freehold property. *Prichard* v. *Prichard*, 11 L. R., Eq., 232; 40 L. J., Ch., 92; 24 L. T., N. S., 259.

XXXVIII. Particular Words of Description and Descriptive Gifts.

See also XXXV. *ante*—XXXVI. *ante*—XLI. *post*—LXIII. I. *post*.

I. ADVOWSON AND NEXT PRESENTATION. WHAT WORDS WILL PASS.

1. An advowson in gross will pass by the words "tenements" and "hereditaments," but not by the word "lands," and it is assets by descent to satisfy bond creditors. *Westfaling* v. *Westfaling*, 3 Atk. 460, 465.

2. An advowson does not pass by the word "tenement." *Kensey* v. *Langham*, Forrest, 146 n.

3. Devise of lands, tenements, and hereditaments, subject to a term of eleven years, in trust, to receive the rents, issues, and profits of the premises that from time to time should accrue and become due, and dispose, etc. An advowson in gross passes, and a sale of the next presentation within the term by direction, and for the benefit of the *cestui que trust*, was established. *Albemarle* (*Earl*) v. *Rogers*, 2 Ves. J. 477.

4. Devise of surplus rents and profits carries a right of presentation. *Sherrard* v. *Harborough* (*Lord*), Ambl. 167.

5. A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the rents, dividends, interest, and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child; and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate, and the rents, dividends, interest, and annual income thereof, in trust for her children or child who should attain twenty-one, their heirs, etc.; and if she should have no such child, then in trust, after her death, for the trustees, their heirs, etc. The testator then directed his trustees to sell the advowson after his death. At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was whether the children, their mother, or the trustees were entitled to present to it:—Held, that as the presentation to a living does not produce rents, dividends, interest, or annual income, the dispositions of the will were not applicable to that species of property; and, consequently, that the testator's sister was entitled, as his heiress-at-law, to present to the living on the existing vacancy. *Martin* v. *Martin*, 12 Sim. 579; 11 L. J., N. S., Ch., 291; 6 Jur. 360.

6. A testator, who was entitled to various rectories, devised his manors, advowsons, messuages, and hereditaments to trustees to make certain payments out of the rents, issues, and profits, and subject thereto to accumulate the "residuary or surplus rents, issues, and profits" of the property for twenty-one years on specified trusts. A claim by the heir-at-law to the proceeds of sale of a next presentation to one of the rectories, on the ground that the next presentations were not disposed of under the trust of "rents, issues, and profits," was disallowed. *Cust* v. *Middleton*, 34 L. J., Ch., 185; 11 L. T., N. S., 552; 10 Jur., N. S., 1227.

Semble, that the words "rents, issues, and profits" were of themselves sufficient to include the proceeds of sale of the next presentation. *Ib.*

7. A., by will, directed trustees, upon the death of the present incumbent, to present A. to the living of S, in case he should take orders; and if he should not, or, taking orders, should die in the lifetime of B., then to present B., in case he should take orders; and after their several deceases, or of such of them as should take orders and be presented, or in the event of neither taking orders, A. devised the

advowson to C. in fee:—Held, that the gifts in favour of A. and B. were in succession and not alternative, and that on the death of A., B. was entitled to be presented. *Hatch* v. *Hatch*, 20 Beav. 105; 3 W. R. 354.

A testator having the power of disposing of an advowson (subject to the existing incumbency of A., and a contingent right of B. to be afterwards presented), devised "the next avoidance thereof" in favour of C.:—Held, that "the next" meant the next the testator had power to dispose of, viz. that following the incumbency of A. and of B. *Ib.*

1. A testator devised all his real and personal estates to trustees, their heirs, executors, administrators, and assigns, upon trust to sell the same as soon as conveniently might be (except his advowson of the rectory of C. and certain land in the parish, which he directed should be sold immediately after the decease of the then incumbent, his son J.). The trusts of the proceeds were declared to be for his children therein named. J. had lately died:—Held, that the right of presentation did not revert to the heir-at-law of the testator, but passed by the will. *Johnstone* v. *Baber*, 6 De G. M. & G. 429; 2 Jur., N. S., 1053; 25 L. J., Ch., 899.

Held (reversing 22 Beav. 562), that the right of the parties beneficially entitled under the will to present to the rectory should not be successive, but should be decided by lot. *Ib.*

2. The word living is sufficient to pass an advowson, but it may be restricted to the next presentation. The context must determine its meaning. *Webb* v. *Byng*, 2 Kay & J. 669; 4 W. R. 657.

Devise to a minor of "the livings of Q. and C., should he like the profession and be qualified for them":—Held, to show an intention to confer on the devisee a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the advowson. *Ib.*

3. Testator devised *inter alia* all his estate, etc., to trustees on trust, out of the rents and profits during the lives of A. and B., and the survivor, to pay debts, legacies, and repairs, subject thereto to pay 2,000*l.* a year to A. who was his heir-at-law, and subject thereto to B. for life:—Held, that advowsons passed, that the next presentations belonged neither to A. nor to B. till the trusts for payment of debts, etc., were satisfied, and must be sold for those purposes. *Cooke* v. *Cholmondeley*, 3 Drew. 1; 3 W. R. 1.

4. If A., seised of an advowson, be also incumbent and devises it, the devisee, after his death, shall nominate; for where the ownership and property of an advowson be in the devisee, they, and not the heir, shall nominate in consequence of such ownership, nor will it make any difference, whether the devisee has the advowson in him as a personalty or as a realty. *Hawkins* v. *Chappell*, 1 Atk. 622.

II. APPURTENANCES.

5. By a devise of a house, *cum pertinentiis*, only the garden and orchard will pass with it; but by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass. One devised that his cousin A. should continue to live at his house, and be at the charge of keeping the house and the servants, and coach-horses which the testator employed in ploughing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin A. *Blackborn* v. *Edgley*, 1 P. W. 603.

6. A testator devised and bequeathed his indigo factory in India, "with the zemindaries, villages, and lands therewith held and used, and the appurtenances," to A., for life, with remainder over. At his death, the "outstandings" of the factory business comprised loans secured by bonds of native landowners to obtain leases of lands for the cultivation of indigo, and advances made to sub-lessees to secure the supply of indigo to the factory. These loans and advances were always considered part of the concern, which, in fact, could not have been carried on but for such arrangements:—Held, that the outstandings did not pass under the specific devise of the factory, either as appurtenances or otherwise. *Finch* v. *Finch*, 35 L. T., N. S., 235.

7. The word "appurtenances" does not properly, either in a deed or a will, include land where the principal subject of gift is land or a messuage. But in a will, if the circumstances and context show that land was meant to pass as appurtenant, the word is flexible enough to carry such land. In ascertaining such intent as between a *cestui que trust* under a devise in trust and the heir, it is material that the whole land, including that claimed as appurtenant, is comprised in the devise to the trustee. It is also material that the *cestui que trust's* interest is subjected by the will to charges of a particular amount. *Cuthbert* v. *Robinson*, 51 L. J., Ch., 238; 46 L. T. 57; 30 W. R. 366.

8. Devise since 7 Will. 4 and 1 Vict., c. 26, s. 24, of "all that messuage or dwelling-house wherein my son now resides, with the stables and appurtenances thereto belonging, and therewith occupied." The testator subsequently converted a piece of land into garden ground, and attached it to the house, and the garden continued to be occupied with the house up to his death:—Held, that the garden passed under the devise. *Re Otley & Ilkley Railway Co.*, 11 Jur., N. S., 818; 34 L. J., Ch., 596; 13 W. R. 851; 12 L. T., N. S., 659. S. C. *nom. Re Midland Railway Co., Exp. Otley & Ilkley Branch*, 34 Beav. 525; 6 N. R. 244.

9. A devise of lands, situate, lying, and being within the parish of G., "with the appurtenances," does not pass lands, thirty-three and a half acres, in the parish of A., which had been allotted in respect of land in both parishes, and which had always been let and occupied together. *Lister* v. *Pickford*, 34 Beav. 576.

Land cannot be appurtenant to land, and a devise of "land at G., with its appurtenances," will not operate to pass land at B., although it has always been dealt with and leased as part of the land at G. S. C. 11 Jur., N. S., 649; 34 L. J., Ch., 582; 13 W. R. 827; 12 L. T., N. S., 587; 6 N. R. 243.

A testator, possessing a farm in the parish of

G., and a small piece of land in the adjoining parish of A., which had always been occupied and let at an entire rent with the farm in G., devised all his lands and hereditaments, "situate, lying, and being within the parish of G., with the appurtenances," to G. for life, with remainder to the child or children of G. in tail, and he empowered P. and J., the trustees of his will, during the minority of a tenant in tail entitled in possession, to take possession of the property on behalf of the minor, and to grant leases; and he devised the residue of his real estate to P. and J. during the life of M. in trust for M., with remainders over. The testator died in 1842, and thereupon G. took possession of the lands in G. and A. In 1850, G. died, leaving an only daughter, an infant, and P. and J. took possession of the land in G. and A, and in 1861 they granted a lease of the whole farm in pursuance of the power. In 1863, the daughter of G. came of age and took possession of the whole farm. In 1864, M. filed a bill to establish his right to the land in A.:—Held, that the land in A. did not pass by the specific devise, but formed part of the residuary estate, and that M.'s right was not barred by the Statute of Limitations, inasmuch as the possession of P. and J. from 1850 to 1863 must be attributed to their character of devisees in trust of the residuary estate, and was therefore not adverse to that of M. *Ib.*

1. C. occupied a house at B., and stables in the neighbourhood held under a different title. He bequeathed the lease of the house at B., "with all buildings belonging to me, and what the buildings may contain":—Held, that the stables, and the carriages and horses therein, passed to the legatee. *Kennedy* v. *Kelly*, 28 Beav. 223.

2. Under a devise of all the testator's freehold lands situate in the parish of C, with their appurtenances, land in two adjoining parishes, which had always been let with the lands in the parish of C., and occupied by the same tenant:—Held, not to pass. *Evans* v. *Angell*, 26 Beav. 202; 5 Jur., N. S., 134.

3. A devise of lands and tenements without more, or a devise of messuages and tenements to uses applicable only to the freehold property without more, will not pass the testator's leasehold property. But a devise of messuages or tenements, with the appurtenances, to uses applicable only to freehold property, will comprise leasehold property, where a clear intention to that effect can be collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold. *Hobson* v. *Blackburn*, 1 Myl. & K. 571; 2 L. J., N. S., Ch., 168.

III. BALANCE. SMALL BALANCE.

4. Bequest of the balance in the hands of testator's agents at the time of his death:—Held, to include a sum which he had by letter directed them to invest in the funds, but which was not invested till after his death. *Hill* v. *Mason*, 2 Jac. & Walk. 248.

5. Gift of "any small balance remaining in the bank after payment of my funeral expenses." The testatrix had, at the date of the will, a balance of 480*l.* at her bankers', which had increased to the amount of 1,373*l.* 0*s.* 10*d.* at her death:—Held, that the whole balance passed. *Page* v. *Young*, 19 L. R., Eq., 501; 23 W. R. 479.

IV. BONDS.

6. Bequest of a "bond of a given amount, with interest at a given rate":—Held, to carry the arrears of interest due upon the bond at the death of the testator. *Kent* v. *Tapley*, 11 Jur. 940.

7. A gift of 300*l.* upon a bond, does not carry the interest incurred in the testator's lifetime. *Roberts* v. *Kuffin*, 2 Atk. 112.

8. Bequest, after several pecuniary legacies, "of all my bonds, shares in the bank to A, by paying the above-mentioned sums." The testator was possessed of several bonds, upon which judgment had been entered, and of some which were barred by the Statute of Limitations:—Held, that the moneys due on the judgments entered on the bonds passed by this bequest. *Mercer* v. *Mercer*, 10 Ir. Ch. R. 505.

9. Canal shares will not pass under a bequest of property vested in "bonds or securities." *Hudleston* v. *Gouldsbury*, 10 Beav. 547; 11 Jur. 464.

V. BOOK DEBTS.

10. A. bequeathed his stock-in-trade, etc., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book-debts or capital which he at his death might have employed therein."—Held, that the widow and son were entitled to the book-debts or capital absolutely. *Terry* v. *Terry*, 12 W. R. 66; 9 L T., N. S, 469; 33 Beav. 232.

11. Book-debt held to be balance due to a testator who was a trader, after deducting the amount to which the testator was indebted to his debtors, for trade and private debts. *Re Chick* v. *Blackmore*, 2 W. R. 488; 23 L. J., Ch., 622; 2 Sm. & G. 274.

See also VIII. *post.*

VI. CHATTELS, GOODS. EFFECTS IN A PARTICULAR PLACE.

See also XIV. and XVI. *infra.*

1. In General.

12. The manuscript note-book of a physician made during his attendance on a patient:—

Held, to pass by his will under the general description of all his books in a particular residence where such note-book was found. *Willis* v. *Curtois*, 1 Beav. 189; 8 L. J., N. S., Ch., 105.

A testator, having three places of residence at A., B., and C., after having devised to his nephew his messuages at A, next bequeathed to him his house at B, which was leasehold, and the will then proceeded, "and I also give to my said nephew all my carriages, horses, implements, and my live and dead stock and chattels in and about the said house and premises, and also my household goods and furniture, pictures, plate, linen, china, liquors of all sorts, and brewing vessels, and likewise my watches and personal ornaments":—Held, that the household goods, etc., in each of the three residences, passed by this bequest. *Quære*, whether a bust passed under the above words. *Ib.*

1. A. devises 1,200*l.* to his wife, and gives her all the goods and chattels, plate, jewels, household stuff, and stock belonging to his house at N.; 400*l.* which the testator has in the house will not pass by these words. *Anon.*, Pre. Ch. 8. S. C. *nom. Saunders* v. *Earl*, 2 Ch. Rep. 188.

2. Where testator devised all his goods, chattels, household furniture, stuffs, and other things which should be in his house at time of his death:—Held, a sum of money there did not pass. *Trafford* v. *Berrige*, 1 Eq. Abr. 201.

3. A testator by his will gave all his engravings in his dwelling-house at A. "or elsewhere" to his wife. He had sold certain engravings to T. by a voidable sale seven years before his will, and he died three years after making his will. The widow afterwards discovered that the sale was voidable and brought an action against T. to have it set aside, in which a decree was made that, as executrix, she was not bound by the sale and was entitled to the proceeds of the engravings:—Held, in an action against her as executrix by legatees that the engravings did not pass by the specific bequest to the widow. *Turner* v. *Turner*, *Hall* v. *Turner*, 28 W. R. 859.

4. By devise of all testator's goods and chattels in and about his dwelling-house and outhouses at A., at his death:—Held, that running horses passed. *Gower* (*Countess*) v. *Gower* (*Earl*), 2 Eden 201; Ambl. 612.

5. A testator bequeathed to A. "my plate, house-linen, furniture, and all other effects in my house at the time of my death":—Held, that a horse, carriage, car, and some hay in the yard and out-offices passed to A., but not a sum of cash in the house. *Watson* v. *Arundel*, 10 Ir. R., Eq., 299.

6. Horses only used at a testator's town house, but regularly wintered at his country house, and happening to be in their winter quarters at the time of his death, will pass by a bequest of the town house, with the horses in, upon, or about the same, or the stables thereof. *Bruce* v. *Howe*, 19 W. R. 116.

7. Under a devise to A., of the testator's house, with the lands thereunto adjoining as then used and occupied by himself, and also all the household and other furniture, pictures, plate, books, and all other things whatsoever usually therein, or considered as belonging thereto, except only cash, banknotes, and securities for money,—neither carriages, carriage and riding horses, used by the testator for the accommodation of himself and his family, nor farming stock and utensils used by him in cultivating said lands, pass, although some were usually in the stables and on the lands, and were there at the time of the testator's decease. *Pennefather* v. *Bury*, 3 J. & L. 727; 9 Ir. Eq. R. 586

8. Bequest of the use and enjoyment "of everything else at my house," means such things as are proper to go with the house as heirlooms, viz., fixtures and ornaments, not watches, etc. *Boon* v. *Cornforth*, 2 Ves. 277.

9. A testator, by his will, said, "I give to my wife all my household furniture, plate," etc, "and other effects of the like nature, and all wines," etc, "which shall, at my decease, be in or about my dwelling-house, then occupied by me":—Held, that in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part, and therefore that it passed plate at the testator's bankers, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, etc., deposited for safe custody at a warehouse. *Domvile* or *Domville* v. *Taylor*, 32 Beav. 604; 11 W. R. 796; 2 N. R. 258; 8 L. T., N. S., 624.

10. Where the testatrix bequeathed to her niece all her pictures and coins (excepting those of the two last reigns), in and about her dwelling-house, and all the residue of her estate, real and personal (except as afterwards given), to grandchildren, and directed that, from and after the day of her interment, all the property over which she had any disposing power in and about her dwelling-house should belong to her niece (except what she had otherwise given); hoards of money, in guineas, sovereigns, notes of the Bank of England, promissory and country notes, and a mortgage security, were afterwards found in the house:—Held, that the niece was entitled to the money and bank notes, but not to the country bank promissory notes, or mortgage. *Brooke* v. *Turner*, 7 Sim. 671; 5 L. J., N. S., Ch., 176.

11. A testator bequeathed his leasehold mill to trustees upon certain trusts, and all the corn and other articles which at his death should be in or about his dwelling-house, mill, or premises, he gave to his two sons absolutely:—Held, that a cargo of wheat consigned to the testator, and in course of transit on the day of his death, passed to the executors and not to the sons. *Lane* v. *Sewell*, 43 L. J., Ch., 378.

12. S. bequeathed as follows: "Whereas I am seised of a life estate in K. house and demesne, which passes after my death to W. S., I will and bequeath to him the house, furniture, books, plate, and so forth, as left by my late aunt, C. S.; also the sheep, milch cows, together with the hay and corn on the premises," reserving certain pictures:—Held, that the bequest was confined to everything at K. of a permanent nature, such as furniture, books, and plate, whether left by C. S. or acquired by himself; and did not include articles

necessarily liable to be parted with or consumed, or any property on the farm acquired by himself, except the sheep, etc., expressly mentioned. *Scaly* v. *Stawell*, 2 Ir. R., Eq., 326.

1. On a gift by a testator of all his freehold house and property situate in Wright's road:—Held, that scaffolding and building materials situate in the ground near the house did not pass. *Conway* v. *Vernon*, 2 Giff. 277; 7 Jur., N. S., 958.

2. Choses in Action.

2. Neither choses in action nor securities for money pass under a bequest of "goods and chattels." *Chapman* v. *Hart*, 1 Ves. 271. What passes by devise of all goods and chattels in a house, not a bond or chose in action. *Ib.* But see *Anon.* 1 P. W. 267.

3. A will in these words, "I give all in S. to R.," does not pass a bond which happened to be at testator's house in S. *Moore* v. *Moore*, 1 Bro. C. C. 127.

4. Bequest of "all my property in A., except" a particular chose in action, described in the will, other choses in action of testator found in A., do not pass, notwithstanding the exception. *Fleming* v. *Brook*, 1 Sch. & Lef. 318.

5. Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house; which parts he gave to his son, and directed the household furniture to go as heir-looms, and gave all arrears of rents which should be due to him at his death to his son: a bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belong to residuary legatee. *Jones* v. *Sifton* (*Lord*), 4 Ves. 166.

6. Generally, choses in action do not pass by a bequest of "goods and chattels" in a particular locality. Bequest "of all the goods and chattels, plate, linen, money at the bankers', or stock in the Monte de Milano, horses, carriages, etc., I may die possessed of at M.:"—Held, not to pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearers to receive the interest and capital a future time:—Held, also, that such securities could not be considered as money or cash; and thirdly, that not having their locality at M., they did not pass under the words, "etc., at M." *Hertford* (*Marquis*) v. *Lowther* (*Lord*) (*Countess Zichy's case*), 7 Beav. 1; 13 L. J., N. S., Ch., 41; 7 Jur. 1167.

7. Banknotes pass as cash by bequest of "all that should be in his house at testator's death." *Popham* v. *Aylesbury* (*Lady*), Ambl. 68.

8. A testatrix bequeathed to her niece, among other things, all her coins in and about her dwelling-house, except those of the two last and present kings, and also gave her a pecuniary legacy. She also gave to another person specifically some of the property in the same house. She then made a general residuary bequest to another person, except as otherwise disposed of, and then gave to her niece all her property in and about her said dwelling-house, except what she had otherwise given. A variety of guineas and sovereigns of the three reigns specified in the exception were found in the house:—Held, that they passed by the general bequest of all property in the house. *Brooke* v. *Turner*, 7 Sim. 671; 5 L. J., N. S., Ch., 176.

Held, that by the description of "all the property over which I have any disposing power in and about my said dwelling-house," securities for money, and promissory and country banknotes did not pass, but that Bank of England notes did. *Ib.*

9. Bequest of "all my right and title to my property in the town of R., namely, my dwelling-house and household furniture, and all things now therein, in my possession, especially my car-horse and covered and side cars":—Held, that banknotes, known by the testator to be in the house at the time the will was made, passed to the legatee, *Mahony* v. *Donovan*, 14 Ir. Ch. R. 262. Affirmed 14 Ir. Ch. R. 388.

3. Chattels to be Settled as Heirlooms.

10. A testator directs that his household furniture, etc., and utensils in and about his mansion house at H., should go with the mansion house, and that for that purpose his trustees should make an inventory of the furniture, etc., and utensils which should be found in and about his mansion house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator, along with the mansion house. *Fitzgerald* v. *Field*, 1 Russ. 427; 4 L. J., Ch., 170.

11. A testatrix having two houses, and residing occasionally in each, and having a life estate in them with limitations over in tail male, gave by two separate gifts, nearly in the same words, the household furniture, etc., "in and about the same," specifically, in one case inserting a few words not found in the other, and excepting in one an article not mentioned in the other. and as to one referring to the articles as "heirlooms," to be enjoyed by the persons entitled in remainder. Money, railway certificates, live stock, carriages, wines and spirits, and hay were found on the premises:—Held, that these did not pass, but that plate, books, jewellery, and a piano did pass, and whatever was not mentioned in one, but was mentioned in the other, did not pass as to that one, but did pass as to the other. *Hare* v. *Pryce*, 12 W. R. 1072; 11 L. T., N. S., 101.

4. Personal Estate, Property, or Effects in a County or Foreign Country.

12. Bequest of the testator's fortune in India, not extended under the general words, "temporal estate," in the introductory part of the will, to the property in England, part remitted from India between the will and the death, and some on its passage to England at his death. *Sadler* v. *Turner*, 8 Ves. 617.

13. A promissory note due to a testator domiciled in England, by a person resident at the Cape, passes by the words, "property I shall leave in the colony." *Scorey* v. *Harrison*, 16 Jur. 1130.

A testator gave the interest of all the property he should leave at the Cape of Good Hope to his wife for life, and after to his children, and a question arose whether a note for 500*l.*, found by the Master to be payable in London, formed part of such bequest:—Held, that it did, the maker being resident in the colony. S. C. 1 W. R. 99.

1. A testator resident in England at the time of his death bequeathed to his son "all his estate and effects in Mauritius." At the time of his death the purchase money of real estate in Mauritius sold by him to persons residing in that island was due to him. He was not domiciled in Mauritius:—Held, that this debt was included in the bequest of his property in Mauritius. *Guthrie* v. *Walrond*, 22 L. R., Ch. D., 573; 52 L. J., Ch., 165; 47 L. T. 614; 31 W. R. 285.

2. A testator, by a will made in India, gave "the whole of my personal property together with my pay, arrears of pay, also all my goods and chattels, with any cash now in hand or money due to me or that may become due to me after my decease":—Held, that a reversionary interest in a fund in England, to which he was entitled under his parents' marriage settlement, passed. *Re Maberley*, 19 W. R. 522; 24 L. T., N. S., 262.

3. Residuary disposition of all the testator's real and personal estate in Jamaica, in trust, to be remitted to England, was held specific, and not to include a debt originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of, was applied, in the first instance, to the debts, etc. *Nisbett* v. *Murray*, 5 Ves. 149.

4. A testatrix bequeathed her shares in a bank to the persons named in her will, and bequeathed the residue and remainder of her money, estate, and effects, whatsoever and wheresoever situate, to A., one of the legatees of the shares. By a codicil she devised and bequeathed her estate and interest in certain freehold houses in the city of London, and "all and every other my estate and effects in the city of London," to B. The shares were in a bank, the head office of which was in the city, and the testatrix also had a balance at a banker's in the city:—Held, that the shares passed under the will, and that the balance at the banker's being a debt, passed to the residuary legatee. *Rhodes* v. *Rhodes*, 22 W. R. 835.

5. A testator gave "all property belonging to him in the county of W." In that county he was entitled to collieries, in respect of which debts were due to him:—Held, that these debts passed under the gifts. *Tyrone (Earl)* v. *Waterford (Marquis)*, 6 Jur., N. S., 567; 29 L. J., Ch., 486; 8 W. R. 454; 1 De G. F. & J 613.

6. A testator "devised and bequeathed his lands and property whatsoever in Australia," together with the arrears of rents, to A. and B., "their heirs and assigns," and he gave the residue of his estate and effects to C.:—Held, that his personalty in Australia passed under the first gift. *Robinson* v. *Webb*, 17 Beav. 260.

7. One devises to his wife all his personal estate at W.; this is a specific legacy, and to be preferred to pecuniary legacies in case of deficiency of assets; all the testator's personal estate that was at W. at his death shall pass, though not there at the making of the will. *Sayer* v. *Sayer*, 2 Vern. 688; Pre. Ch. 392; Gilb. Exch. Rep. 87.

8. Held, as against a claim by pecuniary legatees to marshal, that where there was a gift of all property, freehold, copyhold, and leasehold, at particular places and elsewhere in the county of Somerset, and all other real and personal estates whatsoever (testator not having, as it appeared, and the Court observed, any real or leasehold property except in Somersetshire), the gift was specific, and not liable to be marshalled either as to leasehold or other property. *Symons* v. *James*, 2 Y. & Coll. C. C. 301.

9. A testator bequeathed "all his American stocks, funds, shares, and securities, and all other his personal property in America, or the North American colonies of Great Britain, or otherwise, coming under the designation of property in America, or the North American colonies of Great Britain, including all such properties which might be secured, or the title evidenced by any specialty or other instrument being at his, testator's, death in this country or elsewhere," upon certain trusts. The testator was entitled amongst other stock, funds, and securities to shares and bonds in the Pennsylvania Railroad Company, Tennessee and Ohio shares and bonds, and of various other companies, Brazilian bonds, old and new Mexican bonds, and other South American securities:—Held, that such shares, bonds, and other South American securities passed under the designation of property in America. *Baring* v. *Ashburton (Lady)*, 17 L. T., N. S., 557; 16 W. R. 452.

10. V. in 1859 devised and bequeathed to his son, an infant, a freehold house and property situate in Wright's Road. At the time of his death there were building materials on the piece of ground in Wright's Road, and the son claimed the same:—Held, that chattels and effects were not in the bequest, and that the building materials formed part of his general personal estate. *Conway* v. *Vernon*, 2 Giff. 277; 7 Jur., N. S., 958.

11. Bequest of "my property not in England and in the hands of my attorney abroad, W., consisting of Russian bonds, etc.":—Held, to pass all the testator's property abroad without limitations. *Drake* v. *Martin*, 23 Beav. 89; 26 L. J., Ch., 786.

5. Removal.

12. Testator bequeathed to his wife as follows: "all my interest in my house at Lavender Hill, the furniture, books, pictures, wines," etc., etc. After the date of his will the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wines, and plate. He afterwards purchased more of these articles, and died at Spencer Lodge:—Held, that his wife was entitled to the furniture, books, pictures, wines, and plate which he had at the time of his death. *Norris* v. *Norris*, 2 Colly. 719; 15 L. J., N. S., Ch., 420; 10 Jur. 629.

13. A testator bequeathed the furniture, etc., which should be in Duddon Hall at his death

to be held as heirlooms by the person entitled to Duddon Hall. At his death part of the original furniture of Duddon Hall had been removed and stored away along with new furniture and furniture from another house intended for, but never placed in, Duddon Hall:—Held, that all such furniture passed along with the furniture actually in Duddon Hall. *Rawlinson* v. *Rawlinson*, 24 W. R. 946; 34 L. T., N. S., 848.

1. A father bequeathed to his daughter "the trunks and boxes and anything contained therein which belonged to my late wife, and which were given to me at her death, and have not since been opened, but are sealed up in the dining-room of Carrig Park." After the death of his wife in 1847, two trunks containing her clothes—there being in one of them a dressing-case containing valuable jewellery—had been sent to Carrig Park, the testator's residence. A few years before his death and the date of his will, the testator, finding that the trunk in which the dressing-case was had been opened without his knowledge, caused the dressing-case with the jewellery to be removed out of the trunk and placed in an iron safe in another part of the house, of which he kept the key, where it was found after his death, locked, corded, and sealed. The trunks were found in the dining-room after his death, also locked, corded, and sealed:—Held, that the dressing-case and jewellery passed under the bequest to the daughter, and did not form part of the residuary estate. *Norreys* v. *Franks*, 9 Ir. R., Eq., 19.

2. Testator gave all his plate and linen in his house in S. to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B., the country house, at his death; yet it passed to the wife. *Land* v. *Devaynes*, 4 Bro. C. C. 537.

Goods removed for a necessary purpose, the legacy of them is not adeemed, as from fire or sent to be repaired, etc. *Ib.*

3. A testator, by his will describing himself as of a particular place, gave to his wife all his household furniture, plate, cutlery, linen, etc., which should be in, upon, or about his said dwelling-house at the time of his decease. The testator removed to another place, and the question was, whether that was an ademption of the bequest:—Held, that it was; the words "said dwelling-house" evidently referring to that particular place. *Houlding* v. *Cross*, 3 W. R. 334; 1 Jur., N. S., 250.

4. Bequest of furniture in one house which is afterwards removed to another house is adeemed. *Heseltine* v. *Heseltine*, 3 Madd. 276.

5. One devises to his son the furniture of his house at D., and orders goods to be carried from London to his house at D., and agrees with carriers for that purpose, but dies before the goods are removed to D. These goods shall not pass by the will as part of the furniture of the house at D. *Beaufort* v. *Dundonald*, 2 Vern. 739.

6. J. devises all his household goods and furniture which should be in his house at R., at his death, to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to accept a surrender of the house and removes the goods to another house, and writes an account of this to J., who approves of it. The goods will not pass by the will to the wife; otherwise if they had been removed by fraud to defeat the legacy, or by any fortuitous act without the privity of the testator. *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747.

7. Bequest of goods on board a ship is good, though they may have been afterwards removed, and were not on board at the testator's death. *Chapman* v. *Hart*, 1 Ves. 271.

8. Testator gave to his wife his house in B., and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it:—Held, that the legacy was adeemed. *Colleton* v. *Garth*, 6 Sim. 19; 2 L. J., N. S., Ch., 75.

9. A. bequeathed to B. his furniture, etc., which at the time of his death should be in the house he then occupied at X. The testator, at his death, had ceased to occupy that house, and had no furniture, etc., therein:—Held, that the bequest failed. *Spencer* v. *Spencer*, 21 Beav. 548.

10. A testator directed his furniture in Gloucester Square to be applied in payment of his debts, and in a subsequent part of his will, he bequeathed his furniture in England to his sisters. The testator removed the furniture in Gloucester Square to another residence:—Held, that it did not pass to his sisters. *Blagrove* v. *Coore*, 27 Beav. 138.

11. The testator by will gave to B. all his goods, etc., in his study, except his books and writings. He gave to C. all his books at his Chambers in the Temple. He removed the books into the country before his death:—Held, that C.'s legacy was adeemed. *Green* v. *Symonds*, 1 Bro. C. C. 129. n.

12. A testator, by his will, said, "I give to my wife all my household furniture, plate," etc., "and other effects, of the like nature, and all wines," etc, "which shall, at my decease, be in or about my dwelling-house, then occupied by me":—Held, that in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part, and therefore that it passed plate at the testator's bankers', family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, etc., deposited for safe custody at a warehouse. *Domvile* or *Domville* v. *Taylor*, 32 Beav. 604; 11 W. R. 796; 8 L. T., N. S., 624; 2 N. R. 258.

VII. CLOTHES. PERSONAL ORNAMENTS.

13. Bequest of all my clothes and linen whatsoever, passes body linen only. *Hunt* v. *Hort*, 3 Bro. C. C. 311.

14. Ornaments of the person do not pass by a bequest of a cabinet of curiosities, even though occasionally shown with it. *Cavendish* v. *Cavendish*, 1 Bro. C. C. 467.

Diamonds and pearls, made up for wear, will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, gems, and oriental stones, and other

valuable things; valuable things must mean things *ejusdem generis*. S. C. 1 Cox 77.

1. A pocket book and a case of instruments usually carried about the person of testator:—Held, not to pass under the words "personal ornaments;" but whether a gold pencil case, toothpick, lip-salve box, and eye glass similarly circumstanced would pass, *quære*. *Willis* v. *Curtois*, 1 Beav. 189; 8 L. J., N. S., Ch., 105.

VIII. DEBTS DUE.

2. A testatrix, being entitled to her son's residuary estate, the amount of which was unascertained at her death, bequeathed as follows: "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children":—Held, that the son's residue passed by the bequest. *Bainbridge* v. *Bainbridge*, 9 Sim. 16; 7 L. J., N. S., Ch., 4; 2 Jur. 63.

3. Under a bequest of "all debts due and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator, after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the re-investment being passed at the time of his death, therefore not comprehended in the residuary devise, enumerating (among other things), "his Government stocks and funds." *Essington* v. *Vashon*, 3 Meriv. 434.

4. Testator was entitled to a rent charge or annuity (issuing out of an estate of a tenant for life), equivalent to the amount of the annual interest upon the purchase money of the annuity, and the annual premiums payable upon policies of insurance effected upon the life of the tenant for life, to secure the repayment of the principal; and by a subsequent parol agreement the annuity was made determinable by either party:—Held, upon the entire transaction, that this annuity and the policies, being merely the securities for a debt, passed under a bequest of all the "outstanding debts owing" to the testator:—Held, also, that the word "debentures" in a will was sufficient to include general policies of insurance. *Phillips* v. *Eastwood*, Ll. & G. *temp.* Sugd. 270.

5. Testator gives a debt due from "J. on bond, 300*l.* and upwards," to A., B., and C. The debt is 350*l.*, viz., 200*l.* by bond, and 100*l.* by covenant, and 50*l.*:—Held, that the three sums pass to A., B., and C. *Williams* v. *Williams*, 2 Bro. C. C. 87.

6. A Scotch heritable bond, although it contain a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an English will, but descends to the heir-at-law. *Jerningham* v. *Herbert*, 4 Russ. 388; Taml. 103.

7. Money at a banker's held to pass under a bequest of all debts due to the testator at the time of his death. *Devaynes* v. *Noble*, 1 Meriv. 541.

8. A testator gave to the plaintiff the debt which was due from her to him. The plaintiff was not indebted to the testator, but she owed a sum of money to the firm in which the testator was a partner:—Held, that the joint debt passed under the bequest, subject to the rights of the surviving partners; and it being admitted that the partnership assets could be so arranged that the whole of the joint debt might be included in the testator's share of the assets, the plaintiff was declared entitled to the whole debt. *Mayberry* v. *Brooking*, 4 W. R. 155; 25 L. J., Ch., 87; 2 Jur., N. S., 76; 7 De G. M. & G. 673.

9. A father after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator. By a codicil the testator released the son from another specified debt for moneys misappropriated by the son:—Held, that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by his father between the date of his codicil and of his death. *Everett* v. *Everett*, 7 L. R., Ch. D., 428; 47 L. J., Ch., 367; 26 W. R. 333; 38 L. T., N. S., 580. Reversing 25 W. R. 765; 6 L. R., Ch. D., 122; 36 L. T., N. S., 913.

10. A father directed his debts, including 300*l.* due to his daughter, to be paid immediately. He owed his daughter 150*l.* only:—Held, there was no legacy given by this direction. *Wilson* v. *Morley*, 46 L. J., Ch., 790; 5 L. R., Ch. D., 776; 25 W. R. 690; 36 L. T., N. S., 731.

11. Where arrears of debt are bequeathed, they are confined to those due at time of making will. *Att.-Gen.* v. *Bury*, 1 Eq. Abr. 201.

12. Bequest of debt which shall be owing on a particular day, taken as it stood at that day, and not affected by consignments from Indies, on account since death of testator, which happened previous to day specified. *Innes* v. *Mitchell*, 6 Ves. 461.

See also V. *ante*—Legacy, VI.

IX. DIVIDENDS.

13. Unreceived dividends held not to pass under a bequest of the dividends and interest of all the testator's money in the funds to a legatee for life. *Shore* v. *Weekly*, 3 De G. & Sm. 467.

A testator bequeathed all the dividends or interest of all his money in the funds, and of all other his personal property, to A., for life. The testator was at his death entitled to some dividends on stock, which had accrued due during his life, but had not been received by him:—Held, that such dividends did not pass under the words "dividends of his money in the funds," but formed "part of his general personal estate." S. C. 18 L. J., N. S., Ch., 403; 13 Jur. 1021. See also *Constable* v. *Bull*, 18 L. J., N. S., Ch., 302; 13 Jur. 619.

14. A testatrix directed her trustees to pay the dividends arising from her personal estate,

invested at her decease in or upon any stocks, funds, or securities whatsoever, yielding interest, to certain persons named in her will. The testatrix, at her death, left a balance in the hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year:—Held, that this balance did not come within the terms used by the testatrix, but was undisposed of by the will. *Archibald* v. *Hartley*, 21 L J., Ch., 399.

1. A testator bequeathed the dividends on his American bonds, "which should be due to him at the time of his decease," upon trust for payment of certain arrears of allowances to his daughters. In his lifetime the dividends on these bonds having fallen into arrear, part of the arrears was capitalized, and bonds issued for the amount, and delivered to the trustees of a separation deed executed by the testator, though it did not appear that he was himself aware of the capitalization:—Held, that he must be taken to have been aware of the capitalization, and therefore that the capitalized bonds did not pass as dividends due to him at the time of his death, but that only the uncapitalized dividends passed, and that the legacy was specific and not demonstrative. *Ricketts* v. *Harling*, 23 L. T., N. S., 760.

X. FARM.

2. The word "farm" means primarily land which is not held by the owner, but granted out to and occupied by another person, and may relate to the interest either of the lessor or of the lessee. *Holmes* v. *Milward*, 38 L. T., N. S., 381; 26 W. R. 608; 47 L. J., Ch, 522.

A gift of farms with real estate, upon limitations which import the fee, carries the interest in the real estate only and does not carry with it the leasehold interest in a farm. *Ib.*

3. A bequest of "the field in front of my dwelling-house" does not include the house and curtilage, though in fact locally situate in the field, and such house and curtilage pass by a bequest of "the residue of my said farm." *O'Connor* v. *O'Connor*, 19 W. R. 90; 4 Ir. R., Eq., 483.

XI. FARMING STOCK. LIVE AND DEAD STOCK.

4. B., who was a tenant farmer, bequeathed his household goods and other things, together with all his live and dead farming stock, implements, and all other the household and farming effects, to his wife for life, or for so long as she should continue to be his widow; and he directed that after his decease an inventory should be made and taken of his personal estate, and that two copies should be made, one to be delivered to his wife, and the other to be signed by her and kept by his executors, but he gave no directions as to any valuation of his personal estate. The testator, in case his wife should marry again, bequeathed all his personal estate and effects in trust for certain legatees. After his death, an inventory of his personal estate generally was made for probate duty, but no inventory was made and signed as directed by the will. He died in 1853, and the widow married in 1857, whereupon the legatees in remainder claimed that the widow and her husband might be charged with the value of articles included in the inventory, viz., "growing turnips and roots, tallows, labour, seeds, and manure; layers; manure made, and not carried out on the farm; wheat, barley, beans and peas, and straw and haulm severed from the ground; oxen, sheep, pigs, and horses":—Held, as the testator had not directed a valuation, that the established rule of the Court must prevail, viz. that articles *quæ ipso usu consumuntur*, and which were necessarily employed on the farm in order to maintain the course of husbandry, did not pass to the legatees in remainder. *Bryant* v. *Easterson*, 5 Jur., N. S, 166.

5. A farmer bequeathed "the whole of the consumable and other provisions, farming stock and effects, farming implements, growing crops, and tenant right," in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of his decease," and after that day, to transfer "the consumable and other provisions, farming stock, and effects" upon his house and farm, to his son. He declared that his trustees were not to sell the "farming stock and effects" except in the ordinary course of management of the farm, and that the money produced thereby should fall into his residue. He died about four o'clock on the 5th of April, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock, of the value of 3,314*l*:—Held, that these passed to the son. *Harvey* v. *Harvey*, 32 Beav. 441.

6. *Semble*, that by a devise of a W. I. plantation, the stock, implements, utensils, etc., upon it will pass. *Lushington* v. *Sewell*, 1 Sim. 435.

7. A testator bequeathed "all his live and dead farming stock in and about the farm and farm buildings then occupied by him":—Held, as against residuary legatees, that everything upon the farm belonglification testator at the time of his death, inly to the animals, the unsold produce, and thed plate crops, passed under the bequest. *Dùin* the *Burbidge*, 37 L. J., Ch., 47; 16 W. R.nant L. T., N. S., 138. 'tled

8. A gift of "all farming stock" will nuce against the devisee, pass crops on the grout unless there be a plain intention that t. legatee of the farming stock is to take all the personal estate. *Vaisey* v. *Reynolds*, 5 Russ. 12; 6 L. J., Ch., 172.

9. A testatrix, after devising all her real estate to A., gave all the "farming stock, goods, chattels, and effects in and about" one of her farms forming part of her real estate to B.; and she gave the residue of her personal estate to other persons:—Held, that all crops growing on the farm at the testatrix's death passed to B. *Vaisey* v. *Reynold* (5 Russ. 12) disapproved of. *Re Roose, Evans* v. *Williamson*, 17 L. R., Ch. D., 696; 50 L. J., Ch., 197; 43 L. T. 719; 29 W. R. 230.

Live and Dead Stock.] 10. Testator gives "all his stock, cattle, horses, and carriages" to his wife absolutely, and gives his "farm and

stock, and crop thereof," to his said wife during widowhood:—Held, live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. *Randall* v. *Russell*, 3 Meriv. 190. And see *Hardman* v. *Johnson*, *id.* 347.

1. A testator gave to his widow for her own absolute use and disposal "all his furniture, linen, plate, pictures, carriages, horses, and other live and dead stock which might be in his use and possession" at the time of his death:—Held, that the wine, which was of the value of about 150*l.*, and the books, about 50*l.*, passed to her by the specific bequest. *Hutchinson* v. *Smith*, 11 W. R. 417; 8 L. T., N. S., 602; 1 N. R. 513.

2. "Stock" held not to include plated furniture or linen. *Wilson* v. *Wilson*, 11 Jur. 793 And see S. C. 1 De G. & Sm. 152.

3. A tenant for life of a plantation in Jamaica bequeaths and devises to A., his heirs, executors, administrators, and assigns, all her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses, and other live and dead stock upon that plantation, and all other her real estate in Jamaica, and, after various specific and pecuniary legacies, she gives the residue of her goods, chattels, and personal estate and effects to B.; A. is entitled to the growing crops, which were on the plantation at the death of the testatrix. *Blake* v *Gibbs*, 5 Russ. 13.

4 W. devised all his household goods, cattle, corn, hay, and implements of husbandry, and stock belonging to his house, messuage, farm, and premises held by him on lease, to his wife for life.—Held, that a malthouse being included in the lease, the stock of that as well as the stock in husbandry, will pass by the bequest. *Brooksbank* v. *Wentworth*, 3 Atk. 64.

By way of Remainder.] See Vested Contingent and Future Interests, XIII. II.

XII. FOREIGN BONDS.

5. A bequest of "foreign bonds and other securities":—Held, to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds. *Ferguson* v. *Oyilby*, 2 Dr. & War. 518; 1 Con. & L. 554.

6. Colonial bonds will not pass under the description "foreign bonds." *Hull* v. *Hill*, 25 W. R. 223; 4 L. R., Ch. D., 97.

XIII. FUNDS. MONEY IN THE FUNDS.

7. A testatrix, by will, in 1837, bequeathed as follows: "To my dear brother I leave everything I may be possessed of at my decease for his life; and should he marry, and have children of his own, to those children after; but should he die a bachelor, at his death I leave the whole of my fortune now standing in the funds to E., my goddaughter." A portion of the personal estate of the testatrix, both at the date of the will and of her death, consisted of bank stock. Her brother died a bachelor:—Held, that the bank stock did not pass to E. by the bequest. *Slingsby* v. *Grainger*, 5 Jur., N. S., 1111; 28 L. J., Ch., 616; 7 H. L. Ca. 273. Affirming 2 Jur., N. S., 1176; 4 W. R. 623; 25 L. J., Ch., 573; which affirmed 2 Jur., N. S., 276; 4 W. R. 399; 8 De G. M. & G. 385.

8. Certificates of the Boston (U.S.) water scrip and bonds of the Pennsylvania Railway Company:—Held not to pass under the words "stocks in the foreign funds." *Ellis* v. *Eden*, 3 Jur., N. S., 950; 23 Beav. 543; 26 L. J., Ch., 533.

The words "money or stock in the foreign funds":—Held, upon the terms of a will, to comprise all foreign securities, for which the faith of the government of the foreign country was pledged. *Ib.*

9. East India stock will not pass under a bequest of money in the "Government or Parliamentary stocks or funds, or foreign stocks or funds." *Brown* v. *Brown*, 6 W. R. 613.

10. A. bequeathed all his "stock and money in the funds," and all the residue of his estate and effects whatsoever, both real and personal, upon trust, after payment of debts, to convert into cash all his residuary estate and effects, except the freehold, copyhold, leasehold, and stocks:—Held, that certain Long Annuities were, as "stock and money in the funds," within the exception from the general direction to convert the residuary estate. *Grant* v. *Mussett*, 8 W. R. 330; 2 L. T., N. S., 133.

11. Testator bequeathed to trustees, for the use of his wife and children, the interest of his property in the English and French funds, and he gave the capital to his surviving children, that is to say, to be equally divided at the period of his eldest surviving child attaining the age of thirty. By a codicil he bequeathed to his executors, for the use of his children, "whatever sum now stands in my name, or may hereafter, in the Dutch funds, or any other funds, including the interest arising therefrom".—Held, that the words "any other funds" included stock in the British funds. *Montresor* v. *Montresor*, 1 Colly. 693.

12. Under a bequest of "all my Irish funded property, standing in my name in the Bank of Ireland," government debentures, which were in the hands of the testator's bankers at the date of his will, do not pass. *Ridge* v. *Newton*, 4 Ir. Eq. R. 389; 2 Dr. & War. 239; 1 Con. & L. 381.

Semble, they would not pass under the description of "Irish funded property" generally. *Ib.*

13. A bequest of "property in the English funds" will not pass India stock or Exchequer bills. Stock standing in the testator's name at the time of his death, and which his bankers had purchased with moneys received by them on his account, without any express authority for their so doing, will not pass by a bequest of the testator's stock. *Johnson* v. *Digby*, 8 L. J., Ch., 38.

14. Bequest of "all the funded property in my name":—Held to pass Irish bank stock and Irish 3¼ per cents. belonging to the testator, and standing in his name jointly with three others. *Mangin* v. *Mangin*, 16 Beav. 300.

15. A testator directed his trustees to sell and convert into money all his property, except such portion as consisted of moneys in the public funds, and the proceeds thereof to be invested in the public funds:—Held, that the exception included long annuities. *Howard* v. *Kay*, 27 L. J., Ch., 448.

XIV. FURNITURE.

1. In General.

1. Under a bequest of household furniture, plate in the house at testator's death, whether in common use or not, if suitable to the rank of the testator; pictures hung up, linen, and china, both useful and ornamental in the house, will pass; books in the library will not pass. *Kelly* v *Powlet*, Ambl 605; Dick 559. See *Cole* v. *Fitzgerald*, 1 Sim. & S. 189. Affirmed 3 Russ. 301; 1 L J., Ch., 91.

Household furniture comprises everything that contributes to the use or convenience of the householder, or ornament of the house. *Ib.*

2. By the term "household furniture," neither books nor wines pass. *Bridgman* v. *Dove*, 3 Atk. 202.

3. Devise by an E. I. captain of all household furniture, linen, plate, and apparel whatsoever, includes only what is for domestic use, not what for trade or merchandise It does not include books, nor plate for trade. *Le Farrant* v. *Spencer*, 1 Ves. 97.

4. A silversmith bequeathing all his furniture, books, goods, and chattels, his stock-in-trade would not pass, though the plate in his house, as household furniture, would. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 657. Reversing 3 Ves. 212.

5. Under a bequest of the use of a house with all the furniture and stock, of carriages and horses, and other live and dead stock for life, plate passed; wine and books did not. *Porter* v. *Tournay*, 3 Ves. 311.

6. China held to pass under a bequest of furniture. *Hele* v. *Gilbert*, 2 Ves 430.

7. Telescopes held to pass under the words "household furniture and implements of household." *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm 425; 12 Jur. 912.

8. Construction of a will as to what will pass under the description of "furniture." A testator by his will bequeathed his leasehold dwelling-house, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also, all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith; by a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:"—Held, that pictures placed in the house as ornamental furniture, and the plate, and linen, passed by the codicil; but that the codicil had no operation on the disposition made by the will of the books, the gold, and silver coins, trinkets, and things of that nature. *Cremorne* v. *Antrobus*, 5 Russ. 312; 7 L. J., Ch., 88.

9. Books and wine were held to pass by a specific bequest of "all the testator's furniture, linen, plate, pictures, carriages, horses, and other live and dead stock in his use and possession." *Hutchinson* v. *Smith*, 1 N. R. 513; 11 W. R. 417; 8 L. T., N. S., 602.

10. A bequest of "all my household furniture, plate, jewels, etc, and other effects of a like nature, and all wines, liquors, fuel, housekeeping provisions, and other consumable stores which shall at my death be in or about my dwelling-house":—Held, to include plate not in the dwelling-house:—Held, also, to include plate to which the testator was entitled in reversion, and moneys recovered by his executors from the estate of the tenant for life, in respect of the value of plate sold by the latter without the testator's knowledge. *Domville* or *Domvile* v *Taylor*, 2 N. R. 258; 32 Beav. 604; 11 W. R. 796; 8 L. T., N. S, 624.

11. Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects which, at the time of my decease, shall be in and about my mansion house":—Held, not to include articles exclusively of personal ornament, and not adapted for the use or ornament of the house. *Tempest* v. *Tempest*, 2 Kay & J. 635.

12. Testator gave all his household goods, plate, linen, china, furniture, etc., which belonged to him at the time of his death to his wife absolutely, except so many and such parts thereof as should be contained in and described as heir-looms, or otherwise excepted by him in an inventory to be left by him, which he gave to his wife for her life. One of the articles enumerated in the inventory was an astronomical clock, which had belonged to testator's father, and been placed by him with a chronometer-maker thirty years back—in the first instance to ascertain the cost of repairing the same, and subsequently with a direction that it should be sold if a fair price could be obtained. The clock had remained with the chronometer-maker ever since, and had never been in the testator's actual possession:—Held, that this clock did not form part of the testator's general personal estate, but passed to his widow under the specific bequest of his household furniture. *Pellew* v. *Horsford*, 4 W. R. 442; 25 L. J., Ch., 352; 2 Jur., N. S., 514.

13. Under a bequest of "household furniture, plate, china," and "other household effects":—Held, that gold, silver, and china snuff boxes, used for the purposes of ornament about the mansion, passed to the legatee. *Field* v. *Peckett*, 29 Beav. 573.

Held, also, that cabinets for china, which had been ordered by the testator, but had not been delivered at his death, also passed under these words. *Ib.*

Under a bequest of household furniture, plate, china, and other household effects, a number of ornamental snuff boxes and jewel boxes, which were exposed to view in glass cases in the testator's house were held to pass. S. C. 7 Jur., N. S., 983; 30 L. J., Ch., 813; 9 W. R. 526; 4 L. T., N. S., 459.

14. A testator died in the occupation of a furnished tavern, where he carried on the

business of hotel keeper and betting agent, sleeping there occasionally for the convenience of his business, but having his ordinary residence at another house:—Held, that such parts only of the tavern furniture as were for the testator's own domestic or personal use, passed under a bequest of "all my household furniture," contained in his will. *Manning* v. *Purcell*, 7 De G. M. & G. 55; 24 L. J., Ch., 522; 3 W. R. 273; 3 Eq. Rep. 387. And see S. C. in court below 23 L. J., Ch., 423: 2 W. R. 352; 2 Eq. Rep. 616.

1. Where a testator directed that his household furniture and effects should be sold immediately after his decease, and the proceeds applied for the benefit of his three younger children, the Court held that a reversionary interest in a sum of stock to which he was entitled at the time of his death, and the contingency of a failure of issue, was not included in the bequest, but that there was an intestacy. *Marshall* v. *Bentley*, 1 Jur., N. S., 786; 3 W. R. 566.

2. A gift of household furniture, plate, linen, china, glass, books, fixtures, and other effects of a like nature, does not include cows, horses, carriages, and farming stock. *Stone* v. *Parker*, 29 L. J., Ch, 874; 8 W. R. 722.

3. A reversionary interest in two sums of stock held not to pass under a bequest of "household furniture and effects, plate, linen, china, glass, books, wearing apparel, etc" *Newman* v. *Newman*, 4 Jur., N. S., 1030; 26 Beav. 218.

2. Whether it includes Fixtures.

4. Under a bequest of household furniture fixtures belonging to the testator in a leasehold house occupied by him will pass. *Paton* v. *Sheppard*, 10 Sim. 186.

5. A testator, who resided in a leasehold house, which was held by him for a short term of years, bequeathed all his leasehold messuages to his executors, in trust to sell; and bequeathed all his household furniture to his sister for life, and after her death to certain other persons:—Held, that the grates in the testator's residence passed under the bequest of "household furniture." *Peto* v. *Grissell*, 5 L. J., N. S., Ch., 286.

6. A bequest of "household furniture" will not, as a general rule, pass the tenant's fixtures in a leasehold house occupied by the testator. *Finney* v. *Grice*, 10 L. R., Ch. D., 13; 48 L. J., Ch., 247; 27 W. R. 147.

3. Furniture in a Particular Place.

7. One devises to his son the furniture of his house at D., and orders goods to be carried from London to his house at D., and agrees with carriers for that purpose, but dies before the goods are removed to D. These goods shall not pass by the will as part of the furniture of the house at D. *Beaufort* v. *Dundonald*, 2 Vern. 739.

8. A. devises to B. all his goods and furniture in his house, except his pictures, which he gives to C.: pictures in boxes, as well as what were hung up in the house, will pass to C.; and so will pictures bought after making the will. *Gayre* v. *Gayre*, 2 Vern. 538.

9. Devise of a mansion house, with the parks, lands, and grounds thereunto belonging, "as now used and occupied by myself, and also all and every the household and other furniture, etc., and all other things usually therein, or considered as belonging thereto":—Held, not to pass horses or carriages in the stables, or stock, etc, on the land. *Pennefather* v. *Bury*, 9 Ir Eq. R. 586; 3 J. & L 727.

10. A bequest of furniture, prints, pictures, articles of vertu, and effects in, upon, or about a mansion at G, includes pictures sent from thence to be cleaned, books sent from thence to be bound, and furniture sent from thence to be repaired; but does not include pictures, statuary, and furniture purchased for the purpose of being placed in, but not actually placed in, the mansion at G. *Brooke* (*Lord*) v. *Warwick* (*Earl*), 12 Jur. 912; 2 De G. & Sm. 257.

11. A devises that the furniture and pictures of his three houses in B., C, and D should go along with the houses. adjudged the plate then at his three houses passed by this devise. *Franklyn* v. *Burlington* (*Countess*), 2 Vern. 512; Pre. Ch. 251.

12. C. occupied a house at B., and stables in the neighbourhood held under a different title. He bequeathed the lease of the house at B., "with all buildings belonging to me, furniture, and what the buildings may contain":—Held, that the stables, and the carriages and horses therein, passed to the legatee. *Kennedy* v. *Kelly*, 28 Beav. 223.

13. A bequest of household furniture and other household effects, in a dwelling-house and premises, comprises all the property placed there, either for ornament or for use, or consumption in it. *Cole* v *Fitzgerald*, 3 Russ. 301; 1 Sim. & S. 189; 1 L. J., Ch, 91.

14. Gift of furniture in a particular house means furniture permanently there. *Wilkins* v. *Jodrell*, 11 W. R. 588.

See also VI. *supra.*

XV. GROUND RENT

15. Bequest of leasehold ground-rents passes not the reserved rent only, but the reversionary leasehold interest. *Kaye* v. *Lawson*, 1 Bro. C. C. 76.

16. Devise of copyhold estate by the description of copyhold ground-rent good. *Walker* v. *Shore*, 19 Ves. 387.

XVI. HOUSEHOLD GOODS.

17. By devise of all rings and household goods, plate used in the house does not pass. *Jesson* v. *Essington*, Pre. Ch. 207.

18. What passes under words "all his household goods." The words added thereto, "and whatever else legatee should think fit to accept of," were rejected in the construction of the will. *Anon.*, 2 Eq. Abr. 322.

19. Plate passes under a bequest of "household goods." *Stapleton* v. *Conway*, 1 Ves. 427. S. P. *Nicholls* v. *Osborn*, 2 P. W. 421; *Masters* v. *Masters*, 1 P. W. 425; *Lillcott* v. *Compton*, 2 Vern. 638.

20. One, by will, gives all his household goods

and implements of household. The malt, hops, beer, ale, and other victuals in the house do not pass; but the clock, if not fixed to the house, shall pass, but not the guns or pistols, if used as arms in riding or shooting game. *Slanning* v. *Style*, 3 P. W. 334.

1. Devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and goldsmith's notes and bank-bills do not pass by those words. *Timewell* v. *Perkins*, 2 Atk. 102.

2. Articles in the nature of household goods will pass under that description in a bequest, although they may never have been used by the testator, nor even kept in his house. *Pelham* v. *Horsford*, 2 Jur., N. S., 514; 25 L. J., Ch., 352.

A curious and valuable astronomical clock, formerly the property of Napoleon Bonaparte, had been taken as a prize of war by the testator's father in 1815. It had been shortly afterwards sent to a chronometer maker in London for the purpose, first, of repair, and then for sale, and so remained unsold down to the death of the testator in 1854:—Held, that it passed under the description "household goods" in the testator's will. *Ib.*

XVII. MANOR.

3. A devise of a manor with all courts, etc. (enumerating the incorporeal hereditaments appointed to a manor only), extends to the demesne lands of the manor, and evidence of surrounding circumstances cannot be admitted to show that such was not the intention. *Hicks* v. *Sallit*, 1 W. R. 226; 2 Eq. Rep. 818.

In a settlement of a manor, all hereditaments as well corporeal as incorporeal appurtenant thereto were enumerated. In a will exercising a power of appointment reserved by the settlement, the incorporeal appurtenants alone were enumerated, and dispositions were made of parts of the demesne lands, from which it might be inferred that the testatrix did not suppose that the demesne lands passed under the word manor:—Held, that these circumstances were not sufficient to raise a necessary inference upon the face of the will that the word manor was not intended to include the demesne lands. *Ib.*

The manor of W. was, by settlement, vested in trustees, upon such trusts as E. B., a married woman, should by will appoint. Before any will was made, a piece of copyhold land was, under an Inclosure Act, allotted to the trustees of the settlement as lords of the manor, and in compensation of their interest in the soil of the manor. Under the same Act, two copyhold allotments were made to two other persons in respect of copyhold interests. The trustees of the settlement, in exercise of a power vested in them for that purpose, bought the two last-mentioned allotments, and held them upon the same trusts as the manor. Afterwards, in 1807, E. B. made her will, devising the manor, with its appurtenances, to the father of the plaintiff for life, with remainder to his first son in tail, with remainder to his second son, the plaintiff, and devising the residue of her property to trustees on trust to sell. E. B. died in 1818, and the copyhold allotment made to the trustees of the settlement, and the two allotments purchased by them, were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff, while an infant, became entitled, in 1831, by the deaths of his father and elder brother, to the manor under the devise. He attained twenty-one in 1849, and soon afterwards filed a bill claiming the three allotments as part of the manor:—Held, that, as to each allotment, there had been, under the circumstances, an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor. S. C. 3 De G. M. & G. 782; 18 Jur. 915; 22 L. J., Ch., 571.

4. The demesne lands of a manor previously granted in fee do not become reunited to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. *Delacherois* v. *Delacherois*, 11 H. L. Ca. 62; 10 Jur., N. S., 886; 13 W. R. 24; 10 L. T., N. S., 884; 4 N. R. 501.

If the demesne lands of a manor are treated, in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. *Ib.*

On re-purchase, by the lord, of the fee-simple, he will hold of the chief lord. *Ib.*

They will, on such re-purchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase. *Ib.*

XVIII. MESSUAGE. PREMISES.

5. A testator devised his freehold messuage, tenement, or dwelling-house, with the yard, stables, and appurtenances, in Cavendish Square, together with the household furniture and effects therein, unto his widow for life; and, after her decease, he devised the same messuage or tenement, and premises, with the appurtenances, unto his son, his heirs and assigns:—Held, that the household furniture passed to the son. *Sanford* v. *Irby*, 4 L. J., Ch., 23.

6. Devise of "a messuage and premises, situate No. 4, —— Terrace":—Held, to include a strip of garden-ground on the opposite side of the street from the house, but for some time let and occupied with the house. *Hibon* v. *Hibon*, 1 N. R. 532; 9 Jur., N. S., 511; 11 W. R. 455; 8 L. T., N. S., 195; 32 L. J., Ch., 374.

7. Testator took a conveyance of "all that messuage or tenement, garden, fold, yard, and premises, called the Upper House Farm, with the barns, stables, cider mill, and outbuildings, containing 1A. 3R. 1P.," together with other enumerated pieces of land amounting to 41 acres, which estate was ordinarily called the Upper House. By his will testator devised "all that my freehold house and premises called Upper House" upon certain trusts, and gave all the rest, residue, and remainder of his "said real and personal estates" over:

—Held, that the whole estate called Upper House, and not merely the house and garden, passed under the devise of "all that my freehold house and premises." *Ross* v. *Veal*, 3 W. R. 652; 1 Jur., N. S., 751.

1. By his will, a testator gave "all that my messuage, partly freehold, and partly leasehold," in Cannon Street, according to the nature and tenure thereof, respectively, in trust for his widow for life, or, as to the leaseholds, for so long as the term and interest in them should exist, with remainder over. After the date of his will, the reversion in fee of the leaseholds was purchased by, and conveyed to, the testator:—Held, that the fee of the whole passed under the specific gift of "my messuage" at C., and that the rest of the devise was descriptive. *Miles* v. *Miles*, 35 Beav. 191; 1 L. R., Eq., 462; 12 Jur., N. S., 116; 35 L. J., Ch., 315; 14 W. R. 272; 13 L. T., N. S., 697.

2. The word "premises" where in a will it is not used in its primary meaning of "*præmissa*," is equivalent to appurtenances. *Read* v. *Read*, 15 W. R. 165.

Therefore, where a testator excepted from a general devise the yard and premises where he carried on his business, a house adjoining to and communicating with his business premises, and in which he resided when he carried on his business, was not included in the exception. *Ib.*

3. A testator, by will, after giving annuities, directed that the surplus of the rents, profits, and interest of his real and personal estate should be applied by his trustees in the reduction of mortgage and other charges upon his estates. Subject thereto, he delivered his S. estate to trustees for his sons for life, and empowered his trustees to permit the person entitled for life or any greater estate in the property, to occupy the mansion, gardens, and "premises" rent free. The home farm had no farm-house, and the farm buildings and farm were occupied by the testator at the time of his death:—Held, that the word "premises" must be taken to mean property in immediate connection with the mansion and without which the mansion could not be conveniently occupied, and that it did not include a farm occupied by the testator and near the mansion-house, but not otherwise necessary for its convenient occupation than as a means of supplying it with necessary farm produce. *Lethbridge* v. *Lethbridge*, 4 De G. F. & J. 35; 31 L. J., Ch., 737; 10 W. R. 449; 6 L. T., N. S., 727. See S. C. 7 Jur., N. S., 296; 30 L. J., Ch., 388; 4 L. T., N. S., 127; 3 De G. F. & J. 253.

Construction of these Words Under Lands Clauses Act.] See Lands Clauses Act, V.

XIX. MONEY. SECURITIES FOR MONEY.

1. Money.

4. The word "money" by itself, in a will, means money strictly and nothing else; but when used in connection with other words, it may have a much more extended signification. *Glendening* v. *Glendening*, 9 Beav. 324.

5. A testator, after directing payment of debts, gave to his wife for life the interest of all sums of money he might die possessed of; after her decease he gave all such "interest money" to his daughter for life; and after her decease he gave the principal and interest to be divided between his daughter's children. The testator, at his death, was possessed of 455*l.* cash, besides furniture, farming stock, and a farm at a yearly tenancy:—Held, that there was a specific bequest of the money only, and an intestacy as to the rest of his property, and that the debts must be paid out of his general estate. *Larner* v. *Larner*, 26 L. J., Ch., 668.

6. The word "moneys" in a codicil:—Held, to comprise not only all moneys in hand, but also all moneys due to the testator, whether upon security or otherwise, notwithstanding express mention made in the will of "moneys and securities for money." *Langdale* v. *Whitfeld*, 4 Kay & J. 426; 4 Jur., N. S., 706; 27 L. J., Ch., 795; 6 W. R. 862.

7. A bequest of a cabinet with whatever it contains, "except money," will not pass a promissory note payable to the testatrix of a date anterior to the will, and which, at her death, was found in the cabinet. *Read* v *Stewart*, 4 Russ. 69.

8. A testator bequeathed to A. B. all his ships and money due to him at the time of his decease:—Held, that freight earned by a ship under a charter-party executed after the date of the will, and in respect of a voyage not completed until after the testator's death, did not pass to A. B. either as "money due" or as incident to the ship. *Stephenson* v. *Dowson*, 3 Beav. 342; 10 L. J., N. S., Ch., 93; 4 Jur. 1152.

9. Trustees who had a power to sell and mortgage and manage and receive the rents of an estate, were directed to pay a life annuity out of the rents or any other moneys held by them upon the trusts:—Held, that "other moneys" referred to those *ejusdem generis*, and that the annuity was payable out of income only, and not out of capital. *Clifford* v. *Arundell*, 27 Beav. 209.

10. Testator devised his estate in Leicestershire to trustees upon trust to sell the same, and also his books and stock, either together or in parcels. He afterwards disposes of the moneys to arise from the sale of his Leicestershire estate. As the estate, books, and stock might have been sold in one lot, and the produce was to form one common fund:—Held, that the disposition of the moneys to arise from the Leicestershire estate, extended to

the books and stock. *Newburgh (Earl)* v. *Eyre*, 4 Russ. 454; 6 L. J., N. S, Ch., 153.

1. A testator bequeathed to his wife all his household furniture, plate, horses, carriages, stock, and all the money he might have, subject, however, to the payment of his debts and funeral and testamentary expenses, and to the erection of a suitable monument over him. After the date of his will the testator agreed, in writing, to make a grant in perpetuity of certain lands of which he was seised, in consideration of a fine of 1,250*l.* At his death the agreement remained uncompleted, and the fine was unpaid by the intended grantee, who was, however, willing to pay on getting a proper discharge. The will contained no further residuary gift. The lands to which the agreement related had been devised, in events which happened, to the testator's wife, *durante viduitate*, with remainder in trust for charitable purposes:—Held, that the fine of 1,200*l* did not pass to the wife under the above-mentioned gift of "money." *Dillon* v. *M'Donnell*, 7 L. R., Ir., 335.

2. Copyholds held to pass by the words "money, property, and effects," aided by the context. *Streatfield* v. *Cooper*, 27 Beav. 338.

2. Money. Whether it passes Stock.

3. Bequest of "all the testator's money in the Bank of England":—Held to pass stock in the funds, testator having never had any cash in the Bank. *Gallini* v. *Noble*, 3 Meriv. 691.

4. Stock in the funds held in trust for the wife for life, with remainder as the husband should appoint, and in default to his executors, administrators, or assigns:—Held not to pass under the will of the husband by the words "money he might have in the books of the Governor and Company of the Bank of England." *Howell* v. *Gayler*, 5 Beav. 157; 11 L. J., N. S., Ch., 398.

5. A testator, by his will, appointed A. and B. to be his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his death, to be by them placed in the funds or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the moneys held in trust by them between his two nieces. The testator had at his death only a small balance at his bankers, and the sum of 1,200*l.* consols:—Held, that the consols were disposed of by the will under the terms of moneys. *Waite* v. *Combes*, 21 L. J., Ch., 814.

6. The word "moneys" in a will extended, upon the context, to sums of stock. *Barclay* v. *Maskelyne*, 5 Jur., N. S., 12.

7. A., possessed of stock, made her will, and bequeathed "all the money I may die possessed of." She died possessed of no money, but of some personal chattels:—Held, that her intention could only be applied to the stock, and that it passed, by her will, and did not form part of the residue. *Chapman* v. *Reynolds*, 6 Jur., N. S., 440; 29 L. J., Ch., 594; 8 W. R. 403; 28 Beav. 321.

8. South Sea Stock and 3*l.* 5*s.* per cents. held in the context to pass by the expression "surplus money." *Newman* v. *Newman*, 26 Beav. 218; 4 Jur., N. S., 1000.

A testatrix bequeathed specific sums of South Sea Stock and 3*l.* 5*s.* per cents. to her sister for life. At her death she left this money in trust to her niece, "to pay certain legacies," which did not exhaust the whole. She authorised her sister and niece (who were her executrixes) to sell out the residue of "her money" in the 3*l.* 5*s.* per cents. over the sum she had mentioned for payment of her debts, and proceeded "then if there is any surplus money I give it to my niece".—Held, that the niece took the surplus of both the funds. *Ib.*

9. Shares in an assurance company, enclosed in an envelope, and endorsed "to be considered as ready money, and given to" the testator's wife.—Held, "to pass under a bequest of" all sum and sums of money that might be in the house. *Knight* v. *Knight*, 2 Giff. 616; 7 Jur., N. S., 893; 30 L. J., Ch., 645; 5 L. T., N. S., 72.

10. A testator bequeathed all and every his household furniture, and other effects, "and also all and every sum or sums of money which may be found in my house or be about my person or due to me at the time of my decease, and also all my stocks, funds, and securities for money, money due on bonds, bills, notes, or other securities which I may die seised, possessed of, or entitled to, and of any kind and description whatever, my will and intention is that my executors do and shall pay the same to H." The will contained no residuary gift:—Held, that shares in joint stock companies which belonged to the testator passed under this bequest. *Herbert* v. *Harrison*, 17 W. R. 523; 20 L. T., N. S., 386.

11. A testatrix made a bequest of "any interest or moneys to which she might be entitled on behalf of her late husband." At the time of her death she was entitled to a reversionary interest in consols and to other property, outstanding in the names of trustees, but to which she might at any time have obtained possession. As to one-third of the whole of this property, she had become directly entitled through her husband, and as to the other two-thirds through her infant son, who had acquired the same as one of the next of kin of his father:—Held, that the whole of the property passed under the bequest. *Moysey* v. *Stuart*, 23 L. T., N. S, 644.

Stock Excluded.] 12. A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease, his property consisted of 600*l.* 3 per cent. consols, and 119*l.* in sovereigns:—Held, that the stock did not pass under the word "money;" under the words "from all expense," the legacy of 100*l.* was to be paid discharged of duty. *Gosden* v. *Dotteril*, 1 Myl. & K. 56; 2 L. J., N. S., Ch., 15.

13. Under the following bequest, "to my brother, the whole of my money for his life, at his death to be divided between my two nieces, Rebecca and Mary; my clothes to be likewise divided between them; my watch and trinkets for my niece, Mary. I likewise declare the longest survivor of my nieces is to become possessor of the whole money." The testatrix died possessed of certain small sums of ready money or cash, but of con-

siderable sums of stock:—Held, that stock did not pass. *Lowe* v. *Thomas*, 5 De G. M. & G. 315; 18 Jur. 563; 23 L. J., Ch., 616; 2 W. R. 499; 2 Eq. Rep. 742. Affirming 2 W. R. 252; 1 Kay 369; 23 L. J., Ch., 453.

1. Stock in the funds, in which a testator has a reversionary interest, will not pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." *Cowling* v. *Cowling*, 26 Beav. 449.

2. Testator, after giving certain annuities, gave to H. all his books, plate, linen, china, wearing apparel, watches, jewels, and money (except his money at his bankers or in the funds, or placed on security), and all other property not otherwise disposed of. He subsequently, after directing that if the rents, etc., should be insufficient to pay the annuities they were to be reduced *pro ratâ*, directed that upon the decease of the annuitants the whole personal estate was to be invested in Government securities and transferred to certain societies:—Held, that money must be taken in its strict legal sense, and did not include foreign stock and stock in various railway companies, the object of the exception being to restrict and not to enlarge; but that "all other property" was not confined to articles *ejusdem generis* with those preceding, but must have an extended signification as to the personalty:—Held, also, that there was an immediate gift to the societies, subject to the fund remaining in its existing state of investment to pay the annuities, the investment in Government securities being postponed until the death of the last annuitant. *Ludlow* v. *Stevenson*, 2 W. R. 675; 5 W. R. 828.

3. A testator, after stating "as for his worldly goods and chattels, he bequeathed them as follows:" gave certain pecuniary legacies to his sons and daughter, and then bequeathed to his daughter "all things in the house remaining" of whatever kind, and "all moneys both in the house and out of it." There was no other gift of his residuary estate. He had some moneys both in the house and out of it at his death. He had also consols standing in his name, and some shares in a benefit building society:—Held, that the bequest of "moneys" was specific, and that it did not carry the consols, the shares in the building society, or the residuary personal estate. *Collins* v. *Collins*, 40 L. J., Ch., 541; 12 L. R., Eq., 455; 24 L. T., N. S., 780; 19 W. R. 971.

3. Money. Securities for Money.

4. An unpaid legacy bequeathed to a testatrix does not pass under her will by the words "moneys, and securities for moneys." *Re Mason*, 34 Beav. 494; 11 Jur., N. S., 835; 34 L. J., Ch., 603; 13 W. R. 799.

A., a married woman, died in 1858, having bequeathed her money and securities for moneys to one, and all her separate personal estate and effects not thereinbefore disposed of to another. In 1863, A.'s mother died, having bequeathed to her a legacy and half her residue, and which bequest was saved from lapse by 7 Will. 4 & 1 Vict., c. 26, s. 33:—Held, that this legacy was passed under the residuary, and not under the specific, bequest in A.'s will. *Ib.*

5. Money of the testator, in the hands of his salesmaster, does not pass under a bequest of all his ready money, and securities for money, there being no evidence that the salesmaster acted as the banker of the testator. *Smith* v. *Butler*, 3 J. & L. 565; 9 Ir. Eq. R. 398; S. C. 7 Ir. Eq. R. 467; 1 J. & L. 692.

6. Bank notes, being always regarded, by common usage, as cash, cannot be considered as a security for money. *Southcot* v. *Watson*, 3 Atk 233.

7. Under a bequest of "money, and securities for money," an I. O. U. held by the testator at the time of his death:—Held, not to pass. *Barry* v. *Harding*, 1 J. & L. 475; 7 Ir. Eq. R. 313.

8. A. and B. were both domiciled in England. A. lent B. money on an English bond payable to him and his executors. Afterwards B. gave A. a heritable bond, charging lands in Scotland, as an additional security, and made payable to him and his heirs at a different time, and with a different rate of interest. On the death of A.:—Held, that the English bond was the primary security, that it did not merge in the Scotch heritable bond as the *jus nobilius*; and that the debt passed under A.'s will executed according to the English, but not according to the Scotch solemnities, under the general term "securities for money." *Cust* v. *Goring*, 18 Beav. 383; 18 Jur. 884; 24 L. J., Ch., 308; 2 W. R. 370.

When Sufficient to pass Legal Estate of Mortgagee.] See XXXVI. 1. 2 *ante*.

4. Securities for Money. Whether it passes Stock.

9. The words "securities for money," in a will, pass stock in public funds, unless force of expression is controlled by context. *Quære*, as to bank stock. *Bescoby* v. *Pack*, 1 Sim. & S. 500; 2 L. J., Ch., 17.

10. Stock included in a will under the word "securities," legacies being charged for which the securities properly so called were not sufficient. *Dicks* v. *Lambert*, 4 Ves. 725.

11. A testatrix bequeathed the residue of her property, of whatsoever nature and description, "not being ready money or securities for money," to three legatees:—Held, that stock in the 3½ per cents. was included in the exception, and, therefore, did not pass to the residuary legatees. *Buckman* v. *Ives*, 6 L. J., N. S., Ch., 197; S. C. *nom. Rickman* v. *Ives*; 1 Jur. 234.

12. O. by her will gave all her "money and securities for money of every description:"—Held, that these words did not carry Bank of England stock, shares in a canal company, or moneys invested on mortgage by and in the names of the trustees of the will of F., a prior testatrix to whose estate O. was entitled as residuary legatee, subject to an outstanding unpaid legacy; but that the same words carried first moneys which had been advanced on mortgage by F. herself, and allowed by her trustees for sixteen years after her death to remain invested on the same mortgage; and, secondly, moneys which had been advanced by F. on mortgage, and on the mortgage

having been paid off after her death had been received by one of her trustees as agent for O. *Ogle* v. *Knipe*, 38 L. J., Ch., 612, 8 L. R., Eq., 434; 20 L. T., N. S., 867; 17 W. R. 1090.

5. Money Due or Owing.

1. Testator bequeathed to A. B. all his ships and money due to him at the time of his decease:—Held, that freight earned after his decease under a charter-party executed before that event, but after the will, did not pass either as "money due" or as incident to the ship. *Stephenson* v. *Dowson*, 3 Beav. 342; 10 L. J., N. S., Ch., 93; 4 Jur. 1152.

2. A testatrix, who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeaths "all such sums of money as should be owing to her, at the time of her decease, from G. B." These words will not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate. *Collins* v. *Doyle*, 1 Russ. 135.

3. Bequest of "all sums of money due to me at the time of my decease." At the death of the testator, A. was under an unascertained liability to him for a breach of a covenant in a lease:—Held, that the damages recovered in an action brought by the executor against A. for the breach, passed under the bequest, as the action merely ascertained the amount of what was due to the testator at his death. *Bide* v. *Harrison*, 29 L. T., N. S., 451; 17 L. R., Eq., 76; 43 L. J., Ch., 86.

4. A testatrix made a specific disposition of property, including "all sum and sums of money which shall be due and owing to me at the time of my decease," and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into court a sum of money on account of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shown as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix:—Held, that the moiety of the testatrix in the fund in question did not pass under the gift of "sums of money due and owing to me at the time of my decease;" but under the residuary bequest, it not being shown that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her. *Martin* v. *Hobson*, 8 L. R., Ch., 401; 42 L. J., Ch., 342; 21 W. R. 376; 28 L. T., N. S., 427.

6. Money Due on Mortgage.

5. A devisee of 200*l.* on a mortgage passes the principal only. *Roberts* v. *Kuffin*, 2 Atk. 112.

6. A term of 500 years was created in real estate, the trusts of the term being, at the request of B. to raise and pay to him by demise, sale, or mortgage, or out of the rents, the sum of 1,500*l.*, and in the meantime, and until the whole of this sum should be raised upon trust, to pay to B. interest at 4*l.* per cent.:—Held, that the 1,500*l.* thus charged upon the land passed under a specific gift in B.'s will of "all the moneys whatsoever due to me on mortgage; and all debts owing to me on an account." *Brown* v. *Brown*, 6 W. R. 613; 1 L. T., N. S., 297.

7. A bequest of "all money which at the time of my death shall be due or owing to me on mortgage from any person or persons," does not include a sum charged upon the estate of which the testator was tenant for life, to which he had become entitled as the representative of his own younger children who had died intestate and unmarried. *Poulett (Earl)* v. *Hood*, 12 Jur., N. S., 85; 35 L. J., Ch., 253; 14 W. R. 298; 13 L. T., N. S., 783; 35 Beav. 234.

8. A testator by a specific devise bequeathed to A. a mortgage-debt on estates in Ireland amounting to 10,000*l.* due to him from S. At the time of his death there was not this sum due to him on the mortgage, but only 6,781*l.* He, however, held a judgment against S. for 771*l.*, registered and re-registered according to the Irish Act, 13 & 14 Vict., c. 29:—Held, that the judgment debt, being duly registered at the time of the testator's death, passed to A. under the devise of the 10,000*l.* mortgage debt. *Puxley* v. *Puxley*, 8 L. T., N. S., 570; 1 N. R. 509.

The testator recited in his will that he had contracted for the purchase of farms, and had paid off and taken a transfer of a mortgage thereon from J. He directed that the purchase and conveyance should be completed, and specifically devised these farms to B., as part of his estate at L.:—Held, that the devisee was not entitled to the interest on the mortgage debt between the death of testator and completion of the purchase. *Ib.*

9. Testatrix, mortgagee of an estate, of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him the arrears of her mortgage on his estate; likewise a bond from him in her possession; half of the mortgage money was paid before the will: the principal mortgage money does not pass. *Hamilton* v. *Lloyd*, 2 Ves. J. 416.

10. Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security":—Held, that mortgages on turnpike road tolls and toll-houses, were mortgages on real security, and came within the exception in the bequest. *Cavendish* v. *Cavendish*, 24 L. R., Ch. D., 685; 49 L. T. 626; 53 L. J., Ch., 191. Reversed, 30 L. R., Ch. D., 227; 53 L. J., Ch., 191; 49 L. T. 626.

11. *Quære*, whether a debt, secured by a deposit of gems, with a written memorandum empowering the creditor to sell, if default were made in payment, by a day fixed, passed under the will of the latter by the description of "debts secured by mortgage." *Townsend* v. *Martin*, 7 Hare 471.

1. Bequest of the debts that shall be due at the death of the testator, by mortgages, bonds, or open accounts from certain persons, extended from the explanation of a similar bequest, by another clause, to debts of every description; therefore, including judgments. *Senhouse* v. *Mitchell*, 11 Ves. 352.

Legal Estate of Mortgagee pass] See XXXVI. I. 2 *ante*.

7. Money I die possessed of.

2. A gift by a testatrix of "any money of which I may die possessed," includes cash in the house and money at the bankers', and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal. *Byrom* v. *Brandreth*, 16 L. R., Eq., 475; 42 L. J., Ch., 824; 21 W. R. 942.

3. Testatrix, after giving the residue of her moneys, securities for moneys, goods, and personal estate to M. by will, by a codicil gave all the residue of the moneys of or to which she might at the time of her death be possessed or entitled, to N.:—Held, that "moneys" in the codicil included not only moneys actually in hand, but also moneys due to the testatrix on security or otherwise at the time of her death. *Langdale* v. *Whitfield*, 6 W. R. 862; 4 Kay & J. 426; 4 Jur., N. S., 706; 27 L. J., Ch., 795.

4. F. was at the time of his death entitled to an estate in fee simple, subject to a mortgage debt, which was vested in trustees for his wife during her life, and after her death for him absolutely:—Held, that such reversionary interest passed under his will by a bequest of "sums of money upon real securities which he should die possessed of or in anywise entitled to," and did not fall into the residuary bequest. *Wilkes* v. *Collin*, 17 W. R. 878; 8 L. R., Eq., 338.

5. A testator gave to his wife "any money that he might die possessed of, or which might be due and owing to him at the time of his decease".—Held, that the money receivable under a policy of assurance on his own life to which the testator was entitled, passed under the bequest. *Petty* v. *Willson*, 4 L. R., Ch., 574; 17 W. R. 778.

6. A testatrix, whose only property consisted of a small sum in consols, bequeathed, after the payment of her debts, "all the money she might die possessed of" to her brother and sister, and she gave her other property to her executor:—Held, that the stock passed to the brother and sister under the word "money." *Chapman* v. *Reynolds*, 28 Beav. 221; 6 Jur., N. S., 440; 29 L. J., Ch., 594; 8 W. R. 403.

8. Money. Ready Money. Securities for Money. Whether it passes a Banking Account.

7. Bequest of "all my moneys":—Held to include two balances standing to the credit of the testator at his bankers'; one upon an ordinary current account, the other secured by deposit notes bearing interest. *Manning* v. *Purcell*, 7 De G. M. & G. 55.

Secus, as to a sum of money returned to the testator's personal representative by stakeholders with whom the testator had placed it to abide the result of a wager which remained undecided at his death. *Ib.*

A testator by his will bequeathed to his wife all his moneys, household furniture, plate, books, linen, wearing apparel, etc., and his residue to his wife for life, and after her death, to his children. The testator had, as a house of business, a tavern and betting office, and a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. At the time of his death he had at a bank 2,000*l.* on a common banking account, and 5,000*l* on a deposit account, for which latter interest was allowed; he had placed 6,000*l.* with certain shareholders to abide the event of a bet, and after his death it was repaid to his administratrix, and he held moneys for wagers, some of which were decided in his lifetime, but others not; all of which the administratrix paid.—Held (affirming 23 L. J., Ch., 423; 2 W. R. 352; 2 Eq. Rep. 616), that the 2,000*l.* and the 5,000*l.* deposit account passed to the widow under the word "moneys":—Held also, but reversing the same decision, that the 6,000*l.* did not so pass. S. C. 24 L. J., Ch., 522; 3 W. R. 273; 3 Eq. Rep. 387.

8 J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B. from his brother, A. B. having received moneys for him from time to time, and with his knowledge paid them to his own bankers as his own moneys; but J. B. had no concern with A. B.'s bankers, nor did they know that he was interested in the moneys paid by A. B. J. B. bequeaths all his money in the hands of any banker:—Held, that his balance at his own bankers', and also his share of A. B.'s balance, will pass; and that evidence is admissible to show that he so intended. *Heming* v. *Whittam*, 2 Sim. 493; 1 L. J., N. S., Ch., 94.

9. Under a specific bequest of personalty a gift of money will not include money at a banker's. *Loring* v. *Thomas*, 5 L. T., N. S., 269.

10 A bequest of "ready money" comprehends money of the testator in the hands of his banker. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290; 11 L. J., N. S., Ch., 223; 6 Jur. 292. Affirmed as to "ready money" comprehending money at bankers', 1 Ph. 356; 2 Y. & Coll. C. C. 279; 12 L. J., N. S., Ch., 314; 7 Jur. 457.

11. Where a testator gives to one person "all his moneys in hand;" and to another "all his moneys out on securities;" the balance at his bankers' will pass as money in hand. *Vaisey* v. *Reynolds*, 5 Russ. 12; 6 L. J., Ch., 172.

12. The testator directed his debts to be paid out of his ready money, and then gave his furniture, plate, etc., and the residue of his ready money, on certain trusts. The testator, at the date of his will, kept his money in his own house, and had no banker, but at his death he had 3,190*l.* at his banker's, and 100*l.* cash at home:—Held, that the money at the banker's passed under the term "ready money." *Taylor* v. *Taylor*, 1 Jur. 401.

13. "I give to my wife all my ready money at my banker's, in my dwelling-house, or elsewhere; by which I mean money not invested

in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease":—Held, that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass. *Fryer* v. *Ranken*, 11 Sim. 55; 9 L. J., N. S., Ch., 337.

1. Cash of a testatrix at a savings bank, as to which she had given notice requiring payment, and which only awaited her receipt:—Held, to pass by a bequest of all her ready money. *Re Powell*, Johns. 49; 5 Jur., N. S., 331.

But sums secured to her on notes of hand:—Held, not to pass by that bequest, although preceded by a direction for payment of her funeral and testamentary expenses. *Ib.*

2. A testator had at his death two sums of money at his banker's, one on a drawing account, the other on deposit, for which no notice of withdrawal was necessary; and he was also entitled to proportionate parts of two pensions, and of interest on mortgages, and of dividends on shares and stocks:—Held, that a gift of his "ready money" passed the two sums upon drawing and deposit account, but not the pensions, interest, or dividends. *Stein* v. *Ritherdon*, 37 L. J., Ch., 369.

3. A testatrix, by her will, after devising her real estates on trust for the plaintiff for life, with remainder to her children, empowered the trustees to permit the personal estate invested at her decease in or upon any stocks, funds, or securities whatsoever yielding interest, to continue in the same state of investment, and bequeathed these securities upon trusts similar to those respecting her real estates. The testatrix had at the time of her decease 1,000*l.* at her bankers', who allowed interest at the rate of 2½ per cent. per annum upon all balances remaining in their hands for one year:—Held, that as the sum in question was a debt secured only upon the personal credit of the bankers, it did not fall within the bequest as "securities," and was therefore undisposed of. *Archibald* v. *Hartley*, 21 L. J., N. S., Ch., 399.

4. A testatrix, having money placed with her bankers on deposit notes, being receipts for the money to account for on demand, gave "all bonds, promissory notes and other securities for money in my hands at the time of my decease, and all moneys due thereon," upon certain trusts:—Held, that the bankers' deposit notes were not included in this bequest, but passed under a residuary clause. *Hopkins* v. *Abbott*, 19 L. R., Eq., 222; 44 L. J., Ch., 316; 31 L. T., N. S., 820; 23 W. R. 227.

9. Ready Money.

5. A testator gave all his ready money to his widow. He had three half-years' dividends at the bank, for which he had not received the dividend warrants:—Held, that the unreceived dividends did not pass by the words "ready money." *May* v. *Grave*, 18 L. J., N. S., Ch., 401; 13 Jur. 1021; 3 De G. & Sm. 462.

6. A bequest of the testator's "ready money" comprehends money of the testator in the hands of his banker. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290; 11 L. J., N. S., Ch., 223; 6 Jur. 292. Affirmed as to "ready money" comprehending money at bankers', 1 Ph. 356; 2 Y. & Coll. C. C. 279; 12 L. J., N. S., Ch., 314; 7 Jur. 457.

Quære, whether a bequest of "all the rest and residue of my ready money, securities for money, and moneys in the funds," will comprehend property of that description acquired after the date of the will. *Ib.*

7. R. L. P., in May 1847, placed money in the hands of his agent, J. C., for investment on mortgage, and in April 1848 bequeathed to his wife all his "ready money and securities for money, money in the funds, and money in the bank or banks (if any), due and owing to him at the time of his decease." J. C. died in October 1847 without having invested the fund, but retained it in his hands; and R. L. P. died in July 1848. In administering the estate of J. C., a claim by the executor of R. L. P. for the amount, subject to a deduction for money due by R. L. P., was allowed:—Held, that the sum due from J. C.'s estate to the estate of R. L. P. passed to the wife of the latter under the above bequest. *Cooke* v. *Wagster*, 18 Jur. 849; 23 L. J., Ch., 496; 2 Sm. & G. 296; 2 Eq. Rep. 789.

Held, that though the money did not pass under the words "ready money," yet following *Parker* v. *Marchant*, 1 Ph. 356—looking at the whole frame of the will, and the intention of the testator as indicated by the context—the money did pass, and was the legatee's money in the hands of the agent's executors. S. C. 2 W. R. 434.

8. Bequest of the residue of the personal estate "not being securities for money and ready money," to A. B.:—Held, to pass stock in the funds. The construction of the words "securities for money" must depend upon the context. *Rickman* v. *Ives*, 1 Jur. 234; S. C. *nom. Buckman* v. *Ives*; 6 L. J., N. S., Ch., 197.

9. Money in the hands of the salesmaster, whom a testator was in the habit of employing, is not "ready money" within the meaning of these words in a will. *Smith* v. *Butler*, 9 Ir. Eq. R. 398; 3 J. & L. 565.

A testator directed that his debts, and all charges and incumbrances affecting his estates, should be paid by the application in the first instance of all ready money and securities for money which he should die possessed of; and he charged his estates of C. exclusively with the payment of such, if any, which should remain after such application. He devised his real estate to trustees and their heirs, as to the residue thereof not before disposed of (which included C.), to the use of his wife for her life; and he bequeathed to her, in case she should survive him, all his personal property not before bequeathed. He then bequeathed a legacy, payable immediately after his decease, and gave, devised, and bequeathed, after the decease of his wife, two other legacies, and appointed his wife executrix:—Held, that money of the testator, which at his death was in the hands of a salesmaster in Smithfield, was not ready money within the meaning of the will. S. C., 1 J. & L. 692; 7 Ir. Eq. R. 467.

10. A British subject domiciled in Russia made a will in the Russian language and in

Russian form, commencing with the statement that he thereby disposed of all his property. He directed a sale of his landed estates in Russia, which he specified, and proceeded to make a disposition of "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death, in ready money, and in bank billets, belonging to me." He closed his will with the statement that as all his property was entirely his own, and acquired by himself, nobody had a right to interfere with or contest his dispositions or those of his executors. It was proved that "bank billets" were a particular kind of Russian negotiable securities. At the time of his death, he had, besides his Russian property, a large sum in the English funds:—Held, that the words "in ready money and in bank billets" were not merely words of defective enumeration, but a description comprising the whole subject of the gift; that the description of the gift being clear and unambiguous, the first and last clauses of the will were not sufficient to extend the meaning of that description, and that the property in the English funds was undisposed of. *Wylie* v. *Wylie*, *Wylie* v. *Enohin*, 1 De G. F. & J. 410; 6 Jur, N. S., 259; 29 L. J., Ch., 341; 8 W. R. 316. Affirmed *sub. nom. Enohin* v. *Wylie*, 8 H. L. Ca 1; 8 Jur., N. S., 897; 31 L. J., Ch., 402; 10 W. R. 467; 6 L. T., N. S., 263.

See also 8 *supra*.

10. Remainder of Money.

1. A bequest of what might remain of testatrix's money after her lawful debts and legacies were paid, sufficient to pass stock. *Rogers* v. *Thomas*, 2 Keen 8.

2. "Stock" held upon the context of a will not to pass by the word "money." A testatrix first directed her funeral expenses to be paid, and she gave the remainder of her moneys to B., and her wearing apparel and all other property whatsoever and wheresoever to C.:—Held, that money in the funds did not pass to B. *Willis* v. *Plaskett*, 4 Beav. 208; 5 Jur. 572.

3. A share in Long Annuities held, upon the context, to pass under the words "remaining sum or sums of money." *Grosvenor* v. *Durston*, 25 Beav. 97.

4. A bequest of any "money" which may remain after payment of his debts:—Held, to pass a reversionary interest in a sum charged on real estate. *Stocks* v. *Barre*, Johns. 54; 5 Jur., N. S., 537.

5. General residue of personal estate including railway stock held to pass under the words "residue of money," the will commencing with a general bequest of everything "in trust for the following purposes," and the gift of money being preceded by bequests of specific chattels. *Montagu* v. *Sandwich* (*Earl*), 33 Beav. 324; 10 Jur., N. S., 61; 12 W. R. 236; 9 L. T., N. S., 632; 3 N. R. 186.

6. A sister bequeathed 80*l.* to her brothers, and to S. 170*l.*, "also my watch, my chain, my Bible, my rings, my workbox, and all it contains, my cameo brooch and my father's miniature, and also anything else whatsoever belonging to me that he may wish to get; and I also direct that whatever money is left after my burial be handed over to him, he seeing that I am interred respectably and decently." She had at her death only a few pounds, chattels, and a sum of 500*l.* in the Government funds:—Held, that the stock, after satisfying the pecuniary legacies, passed to S. *Boardman* v. *Stanley*, 7 Ir. R., Eq., 342; 21 W. R. 644.

7. A testatrix gave the interest of 2,777*l.* in the South Sea stock, and 2,650*l.* 3*l.* 5*s.* per cents., to her sister for life, and at her death she left "this money" in trust to her niece, A., to pay the following legacies: To her niece, A., 1,777*l.* in the South Sea stock, and 650*l.* in the 3*l.* 5*s.* per cents.; to her niece, B., the interest of 1,000*l.* in the South Sea stock, and 900*l.* in the 3*l.* 5*s.* per cents., for her life; to her niece, C., 320*l.* in the 3*l.* 5*s.* per cents.; to her niece, D., 100*l.* in the 3*l.* 5*s.* per cents.; and she empowered her sister and her niece, A., to sell out any of the "residue of the money" in the 3*l.* 5*s.* per cents. for the payment of her debts and funeral expenses; and if there was any "surplus money," she gave it to her niece A. She appointed her niece, A., and her sister executrixes:—Held, upon the general intent of the will, that there was no intestacy, and that the two sums of 1,000*l.* South Sea stock, and 900*l.* 3*l.* 5*s.* per cents., subject to the life interest therein of the testatrix's niece, B., passed to her niece, A. *Newman* v. *Newman*, 4 Jur., N. S., 1030; 26 Beav. 218.

8. A testator, after making certain specific gifts, gave to his widow "the remainder of all my moneys, wherever it may be, in bonds, or consols, or anything else," for her sole use as long as she should live, but not to give it away from his sons or daughters at her death; and the testator, after disposing of the remainder of all his moneys, made a further specific gift. The testator died possessed of furniture, a leasehold house, and a policy of insurance, not specifically bequeathed:—Held, that the gift of the remainder of his moneys by the testator did not include the furniture and leasehold house, but did include the policy. *Stooke* v. *Stooke*, 14 W. R. 564.

Held also that the wife was entitled to all the testator's residuary personal estate invested in any security. S. C. 35 Beav. 396.

9. A., an officer in the army under orders at Cape Town to return to England, after bequeathing small legacies to men of his regiment, and directing that certain articles should be sent home to his father and disposed of as he should think proper, devised "that the remainder of his money and effects might be expended in purchasing a suitable present for his godson, son of the paymaster of the regiment," a boy of about a year old. The testator died at Cape Town. After satisfying the debts and the bequests there remained in the hands of the paymaster a small balance of money. At the time of his death the testator was entitled to reversionary interests in stock, expectant on the death of his mother and father, both of whom were living at his death:—Held, that the reversionary interests in the stock did not pass under the bequest of "all the remainder of his money and effects to be expended in purchasing a suitable present for his godson." *Borton* v. *Dunbar*, 6 Jur, N. S., 1128; 30 L. J., Ch., 8; 3 L. T., N. S., 519; 2 De G. F. & J. 338; 9 W. R. 41. Affirming 2 Giff.

221; 6 Jur., N. S, 721; 29 L. J., Ch., 572; 8 W. R. 577.

When it passes the General Personal Estate.] See XLI. 1. 2 *post.*

XX. PLATE. JEWELS.

1. A bequest by a testator of all the furniture (except plate and pictures) which might be in a house mentioned at his decease:—Held, to be confined to articles of solid silver, and not to include a plated service in the said house. *Holden* v. *Ramsbottom*, 4 Giff 205.

R., after giving a legacy and an annuity to H., bequeathed to her for life a leasehold house at Chelsea which he occupied, in case he should be residing therein at the time of his death; and also absolutely all the furniture (except plate and pictures) which might be in the house at his decease; but in case she did not have the benefit of these contingent bequests, the annuity was to be increased. The testator died in the house at Chelsea. At his decease there were in the house a service of plated silver, and some articles of solid silver:—Held, that the plated articles passed to the legatee, the term "plate" meaning solid plate only. S. C. *nom. Holder* v. *Ramshottom*, 9 Jur., N. S., 350; 11 W. R. 302; 7 L. T., N. S, 735; 1 N. R. 307.

2. A bag of coins found by the executors in the testator's strong box:—Held not to pass under a bequest of "jewellery." *Sudbury* v. *Brown*, 4 W. R. 736.

3. A bequest of family diamonds and "other jewels" includes masonic orders and silver filigree ornaments. *Brooke (Lord)* v. *Warwick (Lord)*, 12 Jur. 912; 2 De G & Sm. 425.

4. A testatrix directs all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeaths the remainder of her rings, her necklaces of every description, pearls, garnets, cornelians, and watches to B.; by a subsequent testamentary disposition she gives all her trinkets of every denomination, her jewels excepted, to C., and, in another part of the same instrument, directs her jewels to be sold; afterwards, by a third testamentary instrument, she bequeaths to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds: the testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed:—Held, that the diamond necklace and rings, and the diamond rings not specifically mentioned, were to be sold, and did not pass to B.: that the pearl necklace passed to B., under the gift of necklaces of every description, and did not pass to C., under the gift of pearls. *Att.-Gen.* v. *Harley*, 5 Russ. 173; 7 L. J., N. S., Ch., 31.

XXI. PROFITS. RENTS AND PROFITS.

5. A gift of "the profits arising in my will" by a codicil to a will which disposed of the rents and profits of real estate:—Held, to be confined to the produce of the real estate. *Elwood* v. *Cole*, 17 W. R. 953; 21 L. T., N. S., 89.

6. One, possessed of a term for years, devises all the profits thereof to S.; only the profits accruing from the death of the testator shall pass. *Tissen* v. *Tissen*, 1 P. W. 503.

7. A testator directs, that W. F. shall, with a capital taken out of his assets, continue his, the testator's, business; that he shall bind D G. apprentice to himself; that he shall take D G into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D. G. shall have one-third of the profits of the business: D G. is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon* v. *Rutherford*, T. & R. 373; 2 L J., Ch, 50.

8 Testator being seised in fee of freehold collieries, for which he received a rent, and also having shares in a leasehold colliery, directed that his legacies should be paid "out of the rents and profits of his collieries":—Held, that the freehold collieries only were charged. *Shipperdson* v. *Tower*, 4 Y. & Coll. C. C. 441; 6 Jur. 658.

9. Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due." *Hele* v. *Gilbert*, 2 Ves. 430.

Ground Rent.] *See* XV. *supra.*

When they pass Real Estate or the Fee.] See XXXVII. VII. *ante*—XLIII. V. 7 *post.*

XXII. SEISED.

10. R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death, his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession of the property, having devised to L all real estate (if any) of which she might die seised. An action having been brought by L. against the devisees of R.'s widow for recovery of the land:—Held, that "seised" being a purely technical word, and there being no qualifying context, it must be construed according to its technical meaning; and that as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise. *Leach* v. *Jay*, 9 L. R., Ch D., 42; 47 L. J, Ch., 876; 39 L. T., N. S, 242; 27 W. R. 99. Affirming 46 L. J., Ch., 499; 25 W. R. 574; 6 L. R., Ch. D., 496.

XXIII. SHARES.

11. A testator bequeathed some railway shares, "and all his right, title, and interest therein":—Held, that moneys which he had paid in advance beyond the calls, passed to the legatee. *Tanner* v. *Tanner*, 11 Beav. 69; 17 L. J., N. S., Ch., 115; 12 Jur. 87.

12. Shares in a partnership formed for working a slate quarry, pass under a bequest in a codicil of "all shares, debentures, or securities in railways or mines of which the testator should die possessed," the testator having no other interest in quarries or mines at the date of his codicil, but having since bought, and dying possessed of, some transferable shares in a mining company. *Cleveland (Duchess)* v. *Meyrick*, 16 W. R. 104.

A testator, by codicil, bequeathed "all shares in mines of which he should die possessed" to his wife absolutely. At the date of the codicil and of his death (besides certain mining shares acquired after the date of the codicil), he possessed ten shares in a company originally formed for slate, copper, and lead mining, but afterwards reconstituted and limited to the working of slate quarries. It being shown, however, that for some years prior to the date of the codicil the company's slate works had been, to the knowledge of the testator, and at the time of his death still were, carried on almost entirely by underground or mining operations, and not by quarrying:—Held, as against residuary legatees, that the shares passed under the specific bequest. S. C. *nom. Cleveland* v. *Meynick*, 37 L. J., Ch., 125.

1. A bequest of railway shares will carry railway stock. *Morrice* v. *Aylmer*, 10 L. R., Ch., 148; 44 L. J., Ch., 212; 31 L. T., N. S., 660; 23 W. R. 221. Affirmed 7 L. R., H. L., 717; 22 W. R. 107; 45 L. J., Ch., 614; 24 W. R. 587; 34 L. T., N. S., 218. Reversing 23 W. R. 107.

A testator who had stock in the public funds, and also stock in a railway company and partly paid-up shares in the same company, made a bequest of "all such stocks in the public funds or shares in any railway" of which he might die possessed:—Held, that the railway stock passed under the bequest. *Ib.*

2. A shareholder in an assurance company bequeathed all and every his "shares and interest" in the company, and "all the advantages to be derived therefrom." There was also a general residuary bequest. The rules of the company required each shareholder to effect, or procure to be effected, an assurance to a prescribed amount, and provided that one-third of every bonus on a policy should be added to the capital of the company:—Held, upon the whole context of the will and codicils, that neither the moneys made payable by a policy effected by the testator on his own life nor the proportion of a bonus payable in respect of the policy, passed under the above words to the specific legatees. *Harrington* v. *Moffatt*, 4 De G. M. & G. 1; 22 L. J., Ch., 775; 1 W. R. 234; 1 Eq. Rep. 35.

XXIV. STOCK. SUM OF STOCK.

3. A testator having at the date of his will a mortgage to secure the re-purchase of a sum of 3 per cent. consols, of which he had lent the produce on a previous sale, it was held to pass by a bequest of so much stock. *Collison* v. *Curling*, 9 Cl. & F. 88; 6 Jur. 673. Affirming S. C. *nom. Collison* v. *Gurling*, 4 Myl. & C. 63; 2 Jur. 983.

4. A gift by will of all the interest of the testatrix in certain stock, followed by a codicil, directing that a debt owing to her should at her death be laid out in the same stock, will not pass the amount of the debt to the legatee of the stock. *Havard* v. *Price*, 2 Hare 98; 6 Jur. 1011.

5. Under a bequest of the interest, dividends, proceeds, and profits of a sum in stock to S. for life, and of the stock after death of S. to A., but if A. should die before twenty-one to S., a bonus on the stock given under statute 56 Geo. 3, c. 96, was held to belong to A. as the legatee of the stock. *Hooper* v. *Rossiter*, 13 Price 774; M'Clel. 527.

6. Legacies of 1,000*l.* stock:—Held, not to pass additional capital, given as bonus by bank under 56 Geo. 3, c. 96, subsequent to will, and before testator's death. *Norris* v. *Harrison*, 2 Madd. 268. But see *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J., Ch., 106.

7. Where a testator directs the sale and conversion of all his property, except such portion as consists of money, in the public funds, and directs the proceeds to be invested, that direction does not apply to Long Annuities. *Howard* v. *Kay*, 6 W. R. 361; 27 L. J., Ch., 448

8. In a will containing a direction to convert all personal estate except cash and money invested in the Parliamentary Stocks, and the testatrix had a sum in long annuities:—Held, as between tenant for life and remainderman, that the long annuities must be converted. *Reynolds* v. *Brown*, 1 W. R. 50.

9. A bequeathed all his "stock and money in the funds," and all the residue of his estate and effects whatsoever, both real and personal upon trust, after payment of debts, to convert into cash all his residuary estate and effects, except the freehold, copyhold, leasehold, and stocks:—Held, that certain Long Annuities were, as "stock and money in the funds," within the exception from the general direction to convert the residuary estate. *Grant* v. *Mansell*, 8 W. R. 330; 2 L. T., N. S., 133.

10. A bequest of "the capital stock or sum of 800*l.* consols," with other specific property, does not pass 800*l.* consols standing in the joint names of the testator and his wife. *Poole* v. *Odling*, 10 W. R. 591.

11. Freeholds in which a lunatic was interested, were taken compulsorily by a company, and the purchase moneys, which, under the Act of Parliament, were liable to be invested in land, were paid into court, and laid out in the Government funds. The existence of the fund was overlooked, and it went on accumulating. A, who became tenant in tail in possession, with immediate remainder to her in fee, devised her real estate, and bequeathed "all such capital, stock, and moneys as she should be possessed of, or interested in, at her death, in the public, Government, or parliamentary funds;" but she expressed no further intention as to conversion:—Held, that the principal fund passed as real estate, and the accumulations as personal estate. *Dixie* v. *Wright*, 32 Beav. 662.

XXV. STOCK IN TRADE BUSINESS PLANT GOODWILL.

12. A bequest "of my stock in trade and debts accruing therefrom" passes the stock in trade and trade debts existing at the testator's death. *Ferguson* v. *Ferguson*, 6 Ir. R., Eq., 199.

13. A testator, who was a barge builder, specifically bequeathed to his son his business, "together with all and singular his stock in trade as a barge builder." It is a custom in the testator's trade for a barge builder, when selling a new barge, to accept an old barge in

part payment, and to repair such old barge and let the same out on hire. At the testator's decease there were five old barges belonging to him which had been thus acquired, and were thus let out on hire:—Held, that these barges formed part of the testator's stock in trade as a barge builder, and passed under the specific bequest. *Re Richardson, Richardson* v. *Pilliner*, 50 L. J., Ch., 488; 44 L. T. 404.

1. Under a gift of "the plant and goodwill of my business in Aldersgate Street":—Held, that stock in trade and furniture in the house of business did not pass; but it appeared that the house was held by the testator on a lease, of which a few years remained, at a rack rent, and exclusively for the purposes of business:—Held, that the testator's interest in the house passed under the bequest. *Blake* v. *Shaw*, Johns. 732; 8 W. R. 410.

2. Devise of freehold and copyhold estate; part consisted of a brewhouse and malthouse, which was in lease, together with the plant and utensils:—Held, that the plant passed. *Wood* v. *Gaynon*, Ambl. 395.

3. A testator devised and bequeathed his whole property to trustees upon trust to invest such part as they should think fit in his business, and carry on the same till his son should attain the age of twenty-one years, and out of the profits to pay his widow the yearly sum of 200*l.* so long as she should remain a widow; and he directed the trustees, when his son should attain twenty-one, to transfer the business to the son. He then gave certain legacies to his other children, and provided that all his personal estate not required for the business should be continued in its then state of investment or altered at the discretion of the trustees, and the proceeds applied for the same purposes as the capital employed in the business. The business was carried on in a freehold shop:—Held, that the direction to transfer the business did not pass the freehold shop, and that the residuary gift carried the surplus profits of the business during the minority of her son. *Re Henton, Henton* v. *Henton*, 30 W. R. 702.

4. A testator gave his real and leasehold estate, stock in trade, money at the bank, goodwill, book debts, and effects, belonging to his business to his son, and charged his real and leasehold estates with the payment of legacies. The estates were sold to pay the legacies, and bought in by the son:—Held, that the fixtures passed to the son under the bequest of "effects belonging to the business." *Pinder* v. *Pinder*, 18 W. R. 309.

Farming Stock. Live and Dead Stock.] See XI. *supra.*

XXVI. STOCK. INACCURATE DESCRIPTION OR MISTAKE.

5. Where testator gives stock standing in his name, and has not stock so standing, but it is in the name of a trustee, parol evidence is admissible of the mistake. *Hewson* v. *Reid*, 5 Madd. 451.

6. Bequest of "all the funded property in my name":—Held, to pass Irish bank stock and Irish 3½ per cents. belonging to the testator, and standing in his name jointly with three others. *Mangin* v. *Mangin*, 16 Beav. 300.

7. Bequest of 1,000*l.* long annuities "now standing in my name, or in trust for me." At the date of the will the testatrix had no long annuities, but had 1,000*l.* 3 per cent. reduced annuities:—Held, that that sum passed by bequest. *Penticost* v. *Ley*, 2 Jac. & Walk. 207.

8. A testator assumed to dispose of a sum of 1,200*l.* 3*l.* per cent. Consolidated Bank Annuities expressed to be standing in his name. In fact, there was no such sum; but, at the date of the will, there was standing in the testator's name a sum of 1,215*l.* new 3*l.* per cents., subsequently reduced to 1,098*l.*, and there was a sum of 700*l.* 3*l* per cent. Consolidated Bank Annuities, standing in the joint names of the testator and another, who was dead:—Held, that the legatees were entitled to the 1,098*l.* new 3*l.* per cents. Extrinsic evidence is more readily admitted to explain an ambiguity in the subject than in the object of the gift. *Rowlatt* v. *Easton*, 2 N. R. 262; 11 W. R. 767.

9. Testatrix bequeathed "to my uncle P. P. the interest on 200*l.*, being part of a greater sum, in Government stock, now remaining in my name in the Bank of Ireland," and, after his decease, "this principal sum of 200*l.* to be divided equally between the children of P. P. The testatrix had no stock in her name at the date of her will or at her decease, but was entitled to 1,000*l.* stock standing in her mother's name, to whom she was executrix and sole residuary legatee:—Held, that the legacy was specific, and that 200*l.* of the stock standing in the name of her mother passed to the legatee. *Power* v. *Lenehan*, 2 Jones 728.

10. A testator directs the produce of his real estate to be invested by his executors in their own names in 4 per cent. consols. He then directs them to transfer the 4 per cent. consols, and 3 per cent. consols, then standing in his name, to the said account in their own names, and afterwards disposes of "the said 4 per cent. trust stock." This disposition under the special provisions of the will includes the 3 per cent. consols which were standing in his name at the making of the will. *Jacques* v. *Johnson*, 2 Myl. & K. 64.

11. A bequest of "1,000*l.* 3*l.* per cent. consolidated bank annuities, part of the stock standing in my name in the books of the governor and company of the Bank of England," in trust for A. for life, and then over, and other bequests in the same words, for different legatees. The testatrix had no stock standing in her own name, but she was absolutely entitled to a sum of consols insufficient to pay the legacies, and to a sum of 3*l.* 5*s.* per cents. standing in her deceased husband's name:—Held, that the legacies were specific bequests out of both these funds, and carried interest from the death of the testatrix. *Sawrey* v. *Rumney*, 16 Jur. 1110; 1 W. R. 18.

12. Husband devises to his wife 700*l.* East India stock, having none; but there was 700*l.* bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator's debts, and which the husband afterwards transferred in his own name. The 700*l.* bank stock shall go to the wife, being an erroneous description. *Door* v. *Geary*, 1 Ves. 255.

1. Legacy of 2,400*l.* in the 5 per cent. consolidated bank annuities: decreed, that 2,400*l.* 5 per cent. annuities, viz. navy bills, should be purchased, evidence of the intention and mistake as to the fund being rejected. *Chambers* v. *Minchin*, 4 Ves 675.

2. Testator bequeathed 2,042*l.* in the 5 per cent. bank long annuities for thirty years which he had purchased. It appeared that he had bought 106*l.* annuities for terms of years ending January 1860 for 2,042*l.*:—Held, that the 106*l* annuities passed. *Att.-Gen.* v. *George*, 8 Sim. 138; 5 L. J., N. S., Ch., 330.

3. Bequest by will made in 1857, of "my shares in the Great Western Railway." At the date of the will testatrix had no shares, strictly speaking, in the Great Western, or any other railway company, but she was possessed of Wilts and Somerset stock of the Great Western Railway, and also of preference and other stock, which was increased by further purchases of stock in the same company, between the date of the will and her death:—Held, that all the Great Western and Wilts and Somerset stock in the possession of the testatrix at her death passed under the bequest *Trinder* v. *Trinder*, 1 L. R., Eq., 695; 14 W. R. 557.

4. Testatrix, reciting that she was possessed of 12,000*l.* 3 per cent. consolidated bank annuities standing in her name, gave and bequeathed the same, or so much of such bank annuities as should be standing in her name at her death. At the date of her will, and at her death, she had nearly 15,000*l.* in that fund, besides other stock. The excess beyond the sum mentioned did not pass. *Hotham* v. *Sutton*, 15 Ves. 319.

5. The testator by his will gave to his son a legacy of 20,000*l.* in the joint stock of the 4 per cent. bank annuities of the Bank of England, commonly called 4 per cent. bank annuities; the only 4 per cent. bank annuities existing at the date of his will were reduced to 3½ per cents. Afterwards, and before his death, a new stock of 4 per cent. bank annuities was created: the will speaks at the testator's death, and the son is entitled to a sum of 2,000*l.* in the then existing 4 per cent. bank annuities. *Sheffield* v. *Coventry*, (*Earl*) 2 Russ. & M. 317.

6. Legacies of stock given by a married woman by her will, executed in pursuance of a power:—Held, notwithstanding the stock was misdescribed, to be specific. *Warren* v. *Postlethwaite*, 2 Colly. 116; 9 Jur. 721.

7. A testatrix gave all her leasehold and personal estate to trustees, upon trust to pay the rent and profits of two specified houses to A., and she gave the sum of 100*l.* bank stock to B., when he attained the age of twenty-one years, and in the case of his death to C. At her death the testatrix had bank annuities, but no bank stock:—Held, that 100*l.* bank annuities would not satisfy the gift of bank stock, but that the trustees must purchase 100*l.* bank stock out of the funds of the testatrix. *Bignall* v. *Rose*, 24 L. J., Ch., 27; 3 W. R. 77.

8. A testatrix bequeathed 8,000*l.* bonds which she described as "standing in the names of A. and B. at C.'s bank." She had 8,000*l.* bonds standing in the names of A. and B., but part only of such bonds were at C.'s bank, the remainder being at Y.'s bank:—Held, that the bonds at both banks passed. *Hull* v. *Hill*, 25 W. R. 223; 4 L. R., Ch. D., 97.

9. Bequest in these terms by a testratrix having, among other property, Government securities and bank stock, "the whole of my fortune now standing in the funds":—Held, not *falsa demonstratio*, nor to extend to the bank stock, but to be restricted to the Government securities. *Grainger* v. *Slingsby*, 8 De G. M & G. 385. And see S. C. 2 Jur., N. S., 276, 1176; 4 W. R. 399, 623; 25 L. J., Ch., 573; 28 L. J., Ch, 616; 5 Jur., N. S., 111; 7 H. L. Ca. 273.

10 A. bequeathed "his 10,000 dollars Indiana 5 per cent. stock." He had, prior to his will, possessed that amount, but, at that time, it had been charged into 5,000 of that stock, some 2½ per cent. Indiana stock, and some canal stock, all of which he retained until his death:—Held, that the 5,000 dollars alone passed. *Gilliat* v. *Gilliat*, 28 Beav. 481.

When a testator has stock which accurately answers the description in his will, though different in amount, the description will not be extended to stock of a different description. *Ib.*

11. A bequest of bank stock held to pass 3¼ per cent. annuities, no other stock being standing in the name of the testator, either when he made his will or at his death. *Drake* v. *Martin*, 23 Beav. 89; 26 L. J., Ch., 786.

A bequest of eight Russian bonds, purchased by L., his broker:—Held, to pass different Russian bonds purchased through another broker. *Ib.*

A bequest of "my property not in England, in the hands of my attorney abroad, W., consisting of Russian bonds":—Held, to pass bonds of the Hamburg Fire Company, which had been purchased with the produce of the Russian bonds by another agent abroad. *Ib.*

12. A testator bequeathed to each of his six cousins "3,000*l.* three per cent. consols, part of that sum standing in his name in the funds." The estate at the time of his death was insufficient to satisfy the whole of the legacies. Amongst other property he was entitled to 11,000*l.* new three per cent. annuities, but to no consols or any other stock:—Held, that the legatees were entitled to the 11,000*l.* stock in equal shares. *Burbey* v. *Burbey*, 15 L. T., N. S. 501; 15 W. R. 479.

13. A gift by will of "my 1,000 North British Railway preference shares," where the testator was, at the date of his will, possessed of stock fairly answering that description, is a specific gift of that which existed at the date of the will, and cannot be satisfied out of a smaller sum existing at the time of the testator's death. *Re Gibson, Matthews* v. *Foulsham*, 14 W. R. 818.

14. A general gift of money or shares in a particular society will not be invalidated by words erroneously describing the amount. *Lane* v. *Way*, 19 W. R. 842.

15. A. bequeathed "all his shares in a banking company then standing in the names of A. and B." to C. At the date of the will twenty shares were standing in the name of "B. as executor of A.," and fifty-nine shares were standing in the name of B. alone. There was a gift of the residue of the personalty

contained in the will:—Held, that all the shares passed by the bequest to C. *Coltman* v. *Gregory*, 19 W. R. 122; 23 L. T., N. S., 583; 40 L. J., Ch., 352.

1. A testatrix by her will dated in 1850 bequeathed "my" new 3½ per cent. annuities unto T. G. and A. upon certain trusts in her will mentioned. The testatrix at the date of her will was possessed of 3,010*l.* 3¼ per cent. annuities, but at her death was possessed of 17,010*l.* like annuities:—Held, that the whole of this sum passed to T. G. and A. upon the trusts in the will mentioned. The testatrix by her will also gave 1,500*l.* and "my four Danish bonds, one of them for the sum of 485*l.*; another of them for the sum of 1,004*l.*; another of them for the sum of 1,315*l.*; and the other of them for the sum of 716*l.*; making in the whole, together with the said sum of 1,500*l.*, the sum of 5,020*l.* The testatrix had not at the date of her will, or at the time of her decease, Danish bonds of the precise amounts named by her, but she had at the time of her decease Danish bonds to an amount far exceeding the amount in her will named. Included in such amount were four lots which had been exchanged by the testatrix for other Danish bonds, which had been bequeathed to her by her husband, which four lots precisely corresponded with the amounts named in her will:—Held, that the gift of "my four Danish bonds, etc.," was a specific bequest of such Danish bonds as were received by the testatrix in exchange for the four lots of the same bonds which answered the description in the will. *Goodlad* v. *Burnett*, 1 Kay & J. 341.

2. A testator gave all his money in hand and at his bankers, to his trustees, to be added to his new 3*l.* per cents, which 3*l.* per cents. and five Devon Great Consols he desired might be equally divided between his granddaughters; and he gave to his trustees 600 West Basset shares, 600 Wheal Agar shares, and five Devon Great Consols, to divide between his grandsons; the remaining Wheal Agar shares he might hold at the time of his decease, as well as any other property, he desired might be added to the 3*l.* per cents. for the benefit of his granddaughters. He at the time of his death was possessed of ten Devon Great Consols, 600 Wheal Bassets, and 1,304 Wheal Agar shares:—Held, that the bequests were specific. *Hill* v. *Hill*, 11 Jur., N. S., 806; 12 L. T., N. S., 797.

3. A testatrix, the owner of four Spanish certificates or inscription, the nominal value of 1,000*l.* each, redeemable for 550*l*, bequeathed to trustees the sum of 2,000*l.* Spanish bonds or coupons, belonging to her, in trust for A. B. The testatrix had no Spanish bonds or coupons. She during her life was accustomed to describe her certificates as "of 500*l.* each," and of four securities for 2,000*l.*:—Held, first, that the legatee was entitled to two only of the certificates of 1,000*l.* each, the same being sufficiently described as bonds or coupons; and, secondly, that evidence of the expressions used by the testatrix was not admissible to explain the bequest. *Horwood* v. *Griffith*, 23 L. J., Ch., 465; 4 De G. M. & G. 700.

4. A testator having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company who had issued the debentures, and converted them into debenture stock of the same company:—Held, that the debenture stock did not pass by the will. *Re Lane, Luard* v. *Lane*, 14 L. R., Ch. D., 856; 49 L. J., Ch., 768; 43 L. T. 87; 28 W. R. 764.

5. D, being possessed of 4,000*l.* 4 per cent. bank annuities, by his will gave parts of it to a number of persons; he then made a codicil in which he said, "I find willed away only 5,600*l.* 4 per cent. bank annuities, and I have there at present 6,000*l.* I give the interest of the remaining 400*l.* to F. It appeared that he had disposed of only 3,200*l.* of the stock by his will. F. shall take the whole residue of the stock under the bequest in the codicil. *Danvers* v. *Manning*, 1 Cox 203; 2 Bro. C. C. 18.

6. If testator gives stock standing in his name, and has no such stock, the legacy fails. The Court sends it to the Master to inquire what the testator intended, as well where there is a misdescription of fund as of legatee. *Evans* v. *Tripp*, 6 Madd. 91.

7. A. having forty-one shares in a bank standing in her own name and being her own property, and having only a life interest in twelve shares in the same bank standing in the name of B., as trustee of a deed by which she had put in settlement those twelve shares, by her will recited that she was entitled to twelve shares in the bank, which stood in the name of herself and B. as trustee for her, and bequeathed the said shares to three persons:—Held, that the bequest was inoperative, and could not be made good out of her own shares. *Millar* v. *Woodside*, 6 Ir. R., Eq., 546.

8. A testator bequeathed to his son all the shares he held in the Hibernian bank, and all dividends that might be due thereon at his decease, in trust for his eldest daughter; to his son, all the stock of the governor and company of the Bank of Ireland to which he might be entitled at his decease in trust for the benefit of another daughter and her children, and he appointed his son residuary legatee. The testator had not at the date of his will or of his death, but some years before he had had, bank of Ireland stock:—Held, that new 3 per cent. Government stock, which he was entitled to at his death, did not pass under the latter bequest. *Beahan* v. *Beahan*, 14 Ir. R., Eq., 427; 17 W. R. 603.

9. A testator gave to his niece "1,000*l.*, and all the policies of life insurance which I have effected in the Union and Law Life insurance offices, and the moneys payable in respect thereof; and I direct the same to be paid to her" in a specified manner. He then gave to his wife "the other policies of life insurance which I have effected in any other offices;" and the gift of his residuary personal estate to his wife contained in its enumeration "shares in public companies." The testator never had any "policies" effected on his life in the Union or Law Life insurance offices, but he had "shares" in those offices, and in other offices, as well as two policies on his life in one other insurance office. On a case stated between the niece and widow of the testator:—Held, that the testator imagining in error that he had policies in two offices, meant to

give those policies; that where he meant to give shares he has so described them; and that, as it could not be known what will the testator would have made if he had not committed this error, the Court held that the shares did not pass under the description of policies. *Waters* v. *Wood*, 5 De G. & Sm. 717; 17 Jur. 33; 22 L. J., Ch., 206.

1. In June, a testator directed his bankers to purchase 1,127 francs French rentes for him. They entered the purchase in their books, but never transferred the amount into the testator's name; they had, however, sufficient rentes to answer it, which they considered they held for the testator. In July following the testator bequeathed "the annual rente of 1,127 francs, inscribed in his name in the book of public debt of France," to A.:—Held, that A. was entitled to 1,127 rentes, although the testator had none in his name, and though, on the balance of previous transactions in rentes with his banker, he was entitled only to 708 francs in rentes. *Ellis* v. *Eden*, 25 Beav. 482.

2. Testator gave a sum, part of his 4 per cent. bank annuities, to his wife for life, and after her decease to several relations; evidence was admitted that he had no such stock at the date of the will, having previously sold it all and invested the produce in long annuities, and to show the cause of the mistake; and the legacies were established. *Selwood* v. *Mildmay*, 3 Ves. 306.

Testator bequeathed part of his 3 per cent. consolidated bank annuities; upon evidence that he had no bank stock at the date of his will or his death, but that he had 3 per cent. South Sea annuities, the legacy was established. *Id.* 308.

Bequest of stock if the testator has it at the time, is specific, and any act destroying it proves an intention to revoke: if a ring or a picture bequeathed cannot be found, that cannot be rectified. *Id.* 310.

3. In 1843 a testatrix made several bequests to the amount of 1,000*l.* "of the stock 3 per cent. consols then standing in her name in the books of the Bank of England." The testatrix died in the same year, and had not, at the date of the will or at her death, any stock whatever standing in the bank books. It appeared, however, from extrinsic evidence, that in 1840 she had had a sum of 1,000*l.* bank annuities standing in her name, which she sold out and lent to A. B., he paying her, down to her death, a sum equal to the dividends. It was held that extrinsic evidence was admissible to prove how the mistake in description arose, and that the legatees were entitled to a sum equal to the value of 1,000*l.* consols at her death. *Lindgren* v. *Lindgren*, 9 Beav. 358; 15 L. J., N. S., Ch., 428; 10 Jur. 674.

Ademption of Legacies of Stock by Conversion or Change of Investment.] See LEGACY, VIII. II. and VIII.

XXVII. TITHES. WHAT WORDS WILL PASS.

4. One has no lands in A., but has tithes there, and devises all his land in A.; the tithes as they are issuing out of the land, and part of the land, and part of the profits thereof, shall pass. *Ashton* v. *Ashton*, 3 P. W. 386; Ca. *temp.* Talb. 152.

5. Testator devised certain tithes to his nephews D. and W., for their lives successively, and, after the expiration thereof, to the several provision and uses therein expressed and contained of and concerning his real estates: and he devised all his real estates, of what nature or kind soever, and wheresoever situate, subject to the payment of his debts, etc., in aid of his personal estate, to his niece and her sons in strict settlement, with remainders to his nephew W. and his sons, and to two other persons and their sons, in like manner, with remainder to another person in fee. The niece married, and had a son after the date of the will; and the testator, by a codicil, devised all his real estates, of what nature or kind soever, to that son for life, with limitations, by way of remainder, to his first and other sons in tail male; and on failure of such issue, he devised all his said real estates in the manner mentioned in his will, and declared that the devises thereinbefore made should take effect in precedence to the devises of his real estates contained in his will:—Held, that the words "my real estates," in the will, did not include the tithes; but that those words in the codicil did include them, and, consequently, that the estates for life in the tithes, limited to the testator's nephews, D. and W., by the will, were postponed to the limitations in the codicil to the son of the testator's niece and his sons. *Evans* v. *Evans*, 17 Sim. 86; 14 Jur. 383.

XXVIII. OTHER WORDS DESCRIPTIVE OF PERSONAL ESTATE.

6. Where current coin is curious, and kept with medals, it will pass as such. *Bridgman* v. *Dove*, 3 Atk. 202.

7. Neither choses in action nor securities for money pass under a bequest of "goods and chattels." *Chapman* v. *Hart*, 1 Ves. 271.

8. A testator bequeathed the portraits of himself, of his grandfather and grandmother, of his mother and of the Duke of Schomberg, to A. B. The testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarters portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the Duke was represented on horseback, with a battle in the distance:—Held, that that picture was a portrait of the Duke, and that it passed, together with all the other portraits, by the bequest. *Leeds* (*Duke*) v. *Amherst*, (*Lord*), 13 Sim. 459; 14 L. J., N. S., Ch., 73; 7 Jur. 842; 9 *id.* 359.

9. Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due." *Hele* v. *Gilbert*, 2 Ves. 430.

10. *Dugdale's Monasticon*, *Domesday Book*, and the *State Trials* will pass under a bequest of the testator's law library and books of antiquities. *Wallace* v. *Bayldon*, 4 L. J., Ch., 74.

11. A library of books held to pass under a general intention that the testator's house should not be dismantled, but kept up for his family. *Ouseley* v. *Anstruther*, 10 Beav. 462.

12. A. by his will bequeathed unto his wife absolutely all his or her jewels, trinkets, gold,

and silver plate, ornamental and other china, and all objects of vertu and taste. And he directed that his said wife should be entitled, during her life, to his leasehold messuage with the appurtenances in Carlton House Terrace, and the statuary, furniture, and other effects purchased by him therewith, or which might be therein at the time of his decease. After his death, the said leasehold premises, statuary, and effects were directed to be sold, and the produce was made part of his residuary estate. There were in the said house at the testator's death, but not purchased by him therewith, ten pictures valued at 15,000*l*.:—Held, that the words "objects of vertu and taste" were intended to include only things *ejusdem generis* with those enumerated, and did not include the pictures, but that these passed under the gift of the furniture, statuary, and effects in the said leasehold messuage. *Re Londesborough* (*Lord*), *Bridgman* v. *Fitzgerald* (*Lord Otho*), 50 L. J., Ch., 9; 44 L. T. 408.

1. Testator bequeathed to A. B. the premium of insurance on his life in an insurance office for her immediate expenses. Shortly before the date of the will a bonus had been declared upon the testator's policy of assurance:—Held, that the bonus alone passed under this bequest, a verbal declaration by the testator to A. B. upon the execution of the will to show that he intended her to have both the policy and the bonus being inadmissible in evidence. *Barrow* v. *Method*, 3 W. R. 629.

Held, that the word "debentures" in a will was sufficient to include general policies of insurance. *Phillips* v. *Eastwood*, Ll. & G. *temp.* Sugd. 270.

A policy of assurance on the life of a debtor is a security for a sum to be paid, and may pass in a will under the words "debentures or debts." *Id.* 291.

2. Household furniture does not pass under the description of "fixtures and fittings up." *Simmons* v. *Simmons*, 6 Hare 352; 12 Jur. 8.

3. A. devised to her daughter E. "my strong box, and whatsoever is in it, and all my chests, and cabinets, and whatsoever is in them." This strong box was fixed upon a frame containing several drawers, and in these drawers were found banknotes and other things of value:—Held, that the frame and drawers did not pass by the devise of the strong box; but, on an appeal, this decree was reversed. *Paget* (*Lord*) v. *Bridgewater* (*Duke*), 3 Bro. P. C. 79.

4. A testator gave his property at interest and in the funds to A. S., and he left to his executors any cash or banknotes in his drawer in the study, or in his drawing-room; and by a codicil he left to the servants living with him at his death, one year's wages each, and stated that he left in his drawer in the study money to pay servants, and any surplus over he left to his executors:—Held, first, that deposit receipts passed to A. S. as property at interest. *Sealy* v. *Stawell*, 2 Ir. R., Eq., 326.

Held, secondly, that there being no cash in the study drawer or drawing-room, the bank post bills and cheques went to the executors for their own benefit, subject to the payment of the servants' wages. *Ib.*

5. W., by will, after desiring that his executor and partner H. might be allowed a year for converting his (the testator's) "proportion of capital, invested in the business he was then carrying on with H.," into cash, and that such cash might be paid over as realised (with the exception of special bequests thereinafter mentioned) to the Charity Commissioners to be invested, desired that all shares of which he might die possessed might be transferred into the names of the Charity Commissioners, without being sold; the interest to be paid by them to certain persons for life. W. then directed, that after the death of the persons named, sufficient of the property so invested by the commissioners should be converted by them, and paid over to a number of charities, naming the sum to be given to each; and he then requested his executors would pay, as soon as conveniently might be after his decease, "out of the capital employed in the business," to the persons mentioned, certain sums (naming twenty-two legatees, and sums amounting together to about 700*l*.). At the date of his will, W. was in partnership with H., but before his death the business failed, and a composition was paid, mainly by the testator, at whose death the partnership assets were outstanding, and his proportion of capital consisted of half of these assets, after deducting the debts, one of which was a large debt due to himself:—Held, that the words "capital invested in the business" comprised all that was coming to the testator from his partner's estate, inclusive of the debt. *Bevan* v. *Att.-Gen.*, 9 Jur., N. S., 1099; 9 L. T., N. S., 221; 4 Giff. 361.

6. By an ante-nuptial settlement a sum of 7,356*l*., the property of the wife, was vested in trustees in trust, that if the husband should, within six months, secure payment to them of 4,000*l*. by mortgage of certain hereditaments belonging to him, they would pay him 4,356*l*., part of the 7,356*l* (of which 356*l*. was to be for his own use); and the mortgage debt of 4,000*l*. was ultimately, in case of no children of the marriage, which happened, to be upon trust for the husband. After the marriage the mortgage was made, and by his will the husband gave to his wife "all our furniture, horses, and movables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a feme sole, should she marry again":—Held, that the ultimate absolute interest of the testator in the 4,000*l*. mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement. *O'Reilly* v. *Smyth*, 1 Ir. Ch. R. 349

7. By a marriage settlement, a husband covenanted that his representative should, after his death, pay a sum of money to the trustees of the settlement to be held by them upon the trusts thereof. The husband died, and the covenant was never called into operation by the wife, the only person who had any interest in its performance. By her will she made a bequest of "all her husband's settled funds":—Held, that this gift did not include the money covenanted to be paid under the settlement. *Moysey* v. *Stuart*, 23 L. T., N. S., 644.

8. Devise of real estate to M. for life, and direction that "timber or wood which should be on his real estates, should from time to time be used for repairing the houses thereupon, or otherwise, for the benefit or advantage of his estate, and that the same should be

sold, and the money arising therefrom should be applied," etc.:—Held, devise to M. carried the underwood, and that trustees, leaving sufficient timber for repairs, might cut all fit timber, except ornamental. *Butler* v. *Borton*, 5 Madd. 40.

1. A testator said, "I leave my wife 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz., the sum of 454*l.* 9*s.* 9*d.*, for life." He subsequently stated that he had 200*l.* in the savings bank, and 454*l.* 9*s.* 9*d.*, and 30*l.* in addition in another bank. His property consisted of the 454*l.* 9*s.* 9*d.*, and 30*l.* and some furniture, and there was in the savings bank a sum of 200*l.* in his wife's name, being part of her separate estate:—Held, that this latter sum was the 200*l.* referred to in the will. *Hesketh* v. *Magennis*, 27 Beav. 395.

2. A husband transferred money in the funds into the joint names of himself and wife, for the purpose of making a provision for her; and by his will he bequeathed to his wife a life interest in "all his property that he was in possession of":—Held, that the stock did not pass. *Low* v *Carter*, 1 Beav. 426.

3. A. having debts due to him by bond, and being possessed of a term for years, gave one moiety of his personal estate to his wife, and several legacies to other persons, and the residue to S. The wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease. *Lee* v. *Hale*, 1 Ch. Ca. 16; 2 Freem. 157. See also *Reynolds* v. *Hyde*, 2 Barnard K. B. 422.

4. A testator devised his real estate (subject to charges) in strict settlement, and gave all his "railway, canal, and navigation shares . . . and personal estate" to his executor, to pay his debts and legacies, and his residuary personal estate and effects to M. He was possessed of two navigation shares, which by the act creating them were made of the nature of real estate. Before his death, the undertaking to which the shares belonged became vested in a railway company, by an act which provided for the extinguishment of the freehold rights in the shares, upon their conveyance to the railway company. The shares were never conveyed to the railway company:—Held, that by the railway company's act, or if not, by the will, they were converted into personal estate, and went to the residuary legatee under the gift of his personal estate and effects. *Cadman* v. *Cadman*, 41 L. J., Ch., 468; 13 L. R., Eq., 470; 20 W. R. 356.

5. A tenant for life, in case she should so long live, and continue unmarried; in case of her marriage to her in fee; in case of her decease, unmarried, to her sister, B., in fee. A. and B., and the husband of B., join in a sale by fine; the purchase money was laid out in funds in names of trustees, without any declaration of trust, or agreement as to the application; nor was any notice of this fund taken in the wills of B. and her husband. B., being the survivor, made a general disposition of all her personal estate in favour of A. Although still unmarried, A. was held absolutely entitled to the stock. *Seawen* v. *Blunt*, 7 Ves. 171.

6. Testator bequeathed to his wife the lease of his house and all the furniture, etc., therein for life, the interest of all money he should die possessed of, then half of the debts due to him at his death, one excepted, which he directed debtor to retain as long as he pleased, paying the interest to her, to be disposed of as she thought fit; in case the interest of the money he should die worth should not be sufficient for her maintenance, executors to allow part of principal out of the debts, except that before excepted, to make her life easy and comfortable; after her death, the interest of all money remaining to his sister; after her death, to her daughter all sums remaining for ever; if they die before his wife, one-half of all sums remaining to be disposed of as his wife should think fit, the other to A. Upon bill by testator's niece against executors of the wife, the niece held entitled to all beyond the debts, and a moiety of all debts but that excepted; the other moiety to wife's executors, who, being also executors of testator, were decreed to take out of wife's share a sum advanced under their power. *Collet* v. *Lawrence*, 1 Ves. J. 268.

Some effect must be given to every part of the will. *Ib.*

7. A testator devised his freeholds in trust to pay two-fifths of the rents to A. for life, with remainder to his children, and to pay three-tenths to B. for life, with remainder to his children, and to pay the remaining three-tenths to C. for life, with remainder to her children. By a codicil he left A. an equal share only of the property with B. and C., instead of the increased share:—Held, that the property was divisible into thirds, one of which belonged to each of the legatees for life, with remainder to his children. *Quentery* v. *Quentery*, 33 Beav. 369.

8. The word "bequeathed" (though not in itself a technical word) is primarily applicable only to property passing under a testamentary disposition. The testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867, she specifically appointed such funds, and then proceeded as follows: "I constitute and appoint E. M. my residuary legatee to any property which has been bequeathed to me and which is not mentioned in this will." The father of the testatrix, by his will in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, and accordingly transferred it to the trustees of her marriage settlement:—Held, that this sum of stock did not pass to E. M. under the residuary gift obtained in the will of the testatrix. *Re Armstrong, Marescaux* v. *Armstrong*, 49 L. J., Ch., 53; 42 L. T. 823.

9. When there is some property which exactly comes within the words of a bequest, the bequest will not include property to which it is doubtful whether the description can apply. *Ridge* v. *Newton*, 1 Con. & L. 381; 2 Dr. & War. 239; 4 Ir. Eq. R. 389.

XXIX. GIFT OF USE, OCCUPATION, OR RESIDENCE.

10. A testator desired that his two sons might have "the use and occupation" of

certain lands, they paying a stated rent; and that in default of payment, or if they converted the arable land into tillage, they should no longer have "possession" thereof:—Held, that personal use and occupation was not enjoined, and that they might underlet. *Rabbeth* v. *Squire*, 19 Beav. 70; 1 Jur., N. S., 218; 24 L. J., Ch., 203. Affirmed 28 L. J., Ch., 565; 4 De G. & J. 406

1. A permission to reside in a house without paying rent gives no right to the rents and profits of the house. *Parker* v. *Parker*, 1 N. R. 508.

2. A testator devised a house and premises to trustees, desiring that the use and enjoyment of the same should be offered, rent free, to his eldest child for the time being, as long as he or she should please; and in case of refusal, or of his or her ceasing to occupy the same, then the house and premises were to be offered to his other children in succession:—Held, that a personal occupation was required, but that this was satisfied by keeping furniture and a servant in the house, with occasional occupation; but the house and premises could not be let. *Maclaren* v. *Stanton*, 4 Jur., N. S., 199; 27 L. J., Ch., 442.

3. Under a bequest to a wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate, the free occupancy of the house entitled the wife either to reside in it or to let it during her life. *Mannox* v. *Greener*, 14 L. R., Eq., 456; 27 L. T., N. S., 408.

4. A. by a codicil to his will stated that whereas he had made too small a provision for his wife, he thereby bequeathed to her a certain annuity for her life, and he also directed that his said wife might reside rent free in his then residence during her life. The widow inhabited the house for some years after the testator's death, but then let it and received the rents.—Held, that the widow, in so doing, was not residing in the house within the meaning of the codicil, and that she was not entitled to retain for her own use the rents received from the house, but must pay them over to the trustees of the will. *May* v. *May*, 44 L. T. 412.

5. Proviso that, until the sale of certain premises directed to be sold under trust for sale, the settlor and his wife, during their joint lives and the survivor after the death of either, should be permitted to reside in and enjoy all or any of the premises rent free:—Held, that where husband and wife did not both elect to reside on the settled premises, the proviso did not enable the husband to do so. *Ramy* v. *Ellis*, 27 L. T., N. S., 463.

6. Testator directed that his wife should have liberty to occupy his house for a year, provided she continues so long in L. Then by a distinct clause he directed his executors to pay her a guinea a week during her stay at L. Her residence there beyond the year does not entitle her to a continuance of the weekly payment. *Walker* v. *Watts*, 3 Ves. 132.

7. A testator directed his trustees to allow A. to occupy a mill, so long as he should think proper to do so, "he nevertheless keeping the premises in good and tenantable repair, and paying" a rent of 100*l*. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—Held, that A. was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to re-build by declining any longer to retain them. *Gregg* v. *Coates*, *Hodgson* v. *Coates*, 23 Beav. 33; 2 Jur., N. S., 964; 4 W. R. 735.

8. Devise upon trust to permit M. to have the use and enjoyment of house and premises free of ground rent, and also of all household furniture, carriages, horses, goods, wines, linen, etc., in or about the house for life or widowhood:—Held, M. was not to be confined to the personal use and enjoyment of the house, furniture, and effects, and that she was entitled to the wines and other consumable articles absolutely. *Clive* v. *Clive*, 2 Eq. Rep. 913; 1 Kay 600; 23 L. J., Ch., 981.

9. A. devised real estate in strict settlement, adding a clause providing that it should be lawful for the trustees for the time being, if they or he should think proper, to permit the person or persons who might, under the trusts before declared, be entitled to a life or other greater estate in the respective portions of his S. estate, to occupy the mansion-house, gardens, and premises, without paying any rent or compensation for the same, and without such person or persons being obliged, at his expense, to keep the same in repair, or being at "any other expense than paying the rates and taxes":—Held, first, that the word "premises" extended to something beyond the gardens. *Lethbridge* v. *Lethbridge*, 7 Jur., N. S., 296; 30 L. J., Ch., 388; 4 L. T., N. S., 127; 3 De G. F. & J. 253. And see S. C. 4 De G. F. & J. 35; 31 L. J., Ch., 737; 10 W. R. 449; 6 L. T., N. S., 727.

Held, secondly, that upon the whole context of the will, and the surrounding circumstances, it comprised the park attached to the mansion house. *Ib.*

Held, also, that the words "any other expense than paying the rates and taxes" meant "any other expenses affecting the property," and not expenses merely incident to the use and enjoyment of it; but that the words immediately preceding those threw on the trustees not only the burden of keeping vineries and forcing-pits in repair, but also that of keeping up the gardens. *Ib.*

10. One devised that his cousin A. should continue to live at his house, and be at the charge of keeping the house and the servants, and coach-horses which the testator employed in ploughing the ground, and spend the corn arising therefrom in the house; here the land enjoyed with the house shall pass to the cousin A. *Blackborn* v. *Edgley*, 1 P. W. 603.

11. Testator divided his will into several clauses or articles, which he numbered; and after appointing several trustees, and providing for their succession, he by the second article of his will bequeathed to his trustees in trust for the use of his wife and children as thereinafter detailed, viz., all his household furniture, plate, medals, china, linen, books, paintings, prints, wines, provisions, horses, carriages, cows, and sheep, and all other live and dead stock in and about his premises, with all his ready money in his house and at his agent's and banker's, with all moneys due to him at the time of his decease; also he gave and devised all and every his dwelling-house and mansion,

buildings, gardens, and lands, with the appurtenances, and all his real estates, upon trust as aforesaid, and upon the uses thereafter stated, that is to say, all his real estate in and about Denne Hill, etc., until the youngest of his surviving children attained the age of twenty-five years; at that period he willed that his eldest surviving child should be put into possession of all his freehold and leasehold property, including all timber and underwood, and all personal property on the estates. By a subsequent article he appointed his eldest son, or next surviving child in seniority, his residuary legatee. There were other clauses in the will, and also a testamentary writing, from which it appeared to have been a principal object of the testator to give his children the advantage of having the same home for a period after his death as they had enjoyed in his lifetime.—Held, upon these clauses taken together, that the enjoyment and rents of the testator's real estates devised by the will belonged to the testator's wife and children generally (subject or not subject to a discretionary power of regulation in the trustees) until the attainment by the youngest surviving child of the age of twenty-five:—Held, also, that the property described as all the testator's ready money in his house, etc., did not belong to the residuary legatee, and did not fall within the description of all personal property on the estates, etc., but was to be applied for the benefit of the wife and children. *Montresor* v. *Montresor*, 1 Colly. 693.

1. "I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that, as she had not disposed of it during her life, it fell into the residue. *Espinasse* v. *Luffingham*, 3 J. & L. 186; 9 *id.* 129.

2. A. bequeathed his stock in trade, etc., to his wife and son to be used by them in his trade and business, which he directed to be carried on by them, in partnership, during the widowhood of his wife; "and for that purpose they were to have the use of the book debts or capital which he at his death might have employed therein":—Held, that the widow and son were entitled to the book debts or capital absolutely. *Terry* v. *Terry*, 12 W. R. 66; 9 L. T., N. S., 469; 33 Beav. 232.

Right to Specific Enjoyment of Residue or Wasting Property.] See Life, Estate for, VI.

Conditions of Forfeiture for Non-Residence.] See Condition, XVI.

XXX. LAND. LOCAL DESCRIPTION OR OCCUPATION.

3. A testator devised "all my manors, messuages, lands, tenements, and hereditaments, whether freehold, leasehold, or copyhold, situate in the several parishes of M., C., L., and W., and also in the city of B., or elsewhere in the kingdom of England;" he had no lands in England, except in the places specified in the will, but he had a large estate in Wales, in the county of Carmarthen; *quære*, whether the devise passed the Carmarthen estate. *Okeden* v. *Clifden*, 2 Russ. 309.

4. A will contained a general devise of all the testatrix's messuages, hereditaments, etc., at Holton-le-Clay, and a subsequent devise of all her copyholds at X., Y., and elsewhere. The testatrix had no other copyholds except those at X., Y., and at Holton-le-Clay. The Master of the Rolls was, under the circumstances, of opinion that the copyhold at Holton-le-Clay passed by the first devise, but directed a case to be sent for the opinion of the Court of Common Pleas. *Borrell* v. *Haigh*, 7 L. J., N. S., Ch., 139; 2 Jur. 229.

5. Testator, having freehold, copyhold, and leasehold estates, some of which were within the liberties of the city of H., and others within the county of H., but out of the liberties of the city, devised all his freehold, copyhold, and leasehold tenements in the city of H. or the liberties thereof, in the county of H., and his two leasehold houses on Ludgate Hill, in the City of London, to trustees in trust to sell. In a codicil he spoke of the sale authorised by his will of his estates in the city and county of H.:—Held, that the estate in the county of H., but out of the liberties of the city, did not pass by the devise to the trustees. *Moser* v. *Platt*, 14 Sim. 95; 8 Jur. 389.

6. A testator, who died in 1818, after devising a freehold house to his wife and her heirs, devised a residue of his freehold estates, situate in four specified parishes, or elsewhere in the county of Cambridge, to two trustees and their heirs, upon the trusts thereinafter declared concerning the same, that is to say, upon trust, that they should sell his several copyholds in the parishes aforesaid, and, after satisfying the costs of the sale out of the moneys thence arising, should pay the residue to his executor, for the purpose of satisfying in the first place certain legacies; and he then devised all the residue of his real and personal estate to A. B. The testator, besides freeholds and copyholds, situate in the four parishes, had freeholds not situate in the county of Cambridge, and copyholds not situate within the four parishes, and all the copyholds had been surrendered to the use of his will:—Held, that the beneficial interests in all the freeholds, whether situate in the county of Cambridge or elsewhere, passed to the residuary devisee; that the legacies were a charge only on the copyholds situate in the four parishes; that no estate in those copyholds passed to the trustees, but only a power to sell; that any surplus of the moneys arising from the sale which might remain after satisfying the legacies, passed by the residuary clause; that the copyhold not situate within the four parishes passed to residuary devisees. *White* v. *Vitty*, 2 Russ. 484. See this case further, 4 Russ. 584.

7. A testatrix devised all her messuages in Denmark Court. She had five houses in the court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place where the five stood, and to the back of which was attached an out-building, abutting on ground within the court. The Vice-Chancellor having decided that the five houses only passed, the Lord

Chancellor, on appeal, directed an ejectment to be brought by the heir-at-law against the devisee, and, on a verdict being found for the defendant, reversed the decision of the Court below, and made a declaration that the house fronting towards the Strand passed the other five. *Newton* v. *Lucas*, 1 Myl. & Cr. 391. Reversing 6 Sim. 54.

1. A gift of "messuages and premises, situate No. 4," etc., held to pass garden ground occupied with the house, No. 4, but on the opposite side of the road. *Hibon* v. *Hibon*, 9 Jur., N. S., 511; 11 W. R. 455; 8 L. T., N. S., 195; 32 L. J., Ch., 374; 1 N. R. 532.

2. Devise of all the freehold and real and leasehold estates in the counties of Lincoln and Cambridge (except such as I have hereinbefore disposed of), "and all the leasehold lands" at S., in the "county of Dorset, and elsewhere, which I can dispose of by this my will":—Held, that it passed freeholds in Norfolk and elsewhere wherever situate. *Pinney* v. *Marriott*, 32 Beav. 643.

3. A testator resided in Camperdown House, and had eleven houses in Camperdown Place, and three in the rear, in Ship Row, all being leasehold. He bequeathed his leasehold estates situate Camperdown House, Camperdown Place, to his wife, for life. After her death, he bequeathed another leasehold to A., and the other leaseholds, viz., fourteen houses, Camperdown, to B.:—Held, the fifteen houses passed to B. *Armstrong* v. *Buckland*, 18 Beav. 204.

4. A devise of "two improved ground-rents in the Queen's Road, Dalston." The testator had no such ground-rents, but owned one ground-rent, issuing in respect of houses in the immediate neighbourhood of the Queen's Road, in the parish of H., and another issuing in respect of houses in the parish of S., not in the immediate neighbourhood of the Queen's Road. The houses in H. and S. were about a quarter of a mile out of Dalston:—Held, that the ground-rents in H. and S. passed under the above description. *Tann* v. *Tann*, 2 N. R. 412.

5. A. B., by his will, dated in 1849, devised all his freehold and copyhold hereditaments in the county of D., which had or might thereafter come into his possession by inheritance from his father, to trustees for a term of 500 years, upon trust, to provide certain sums. The testator died possessed of the Castle Eden estate, in the county of D., which was conveyed to him by his father, and into the possession of which he entered in his father's lifetime. He was also possessed of other estates in the same county, which were devised to him by his father's will, but which, being the heir at law, he took by descent. The descended estate was not sufficient to pay the sums for which the 500 years' term was created:—Held, that the Castle Eden estate was not included in the term. *Wilkinson* v. *Beniake*, 22 L. J., Ch., 781; 3 De G. M. & G. 937; 1 Eq. Rep. 12.

6. Under a devise of all the testator's freehold lands situate in the parish of C., with their appurtenances, land in two adjoining parishes, which had always been let with the lands in the parish of C., and occupied by the same tenant, held not to pass. *Evans* v. *Angell*, 26 Beav. 202; 5 Jur., N. S., 134.

7. A testator entitled in fee to some messuages and lands in A., and entitled for life to other messuages and lands in A., devised his messuages and lands in A. to his son, and charged his tenement in A., occupied by H., with certain legacies. The tenement occupied by H. was part of the property in A. to which the testator was only entitled for life:—Held, that it was not to be inferred from the description as his own of the tenement in A., occupied by H., that the testator intended to describe and devise as his own the other property in A. in which he had only an estate for life. *Parker* v. *Carter*, 4 Hare 400.

8. Devise of "all that freehold farm called the Wick Farm, containing two hundred acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will, and of the death of the testator, W. E. held under a lease from the testator two hundred and two acres of land, which were described in the lease as Wick Farm: of these twelve acres were leasehold:—Held, that the twelve acres did not pass by the devise. *Hall* v. *Fisher*, 1 Colly. 47; 8 Jur. 119.

9. It is the ordinary rule of a court of equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it but acts under it, merely denying that certain portions of the land pass under the description used in it, a court of equity has full jurisdiction to determine the question thus raised without granting an issue, or may grant such issue at its discretion. In such a case parol evidence of what was considered in the lifetime of the testator to be the extent of the lands constituting the estate is receivable. A testator, who described himself as of "Ashford Hall in the county of Salop," devised "all my estates in Shropshire, called Ashford Hall," to trustees for sale:—Held, that this description was not confined to the mansion house so called, and the lands immediately adjoining, but extended to such other lands in Shropshire as he possessed at the time of making his will. *Ricketts* v. *Turquand*, 1 H. L. Ca. 473; varying the judgment below.

10. A will contained the following devise: "I give my mansion house at Tedworth, in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments in the county of Hants, devised to me by my late husband, subject to annuities charged thereon by his will, and subject to an annuity charged thereon by me, and all other hereditaments in the county of Hants, to which I am or shall be entitled at my death; all which hereditaments in the county of Hants are hereafter described or referred to as my Tedworth estate." The Tedworth estate was partly in the county of Hants, and partly in the county of Wilts, and had long been enjoyed as one property. There was no boundary or division line, natural or artificial, between the two counties; and the mansion house was largely disproportioned to the estate in Hants:—Held, that that portion only of the Tedworth estate which was in the county of Hants passed under this devise. *Webber* v. *Stanley*, 16 C. B., N. S., 698; 10 Jur., N. S., 657; 33 L. J., C. P., 217; 12 W. R. 833; 10 L. T., N. S., 417.

1. A testator devised his estate, called "Arkley Hall Farm, in the parish of Ridge," upon certain trusts for A., and his will contained a residuary devise in favour of other persons. It was shown that certain lands in other parishes had been purchased by the testator, and added to Arkley Hall Farm, and had been constantly let with it:—Held, nevertheless, that the land in other parishes did not pass under the devise of "Arkley Hall Farm," but went to the residuary devisees. *Pedley* v. *Dodds*, 2 L. R., Eq, 819; 12 Jur., N. S., 759; 14 W. R. 884; 14 L. T., N. S., 823.

2. A. bequeathed to his son all those his freehold brewhouse, buildings, and premises, situate in S. Street, whereon for many years he had carried on the business of a brewer (except a site of a portion of the premises on which stood a room used as a counting house); and also all that piece of land with the old malthouse standing thereon situate near S. Street. The testator had for forty-five years carried on business as a brewer on freehold premises, situate behind certain houses in S. Street. On a plot of land situate about 218 feet from S. Street, he had, upon a piece of building land bought by him some years before his death, built a malthouse and a carpenter's shop:—Held, that the malthouse did not pass to the son under the description of all the testator's freehold brewhouse, buildings, and premises in S Street. *Lambert* v. *Overton*, 11 L. T., N. S., 503.

3. A devise in 1844 of "all my Quendon Hall estates in Essex." The testatrix at the date of her will, and at her death, had a mansion called Quendon Hall, and land around it, and also other detached farms in Essex. There was no parish of Quendon Hall, nor was the term "Quendon Hall estates" a recognised appellation of any particular property:—Held, that extrinsic evidence was admissible to show what estates the testatrix understood to be comprised in that description. For this purpose, old account books, in the handwriting of the testatrix, one containing "an account of timber cut down on the Quendon estate," and a paper headed, "1844, Quendon Hall Farms," written by the testatrix at about the date of her will, were received in evidence. Evidence was also admitted to prove that much of the property had been derived by the testatrix under the will of a relative who had appended to her gift a direction that her devisee should assume the name and arms of Cranmer, particularly as the testatrix in this cause had annexed a like condition to the above-mentioned devise. *Webb* v. *Byng*, 1 Kay & J. 580; 1 Jur., N. S., 696.

Estates acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that time, and although they were chiefly small additions to what were clearly comprised in the devise, were held not to pass thereby. *Ib.*

4. In construing a will of real estate, the Court will look at the nature and circumstances of the property, and at the value of the subjects of the various devises, and if the whole will, read by the light of such circumstances, discloses intention inconsistent with restrictive words in the description of the subject of a devise, those restrictive words may, as a matter of construction, be rejected as a *falsa demonstratio*. *Stanley* v. *Stanley*, 2 John. & H. 491; 10 W. R. 857; 7 L. T., N. S., 136.

Evidence of the intention of a testator, or of mistake in the preparation of his will, is not admissible, and an issue will not be directed on this ground to try whether particular restrictive words were or were not part of the will. *Ib.*

Where a will contained a devise of hereditaments "in the county of Hants," described as "my Tedworth estate," and it was proved that the testatrix had an estate at Tedworth extending into the two counties of Hants and Wilts, but which had been dealt with without regard to the county division, and the will contained various indications derived from the limitations of the estate, and the value of the Hants and Wilts portions of it, tending to show that the testatrix must have intended to deal with the whole estate:—Held, that although no one of these circumstances alone would have controlled the words of the devise, their cumulative force was sufficient to justify the rejection of the words "in the county of Hants" as a *falsa demonstratio*. *Ib.*

5. The testator had in 1833 taken a conveyance of a farm of forty-one acres by the description of "all that messuage called U., with the gardens, outbuildings, etc., containing one acre and three-quarters; and also all that piece," etc.: the conveyance then enumerating six or seven other parcels, the whole forming one farm, in one occupation. The testator then mortgaged the whole by the same description for 1,000*l.* Afterwards, by will, he devised "all my freehold house and premises called U." to trustees to sell, and pay the said mortgage, and then pay 950*l.* legacies; and gave all the rest and residue of his estate over:—Held, as between the residuary legatees and heir-at-law, that the whole forty-one acres passed by the words "house and premises at U." *Ross* v. *Veal*, 1 Jur., N. S., 751; 3 W. R. 652.

6. A testatrix devised "all that my share and interest in the messuages, lands, and premises, called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnerley, in the county of Salop, now in the occupation of Mr. John Edwards." She was entitled to an undivided moiety of a compact estate containing 224 acres, all held under one title, part of which was called the Dyffrydd, and the rest Little Dyffrydd, the bulk of which answered the description contained in the will. There were, however, in the estate two small fields which, though in the occupation of John Edwards, were not in the parish of Kinnerley and county of Salop, but in the parish of Llandisilio and county of Montgomery; and the one field which, though in the parish of Kinnerley, was not, and never had been, in the occupation of John Edwards:—Held, that the leading words which defined the subject of the devise were "the lands known as the Dyffrydd and the Little Dyffrydd," and that they were not restricted by the words which followed, which were merely an erroneous description, and might be rejected. *Hardwick* v. *Hardwick*, 42 L. J., Ch., 636; 16 L. R., Eq., 168; 21 W. R. 719.

7. Under a power in a settlement, H. devised lands called Claggetts and Sievelands, in the parish of Buxted, to W. There were lands

described in the settlement as Claggetts and Sievelands, in the parish of Buxted, and there were also other lands in the parish of Buxted described in the settlement by other names Evidence was adduced to show that all these lands were, at the time of the will and before and since, held by one tenant, and that the whole were known as Claggetts Farm:—Held, that all the lands known as Claggetts Farm passed by the devise. *Whitfield* v. *Langdale*, 45 L. J., Ch, 177; 1 L. R., Ch. D., 61; 24 W. R. 313; 33 L. T., N. S., 592.

H. devised a messuage, barns, buildings, woods, wood-grounds, commonly called Tickeridge, in the parish of East Grinstead, in the occupation of W., to W. Evidence was adduced to show that Tickeridge Farm, in the occupation of W., consisted of 85 acres in the parish of East Grinstead, and 116 acres in the parish of Westhoathly, and that the farmhouse and buildings were partly in one and partly in the other:—Held, that the whole of Tickeridge Farm, in the occupation of W., passed by the devise. *Ib.*

Some of the woodlands adjoined and formed part of Tickeridge farm, but had been expressly excluded in the demise of this farm to W., and were retained by H. in her own occupation:—Held, that the woodlands did not pass by the devise. *Ib.*

H. devised a messuage, buildings, farm, and land called Hookland, in the parish of Lindfield, by estimation 80 acres, more or less, in the occupation of C., to C. in fee. As to this, the description in the will was almost the same as that in the settlement. Evidence was adduced to show that H. had a farm called Hookland, which at the date of her will was in the occupation of C., but that it consisted of 173 acres, of which 88 acres were freehold in the parish of Lindfield, 66 acres were copyhold in the same parish, and the remaining 18 acres were copyhold in an adjoining parish:—Held, that the whole farm called Hookland, as well copyholds as freeholds, passed by the devise. *Ib.*

1. A testator bought at one time certain houses in Bullen Court in the Strand, and in Maiden Lane. The houses in the Strand were adjoining the houses in Bullen Court, which leads into that street. By his will he devised his freehold estates in Bullen Court, Strand, and Maiden Lane, in the county of Middlesex, to A. and B.:—Held, that the houses in the Strand passed under the devise. *Gauntlett* v. *Carter*, 1 W. R. 500; 17 Beav. 586; 17 Jur. 981; 23 L. J., Ch., 219.

A testator, entitled to certain houses situate in Bullen Court, Strand, in the Strand itself, and in Maiden Lane, which he held under one title, devised to M. and D. for their joint lives, and to the survivor, in fee, "his freehold estates situate in Bullen or Bull Inn Court, Strand, and Maiden Lane." M. having died:—Held, that the word "Strand" was to be read disjunctively. S. C. 17 Jur. 981.

2. The testator devised freehold and other property to E. N. for life, and at her decease, he gave the same, together with his copyhold and leasehold property "situate at C., in the parish of S. N.," to J. N. A.:—Held, that J. N. A. took no estate or interest in the copyhold or leasehold property till the death of E. N., but that it passed to the heir at law in the meantime; and that the bequest of the leaseholds did not include other leaseholds of the testator in the parish of S. N., but at some distance from C. *Attwater* v. *Attwater*, 18 Beav. 330; 18 Jur. 50; 23 L. J., Ch., 692; 2 W. R. 81.

3. A testator devised all his lands "situated at or within Dormstone, in the occupation of J." The testator was seised of two farms, both in the occupation of J. The greater part of each of the farms was within the parish of Dormstone, but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of Dormstone immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in the one case, a highroad, and, in the other, a fence. In the latter case the parish church of Dormstone was only a few yards distant from the fence:—Held, that the devise comprised the four closes adjoining the parish of Dormstone. *Homer* v. *Homer*, 8 L. R., Ch. D., 758; 47 L. J., Ch., 635; 39 L. T., N. S., 3; 27 L. T., N. S., 101.

The testator also devised all his land "situate at G. in the occupation of S.":—Held, that this devise did not include land situate at G., but in the occupation of J. *Ib.*

4. The greater part of a farm held by S. was situated in D. A devise by A. of his lands "at or within D. in the occupation of S." was held not to pass any part of the farm not within D. *Horner* v. *Horner*, 46 L. J., Ch., 617.

A father devised his lands at D. and at G., in the several occupation of G., S., and J., and also other lands in the occupation of H., to his son for life. He devised his lands at G. in the occupation of S. in remainder.—Held, that the remainder in the land at G. in the occupation of J. did not pass by such devise, but by a residuary devise. *Ib.*

5. Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety expressly and definitely given shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overlooked by an apparently general devise. *West* v. *Lawday*, 11 H. L. Ca. 375; 13 L. T., N. S, 171.

A person was possessed under one and the same lease for lives, renewable for ever, of lands denominated B., C., F., and G., all situate in the county of Kerry. He granted out the lands of G. for lives, with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable for ever, of certain lands in the county of Kerry, which said lands are denominated B., C., and F., all situate in the parish of, etc., in the county of Kerry. He directed that "the aforesaid lands should be sold, and after payment of his debts be equally divided between J. W. and S. L. After giving several legacies, he made J. W. "residuary legatee of all my real and personal estate and effects":—Held, that the estate of G. did not pass under the general devise, but went to the residuary legatee. *Ib.*

1. Where a testatrix "gave all those her freehold messuages or tenements, hereditaments and premises, called West Cliff, with the appurtenances thereto belonging, situate at West Cowes, and now used as lodging-houses;" and in a codicil referred to the same property as her estate, called West Cliff, at West Cowes:—Held, sufficient to pass, besides the lodging-houses, other houses, of which some were unfinished; and also certain plots of ground, together with the site of a private road and of a church, the building, and the advowson, all known as the West Cliff estate. *Cunningham* v. *Butler*, 3 Giff. 37; 7 Jur., N. S, 461; 4 L. T., N. S., 234.

2. A father gave all that part of Rigby's estate purchased by him consisting of closes A., B., C., D., E., and F., with the timber and coal mines, to trustees in trust for his son O. for life, with remainder to the use of O.'s children as he should by deed or will appoint, and in default of appointment to the use of O.'s right heirs. O., by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of Rigby's estate purchased by his father consisting of A., B., C., and F., with the timber, but not including the mines, to his two sons T. and J.; and he appointed the mines under the land which he had appointed to T. and J. to his four other children. The two omitted closes, D. and E., lay between the other four:—Held, that the corpus of the estate devised by the father was sufficiently designated in the son's will; that the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment. *Travers* v. *Blundell*, 6 L. R.. Ch. D., 436; 36 L. T., N. S., 341.

3. A father devised his freehold property at M. in trust for his children, a son and daughter, equally. He had no freehold property at M., but he had two undivided fourth shares of some in R., which M. adjoined, and in which parish it was situate:—Held, that the property in R. descended to the heir at law. *Barber* v. *Wood*, 4 L. R., Ch. D., 885; 46 L. J., Ch., 728; 36 L. T., N. S., 373.

4. A person purchased a piece of land abutting on O. Street on the east and on T. Street on the west. He built two houses, one in O. Street and the other in T. Street, and he divided the property into two portions. He devised "all that his freehold estate situate in T. Street":—Held, that the whole property passed. *Harman* v. *Gurner*, 35 Beav. 478.

5. Where a testator uses a description of parcels consisting of two distinct and separable parts, of which the first is complete and correct, and the second incomplete and erroneous, the maxim *falsa demonstratio non nocet* applies, and the part which is false will not cut down that which is true. *Secus*, where the parts of a description are not distinct and separable. *White* v. *Birch*, 36 L. J., Ch., 174; 15 W. R. 305; 15 L. T., N. S., 605.

A testator devised "all his freehold estates at or near R. in the parish of H.," which was a complete and correct description of the property intended to pass. The context indicated an intention to pass the whole of such estate:—Held, that the gift was not narrowed by the erroneous addition of the words, "and now in my own occupation." *Ib.*

6. Testator, who was possessed of three leasehold houses in K. Street, bequeathed "two houses in K. Street" in trust for P. for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in K. Street:—Held, that two of the houses passed under the gift, and that P. was entitled to elect which he would take. *Tapley* v. *Eagleton*, 12 L. R., Ch. D., 683; 28 W. R. 239.

7. A testator devised his mansion and estate, called Cleve Court, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the Cleve Court estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the Cleve Court estate:—Held, that evidence was admissible to show what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will and treated by the testator immediately before his death as additions to the Cleve Court estate, passed under the particular devise. *Castle* v. *Fox*, 11 L. R., Eq., 542; 40 L. J., Ch., 302; 24 L. T., N. S., 536; 19 W. R. 840.

8. A bequest of "the field in front of my dwelling-house" does not include the house and curtilage, though in fact locally situate in the field, and such house and curtilage pass by a bequest of "the residue of my said farm." *O'Connor* v. *O'Connor*, 19 W. R. 90; 4 Ir. R., Eq., 483.

XXXI. DESCRIPTION BY REFERENCE TO TITLE OR OWNERSHIP.

9. Devise of "my estates at S, which were devised to me or purchased from A.," the fact proving otherwise, construed not as an intended restriction, but as a misdescription. *Welby* v. *Welby*, 2 Ves. & B. 191.

10. A testator, by a will made after the Wills Act came into operation, devised to trustees for five hundred years all his freehold and copyhold hereditaments in the county of D. which had or might thereafter come into his possession "by inheritance" from his father, whose heir he was. The testator's property in the county of D., when he made his will, consisted of one estate devised to him by his father before the Wills Act came into operation, and of another which had been conveyed to him by his father by a deed of gift, and into the possession of which he entered in his father's lifetime:—Held, that the latter estate was not subject to the trusts of the term, though without it they could not be fully performed as regarded the amounts directed to be raised under them. *Wilkinson* v. *Bewicke*, 3 De G. M. & G. 937; 22 L. J., Ch., 781; 1 Eq. R. 12.

11. A bequest of "the property which the testatrix had received by the death of B.":—

Held, to pass not only the property which the testatrix actually received in her lifetime from the source referred to, but also property to which the testatrix was then entitled in possession, but which was not actually paid until after her decease, and was then received by her representatives. *Girdlestone* v. *Creed*, 10 Hare 487; 1 W. R. 228.

1. A testator having a vested estate under the will of his grandfather, subject to a life estate in his grandfather's daughter, Mary, excepted from the operation of his will the real and personal estate which he might derive from his aunt Mary, or any of her family:—Held, a sufficient description of his vested interest under his grandfather's will. *James* v. *Wynford* (*Lord*), 2 Sm. & G. 350; 18 Jur. 868; 23 L. J., Ch., 767.

2. A lady was entitled under a will to a share of an estate, which, after the testator's death, was varied by allotments and exchanges under an inclosure act. She afterwards devised her share of the estate as "devised" to her "by the testator's will":—Held, that this passed the lady's share in the estate in its actual condition. *Cooch* v. *Walden*, 46 L. J., Ch., 639.

3. A father devised his real estate to his sons, A., B., and C., as tenants in common, subject to charges in favour of his wife and daughters, and gave his personal estate to his children in equal shares. Many years after his death, but before the charges had been satisfied, A. made a will, giving all his property "unto my brothers B. and C. absolutely for their uses under the directions of the will of my father":—Held, that the use of the plural word "uses" and the reference to the directions of the father's will were not sufficient to vary the construction of the previous words of gift, and that B. and C. took as joint tenants. *Oliver* v. *White*, 4 De G. F. & J. 17; 31 L. J., Ch., 689; 10 W. R. 276; 6 L. T., N. S., 198.

4. A testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," and other plots to the granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for the sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death:—Held, that as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devises, and that the purchase money paid by the railway company to the trustee of the testator's will ought to have been paid to the plaintiff, the residuary devisee and legatee. *Re Jackson, Wilson* v. *Donald*, 44 L. T. 467.

5. The word "bequeathed" (though not in itself a technical word) is primarily applicable only to property passing under a testamentary disposition. The testatrix, a married woman, had under her marriage settlement an absolute power of appointment over certain funds. By her will in 1867 she specifically appointed such funds, and then proceeded as follows:—"I constitute and appoint E. M. my residuary legatee to any property which has been bequeathed to me and which is not mentioned in this will." The father of the testatrix, by his will, in 1873, bequeathed to her a certain sum of stock, but he subsequently determined to give it to her in his lifetime, and accordingly transferred it to the trustees of her marriage settlement:—Held, that this sum of stock did not pass to E. M. under the residuary gift contained in the will of the testatrix. *Re Armstrong, Marescaux* v. *Armstrong*, 49 L. J., Ch, 53; 42 L. T. 823.

6. A testator bequeathed all the property to which he was or should be entitled under his uncle's will to trustees upon trust for the benefit of the defendant. After the date of his will he received a sum in cash from his uncle's estate, part of which sum he invested in the purchase of stock in a railway company:—Held, that the railway stock passed under the bequest. *Morgan* v. *Thomas*, 25 W. R. 750; 46 L. J., Ch., 775; 37 L. T., N. S., 689; 6 L R., Ch. D., 176.

7. A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7,000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8,750*l.*; the testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7,000*l.* The Court decreed, that the 8,750*l.* passed by force of general expressions, which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J., Ch., 106.

8. A reversionary interest in consols and other property to which a testatrix was absolutely entitled in possession, but in respect of which latter property she had received no income, and which was at the date of her will outstanding in the name of a trustee, passes under a bequest of "any interest or moneys to which I may hereafter be entitled on behalf of my late husband," although as to two-third parts she had become entitled thereto as sole next of kin of her infant son, who had acquired the same as one of the next of kin of his father. *Moysen* v. *Stuart*, 18 W. R. 146.

9. J. tenant for life, remainder to W. for life, remainder to J. in fee; during life of J., houses on estate were burnt down, and insurance money paid to J., the insurer, and placed in funds in his name; J., by will, devised estate to R. in fee, and his personal estate to W. W. applied part of insurance money in repairing house on estate; insurance money unapplied remains in J.'s name; W., by will, stated the circumstances as to fund so standing in his brother's name, and bequeathed residue of his personal property:—Held, insurance money passed to R. as devisee of J. *Norris* v. *Harrison*, 2 Madd. 268.

10. A policy of insurance for 3,000*l.* on A.'s life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death, 9,000*l.* was received

under the policy:—Held, that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A. and C., in proportion to their legacies *Courtney* v. *Ferrers*, 1 Sim. 137; 5 L. J., Ch., 107.

1. A testator entitled in fee to some messuages and lands in A., and entitled for life to other messuages and lands in A, devised his messuages and lands in A. to his son, and charged his tenement in A., occupied by H., with certain legacies. The tenement occupied by H. was part of the property in A. to which the testator was only entitled for life:—Held, that it was not to be inferred from the description as his own of the tenement in A., occupied by H., that the testator intended to describe and devise as his own the other property in A. in which he had only an estate for life. *Parker* v. *Carter*, 4 Hare 400.

2. Bequest, after the death of certain annuitants, of a sum set apart by the Court for payment of them, or of such part of it as should not, by reason of their deaths, have been assigned or transferred:—Held, that a sum which had been ordered to be transferred on the death of an annuitant, but had not been actually transferred, did not pass. *Hooper* v. *Goodwin*, Jac. 375.

3. A testator, after reciting that he was possessed of property in D. for the residue of terms of years, bequeathed "his said D. property." He was entitled to freeholds as well as leaseholds in D.:—Held, that the leaseholds only passed under this gift. *Corballis* v. *Corballis*, 9 L. R., Ir., 309.

XXXII. EQUIVOCATION.

4. Testator bequeathed all his property in the Austrian and Russian funds, and also that vested in a Swedish mortgage security. The testator at the death of his will had several sums invested on different Swedish mortgages:—Held, that the bequest was not void for uncertainty, but that all the sums invested on Swedish mortgages passed by it. *Richards* v. *Patteson*, 15 Sim. 501; 11 Jur. 113.

5. A testator devised all his real estates (except the hereditaments thereinafter particularly devised), including all estates vested in him upon trust or by way of mortgage, to trustees upon certain trusts: in a subsequent part of his will, he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., called respectively S. and M., both of which were in the possession of T. H., but at different rents. On a question being raised which of the two farms the testator intended to give to T. R.:—Held, that the devise must be taken to have been made to T. R. for his personal advantage, and not upon trust; and if, therefore, it could be ascertained that one of the farms was subject to a trust, or that the testator supposed or treated it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. In the present case, it was sufficiently established by the evidence, that during the lives of the testator and his father the proceeds of the farm S. had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose:—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M. was the one devised to T. R. *Blundell* v. *Gladstone*, 3 Macn. & G. 692. Reversing 14 Sim. 83; 8 Jur. 301.

6. A testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended. All the lands pass by his will, except the lands in the latter parish, which were subject to his power. *Napier* v. *Napier*, 1 Sim. 28; 5 L. J., Ch, 65.

7. A testator gave his four leasehold messuages in L. P., with other tenements in trust out of the rents to pay the ground rents of the whole, and of another tenement in Y. P., comprised in the lease under which two of the houses in L. P. were held, and to apply the surplus on certain trusts. The testator had five messuages in L. P. held under four leases —Held, on the context, that the five messuages passed under the bequest. *Sampson* v. *Sampson*, 8 L. R., Eq, 479.

Uncertainty Generally.] See XII. *ante.*

XXXIII. MONEY TO BE LAID OUT IN LAND PASSING BY WORDS APPLICABLE TO REAL ESTATE AND VICE VERSÂ.

8. Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in a will as would pass land, as "all my estates, etc., whatsoever and wheresoever." *Rashleigh* v. *Master*, 1 Ves. J. 201; 3 Bro. C. C. 99.

9. A remote reversion in real estates and lands to be purchased and settled, will pass by general words in a will, as "all and every other my lands, tenements, and hereditaments," though the uses are immediate. But the purchase being postponed to the death of the devisor, the reversion in the estates to be purchased and settled to the same uses subsequent to his death, not being an interest vested in him, did not pass; and though, upon the settlement, a power of appointment was implied, the will, particularly executing express powers, did not amount to an execution of that implied power. *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

10. Money was to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children; the money was afterwards invested by direction of the husband in S. S. annuities; afterwards, by will, he devised generally all his manors, etc, to certain uses; the money in the funds must be laid out in land. *Hickman* v. *Bacon*, 4 Bro. C. C. 333.

11. Money agreed to be laid out in land:—Held, to pass under a devise of all freehold, leasehold, and copyhold lands lying in I. and in E. or elsewhere. *Guidot* v. *Guidot*, 3 Atk. 254. And see *Harvey* v. *Aston*, 1 Atk. 361;

Green v. *Stephens*, 12 Ves. 419; 17 Ves. 64; *Lingen* v. *Sowray*, 1 P. W. 172; Pre. Ch. 400; Gilb. Exch. Rep. 91; 10 Mod. 39.

1. Money under a direction to be laid out in land considered as real estate, under a general disposition by the will of a person entitled absolutely in either shape of the "money and land," in the absence of intention, the word "money" being answered by another fund of stock. *Biddulph* v. *Biddulph*, 12 Ves. 161.

2. A bequest of a moiety of the interest of the residue of the testator's personal estate:—Held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*, 1 Russ. & M. 503; 8 L. J., Ch., 156.

3. Trustees holding moneys in trust for a married woman invested the amount in the purchase of land; and, by the purchase deed, to which the vendor and they were the only parties, they declared themselves possessed of the estate, in trust to pay the income to the married woman for her separate use, for life, and, after her decease, in trust for the benefit of all the children of the husband and wife equally between them; and, in default of children without issue, then in trust for the husband in fee; and power was reserved to the trustees, at the request of the husband and wife, to sell the property; and thereupon, with all convenient speed, to lay out the produce in the purchase of other freehold estates, and so on *toties quoties*. At the end of fifteen years the estate was sold, and the purchase money was invested as money, and the income was paid to the married woman for forty-four years, until her death. Several years after the sale of the estate, the trustees, by a deed, which the husband and wife executed, declared that they held the fund upon the trusts of the first purchase deed. The husband died intestate, and the wife survived him for ten years. By her will, she gave "all" her "personal estate and effects whatsoever and wheresoever, and of every kind soever, either in possession, remainder, reversion, or expectancy," unto two of her children:—Held, that there was no evidence that the widow intended to change the character of the fund from being real estate; that there being children entitled for their lives to the fund, it was not competent for her alone to change its character; but that, as the property vested in her subject to her children's life interest, it was competent to her to have given such reversionary interest by will, but that the words she had used were not sufficient to include it. *Gillies* v. *Longlands*, 4 De G. & Sm. 372; 15 Jur. 570; 20 L. J., Ch., 441.

4. Testator, resident in Jamaica, and seised of plantations and slaves in the island, by his will, dated June 1834, after giving certain bequests, proceeded as follows:—"Also, I give, devise, and bequeath, share and share alike, unto R. and her children, all my right, title, and claim to compensation such as may be awarded to me, as my portion of the compensation fund, for the emancipation of such slaves as may belong to me, and be living on the 1st August 1834." This will was not attested so as to pass real estate, but was properly executed to pass personalty. By the law of Jamaica, slaves could only be directly devised as real estate. The Act for the Abolition of Slavery (3 & 4 Will. 4, c. 73, passed on the 28th August 1833) provided that, on the 1st August 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The Court in Jamaica decreed that the compensation money partook of the nature of real estate, to the same extent as the slaves, and did not pass under the will. Upon appeal:—Held, reversing such decree, that (treating the slaves as real estate) the legislature became purchasers under the 3 & 4 Will. 4, c. 73, from the date of the Act, giving a limited interest in the slaves for a term of years to the vendor, and that the money to be received under the compulsory sale of the slaves was converted into personal estate, and passed to H. and her children as specific legatees under the will. *Richards* v. *Jamaica* (*Att.-Gen*), 6 Moo. P. C. 381; 13 Jur. 197.

5. Real estate was settled by a marriage settlement, not comprising any personal estate. The tenant for life sold part of the land to a company under the powers of its Act, and the proceeds were paid into court and invested. Afterwards, the tenant for life, under the power in the settlement, appointed by will to his son the whole of the settled estate, and the purchase money of the part which had been sold. The son by will disposed of his residuary personal estate of which he might be possessed, or over which he might have any power of disposition at his death, including in such personal estate "all moneys to which I may be entitled under the marriage settlement of my father and mother;" and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living:—Held, that the fund arising from the sale did not pass by the will. *Re Sheggs*, 2 De G. J. & S. 533; 13 W. R. 567.

6. Upon a marriage, an undivided eighth share in remainder in fee belonging to the wife expectant on a life estate entirety, was settled in trust for the wife for life, with remainder to the husband for life, with remainder to the children in tail, and remainder to the heirs of the wife; and a power of sale and of exchange was given to the trustees, who were to invest the proceeds in the purchase of realty in possession, and hold it on the trusts declared respecting the reversionary interest thus settled. The entirety of a portion of this estate was sold in concurrence with the trustees of the settlement, by the other parties interested in the estate. By the deed an eighth part of the purchase money was apportioned according to the values of the life-interest and the reversion in that share, and the value of the reversionary interest and the reversion in that share, and the value of the reversionary interest was expressed to have been paid to the trustees of the settlement. In point of fact, however, the whole of the eighth part was invested in consols, the dividends of which were paid to the tenant for

life for the entirety. This state of things continued after the death of the wife (who died without leaving issue), during the lives of her husband and heir at law successively, but there was no evidence of their intention as to the destination of the fund beyond what was to be inferred from the above course of dealing with it:—Held, that an election could not be inferred to take the property in its actual state, and that on the death of the heir at law his share of the fund was to be treated as part of his real estate. *Re Pedder*, 5 De G. M. & G. 890; 24 L. J., Ch., 313.

Held, also, that it did not pass by his will under a devise of all such shares as he might at his death possess in the estate, there being a part of it remaining unsold to answer the description. *Ib.*

1. A testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," and other plots to the same granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death:—Held, that, as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devises, and that the purchase money paid by the railway company to the trustee of the testator's will ought to have been paid to the plaintiff, the residuary devisee and legatee. *Re Jackson, Wilson* v. *Donald*, 44 L. T. 467.

XXXIX. Time of Operation and After-acquired Property.

I. UNDER WILLS BEFORE THE WILLS ACT. IN GENERAL.

2. The rule, that after-purchased lands do not pass by a devise, does not arise from the word "having" in the Statute of Wills, but from the difference between the Roman testament or wills of personal estate, and a devise by the law of England, which is an appointment of the person to take the specific estate in nature of a conveyance, though fluctuating till death. *Brydges* v. *Chandos* (*Duke*), 2 Ves. J. 427.

3. Words *primâ facie* equivalent to pass future interests in personal estate, to have that effect unless controlled by the context. *James* v. *Dean*, 11 Ves. 389. Affirmed 15 Ves. 236.

4. The words "all I am possessed of," in a will, in a legal construction, relate to the time of the death, not of the execution of the will unless explained. *Wilde* v. *Holtzmeyer*, 5 Ves. 811.

5. A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will, and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

6. Bequest of all testator's pictures, etc., they being a good collection; after-purchased pictures shall pass. A bequest of any species of personal estate is considered as fluctuating till the death of testator, and the whole of that species he has at his death passes. *Christchurch* (*Dean*) v. *Barrow*, Ambl. 641.

7. Reasons for the rules on which a residuary bequest of personal estate is extended to that which testator subsequently acquires. *Bland* v. *Lamb*, 2 Jac. & Walk. 405.

Very special words are required to confine a residuary bequest to property belonging to testator at date of his will. *Ib.*

8. Every gift of land, even a general residuary devise, is specific, and that only to which the party is entitled at the time can pass; in the case of personal property, what he has at his death will pass, and, if the description is specific, it may operate as a direction to purchase. *Nannock* v. *Horton*, 7 Ves. 399.

9. A. devises his library of books, now in the custody of B., to a college, and afterwards buys more books, which he places in the same library, and gives 4,000*l.* more to increase their library; after-bought books shall pass. *All Souls' College* v. *Coddrington*, 1 P. W. 597.

10. Bequest of household goods extends to all household goods purchased afterwards, and that are in the house at the testator's death. *Masters* v. *Masters*, 1 P. W. 424.

11. A. devises to B. all his goods and furniture in his house, except his pictures, which he gives to C.: pictures in boxes, as well as what were hung up in the house, will pass to C.; and so will pictures bought after making the will. *Gayre* v. *Gayre*, 2 Vern. 538.

12. *Quere*, whether a bequest of "all the rest and residue of my ready money, securities for money, and moneys in the funds" will comprehend property of that description acquired after the date of the will. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290; 11 L. J., N. S., Ch., 223; 6 Jur. 292.

13. Bequest of debt which shall be owing on a particular day, taken as it stood at that day, and not affected by consignments from Indies, on account since death of testator, which happened previous to day specified. *Innes* v. *Mitchell*, 6 Ves. 461.

1. Where arrears of debt are bequeathed, they are confined to those due at time of making will. *Att.-Gen.* v. *Bury*, 1 Eq. Abr. 201.

2. A testator, by will, gives his moiety of an estate called H. to his sister and her children, and subsequently, by a codicil which purports to give them the whole of that estate if she shall possess it at her death, charges it with a sum of money to legatees: at the date of the will and codicil he was owner of only one moiety of H, but before his death he acquired the other: although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and Equity will make no appointment. *Lushington* v. *Sewell*, 1 Russ. & M. 169.

3. There is no distinction between a residuary and a specific devise of real estate; every devise of land being in effect specific, inasmuch as a residuary devise will only pass such real estate as the testator had at the time of making his will, and will not pass a real estate subsequently acquired. *Spong* v. *Spong*, 1 Y. & J. 360. Reversed 3 Bli. N. S. 84; 1 Dow, N. S., 165.

4. A. B. bequeathed dividends of property in funds to C. D. for life, and directed, that after C. D.'s decease principal should be divided amongst his children, in manner after mentioned; she then gave children certain sums of money, which would have exhausted whole of funded property at date of will; between that time and A. B.'s death, that property greatly increased:—Held, executors entitled to surplus as undisposed of. *Haynes* v. *Littlefear*, 1 Sim. & S. 496; 2 L. J., Ch., 13.

5. Testator gave to wife ready money, etc., which he should have in house at time of death; he gave specifically to others his Exchequer bills, stock, etc. Becoming insane, 3,000*l.* paid into his house was laid out in stock and Exchequer bills: specific legatees of Exchequer bills, etc, entitled. *Browne* v. *Groombridge*, 4 Madd. 498.

6. One partner by will gives one-ninth of one-twelfth of the profits reserved to him, to his partners. He afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles:—Held, they were entitled to one-ninth of the testator's interest in the partnership at his death, and that the renewal of the articles was not an ademption or revocation of the devise. *Backwell* v. *Child*, Ambl. 260.

7. T, in 1815, by will, after directing his debts to be paid, gave his personal estate, and money at his bankers' at the time of his decease, and his real estate, to trustees, to convert the personalty, and thereout to pay debts and certain legacies to his son and his daughter M., "and equally to divide the remainder of the proceeds of sale" between his daughters E. and O. The real estate was directed to be sold, and after payment of expenses the proceeds were ordered to be divided between his daughters E. and O. In 1837, the testator was found by inquisition to be of unsound mind, and the Master in Lunacy made a report, and a committee was appointed, who, between the date of the report and the death of T., sold the personalty, and paid sums into court, which were invested. T. died, in 1838, leaving his son and three daughters his next of kin. The chief clerk certified that of the property converted during the testator's lifetime, a large sum was cash at his bankers'. There were moneys received in respect of debts due, and of the proceeds of sale of personalty:—Held, first, that the will must be read as from the date. *Wheeler* v. *Thomas*, 7 Jur., N. S., 599; 4 L. J., N. S., 599.

Held, secondly, that the testator intended that all his property, together with the ready money, should form one common fund, out of which were to be paid the debts and legacies. *Ib.*

Held, thirdly, that the whole of the general fund remaining in the hands of the executor, and which was applicable for the payment of debts and legacies, belonged to E. and O. as residuary legatees. *Ib.*

8. B. devised to his wife in these words:—"I do hereby give, devise, and bequeath unto my well-beloved wife Frances, all such sum and sums of money as now is or hereafter shall grow due to me from their Majesties, for my own and servants' service, either by sea or land; as also, all such sum and sums of money, lands, tenements, goods, chattels, and estate whatever, wherewith, at the time of my decease, I shall be possessed, or invested, or which shall then, or of right doth, appertain unto me. And I do hereby nominate and appoint her, the said Frances, to be the whole and sole executrix of this my last will and testament." The testator had no real estate at the time of making this will; but having about nine years afterwards received part of his wife's fortune, he therewith purchased lands of about 200*l.* per annum. There having been no republication of the will after this purchase:—Held, that the lands did not pass, but descended to the testator's brother as heir at law. *Bunker* v. *Cook*, 3 Bro. P. C. 19.

9. One articles to buy certain lands; he thereby becomes seised thereof in equity; but where A. devised all his real and personal estate, and afterwards articled to purchase lands and then died, the heir at law was held to be entitled to this estate, as not passing by the will: *secus*, had the articles for the purchase been before the will; for then the estate would have passed. *Langford* v. *Pitt*, 2 P. W. 629.

10. Devise (before the Statute of Wills, 7 Will. 4, & 1 Vict., c. 26), of lands to certain persons, and of pits and veins of clay under the same lands to other persons; the latter devise passed only the pits and veins of clay open at the date of the will, *semble*. *Brown* v. *Whiteway*, 8 Hare 150.

Whether since the statute such a devise would pass pits or veins open at the death of the testator, *quære*. *Ib.*

11. A devise before 1838 of all my freehold hereditaments, and all my goods, chattels, "and generally all other my real and personal estates and effects whatsoever, whereof, I, or any person or persons in trust for me, am, is, or are, or shall or may be seised or possessed":—Held, to put the heir to his election as to after-acquired lands. *Hance* v. *Trawhitt*, 2 John. & H. 216; 8 Jur., N. S., 430; 10 W. R. 191; 6 L. T., N. S., 19.

12. In a will made before 1838, a gift of

"400*l*." stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were, "residue of my property stock":—Held, that the will, by these words, passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will and after 1838. *Banks* v. *Thornton*, 11 Hare 176.

II. RENEWAL OF LEASES.

1. One seised of a lease for lives, devises it, and afterwards renews; the renewal is a revocation of the will. *Marwood* v. *Turner*, 3 P. W. 166.

2. One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will. Whether the renewal of the lease is a revocation, and whether the adding a codicil to his will is a re-publication, *quære*. *Alford* v. *Earle*, 2 Vern. 209; Nel. 162.

3. A. devised all his estates to widow for life, remainder to nephew, he paying 2,000*l*. to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will; *quære*, if a revocation. The widow, by will, in "pursuance of power," appointed plaintiffs, and devised estates "so given by her said husband's will, and all her interest, etc., therein," to trustees for nephew, on his paying the said 2,000*l*., "according to the true intent, etc., of husband's will, but not before or otherwise." Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to real intent of husband. *Penrice* v. *Garnons*, 3 Anstr. 821.

4. A devise of a lease, and of the right of renewal, carries both the lease and the right. *Abney* v. *Miller*, 2 Atk. 598.

Where testator says, "I give all my estate, right, and interest I shall have to come in a college lease at the time of my death," though renewed after the will, it passes notwithstanding. *Id.* 599.

B., after making his will, surrendered the college leases he had devised thereby, and accepted two new leases, for which he paid a larger fine: but the last lease was not sealed by the college till after the testator's death:—Held, that the first lease was a revocation; but the latter, which was not sealed, was not. S. C. 2 Atk. 593; 2 Ves. 418.

If testator, after devising an estate for lives, surrender it and take a new lease, it is a revocation. *Id.* 527.

5. Upon a bill filed to have an assignment of rents and profits of a leasehold estate vested in defendant, in trust for plaintiff, the Court, under the circumstances:—Held, that a will in 1735 was sufficient to pass the trust of a lease then in being, and the subsequent renewals in 1739. *Carte* v. *Carte*, Ridgw. 210; 3 Atk. 174; Ambl. 28.

The word "advantages" is sufficient to take in all the benefits belonging to the trust of an estate for years, not the profits only, but the renewals, which are consequential. S. C. 3 Atk. 178.

6. Renewal of a lease for life, revocation of will as to those leases, but not as to lease for years. *Digby* v. *Lingard*, Dick. 500.

7. Bequest of a leasehold, without any words to pass the right of renewal, is revoked by taking new leases after the will. *Att.-Gen.* v. *Downing*, Ambl. 571.

8. Renewal of a prebendal lease is an ademption of a bequest of it, but a codicil to the will, though to pass after purchased property, is a republication of the will, and the lease shall pass by republication. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.

9. Devise of a leasehold estate held under a college; after the will made, the lease is renewed; this new lease does not pass by the will. *Hone* v. *Medcraft*, 1 Bro. C. C. 266.

10. After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease:—Held, to amount to a revocation, so that a re-publication was necessary. *Rudstone* v. *Anderson*, 2 Ves. 418.

11. A. held a church lease, of which nine months had remained unexpired. He made his will in sickness, and devised all his interest in such lease to B. A., recovering, renewed his lease, and re-published his will. Resolved, the renewed lease passed by the re-publication. *Anon.*, 2 Freem. 116.

12. A testator, being under-lessee for a long term of years of two houses in Gower Street, numbered 63 and 64, and being possessed of two other houses in that street, numbered 67 and 76, for the residue of certain terms of years, bequeathed them to trustees in trust for D. C. for her life, remainder in trust, as to 63, 64, and 67, for his half brothers and half sisters (whom he named), and the survivors and survivor of them, for their, his, or her lives or life, remainder in trust to sell and divide the proceeds amongst their children living at the death of the survivor of them: and as to number 76, in trust, after the decease of D. C., for his niece S. C. for life, remainder in trust for her children who should survive her; and in default of such children, upon the same trusts as he had declared of the other houses after the death of D. C.; and he gave the residue of his effects to D. C., and appointed her his executrix. The testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 and 65, as well as 63 and 64; and a few months afterwards made a codicil, by which he confirmed his will. He subsequently made another codicil, which was in part as follows: "I also give, subject to her life estate, one moiety of the residue of my estate unto and amongst my nephews and nieces living at my decease, payable in like manner as by my will is directed concerning their shares and interests in the reversion of my houses in Gower Street, except that their shares and interests in the said moiety is to depend solely on the decease of my executrix." D. C. and all the testator's half brothers and half sisters died before the suit was commenced:—Held, that though the bequest in the will of numbers 63 and 64 was adeemed by the testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of the testator's half brothers and half sisters who were living at the decease of the survivor of them, to the

testator's interest in numbers 63 and 64 as it existed at his death. *Porter* v. *Smith*, 16 Sim. 251; 12 Jur. 931.

1. Bequest of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease: the term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year; upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease obtained by the executrix, the widow and tenant for life under the will was held subject to the uses of the will, as the residue of the term at his death, if any, however short, would have been. *James* v. *Dean*, 11 Ves. 383. Affirmed 15 Ves. 236.

A renewed lease does not pass by a previous will bequeathing the lease or the premises held on lease. S. C. 11 Ves. 387.

2. Bequest of leasehold premises, and all testator's estate, term, and interest therein: the interest acquired under a subsequent renewal of the lease does not pass. *Slatter* v. *Noton*, 16 Ves. 197.

3. Whether a renewal of lease is an ademption of a previous bequest of lease depends on the intention apparent in will; generally it is. *Colegrave* v. *Manby*, 6 Madd. 72.

A., being possessed of a lease of manor lands and hereditaments for twenty-one years, granted by the warden of an hospital, assigned, by his marriage settlement, the premises and all the interest, benefit, and advantage of a renewal therein, etc., to trustees upon trust, out of the rents and profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, and renew the lease accordingly, and subject thereto to pay the rents to A. during his life, and after his death to stand possessed of the leasehold premises, on certain trusts, for the sons of the marriage, and on failure of those trusts for A. absolutely. A., by his will devised his manor, hospital lands, and hereditaments, situate in, etc., held by lease from, etc., to the same persons who were trustees of his marriage settlement, with directions to perform the covenants in the new lease, or any leases hereafter to be procured, to collect out of the rents a competent sum for renewing the lease, and to renew the same from time to time. After the date of his will, A. surrendered the existing lease, and obtained a renewed lease:—Held, that this renewed lease passed by, and was subject to, the trusts of this will. S. C. 2 Russ. 238. Affirming 6 Madd. 84.

4. Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease during her life, and he directed that at her decease one moiety of such stock, "subject to and after deducting such premium or sum of money as should be necessary for the renewal of the Crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such lease in his lifetime," should go to his five children. In a subsequent part of the will he gave to his son G. all his leasehold houses which he purchased of Sir H. T., to hold to his said son and his executors, etc., for the then existing term or terms therein, and all benefit of renewal "aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting unrenewed:—Held, that by the "renewal" of the lease was intended a grant at the widow's death of a reversionary lease, to commence at the expiration of the former lease, for the same term, at the same rent, and under the same covenants as were mentioned and comprised in the former lease, or as near thereto as the law by which the Crown leases are regulated would allow. *Richards* v. *Richards*, 2 Y. & Coll. C. C. 419; 12 L. J., N. S., Ch., 460; 7 Jur. 715. Affirmed 13 L. J., N. S., Ch., 344.

III. RENEWAL OF LEASE TO LESSEE, WHO IS ALSO DEVISEE OF THE LEASE.

5. A renewal of a lease containing a covenant for perpetual renewal, executed to the lessee after the date of her will, devising her interest in the lease, though it was (previous to the passing of the 1 Vict., c. 26) a revocation of the will at law, was held not to have such effect in equity. *Poole* v. *Coates*, 2 Dr. & War. 493; 1 Con. & L. 531; 4 Ir. Eq. R. 497.

IV. BEQUEST OF LEASE. SUBSEQUENT PURCHASE OF THE REVERSION.

6. Where a testator has given certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquires the fee, such fee passes under the 24th section of the 1 Vict., c. 26. Where there is a revocation of a specific gift of a house charged with an annuity, and another house is given in substitution, a certain reason being assigned for such revocation, though that reason does not arise, the revocation of the gift and the annuity is complete, and the substituted house is taken free from the annuity. An annuity of like amount, subsequently given, is in substitution for the annuity charged on the revoked gift. *Struthers* v. *Struthers*, 5 W. R. 809.

7. A testator devised all his freehold estate at B., which he purchased of C., by a will dated before, and re-published by a codicil dated after the Wills Act; but a small piece of land purchased with the estate by the testator of A., and always held and mixed with it, was leasehold. After making the codicil, the testator purchased the fee of that small piece of land, and the leasehold interest was merged:—Held, notwithstanding the 24th section of the Wills Act, that the codicil did not pass the after-acquired fee. *Emuss* v. *Smith*, 2 De G. & Sm. 722.

8. A testator gave all his "personal property, estate, and effects" to his widow, and died intestate as to real estate. Being possessed of a term in real property, he subsequently purchased the reversion, and had it conveyed to a trustee, to prevent the term from merging:—Held, that the reversion did not pass by the will, but that the term did so. *Belaney* v. *Belaney*, 2 L. R., Eq., 210; 12 Jur., N. S., 445.

9. A testator being entitled to a house, as

to part in fee, and as to the residue for a term of years, gave the same, by the description of "all that my messuage, partly freehold and partly leasehold, No. 3, C. Street, together with other estates, to trustees, their heirs, executors, administrators, and assigns, upon certain trusts for his wife for her life, and then for his son H. and his issue, in strict settlement." The testator, after directing that the estates, hereditaments, and premises should not be sold, gave the residue of his estate and effects upon trust for sale and division among his wife and children. After the date of the will the testator purchased the reversion in fee of the leasehold portion of No. 3, C. Street, and took a conveyance thereof, whereby the term became merged:—Held, that the whole of the testator's interest in the house passed under the specific devise, the description being sufficient, and the will affording evidence that the testator did not intend that the freehold and leasehold portions of the house should be divided. *Miles* v. *Miles*, 1 L. R., Eq., 462; 12 Jur., N. S., 116; 35 L. J., Ch., 315; 14 W. R. 272; 13 L. T., N. S., 697; 35 Beav. 191.

1. A testator, by will, dated in 1865, bequeathed to trustees house property held by him on lease, and part of which he described as leasehold, for the benefit of his wife for life, and, after her death, as she should appoint generally. He also made a residuary devise and bequest of realty and personalty. After the date of the will he purchased the reversion of the above leaseholds, and took a conveyance of the same to himself in fee:—Held, that the freehold interest in the property passed to the trustees in trust for the wife. *Cox* v. *Bennett*, 6 L. R., Eq., 422.

2. A testator gave to his wife all his term and interest in the leasehold house at B., at which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. After the date of his will the testator purchased the freehold of the house at B., which was conveyed to him in fee simple:—Held, that the house passed to the testator's widow, under the specific devise contained in the will, for an estate in fee simple. *Saxton* v. *Saxton*, 13 L. R., Ch., 359; 49 L. J., Ch., 128; 28 W. R. 294; 41 L. T. 649.

V. UNDER WILLS OPERATING UNDER THE WILLS ACT.

1. General Devise.

3. A will made after the Wills Act, 1 Vict., c. 26, whereby the testator gave, devised, and bequeathed all his estate and effects whatsoever and wheresoever, and of what nature or kind soever, to A., to be paid, assigned, or transferred to him, on his attaining twenty-one:—Held, to pass real estate (copyhold of inheritance) subsequently acquired, notwithstanding a direction in the will, that in the meantime, the executors should apply the interest, dividends, and proceeds of such estate and effects, or so much thereof, or so much of the principal thereof, as they should think necessary, in the maintenance, education, and putting forth of A. in the world, and should invest the said estate and effects on real or personal security at their discretion. *Stokes* v. *Salomons*, 9 Hare 75; 20 L. J., N. S., Ch., 343; 15 Jur. 483.

The directions applicable only to personal estate may, in such a case, be construed as referring, not to the whole subject-matter of the gift, but to such portions of the estate as may consist of personalty, to which such directions may be fitly applied. *Ib.*

4. In 1840 a testator devised as follows: "I give and devise to my wife, all my part, share, estate, or interest of and in the dwelling-house or tenement, and likewise the several closes or parcels of land hereinafter mentioned (describing them). And I also give and bequeath all my goods and chattels, dwelling-house or tenement heretofore mentioned to my wife for her use and interest during the term of her natural life; and after her decease I give and devise all my property, real and personal, unto my heir or heirs, to be equally divided among them, and as joint heirs of this my above-mentioned property." Several years afterwards the testator became possessed of two other closes and two cottages, and died in 1850:—Held, that the after-acquired property passed under the will, and the wife took a life interest in it. *Jepson* v. *Key*, 2 H. & C. 873; 10 Jur., N. S., 392; 12 W. R. 621; 10 L. T., N. S., 68.

5. A testator, having no real estate, gives to trustees all his leaseholds and other his estate and effects, upon trust to sell and divide amongst parties named. After the date of the will the testator acquires a freehold house, and then by a codicil revokes the appointment of one of his executors, and confirms his will. Upon a suit to administer his estate and inquiries in chambers, no heir at law can be discovered; and on the questions whether the freehold house passed by the general devise in the will, under the 20th and 24th sections of the 7 Will. 4 & 1 Vict., c. 26, or, if not, whether it went to the Crown, there being no heir at law:—Held, that it went to the Crown, as it was evidently the intention of the testator not to give it; and that not even the legal interest passed to the trustees, although the wording *per se* was sufficient to pass it. *Pierce* v. *Att.-Gen.*, *Pierce* v. *Harrison*, 3 W. R. 612.

2. Specific Devise or Bequest.

6. The 24th section of the Wills Act (7 Will. 4 & 1 Vict., c. 26), that every will shall be construed with reference to the personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator, "unless a contrary intention shall appear by the will," illustrated: "If I refer to a particular thing, *e.g.*, a ring or a horse, and bequeath it as 'my ring' or 'my horse,' *semble* the 'contrary

intention,' to which the 24th section refers, appears by the will, and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" *Goodlad* v. *Burnett*, 1 Kay & J. 341.

Testatrix in 1850 bequeathed thus: "I give my new 3½ per cent annuities":—Held, that the bequest comprised all the new 3½ per cents. which she had at her death. *Ib.*

Testatrix gave to trustees 1,500*l.* and certain Danish bonds, which she described thus: "My four Danish bonds, one of them for the sum of 485*l.*, and another of them for the sum of 1,004*l.*, another of them for the sum of 1,315*l.*, and the other of them for the sum of 716*l.*, making the whole, together with the said sum of 1,500*l.*, the sum of 5,020*l.*" She had not any Spanish bonds for the specified amounts, but she had a mass of Danish bonds which, before making her will, she had received in exchange for other Danish bonds bequeathed to her by her husband, comprising four lots purchased by him at four several periods for sums corresponding with those specified in the bequest:—Held, it appearing that none of such bonds had been sold by the testatrix, that the bequest was a specific bequest of so much of her Danish bonds as was received by her in exchange for the bonds purchased by her husband with the specified sums. *Ib.*

1. The 24th section of the 1 Vict., c. 26, which provides that a will shall speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appears by the will, will probably give an extended effect to what would have been a specific bequest of a class of personal property before the statute. *Douglas* v. *Douglas*, 1 Kay 400; 23 L. J., Ch., 732.

For instance, a bequest, since the act, of "all the stock," would probably pass all the stock of the testator at the time of his death; but a gift of "all my stock which I have purchased" must be confined to stock actually purchased at the date of the will. *Ib.*

2. A testator specifically bequeathed railway stock which he afterwards sold. At his death he was entitled to similar stock which the description in the will was probably sufficient to comprise:—Held, that as there had been a specific thing existing at the date of his will to which the description applied, this circumstance was sufficient to exclude the application of the general rule contained in 7 Will. 4 & 1 Vict., c. 26, s. 24, that a will shall be construed to speak from the time of the testator's decease. *Re Gibson, Matthews* v. *Foulsham*, 2 L. R., Eq., 669; 35 L. J., Ch., 596.

3. A gift of "all my shares and stock" in a will made since the Wills Act, 7 Will. 4 & 1 Vict., c 26, is a specific gift. Such a gift in a will made before the Act would have been a specific gift of all the shares and stock possessed by the testator at the date of his will, and the effect of the Act is to import into the gift all the stock and shares acquired by the testator before his death. *Bothamley* v. *Sherson*, 44 L. J., Ch., 589; 20 L. R., Eq., 304; 23 W. R. 848; 33 L. T., N. S., 150.

4. *Semble*, that a will must be construed, as to the property comprised in it, as if made immediately before the death of the testator, unless a contrary intention appears on the face of the instrument. *Everett* v. *Everett*, 38 L. T., N. S., 47, 580: 47 L. J., Ch., 367; 7 L. R., Ch. D., 428; 26 W. R. 333. Reversing 36 L. T., N. S., 913; 25 W. R. 765; 6 L. R., Ch. D., 122.

By his will, after reciting that certain debts were due to him from his son, a testator released those debts, and "all other moneys due from him to me." He subsequently made further advances to his son, and expressly released them by a codicil. After the date of the codicil he made still further advances to his son, but did not release them by a further codicil:—Held, that there was nothing to show a contrary intention, and that the will therefore spoke from the death of the testator, and released the sums advanced after the date of the codicil. *Ib.*

5. A testator having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts. After the date of the will the testator exercised an option given him by the company who had issued the debentures, and converted them into debenture stock of the same company:—Held, that the debenture stock did not pass by the will. *Re Lane, Luard* v. *Lane*, 14 L. R., Ch. D., 856; 49 L. J., Ch., 768; 43 L. T. 87; 28 W. R. 764.

6. A testator by his will, dated in 1835, devised all his freehold lands and hereditaments as follows: "Of or to which I, or any other person or persons in trust for me, am or is seised or entitled in fee-simple, in possession, reversion, or remainder, or which, by virtue of any special power, I am enabled to appoint or dispose of by this my will," upon certain trusts; and by a codicil, dated in 1845, he gave and devised all the lands and hereditaments comprised in and devised by his will, subject to the charges in the will mentioned, and also to certain limitations therein mentioned, to the uses mentioned in the codicil; and he thereby expressly ratified and confirmed the will, except so far as it was altered or revoked by the codicil. After the date of the codicil, he purchased one estate in fee-simple, and acquired another estate by descent, as the heir-at-law of his sister:—Held, following the decision in *Doe* v. *Walker* (12 M. & W. 591), that the after-acquired estates were subject to the trusts and limitations of the will and codicil. *Langdale* (*Lady*) v. *Briggs*, 2 Jur., N. S., 35; 25 L. J., Ch., 100; 4 W. R. 144; 3 Sm. & G. 246. Affirmed 2 Jur., N. S., 982; 26 L. J., Ch., 27; 8 De G. M. & G. 391; 4 W. R. 783.

The true construction of the enactment in s. 24 of the 7 Will. 4 and 1 Vict., c. 26, "that every will shall be construed, with reference to the real and the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," is, that so far as regards the extent of the dispositions of real and personal estate contained in the will, it is to be construed as if executed immediately before the death; and a bequest of "all my

leaseholds" will therefore include after-acquired leaseholds. Per Turner L. J. S. C. on appeal. *Ib.*

1. A. bequeathed, specifically, all the money in the public funds "which he might be possessed of or entitled to at the time of his decease." He subsequently directed his country brokers to invest 5,000*l.* in consols. They debited his account with the amount, and sent instructions to their broker to make the purchase, but no contract was entered into by the broker until five hours after the testator's death:—Held, that the additional stock did not pass by the specific bequest, but fell into the residue. *Thomas* v. *Thomas*, 27 Beav. 537; 29 L. J., Ch., 1237; 5 Jur., N. S., 1237.

2. Real estate is left by T. M. to J. D., a married woman, her heirs and assigns, for ever, independent of H. D., for her separate use and benefit, with power by any deed or instrument in writing, or by her last will and testament, to give, devise, and dispose of the same to any person or persons she may think proper, either absolutely, conditionally, or otherwise, and in default of her making any such gift or disposition, then from and after her decease the said property or such part thereof as she shall not have disposed of shall go to her heirs for ever. There is likewise a gift to J. D. of personalty for her sole and separate use, independent of the said H. D. her husband, and not to be subject to his debts, control, or interference, and her receipt alone to be a sufficient discharge for the same. J. D. makes a will and leaves all her residue to D. M. and T. M. T. M. predeceases her, having made his will and left to her as above. On the question whether the clause for separate use extended beyond the coverture with H. D.:—Held, that it did not. On the question whether the property left to J. D. by T. M. passed by her will—dictum, that it did; and that a second husband surviving was entitled to dividends. *Moore* v. *Morris*, 5 W. R. 383; 3 Jur., N. S., 552.

3. A testator devised his mansion and estate, called Cleve Court, with the appurtenances, upon certain trusts, and gave the residue of his property of every description, other than those thereinbefore mentioned, upon other trusts. The testator had contracted, before the date of his will, to purchase an estate near and adjoining to the Cleve Court estate, which was conveyed to him subsequently. He also purchased, after the date of his will, several other small properties adjoining the Cleve Court estate:—Held, that evidence was admissible to show what property the testator designated by the particular description up to the time of his death, and that all the property acquired after the date of the will, and treated by the testator immediately before his death as additions to the Cleve Court estate, passed under the particular devise. *Castle* v. *Fox*, 11 L. R., Eq., 542; 40 L. J., Ch., 302; 24 L. T., N. S., 536; 19 W. R. 840.

4. K. being seised in fee simple of a several portion of the lands of C. devised them specifically to S. and his heirs. Subsequently to the date of her will, she purchased the other several portion of C., in fee. It appeared that both portions had originally formed one entire denomination, and, having come into the possession of tenants in common, had been apportioned between them in severalty; but both portions continued to be known as the lands of C., although commonly called, in addition thereto, for the sake of distinction, by the names of their respective owners at the time of partition. B. was the residuary devisee of K.:—Held, that under the 7 Will. 4 & 1 Vict., c. 26, ss. 3 & 24, the lands subsequently purchased passed to S., the specific devisee of C., and not to the residuary devisee. *Strevens* v. *Bayley*, 8 Ir. Ch. R. 410.

5. A testator, by will, gave to his son leasehold premises, and his share and interest of and in the partnership stock in trade carried on at the premises. After the date of his will the testator obtained a lease of other premises, at which a portion of the partnership business was subsequently carried on, the rent, outgoings, etc., being paid out of the partnership assets:—Held, that the shares and interest of the testator, both in the houses and stock in trade belonging to him at the date of his will, and those obtained subsequently, passed to his son. *Re Robson*, 9 W. R. 191; 4 L. T., N. S., 49.

6. Where a lord of a manor made his will before the 7 Will. 4 & 1 Vict., c. 26, and devised a manor, and subsequently purchased freehold lands held of the manor:—Held, that the freeholds did not pass by the will. *Delacherois* v. *Delacherois*, 10 Jur., N. S., 886; 10 L. T., N. S., 884; 4 N. R. 501; 10 H. L. Ca. 62; 13 W. R. 24.

7. The testator, William Russell, by a will dated in 1857, after reciting that he was carrying on business as an iron manufacturer in partnership with his two brothers, bequeathed all his share and interest of and in the partnership business, and of and in the real and personal estate employed or invested therein, and of and in the partnership debts, securities, and moneys to which he might be entitled at his decease, to trustees, upon trust to continue the business during his wife's life, and to pay to her a sum equal to half the amount drawn out by the two other partners. The wife had a discretion to discontinue the business, and in case the business should be discontinued testator directed the trustees to get in the share then appertaining to his estate in "the said co-partnership trade or business," and, after making good to the wife "one full third share of the profits," invest the same, and pay the income to his wife for life. After the death of the wife, he directed the trustees, out of the profits of the said share and interest in the business, if continued, and out of the trust fund, if the business should have been discontinued, to pay certain pecuniary legacies, and subject thereto to hold the fund in trust for A. B. Testator died in 1881. After the date of the will he acquired the shares of his two brothers in the partnership, and carried on the business, still under the firm of "Russell Brothers," as sole owner, until his death. A. B. died in the testator's lifetime. The widow had not discontinued the business:—Held, that the will operated upon the whole of the testator's interest in the business at his death, and that the widow took the whole of the income for her life. *Re Russell, Russell* v. *Chell*, 19 L. R., Ch. D., 432; 51 L. J., Ch., 401; 46 L. T. 336; 30 W. R. 454.

3. Use of the Word "Now" and Verbs in the Present Tense.

1. Testator, by his will subsequent to the act, exonerated A. "from all payments and claims in respect of money laid out by me in repairs of the estates in Scotland, of which I am in possession as heir of entail, and which money has, according to the laws of Scotland, been charged thereon":—Held, that this exoneration applied to those moneys only which had been actually laid out and made chargeable at the date of the will, to the exclusion of money expended after the date of the will, and also of money expended at the date of the will, but of which the charge pursuant to the Scotch act had not been completed until after the will. Observations as to the effect of s. 24 of the Wills Act, how far controlled by intention. *Douglas* v. *Douglas*, 1 Kay 400; 23 L. J., Ch., 732.

2. A testator, by his will, dated after the Wills Act had come into operation, expressed himself thus: "And as to all and singular the residue and remainder of my messuages, lands, and hereditaments, whatsoever and wheresoever, and of what tenure or nature soever, and generally all the freehold, copyhold, and leasehold estates, whereof I am now seised or possessed;" and in a subsequent part of his will he used these words: "I give to my nephew all such manors, farms, etc., as well freehold as copyhold and leasehold, as are now vested in me, or as to the said leasehold premises as shall be vested in me at the time of my death as a trustee, to hold unto and to the use of my said nephew, his heirs, executors, etc., upon the like trusts as the same are now or shall be vested in me." The testator purchased a freehold estate after the date of his will:—Held, that the testator had himself put a construction upon the word "now," and that the will could not be construed to speak and take effect, with reference to the estates to which the testator died beneficially entitled, as if it had been executed immediately before his death. *Cole* v. *Scott*, 16 Sim. 259; 17 L. J., N. S., Ch., 423; 12 Jur. 509. Affirmed 1 Macn. & G. 518; 1 H. & Tw. 477; 19 L. J., N. S., Ch., 63; 14 Jur. 25.

The 4th section of the Act 7 Will. 4 & 1 Vict., c. 26, having laid down the rule that a will shall be construed to speak and take effect from the death of the testator, "unless a contrary intention shall appear by the will":—Held, that it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt, but that it is to be gathered by adopting, in reference to the expressions used by the testator, the ordinary rules of construction applicable to wills. *Ib.*

3. A testator devised a messuage or a dwelling-house, wherein C. "now resides, with the stables or appurtenances thereto belonging and therewith occupied." Between the date of his will and his death the testator purchased a garden, which he attached to the messuage, and the garden continued to be occupied with the house up to his death:—Held, notwithstanding *Cole* v. *Scott* 16 (Sim. 259; 1 Macn. & G. 518), that the garden passed under the devise. *Re Midland Railway Co., Re Otley & Ilkley Branch*, 34 Beav. 526; 6 N. R. 244. S. C. *nom. Re Otley & Ilkley Railway Co.*, 11 Jur., N. S., 818; 34 L. J., Ch., 596; 13 W. R. 851; 12 L. T., N. S., 659.

4. H., in 1846, while encamped at P, and forming part of the army of the Sutlej, bequeathed as follows: "To my brother, G., all the shares which I now possess in the Union Bank in C., and also all the interest, . . . and the money lodged there in deposit. . . . I leave and bequeath to W. S. all the money I possess in the company's funds, with whatever may be due thereon up to the day of my death, which is lodged with and under the management of the Government agents and Major S. . . . I leave and bequeath the shares I am possessed of in the Agra Bank" to parties named, "and out of the money now in the Agra Bank in deposit." The testator died in 1851. After the date of the will, and before his death, his property in the company's funds was largely increased. On a bill filed by the next of kin:—Held, that the language of the 7 Will. 4 & 1 Vict., c. 26, s. 24, had not been controlled by any manifestation by the testator of a contrary intention, and consequently that the whole of the property passed under the will. *Hepburn* v. *Skirving*, 4 Jur., N. S., 651.

5. A retroactive effect will not be given to an order for the purchase of stock, so as to include stock purchased after a testator's death, in a bequest of all stock "I may be possessed of or entitled to at the time of my decease." *Thomas* v. *Thomas*, 29 L. J., Ch., 281; 27 Beav. 537; 5 Jur., N. S., 1237.

6. A., in 1841, devised all the freehold property "I am seised or entitled in fee simple" in strict settlement. He afterwards devised all the copyholds "I am or at the time of my death shall be possessed of," upon trusts corresponding with those of his freeholds. He died in 1861:—Held, that freeholds acquired after the date of the will passed by the devise. *Lalford (Lord)* v. *Keck*, 30 Beav. 300; 10 W. R. 240.

7. Under a gift of "all my ready money, bank and other shares, freehold property, . . . and any other property that I may now possess," personal estate acquired subsequently to the date of the will passes. *Wagstaff* v. *Wagstaff*, 8 L. R., Eq., 229; 38 L. J., Ch., 528.

8. O. gave all his freehold, leasehold, and personal estate of which he should be seised or possessed at the time of his decease upon trust for his wife during her life and widowhood, provided that if his son should attain twenty-one before he should become entitled in possession to the testator's estate at C. he should be paid, as his share of the income, 40*l.* annually, from the period of his majority to the death or second marriage of the testator's wife, and after that event in trust to assign all the testator's leaseholds at C. unto his son, his executors, administrators, and assigns. The testator gave all his real and leasehold estates, except his leasehold property bequeathed to his said son, upon trust for all his other children. After the date of the will, the testator contracted to purchase other leaseholds at C., adjacent to those belonging to him at the date of his will, and paid a deposit. The balance of purchase money was paid and assignment taken by his executors:—Held, that the subsequently acquired leaseholds passed under the specific

bequest free from any burden in respect of the balance paid by the executors. *Re Ord, Dickinson* v. *Dickinson*, 9 L. R., Ch. D., 667; 26 W. R. 880. Affirmed 12 L. R., Ch. D., 22; 41 L. T., 13.

Held, also, that the annuity of 40*l.* was payable, after the death of the son, to his personal representative, until the death or marriage of the testator's widow. *Ib.*

4. Excepted Property.

1. A testator devised and bequeathed all the residue of her property "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children:—Held, that the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M. passed under her will. *Hughes* v. *Jones*, 32 L. J., Ch., 487; 11 W. R. 898; 9 L. T., N. S., 143; 1 Hem. & M. 765; 2 N. R. 427.

VI. TIME OF OPERATION IN OTHER CASES NOT RELATING TO AFTER ACQUIRED PROPERTY.

2. Wills in general construed from the making, unless circumstances, or the tenor of it, show it should be from death of testator, but the intermediate time not regarded. *Lomax* v. *Holmden*, 1 Ves. 295.

3. Paper writing proved as a testamentary schedule, and held to have effect from the date to pass what was in the hands of M. at the time of the date, not what was at the death of testator. The general rule as to testaments is, that the time of the testament, and not the testator's death, is regarded. *Downing* v. *Townsend*, Ambl. 280.

4. The statute 1 Vict., c. 26 extends generally to wills made previously to the passing of the Act, where alterations have been made affecting such wills subsequently to the 1st January 1838. *Croker* v. *Hertford (Marquis)*, 4 Moo. P. C. 339.

5. The provision in the 7 Will. 4 & 1 Vict., c. 26, s. 24, that a will is to be construed as if made immediately before the testator's death, relates only to the property comprised in the will. *Bullock* v. *Bennett*, 7 De G. M. & G. 283; 3 W. R. 545; 1 Jur., N. S., 567; 3 Eq. Rep. 799. Reversing 3 W. R. 291; 1 Kay & J. 315; 24 L. J., Ch., 397; 1 Jur. N. S., 443.

A testator had a daughter who, at the date of his will, was a widow, having been twice married. By his will, dated after the 7 Will. 4 & 1 Vict., c. 24 came into operation, he gave stock upon trust to pay the income to her for her life or until her marriage, and after her marriage or decease, which should first happen, upon trust for her children by both her husbands. After the date of the will the daughter married a third time, with the knowledge and approbation of the testator, who however died without re-publishing his will:—Held, that the daughter took no interest under it, and that the will spoke with relation to the state of circumstances at the date of the will, and not from the death of the testator, and therefore that the gift over had taken effect. *Ib.*

6. A. bequeathed to his sister an annuity, with a clause of revocation in case she should do any act or take any proceedings to alter, frustrate, or dispute the devises and bequests in the will of their deceased father. She, in pursuance of a power in the father's will, did take proceedings for altering the devises and bequests therein, and A. afterwards joined in an agreement, which was expressed to be for the purpose of preventing and terminating all doubts and controversies, to refer such devises and bequests to a valuer. The valuer awarded a sum of money to her for equality of partition, and all the parties interested under the father's will, including A., executed a deed of mutual confirmation and discharge, which recited that they were satisfied with the valuation, and was expressed to be made in order to carry into effect what they believed to be the wishes of the father. A. afterwards by codicil confirmed his will. *Quære*, whether the steps taken by his sister were within the proviso in the testator's will. But, held, that if so, he had by his subsequent acts dispensed with the prohibition. *Violett* v. *Brookman*, 26 L. J., Ch., 308.

7. The Apportionment Act held to apply to a devise contained in a will dated before the Act to which a codicil was made after the Act. *Hasluck* v. *Pedley*, 19 L. R., Eq., 271; 44 L. J., Ch., 143; 23 W. R. 155.

XL. Residuary Bequests and Words passing the General Personal Estate.

I. WHAT IS A GIFT OF RESIDUE.

4. *By words "Rights and Credits,"* 7856.
5. *Under Construction of words "Ejusdem generis,"* 7856.
6. *Effect of the words "Residuary Legatee" on Real Estate.* See XXXVII. VIII. *ante.*
7. *Two Residuary Gifts when Inconsistent.* See XIII. II. *ante.*

1. What Expressions Sufficient.

1. Words of will were, "All my other effects I will to J., etc, to be sold for his benefit":—Held, all residue of testator's property, including money, passed thereby to J. *Hearne* v. *Wigginton*, 6 Madd. 119.

2. Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a surplus beyond the property specifically mentioned. *Bland* v. *Lamb*, 2 Jac. & Walk. 399. Affirming 5 Madd. 412.

3. An unascertained residue held to pass under the will of the residuary legatee, by the words "debts due to me at my decease." *Bainbridge* v. *Bainbridge*, 9 Sim. 16; 7 L. J., N. S., Ch., 4; 2 Jur. 63.

4. A bequest of "my furniture, plate, books, and live stock, or what else I may be possessed of at the time of my decease," will pass the general residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to various other persons. *Fleming* v. *Burrows*, 1 Russ. 276; 1 L. J., Ch., 115

5. Instance of a constructive disposition of residue *Hodgkinson* v. *Barrow*, 2 Ph. 578; L. J., N. S., Ch., 131.

6. A testator, after making various dispositions of parts of his estate, appointed S, his executor, to "execute the disposal of all his personal property and effects by sale at auction, the proceeds of which he gave to his two youngest nieces in London or elsewhere;" and the residuary clause was, "the rest of my property in consols, after all my just debts and funeral expenses are paid, and what is found on my person and in the house, I give and bequeath" to five charities (naming them) "free of legacy duty":—Held, that the bequest to the nieces was residuary. *Foxen* v. *Foxen*, 10 L. T., N. S., 290; 10 Jur., N. S., 1061; 13 W. R. 33; 11 L. T., N. S., 222; 5 N. R. 1; 3 N. R. 452.

7. A testatrix, after several small bequests, bequeathed "all my household goods, furniture, clothes, moneys, securities for money, whatsoever" to her sister:—Held, that these words constituted a residuary bequest, and the Court granted administration with the will annexed to the sister. *Garrett, In goods of*, 26 L. T., N. S., 984.

8. A will, after gifts of legacies and direction for payment of funeral expenses, contained the words: "I leave —— to my sister":—Held, that there was a gift of residue. *Perkins* or *Parkins* v. *Fladgate, Re Bassett*, 41 L. J., Ch., 681; 14 L. R., Eq., 54; 20 W. R. 589.

9. A. bequeathed "her household furniture, goods, ready money, and all debs and securities":—Held, that the residuary personal estate of A. passed thereunder. *Avison* v. *Simpson*, Johns. 43; 5 Jur., N. S., 594; 7 W. R. 277.

10. A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my moneys, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor* v. *Taylor*, 6 Sim. 246.

11. A testator may make a residuary gift at the commencement of his will, if there be no other gift of that nature; and the words "goods and chattels" in such a clause may pass general personalty; but where there is a subsequent and clearly residuary clause, "goods and chattels" must be taken in the ordinary sense. *Mullins* v. *Smith*, 8 W. R. 739; 1 Dr. & Sm. 204.

12. A testator gave various specific portions of personal estate to his wife, for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had or might thereafter have by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will:—Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. *Wiggins* v. *Wiggins*, 2 Sim. N. S. 226; 21 L. J., N. S., Ch., 742.

13. In a will made before 1838 a gift of "400*l.*" stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were "residue of my property stock":—Held, that the will, by these words, passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will and after 1838. *Banks* v. *Thornton*, 11 Hare 176.

14. By deed and by will two funds of 37,914*l.* and 800*l.* consols were settled with power of varying investments, upon trusts for the nephews and nieces of H., subject to a power in H. of exclusive appointment among them. H. made and revoked a series of appointments, and ultimately, by a deed-poll in November 1870 (at which time the fund had been reduced to 27,170*l.* consols and 8,000*l.* cash), H., after reciting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named, in the shares and proportions and in

manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds, "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to 7,000*l.* consols, part of the 37,914*l.* and 800*l* consols, or other the stocks, funds, of securities of which the same might consist, for his nephew absolutely. H. then appointed in like manner further sums (making an aggregate or 37,000*l* consols) in trust for the four nieces and nephew named; and the residue of the two several sums of consols or other the stocks, funds, or securities, in trust for his niece C The trust funds at the death of H. were insufficient to pay the 37,000*l* consols:—Held, that the gift of C. was residuary and not specific, and that it failed altogether. *De Lisle* v. *Hodges*, 17 L. R., Eq, 440.

1. A wife by a codicil, reciting that by her will she had bequeathed her residuary personalty to her husband's family, but that a sum of 12,000*l.* out of such residuary estate was derived from her husband, bequeathed it to his family in six shares of 2,000*l* each upon the same trusts as were declared of her residuary personalty and the income thereof:—Held, that such sums of 2,000*l* were residuary bequests. *Webb* v. *Pollock*, 20 W. R. 796.

2. A testator, after bequeathing several legacies to his relations, and for charitable purposes, says, "to meet these I have 200*l.* in the Bank of Ireland; the little matters of furniture will be sold. If anything shall remain after all being paid, the Rev. Mr. G. will divide it amongst the poor." At the time of his death the testator had no such sum as 200*l.* in the Bank of Ireland, but his property consisted of 12,462*l* 2*s.* 8*d* of 3½ per cent. stock and 52*l* in cash:—Held, that the general residue of the testator's estate passed under the residuary clause. *Gaffney* v. *Hevey*, 1 Dr. & Wal. 12.

3 By will testator nominated wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," etc.:—Held, she is entitled, though not as executrix, to all his property that such a will could pass. *Noel* v. *Hoy*, 5 Madd. 38.

4. A testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after my funeral expenses, etc., are paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed a sum of 500*l.* to W. B.:—Held, that under the first-mentioned paper W. B. was her residuary legatee. *Leighton* v. *Bailie*, 3 Myl. & K. 267; 3 L. J., N. S., Ch., 133.

5. Testator, reciting his intention to dispose of all his property, and that his daughter was likely to die (of a violent distemper), left his wife, if she died, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower, giving the residue and dividends to that daughter; if she died without children, testator gave his brother "all that should be left": the daughter survived the testator, but died of the same illness without issue:—Held, that the mother was still entitled for life, and that the words "what should be left" constituted a good residuary bequest to the brother. *Duhamel* v. *Ardovin*, 2 Ves. 162.

6. A testatrix, after directing her debts and funeral expenses to be paid, and giving certain legacies and annuities, gave to N. whatever money remained. She afterwards made some specific bequests, and concluded, "If I have omitted naming anything, I leave it to my two sisters":—Held, that there was a general residuary bequest to N, and that the corpus required for payment of the annuities passed by that bequest after the annuities were satisfied. *Barrett* v. *White*, 1 Jur., N. S., 652; 24 L. J., Ch., 724; 3 W. R 578.

7. The words "what remains" at the close of a bequest of a specific fund:—Held, a general residuary disposition, the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death. *Crook* v. *De Vandes*, 11 Ves. 330.

8. Testator, intending to dispose of all his personal estate, gives the residue in fifth shares, but appoints his brother "heir to whatever part of his estate should be unappropriated by his will;" one of the five shares lapsed in testator's lifetime:—Held, that the above was an ultimate general residuary clause, and comprised this as including not merely what was not mentioned, but everything not effectually given. *Jackson* v. *Kelly*, 2 Ves. 285.

9. If a man gives a legacy and then says, "I give all my goods," it will pass the residue, though the word "goods" in common parlance means "goods only," and not the whole personal estate. *Crichton* v. *Symes*, 3 Atk. 61.

10. The only disposition of property in the will of A. was as follows: "All the property that I have now, or may have at the time of my decease, in my apartments at 13, Plaistow Grove, or elsewhere, I give to my three nieces":—Held, that the words "or elsewhere" must be so construed as to pass the residuary estate of A. *Scarborough, In goods of*, 9 W. R. 149.

11. "Residue" is not a "legacy" in the ordinary sense of the term, though the person taking it is a residuary legatee. *Ward* v. *Grey*, 26 Beav. 485.

12. Testator says, as to the rest and residue of his lands, etc., his will is, that the annual profits should be equally divided between A. and C, and said nothing about the personal estate. By all the rules of grammar as well as law the words "rest and residue" must relate to something that went before; and, where testator calls it by the name of real estate, can never be said to affect his personal. *Beauclerk* v. *Mead*, 2 Atk. 168.

13. It is a question, to be determined by the particular words of each will, whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were "and the overplus which the said, etc., do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum)" they were held to mean surplus, and not pro-

portional share. *Southmolton (Mayor)* v. *Att.-Gen.*, 5 H. L. Ca. 1; 18 Jur. 435; 23 L. J., Ch., 567.

1. D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300*l.* to a daughter, and five shillings a week to his son, J. D., bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate and appoint my son, R. D." sole executor; but the testator omitted to say to whom he bequeathed the remainder:—Held, that he had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate. *Driver* v. *Driver*, 43 L. J., Ch., 279.

2. A testator gave his freehold estate "and property, whether real or personal," to A. for life; and after her decease, he gave "all his said freehold estate and property" to B. and wife for life; and after their decease, he gave "all his said freehold property" to their children, "for an estate of inheritance in fee-simple," and, in default, he gave "his freehold estate and property" to C., his heirs and assigns, in fee-simple. He charged his personal estate with some legacies, and he gave the residue of which he should die possessed, etc., to A.:—Held, that B. and his children took no interest in the personal estate, which belonged to A. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., N. S., Ch., 722.

3. The testator, after giving his whole property to his wife and daughter, qualified the bequest by the words "namely, to give to my wife 50*l.* a year for her life, and 500*l.* to my daughter at twenty-one":—Held, that there was an intestacy as to the residue after payment of the 50*l.* per annum and the 500*l.* *Childs* v. *Wilson*, 2 Jur. 115.

4. A testator having in the commencement of his will appointed his daughter to act in concert with his son to be guardian and executrix, added, "I also appoint and desire in this my last will and testament, that my son to be my executor and residuary legatee, do jointly with my daughter, my executrix, who is to act independent of her husband, and be guardian to the children":—Held, that the son alone was entitled to the residue. *Langley* v. *Thomas*, 6 De G. M. & G. 645; 3 Jur., N. S., 345.

2. By word "Money."

5. A mere gift of money may pass whatever is the representative of money. The expression "money" may represent the entire personal estate. *Stratton* v. *Hillas*, 2 Dr. & War. 51.

6. Sums of money in a will:—Held, to comprise personal estate generally. *Whateley* v. *Spooner*, 3 Kay & J. 542.

7. "All the moneys which may hereafter revert to me":—Held, to be confined to money in its ordinary sense, and not to pass the general residue. *Eaton* v. *Att.-Gen.*, 13 W. R. 424.

8. A testator made his will in the following words: "I give to my wife, during her natural life, the interest of all sums of money I may die possessed of, subject to such agreements, if any, which I may enter into in my lifetime; and after her decease, I give all such interest money unto my daughter Mary during her natural life, and after her decease then I give the principal and interest unto my daughter's child or children, equally between them, share and share alike; and I direct my executors to advance and allow any reasonable sum or sums of money, from time to time, for the promotion in life of all or any of the children of my daughter, by way of apprenticeship or otherwise. And in case my daughter should die without issue of her body, unmarried or under age, then I give the said money and interest equally between my brothers and sisters; and in case of their deaths, to their respective child or children, equally between them. There was no residuary gift. At his death he left 450*l.* cash, furniture, and leasehold farm, cattle and farming stock:—Held, that the language relating to "moneys" meant "money" strictly, and that there was intestacy as to the residuary property. *Larner* v. *Larner*, 3 Drew. 704; 5 W. R. 513.

9. A testatrix, two days before her death, made a holograph will in these words: "I leave one half of the money of which I am possessed to my sister, H. F. C., and the remainder to be equally divided between my sisters O. G. P. and S. A. C., and after them to their children":—Held, a complete disposition of all her personal estate. *Re Cadogan, Cadogan* v. *Palagi*, 49 L. T. 666; 32 W. R. 57.

10. A testator, after expressing his intention to make a settlement of his affairs, appointed A. B. and C. D., his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his decease, and to prosecute, if necessary, for the recovery thereof, to be by them placed in the British funds, or otherwise laid out upon such security as they should deem sufficient. On a question whether a sum of stock was disposed of by will:—Held, that the will operated as a complete disposition of all the personal estate, even if the word "moneys" were to receive only the strict construction, but that on the context of this will the word "moneys" must be taken to include stock in the funds. *Waite* v. *Combes*, 5 De G. & Sm. 676; 17 Jur. 155; 21 L. J., Ch., 814.

11. A testator sold lands and left 900*l.*, the purchase money, in the hands of his agent, a land surveyor, to be invested on security; the agent died, and was supposed insolvent, without having invested the money. The testator then, by his will, gave to his wife all his ready money and securities for money, money in the funds, and money in the bank or banks, if any, due or owing to him at the time of his decease:—Held, that the 900*l.* passed, and the rather because there was no gift of any residue, so that on the whole will there appeared an intention that all his property should pass, and that the words he had used should include everything, there being no other assets. *Cooke* v. *Wagster*, 2 Sm. & G. 296; 18 Jur. 849; 23 L. J., Ch., 496; 2 W. R. 434; 2 Eq. Rep. 789.

12. A gift to A. of the remainder of money, goods and debts due to the testator after payment of debts, constitutes A. residuary legatee. *Bloomfield, In goods of*, 31 L. J., Prob., 119.

13. A testatrix, having given directions respecting her funeral, after payment of her funeral expenses and just debts gives certain

legacies and annuities, and after all the legacies are paid leaves whatever money remains or whatever money she may be entitled to, or have left her, to M. G. and F. G., and in case of the death of either of two annuitants an annuity of 60*l.* to go to the survivor, and then over to M. G. and F. G., with other provisions. The testatrix then left whatever money remained to O. and his four sisters with specific gifts to her two sisters; and if they did not survive her to M. G. and F. G.; and if she had omitted naming anything she left it to her two sisters C. B. and J. V. The testatrix left funded property, some of which was set apart to answer the annuities; three annuitants, one being a legatee, survived the testatrix. M. G. died under age and unmarried, and one of the trustees was also dead. Upon bill filed to determine the meaning of the words "whatever money remains," and whether that clause or the clause where she referred to having "omitted naming anything" was residuary:—Held, that the latter was not, but that the former was residuary and included everything not before given. *Barrett* v. *White*, 3 W. R. 578; 1 Jur., N. S., 652; 24 L. J., Ch., 724.

1. A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide equally any moneys which might remain to his account after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money-accounts subsisting between him and his bankers, and other persons:—Held, that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies. *Hastings* v. *Hane*, 6 Sim. 67.

2. A testatrix gave "everything of which she died possessed" to her executors for certain specified purposes. She made several specific bequests of jewellery, and, if any money remained after paying these bequests, she left "the residue of money (if any)" to A.; she then made a specific bequest to B., and some small pecuniary legacies:—Held, that her general residuary personal estate (including railway stock) passed under the gift of "the residue of money." *Montagu* v. *Sandwich* (*Earl*), 3 N. R. 186; 33 Beav. 324; 10 Jur., N. S., 61; 12 W. R. 236; 9 L. T., N. S., 632.

3. The word "money" standing by itself is confined to the proper meaning of that word; yet, if money is given after a direction to pay debts, legacies, and funeral and testamentary expenses, or with any other words, which denote an intention on the part of the testator to dispose of the whole of his estate, it will be construed as synonymous with property. *Nevinson* v. *Lennard* (*Lady*), 34 Beav. 487.

4. A testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row, all which might remain of her money after her lawful debts and legacies were paid:—Held, that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate. *Rogers* v. *Thomas*, 2 Keen 8.

5. A testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of money to the five children of E. D.:—Held, that by the words "whatever remains of money," the testatrix referred to her general residuary personal estate. *Dowson* v. *Gaskoin*, 2 Keen 14; 6 L. J., N. S., Ch., 295; 1 Jur. 669.

6. A bequest "of money which may remain after payment of the testator's debts," in the absence of any other gift of the residue, includes the general residue of the testator's personal estate not specifically bequeathed. *Stocks* v. *Barré*, Johns. 54; 5 Jur., N. S., 537.

7. A testator, after stating that "as for his worldly goods and chattels, he bequeathed them as follows": gave certain pecuniary legacies to his sons and daughter, and then bequeathed to his daughter "all things in the house remaining" of whatever kind, and "all moneys both in the house and out of it." There was no other gift of his residuary estate. He had some moneys both in the house and out of it at his death. He had also consols standing in his name, and some shares in a benefit building society:—Held, that the bequest of "moneys" was specific, and that it did not carry the consols, the shares in the building society, or the residuary personal estate. *Collins* v. *Collins*, 12 L. R., Eq., 455; 40 L. J., Ch., 541; 24 L. T. 780; 19 W. R. 971.

8. A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money, however invested," to her nephew R. J. F., "under deduction of 50*l.* to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors:—Held, that the gift to R. J. F. was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed. *Re Pringle, Walker* v. *Stewart*, 17 L. R., Ch. D., 819; 50 L. J., Ch., 689; 45 L. T. 11; 30 W. R. 44.

9. In a will the testator gave the income of his "principal money" to his wife, for the support of herself and the education of his children, and at her death, or on her marriage, to be divided between them, and made no other disposition of his property. He died entitled to some real estate, and of personal property worth 40,000*l.*, consisting chiefly of the value of his shares in two businesses, but including certain leaseholds:—Held, that the words "principal money" included his whole personal estate, including the leaseholds, but not the pure realty. *Prichard* v. *Prichard*, 19 W. R. 226; 11 L. R., Eq., 232; 40 L. J., Ch., 92; 24 L. T., N. S., 259.

3. By words "Property in Action or Securities."

10. A testatrix, after disposing of various portions of her property (other than Spanish bonds), bequeathed "the remainder of her money in the Spanish bonds" to her nephews and nieces, and stated her intention to be to divide her property equally between her two sisters' children. The bulk of the residue

consisted of Spanish bonds:—Held, that the general residue passed under the bequest; the words "in the Spanish bonds" being, under the circumstances, descriptive only of the nature of the investment of the bulk of the property comprised in the bequest. *Patrick* v. *Feathcrd*, 33 L. J., Ch., 286; 12 W. R. 304; 10 L. T., N. S., 92; 3 N. R. 367

1 A., a British subject, domiciled at St. Petersburg, made a will in the Russian form and Russian language, by which he expressed a desire "to dispose of all my movable and immovable property." After giving legacies, and directing his household property and estates in Russia to be sold, he went on, "the money proceeds of all the above, as also the whole of my capital which shall remain with me after my death, in ready money and in bank billets" (bank debentures peculiar to Russia), "belonging to me, shall be divided into ten equal parts," two of which he devoted to debts and funeral expenses; and said, "of the remaining eight parts, I intend afterwards making a detailed disposal;" but if he did not (and he never did), they were to go to charitable purposes. He then named executors, and concluded thus: "and as all my movable and immovable property is mine own, honestly acquired by myself, nobody has a right to interfere with my dispositions, and contest the same, and no one has a right to interfere with or contest the dispositions and proceedings of my executors." The testator had large funds in English consols:—Held, that the executors did not take these consols under the general bequest in the will. *Enohin* v. *Wylie*, 8 H. L. Ca. 1; 8 Jur., N. S., 897; 31 L. J., Ch., 102; 6 L. T., N. S., 263; 10 W. R. 467. Affirming S. C. *nom Wylie* v *Wylie*, *Wylie* v. *Enohin*, 6 Jur., N. S., 279; 29 L. J., Ch., 341; 8 W. R. 316; 1 De G. F. & J. 410.

Held, also, that as to these consols there was an intestacy. *Ib.*

4. By words "Rights and Credits."

2. A testator, having by his will bequeathed certain legacies, proceeded as follows: "To my son I give, devise, and bequeath all my lands, tenements, rights, and credits, *subject to the legacies aforesaid, and my debts, the remainder of my property* to be disposed of by him to and amongst his children in such shares and proportions as he shall think proper." The words in italics were interlined. By the last clause in the will, the interlineations, as well as the original text, were declared to be in the handwriting of the testator. In 1839 he added a codicil to his will, by which he merely made a declaration with reference to one of the legacies given by the will. *Semble*, the general personal estate of the testator would have passed under the words "rights and credits" alone, even if the interlineations had not been made. *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. R. 382.

5. Under Construction of words "Ejusdem Generis."

(*a*) *Words of Wide Meaning followed by Enumeration of Particulars*, 7856.
(*b*) *Words of Wide Meaning followed by Et Cætera*, 7857.
(*c*) *Enumeration of Particulars followed by words of Wide Meaning*, 7858.
(*d*) *Residue not Pass. Contrary Intention*, 7862.

(*a*) *Words of Wide Meaning followed by Enumeration of Particulars.*

3. The word "effects" in a will restrained to articles *ejusdem generis* with those specified, though the consequence was a residue undisposed of. *Rawlings* v. *Jennings*, 13 Ves. 39.

4. As to the residue "of his estate and effects, whatsoever and wheresoever, canal shares, plate, linen, china, and furniture," the testator devised and bequeathed the same to his wife:—Held, that the residuary personal estate passed, and that the general words were not limited to things *ejusdem generis* with canal shares, etc. *Fisher* v. *Hepburn*, 14 Beav. 626.

5. A testator bequeathed to his mother "all and everything he died possessed of, namely, money, plate, books," and other enumerated articles, for her sole use; "and, lest there be any dispute, he declared again that he left her everything he died possessed of for her sole use, as stated above":—Held, that the whole residue passed, and that the bequest was not restricted to the enumerated articles and others *ejusdem generis*. *Re Kendall's Trust*, 14 Beav. 608; 21 L. J., N. S., Ch., 278.

6. A sergeant in the East India service bequeathed as follows: "To my wife I bequeath my pay, clothing, balance of clothing money, and moneys that may be now due or may become due to me at my decease; also, the whole of my property and effects, that is to say, my box, clothes, bedding, etc., I bequeath to my wife"—Held, that the whole residue passed, including a reversionary interest in the produce of the sale and conversion of a residuary real and personal estate of another testator. *Gover* v. *Davis*, 7 Jur., N. S., 399; 30 L. J., Ch., 505; 29 Beav. 222; 9 W. R. 87.

A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift. *Ib.*

7. Testator gave his bank stock to trustees, in trust for T. B., for life, and his funded property to the same trustees, in trust for W. R. E., for life, and after his death in trust for his issue; and he directed the trustees, after the decease of T. B., to pay the dividends of his bank stock to W. R. E., for life, and after his decease to apply the dividends and capital for the benefit of the children or child of W. R. E., in such manner as he had directed respecting his funded property; and should W. R. E. die without issue, male or female, of his body lawfully begotten, then he directed the trustees to apply his funded property and bank stock for such charitable or other purposes as they should think fit, without being accountable to any person; and he gave the residue of his personal estate and effects, wines, pictures, plate, books, and furniture, to W. R. E.:—Held, that the ultimate trust of the funded property and bank stock was not too remote, but was void for uncertainty,

and that the residuary clause was general *Ellis* v. *Selby*, 7 Sim. 352; 4 L. J., N. S., Ch., 69. Affirmed 1 Myl. & C. 286; 5 L. J., N. S., Ch., 214.

1. A testatrix says, "I give to B, etc., all my goods, wearing apparel, of what nature and kind soever, except my gold watch":—Held, that all her wearing apparel and ornaments of her person passed to the legatee, and any other household goods and furniture, but no other part of her estate. The words "all my goods, wearing apparel" shall not be confined to wearing apparel only, but shall be construed "goods and wearing apparel." *Crichton* v. *Symes*, 3 Atk. 61.

2. When a testator gives his property generally by words such as "all my property," or "all that I have power over," and then proceeds to enumerate particulars, the subsequent enumeration of particulars does not cut down the effect of the general words, even when the particulars enumerated constitute only an insignificant portion, and not the principal part, of the testator's property. *King* v. *George*, 36 L. T., N. S., 759; 5 L. R., Ch. D., 627; 46 L. J., Ch., 670; 25 W. R. 638. Affirming 35 L. T., N. S., 786; 4 L. R., Ch. D., 435; 25 W. R. 266.

Therefore, where a testatrix made a holograph will in these words: "I do bequeath to A. all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H. The servants in the house who have been a year with me to receive 10*l.*, and the clothes divided between them. Also all kitchen utensils," and the articles enumerated formed an insignificant part of her property:—Held, that the bequest was not restricted to the articles specifically enumerated, but that it passed the whole of the real and personal estate of the testatrix. *Ib.*

3. A markswoman made a will, shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." She was possessed at her death of property, besides cash in hand and clothes, consisting of money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash:—Held, that the words "consisting of money and clothes" did not cut down the generality of the gift of personal property, being only an imperfect enumeration of the particulars of which the personal estate consisted; and that the whole of her personal estate passed by her will. *Dean* v. *Gibson*, 3 L. R., Eq., 713; 15 W. R. 809; 36 L. J., Ch., 657.

4. N. K. by his will, after bequeathing legacies and directing his debts to be paid, ordered all his effects to be sold by auction, and such money or valuables as he should die possessed of to be handed over to D., to be applied to the use of M. K. to a certain amount during her life, and, if after her demise any residue remained, such residue to be expended in masses for his son's sake; and directed a security in the hands of J. O. N. to be applied as above directed. "My Royal Canal stock is to be sold; also, my Grand Canal debentures, as necessity may require, at the discretion of my executors":—Held, that the whole of the residue, including the stock and debentures, was disposed of under the residuary clause, and passed to the executor on the death of M. K.:—Held, also, that the bequest for masses for the testator's son was valid, and not void as a superstitious use. *Read* v. *Hodgens*, 7 Ir. Eq. R. 17.

5. Bequest of "all my right and title to my property in the town of R, namely, my dwelling-house and household furniture, and all things now therein, in my possession, especially my car-horse and covered and side cars".—Held, that banknotes, known by the testator to be in the house at the time the will was made, passed to the legatee. *Mahony* v. *Donovan*, 14 Ir. Ch. R. 262. Affirmed 14 Ir. Ch. R. 388.

6. A testatrix, having executed a will and three codicils, made a fourth codicil as follows: "I do hereby bequeath to J. B. (to whom I have willed my landed property) also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do." The wishes of the testatrix as communicated to J. B. appeared fully from his affidavit in the action, and in part from a memorandum drawn up by him (but not signed by the testatrix) immediately before the execution of the codicil, and it also appeared thereby that the testatrix did not intend to alter her previous dispositions, except for the purpose of giving effect to her wishes as stated to J. B.:—Held, that the words "cash, furniture, etc.," were not sufficient to cut down the general expression "all my personalty;" and that, therefore, the fourth codicil extended to and comprised the whole personal estate of the testatrix *Re Fleetwood, Sidgreaves* v. *Brewer*, 15 L. R., Ch. D., 594; 49 L. J., Ch., 514; 29 W. R. 45.

(*b*) *Words of Wide Meaning followed by Et Cætera.*

7. Whether stock will, or will not, pass under the word "moneys," or under the word "stock," or under the word "chattels," depends upon the whole context of the will The word "goods," and equally the word "chattels," used simply and without qualification, will pass the whole personal estate including stock. A bequest of all moneys, goods, chattels, clothing, etc., the testator's property, which may remain after paying his funeral charges and debts, will pass the testator's interest in stock and money. *Kendall* v. *Kendall*, 1 Russ. 360; 6 L. J., N. S., Ch, 111.

8. Bequest of "all my household furniture and effects, plate, glass, books, wearing apparel, *et cætera*":—Held, to pass the articles enumerated, and others, *ejusdem generis*, but not the general residue. *Newman* v. *Newman*, 26 Beav. 220.

9. The expression "etc." following the mention of specific chattels, is confined to things *ejusdem generis*, and does not include the residue of a testator's personal estate. *Barnaby* v. *Tassell*, 19 W. R. 323; 11 L. R., Eq., 363; 24 L. T., N. S., 221.

10. A husband directed that his freehold estate should be sold, and his debts paid by his widow and sole executrix, to whom he bequeathed "all my money, cattle, farming implements, etc., she paying my brother, J. C.,

the sum of ":—Held, that the widow was entitled to the general residue. *Chapman* v. *Chapman*, 46 L. J., Ch., 104; 4 L. R., Ch. D., 800.

1. A testator, after directing his debts, etc., to be paid, bequeathed to his wife his moneys, plate, etc. (enumerating several particular descriptions of personal property), and all the residue of his personal estate after payment of his debts, etc., and he directed his wife to give to his executors a bond for securing to them the payment of half the value of the said wines, plate, etc., enumerating several of the above-mentioned descriptions of personal property, but not mentioning the residue of his personal estate. The value was to be ascertained within three months from his death, and the plate was to be valued at a fixed price. The money payable on the bond was for the benefit of his nephews and nieces:—Held, that the bond was to be given for half the value of the property only which was specifically enumerated, and not for half the value of the general residuary estate. *Martin* v. *Welstead*, 18 L. J., N. S., Ch., 1.

2. Devise of the house in Camden Place and "all therein" to M. for life; "at her death I give and bequeath the house, etc., etc., to my nephew T., and his heirs." After the death of M., T. is entitled to all the chattels which were in the house at the testator's death, except the consumable articles. *Twining* v. *Powell*, 2 Colly. 262.

3. Generally, choses in action do not pass by a bequest of "goods and chattels" in a particular locality. Bequest "of all the goods and chattels, plate, linen, money at the bankers', or stock in the Monte de Milano, horses, carriages, etc., I may die possessed of at M.":—Held, not to pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate, entitling the bearers to receive the interest and capital at a future time; held, also, that such securities could not be considered as money or cash; and thirdly, that not having their locality at M., they did not pass under the words *et cætera* at M. *Hertford* (*Marquis*) v. *Lowther* (*Lord*) (*Countess Zichy's case*), 7 Beav. 1; 13 L. J., N. S., Ch., 41; 7 Jur. 1167.

4. Enumeration of particulars followed by a gift in the following terms: "and also the whole of my property and effects, that is to say, my box, clothing, bedding, etc.":—Held, that the whole residue passed. *Gover* v. *Davis*, 7 Jur., N. S., 399; 30 L. J., Ch., 505; 29 Beav. 222; 9 W. R. 87.

5. Bequest of "the remaining part of my whole property, both in stock, household furniture, cash, etc., etc.":—Held, that the chattels real (with which alone the suit was conversant) passed by the will. *Mullally* v. *Walsh*, 3 L. R., Ir., 244.

(c) Enumeration of Particulars followed by words of Wide Meaning.

6. *Semble*, that the general word "things," in a will following particulars enumerated, is confined to things *ejusdem generis*. *Stuart* v. *Bute* (*Marquis*), 1 Dow 73.

Testator gave all his waggon ways, tails, staiths, and all implements, utensils, and things at his death, used or employed, together with, or in or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held or enjoyed with the collieries. Decree by Lord Rosslyn (3 Ves. 212), that, under this bequest, and upon the circumstances, money due from the fitters and others, and in the Tyne bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock-in-trade, passed. The decree, affirmed upon a re-hearing by Lord Eldon (11 Ves. 657), but with considerable doubt, was reversed by the House of Lords. S. C. 11 Ves. 666; 3 Dow. 73.

"Goods and chattels" will pass all personal estate, but, after furniture, etc., are restrained to articles *ejusdem generis*. S. C. 11 Ves. 666.

7. Construction of a very inaccurate will, and the words "and all I am possessed of," were confined to a specific bequest of stock immediately preceding, meaning all interest in that fund, and did not comprise the general residue, which was by a subsequent clause expressly disposed of in a different manner. *Wilde* v. *Holtzmeyer*, 5 Ves. 811.

8. Testator, after giving at the commencement of his will various pecuniary legacies, and bequeathing all the rest and residue of his ready money, securities for money, and moneys in the funds to trustees upon certain trusts, concluded his will as follows: "And I do further give and bequeath to my said wife, all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever; and I do hereby constitute and appoint her, my said wife, sole executrix of this my will":—Held, that this clause carried the residue of the testator's property to the wife. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290; 11 L. J., N. S., Ch., 223; 6 Jur. 292. And see S. C. on appeal 1 Ph. 356; 2 Y. & Coll. C. C. 279; 12 L. J., N. S., Ch, 314; 7 Jur. 457.

Although the words "goods, chattels, and effects" may frequently be considered as having been used by a testator in a restrictive sense, yet *primâ facie* their import is general, and there are good grounds for considering them as used in a general sense either where they are not placed in connection with words of locality, or where they follow the enumeration of specific articles, or where there are no expressions in the will showing a doubt in the testator's mind as to their comprehensiveness, or where the bequest in which they are contained is followed up by the appointment of an executor. *Ib.*

9. A bequest of "my wines and property in England":—Held, to pass the testator's property in England of every description, including money in the funds and at his bankers', debts, and arrears of a pension due to him, and not confined to property *ejusdem generis* with wines. *Arnold* v. *Arnold*, 2 Myl. & K. 365; 4 L. J., N. S., Ch., 123.

10. General disposition by will not restrained by a defective specification. *Chalmers* v *Storil*, 2 Ves. & B. 222.

11. A will restrained in point of extent to a partial disposition by a particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate;"

specific disposition by will subsequent to annuities and legacies held auxiliary only, the general personal estate to be applied in the first instance. *Holford* v. *Wood*, 4 Ves. 76.

1. A testator bequeathed as follows: "As regards my worldly goods, I give and bequeath all my furniture, plate, books, and other personalty" to my wife:—Held, that the general words were not to be confined to things *ejusdem generis*, but that they included a share of the produce of real and personal estate, to which the testator was entitled under the will of his father. *Nugee* v. *Chapman*, 29 Beav. 190.

2. A testator by his will gave the residue of his personal estate to A., B., and C., to be equally divided between them. By a codicil he gave A. the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A. all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil he revoked the bequest made to B. by his will:—Held, that the gift to A. by the first codicil was a general one, and that the words "property, goods, and articles" were not to be confined to articles *ejusdem generis* with clothes, and that consequently A. was entitled to two-thirds, and C. to one-third of the residue. *Everall* v. *Browne*, 22 L. J., Ch., 376; 1 Sm. & G. 368; 1 W. R. 210, 226.

3. Bequest of household furniture, stock-in-trade, goods, chattels, and effects of every sort and kind, and also all moneys due on bond or simple contract:—Held, that the words "goods, chattels, and effects" ought not to be taken as *ejusdem generis*; but that the clause contained at once a general residuary bequest, and a specific bequest of the furniture, stock-in-trade, and moneys. *Harris* v. *James*, 12 W. R. 509.

4. A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my moneys, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. *Taylor* v. *Taylor*, 6 Sim. 246.

5. Diamonds and pearls made up for wear will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, gems, and Oriental stones, and other valuable things; valuable things must mean things *ejusdem generis*. *Cavendish* v. *Cavendish*, 1 Cox 77.

6. A testator (tenant for life under a settlement of the B. H. estate and other lands, with remainder to his first and other sons in tail male with several limitations over), by his will, gave certain specific things to be enjoyed by the person or the persons who for the time being should be entitled to the freehold or inheritance of the family estate at Stapleton, as and in the nature of heirlooms. He gave his furniture, plate, etc., to his brother A. He directed a sum of 1,000*l.*, secured to him on the B. H. estate and other estates, to sink into the freehold and inheritance of the said estates, that the same might merge them, and the rents and arrears of rent, with timber fallen, and other annual profits due to him at the time of his decease from the B. H. estate, unto the person or persons who should be entitled to the freehold and inheritance of the same estate in possession on his decease. He gave his residue to his two brothers B. and C.; and he appointed his brother A. his sole executor. B. died in the testator's lifetime.—Held, that certain prepared brick earth, dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so made and remaining on the estate, were comprised in and passed by the words "other annual profits;" and that certain apportionable parts of the rents which, under the Apportionment Act, went to the testator's executor as part of his assets, passed under the words "due to him at the time of his decease." *Stapleton* v. *Stapleton*, 2 Sim. N. S. 212; 21 L. J., N. S., Ch., 434.

7. A devise in express words is not extended by subsequent general ones. *Roberts* v. *Kuffin*, 2 Atk. 112.

Money will not pass by a devise of all goods and things of every kind when the devisee has a money legacy at the outset of the will. *Ib.*

8. Construction of a trust by deed, of money to accumulate, until the grantor's grandchildren, then living, or to be born, respectively attain twenty-one; and on attaining, etc., to pay to each, as they should respectively attain such age, their respective shares, to be ascertained by the number in being as they respectively attain twenty-one, without regard to such as might afterwards be born. No interest vested until payment. The measure of distribution is the number existing at each period; those who had received have no further claim upon the fund, increased by shares falling in; therefore, one dying under twenty-one after all the others had either received their shares, or died under twenty-one, that share is undisposed of by the deed, and passed by a bequest of "all effects whatsoever," following specific descriptions of property. *Campbell* v. *Prescott*, 15 Ves. 500.

9. Testator gave to his son all his plate, jewels, trinkets, and all his furniture and other articles of domestic use and ornament. By a codicil, he gave to his wife all his provisions, wines, carriages, horses, and all his musical instruments, and the use of all his books, and all his money in his dwelling-house and in his banker's and land-steward's hands, for her own sole use and benefit:—Held, that the books were given to the son absolutely; subject to a life interest in the wife. *Cornewall* v. *Cornewall*, 12 Sim. 303; 10 L. J., N. S., Ch., 364; 5 Jur. 744.

10. A bequest of "foreign bonds and other securities":—Held, to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds. *Ferguson* v. *Ogilby*, 2 Dr. & War. 548; 1 Con. & L. 534.

11. Bequest of "household furniture, goods, ready money, debts, and securities":—Held, to comprise the whole residuary personal estate and effects of the testatrix. *Avison* v. *Simpson*, Johns. 43; 5 Jur., N. S., 594; 7 W. R. 277.

12. Testator gave all his freehold and leasehold messuages, lands, and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents

of his freehold and leasehold estates, and the dividends, interest, and proceeds of his money in the funds, and other his said personal estate, to his daughter for life, and, after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his real and personal estate for the children of his daughter; and in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest, and proceeds of his said stock in the funds, and other his said personal estate, to his nephews, for their lives, and after their deaths in trust to stand possessed of his said freehold and leasehold estates, money in the funds, and other his said personal estate for their children; and in default of such children, he gave his freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate, to the corporation of S. in trust, as soon as conveniently might be after they should come into possession thereof, to sell the said freehold and leasehold estates, and also to sell, call in, and convert into money his said stocks in the public funds, and all other his said personal estate, and to lend the same to certain persons upon the terms therein mentioned. The testator at the date of his will, and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate:—Held, that the bequest to the trustees was a general residuary bequest, and that the leasehold and bank stock ought to be sold, and the proceeds invested in the 3 per cents.; and an inquiry was directed, whether the turnpike securities were real and permanent securities. *Mills* v. *Mills*, 7 Sim. 501; 4 L. J., N. S., Ch., 266.

1. On construction of will:—Held, word "effects" coupled with context operated as a bequest of the whole personal estate. *Mitchell* v. *Mitchell*, 5 Madd. 69.

2. Bequest of all other unbequeathed goods and chattels is residuary, notwithstanding a subsequent bequest to the same person of debts due to testator. *Bennet* v. *Batchelor*, 1 Ves. J. 63; 3 Bro. C. C. 28.

3. A testator gave certain specific property, the lease of premises occupied by him in his trade, and effects, to his wife for life, to be accepted by her subject to payment of debts, etc.; and gave certain real estate to his executors, on trust to sell, the proceeds to form part of his residuary estate; and as to all the rest and residue of his estate, of whatever nature, etc., to his next heirs therein equally. Upon the question whether the word "effects" included the residue:—Held, that it did not; that the word "lease" took in all comprised in the lease, and that the charge was a general one. *Howse* v. *Seayoe*, 2 W. R. 597.

4. Construction of the word "other," contained in a residuary bequest of "all other the rest and residue" of the testator's personal estate. *Martin* v. *Glover*, 1 Colly. 269; 8 Jur. 840.

5. The husband by his will bequeathed as follows: "And unto my wife (whom I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses":—Held, that the beneficial interest in the settled stock, which formed part of his general estate, did not pass to the wife. *Collier* v. *Squire*, 3 Russ. 467.

6. One being on ship board, and entitled to part of a considerable leasehold estate by the death of his father, which he did not know he had a right to, makes his will at sea, and devises to his mother (if living) his rings, and makes A. his executor, and devises to A. his red box, and all things not before bequeathed. This shall not pass the leasehold interest, or what the testator did not know he was entitled to, but shall be restrained to things *ejusdem generis*. *Cook* v. *Oakley*, 1 P. W. 302.

7. A bequest in general words will not be restricted by the enumeration of articles forming part of a previous gift. *Gover* v. *Davis*, 7 Jur., N. S., 399; 30 L. J., Ch., 505; 29 Beav. 222; 9 W. R. 87.

8. A husband, after bequeathing a legacy of 1,060*l.* to his wife, gave her his writing-desk and "all the small coins, curiosities, and other articles" therein contained. At the time of his death the desk contained, besides the curiosities, a sum of gold, several bank notes, and silver and copper amounting in all to 32*l.*:—Held, that the gift did not include the 32*l.* *Dutton* v. *Hochenhull*, 22 W. R. 701.

9. Under a bequest "of all household furniture, stock, crop, movables, and other chattels," the legatee is entitled to scrip for shares, bank deposit receipts, and railway dividend warrants in the testator's house at the time of his death, although those securities bore a date subsequently to that of the will. *M'Cormick* v. *Patten*, 5 Ir. R., Eq., 295.

10. A testator bequeathed to his wife absolutely 100*l.*, his household furniture, etc., and then bequeathed to her the interest of moneys invested by him in certain loan societies, and all his other property, during her life. He afterwards bequeathed all moneys belonging to him in a friendly society, and in all other societies, to his wife absolutely—Held, that the expression "all other societies" meant societies *ejusdem generis*. *Marks* v. *Solomons*, 2 H. & Tw. 323; 19 L. J., N. S., Ch., 355.

11. A., living in India, and possessed of a share of 10,000*l.*, charged on lands in Ireland, made his will in India, and thereby, after making several bequests in the Company's rupees, proceeded as follows: "I desire that my plate, clothes, horses, and books, with the exception of those which my wife shall select, together with all my other personal property, with the following exceptions, be sold to the best advantage, and the proceeds appropriated to the liquidation of my debts; the balance, if any, to be handed over to my wife, to assist in defraying her expenses to England." He then bequeathed his watch and chain, and mathematical instruments of every description, and his professional books, to his brother-in-law, and appointed executors for India and executors at home:—Held, that the share in the Irish charge passed as part of the testator's other personal property. *Armstrong* v. *Armstrong*, 9 Ir. Ch. R. 487.

12. After sundry specific and pecuniary gifts, a testatrix "directed her executor to sell by

public auction all her household furniture and other effects, and apply the same in discharge of the debts, etc., and the surplus to sink into the residue of her property thereinbefore mentioned, subject to the legacies and payments in the will mentioned; and as concerning such residue, she gave the same," to the residuary legatees:—Held, a good residuary bequest of all the personal estate, and therefore sufficient to comprise and pass many particulars of considerable value, of the existence of which the testatrix was probably ignorant. *Re Lloyd, Baker* v. *Lloyd*, 2 Jur., N. S., 539.

1. Under a bequest of lands, "stock, crop, farming implements, household furniture and effects, whatsoever and wheresoever," money in a bank, and debts due to the testator, will pass. *Lowry* v. *Patterson*, 8 Ir. R., Eq., 372.

2. A gift by will of "my household furniture and effects of all kinds" followed by a gift for another purpose of "all my other real and personal estate":—Held, to include only effects *ejusdem generis*. *Hutchinson* v. *Rough*, 40 L. T. 289.

3. A testator gave various specific portions of personal estate to his wife for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given; adding the words, "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit, for and during the term of her natural life if she shall so long continue my widow," to be equally divided among the children that he then had, or might thereafter have, by his said wife; but in case his wife should not marry again after his decease he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will:—Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. *Wiggins* v. *Wiggins*, 2 Sim. N. S. 226; 21 L. J., Ch., 742.

4. The mere fact that words of general import in a gift are preceded by an enumeration of particulars is not sufficient ground for restricting the signification of the general words. *Hodgson* v. *Hodgson*, 24 W. R. 575; 2 L. R., Ch. D., 122; 45 L. J., Ch., 388.

A will contained a gift of all the testatrix's furniture, plate, linen, and other effects that might be in her possession at her death. There was no other residuary bequest. She died possessed of a considerable amount of money in savings banks, promissory notes, cash, and jewellery:—Held, that the general residue passed under the words "other effects." *Ib.*

Chattels in or about a Particular Place.] 5. Where testator devised all his goods, chattels, household furniture, stuffs, and other things which should be in his house at time of his death:—Held, a sum of money there did not pass. *Trafford* v. *Berrige*, 1 Eq. Abr. 201.

6. General words in a bequest following a specific enumeration of articles in a particular locality will be confined to articles *ejusdem generis*. *Gibbs* v. *Lawrence*, 7 Jur., N. S., 137; 30 L. J., Ch., 170; 9 W. R. 93; 3 L. T., N. S., 367.

Therefore, a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which shall be in, or upon, or about my dwelling-house and premises at the time of my decease":—Held, not to include money found in the house. *Ib.*

7. A testator bequeathed to A. "my plate, house linen, furniture, and all other effects in my house at the time of my death":—Held, that a horse, carriage, car, and some hay in yard and out-offices passed to A., but not a sum of cash in the house. *Watson* v. *Arundel*, 10 Ir. R., Eq., 299.

8. Testator gave all his waggon ways, rails, staiths, and all implements, utensils, and things at his death, used or employed, together with, or in or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held or enjoyed with the collieries. Decree by Lord Rosslyn (3 Ves. 212) that, under this bequest, and upon the circumstances, money due from the fitters and others, and in the Tyne bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock-in-trade, passed. The decree, affirmed upon a re-hearing by Lord Eldon (11 Ves. 657), but with considerable doubt, was reversed by the House of Lords. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 666; 3 Dow 73.

9. Where there is a bequest particularised by one word, followed by general words, the latter will not be restricted to things *ejusdem generis*. *Swinfen* v. *Swinfen*, 29 Beav. 207; 7 Jur., N. S., 89; 9 W. R. 175; 4 L. T., N. S., 194.

A testator devised to S. "all his estate at Swinfen, or thereto adjoining, also all furniture and other movable goods here":—Held, that the live stock and implements of husbandry which were in or about the lands and premises adjoining the mansion at Swinfen (at which the testator resided) passed by this bequest. *Ib.*

Held, also, that money in the house, at the testator's death, also passed to the legatee. *Ib.*

10. A testator devised his mansion-house and real estate to trustees, for his son for life, with remainder to his first and other sons in tail male, with remainders over; and he gave to his son his horses, carriages, household furniture, and other effects (except securities for money) which should be at the time of his decease in or about the mansion-house, absolutely, with a gift over, if his son died under twenty-one, to his daughters, with power to let the mansion, or appropriate the same or any part for the benefit of a minor child, and to preserve the effects as they thought proper. Part of the effects was sold, and accounted for to the son, and the remainder handed over to

him:—Held, that the farming stock did not pass under the limitations over, but only such things as were convenient to be held with the mansion, such as carriages and horses. *Bradish* v. *Ellames*, 13 W. R. 128; 11 L. T., N. S., 470.

1. A bequest as follows—"I give to my wife all my household furniture, plate, jewels, plated articles, linen, china, glass, books, pictures, musical instruments, and other effects of like nature; and all wines, liquors, fuel, house-keeping provisions, and other consumable stores which shall at my decease be in or about any dwelling-house then occupied by me"—passes, first, all the plate and furniture which the testator had in possession, including plate at his bankers' and in his father's house at the testator's death, and furniture at a warehouse; and, secondly, settled plate to which he was entitled in remainder, and the proceeds of a portion which his father wrongfully sold. *Domville* or *Domvile* v. *Taylor*, 11 W. R. 796; 8 L. T., N. S., 624; 32 Beav. 604.

2. A. by his will bequeathed unto his wife absolutely all his or her jewels, trinkets. gold and silver plate, ornamental and other china, and all objects of vertu and taste. And he directed that his said wife should be entitled during her life to his leasehold messuage with the appurtenances in Carlton House Terrace and the statuary, furniture, and other effects purchased by him therewith or which might be therein at the time of his decease. After his death the said leasehold premises, statuary, and effects were directed to be sold, and the produce was made part of his residuary estate. There were in the said house at the testator's death, but not purchased by him, therewith, ten pictures valued at 15,000*l.*:—Held, that the words "objects of vertu and taste" were intended to include only things *ejusdem generis* with those enumerated, and did not include the pictures, but that these passed under the gift of the furniture, statuary, and effects in the said leasehold messuage. *Re Londesborough* (*Lord*) *Bridgman* v. *Fitzgerald* (*Lord Otho*), 50 L. J., Ch., 9; 43 L. T. 408.

See also XXXVIII. VI. and XIV. 3 *ante*.

(d) Residue not Pass. Contrary Intention.

3. Devise of "all my household goods and other goods, plate, etc., to A.; the residue of my personal estate to B." The ready money and bonds do not pass by the words "goods," for then the bequest of the residue would be void. *Woolcomb* v. *Woolcomb*, 3 P. W. 112.

4. A gift of "household furniture, plate, house linen, and all other chattel property" is not a general bequest of the entire personal estate, but merely personal estate *ejusdem generis*. *Lamphier* v. *Despard*, 1 Con. & L. 200; 2 Dr. & War. 59; 4 Ir. Eq. R. 334.

5. A testator, after expressing an intention to dispose of his whole estate, and giving legacies of 100*l.* to each of five persons, desires all his goods and movable effects to be equally divided between them, and then bequeaths 20*l.* to a person whom he appoints executor; afterwards, by a codicil, he directs the money to be paid to those five persons in twelve months, and his utensils and goods to be given to them in one month after his decease:—Held, that the words "goods and movable effects" are to be limited to utensils and articles *ejusdem generis*, and that the testator died intestate with respect to the beneficial interest in the general residue of the property. *Sutton* v. *Sharp*, 1 Russ. 146.

6. A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified moneys should be divided as follows after all his debts should be paid off He then specified certain legacies, and proceeded: "three or four thousand pounds or whatever remaining sum or sums to A.":—Held, that A. did not take the general residue. *Wrench* v. *Jutting*, 3 Beav. 521; 5 Jur. 145.

7. A residuary bequest in general terms. Revocation by a codicil as to "plate, linen, household goods, and other effects" (money excepted). The exception prevents the restrained construction in general of the words "other effects," viz, *ejusdem generis*. Stock, therefore, which does not pass under the word "money" was included with leasehold and all personal property, except money and bank-notes. *Hotham* v. *Sutton*, 15 Ves. 320.

8. A testator gave all his household furniture, money, goods, chattels, and effects to his wife absolutely. By a subsequent bequest in the same will he gave the residue of his personal estate to her for life, and on her death to two persons, in equal shares, absolutely:—Held, having regard to the use of terms applying to locality in the first bequest, that this bequest was limited in favour of the second bequest. *Smith* v. *Davis*; *Jones* v. *Davis*, 35 L. J., Ch., 874; 14 W. R. 942.

9. A testator gave to his son all his furniture, plate, etc., and all other his goods and chattels whatsoever, not being money or securities for money, whereof he might be possessed at the time of his death, and in a subsequent part of the will he bequeathed to his trustees "all my property as well as real and personal or mixed, not hereinbefore disposed of":—Held, that although the words goods and chattels might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet that a residuary bequest being formed in the subsequent part of the will, the gift to the son was specific and not residuary. *Mullins* v. *Smith*, 1 Dr. & Sm. 204; 8 W. R. 739.

Where there is a gift to one for life, with a direction not to sell the interest so given for a specific time, if the tenant for life dies within the time, the term expires by death. *Ib.*

10. A testator bequeathed all his estate and interest in his dwelling-house, together with all his household furniture, plate, linen, and all other effects therein, to M., and the residue of his property to two other persons:—Held, that a sum of money found in the house at the testator's death did not pass under the bequest to M. *Campbell* v. *M'Grain*, 9 Ir. R., Eq., 397.

11. An officer in the army, by his will, made, on his way to England on sick leave, after bequeathing two small legacies to a non-commissioned officer and private in his regiment, and directing his portmanteau, carpet bag, and sea-chest to be sent to his father's residence in England, begged that, after those

sums and other necessary expenses had been provided for, the remainder of his money and effects might be expended in purchasing a suitable present for his godson (then a child of a year old), son of the paymaster of the regiment:—Held, that the residue of the personal estate, consisting of reversionary interests in stock, did not pass to his godson. *Borton* v. *Dunbar*, 2 De G. F. & J. 338; 5 Jur., N. S., 1128; 30 L. J., Ch., 8; 3 L. T., N. S., 519; 9 W. R. 41. Affirming 2 Giff. 221; 6 Jur., N. S., 721; 29 L. J., Ch., 572; 8 W. R. 577.

II. WHAT PASSES UNDER A GIFT OF RESIDUE.

1. What is a Residue.

1. A testator gave all his personal estate for the use of his wife, not doubting but that she would exercise due discretion and economy in expending the same, and directed that the whole of his personal property should be under the care of his wife and other executor, who were requested to pay debts, etc.; and after the decease of his wife, the testator gave the residue of his personal estate over:—Held, that residue meant residue after payment of debts, etc., and that the wife took a life interest only with a gift over. *Re Brooks*, 2 Dr. & Sm. 362; 34 L. J., Ch., 616; 13 W. R. 573; 12 L. T., N. S., 172.

2. A testatrix gave several life annuities and directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the funds set apart to answer the annuities when and so soon as such annuities shall respectively cease," to T. The estate was only sufficient to pay about 5*s.* in the pound on the legacies and values of the life annuities, and under an order of the Court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death of one of the annuitants, T. applied for payment to him of the fund of which that annuitant had been receiving the income:—Held, that he had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full. *Re Tootal, Hankin* v. *Kilburn*, 2 L. R., Ch. D., 628; 24 W. R. 1031.

3. "Residue" of personal estate means the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of the administration of his estate, including the costs of an administration suit. *Trethewy* v. *Helyar*, 4 L. R., Ch. D., 53; 46 L. J., Ch., 125.

4. The share of one of several residuary legatees consists of what remains after all equities between him and the estate have been settled. *Willes* v. *Greenhill*, 29 Beav. 376.

2. Gift of Residue in Proportion to Legacies.

5. Under residuary bequest to legatees, in proportion to their legacies, all legatees, pecuniary and specific, even of things, etc., not expressly or by implication excluded, were held entitled; so annuitants, if they had not been excluded, on construction of whole will. *Nannock* v. *Horton*, 7 Ves. 391.

6. Gift of residue "to be divided among legatees in proportion to the legacies bequeathed by this my will;" restricted, upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund *in futuro*, and of legacies given by codicil. *Hennood* v. *Overend*, 1 Meriv. 23.

7. Testator, after giving some legacies, directs payment to be made to his devisees as under, and then mentions certain persons and the sums to be paid them, and gives residue to all his devisees above mentioned in proportion to their legacies. Every one of legatees is entitled to share of residue. *Coope* v. *Banning*, 1 Sim. & S. 534; 2 L. J., Ch., 11.

8. Testator distributes a sum of stock, except a small part, among certain legatees, as to one of whom, X. Y., he uses expressions of resentment, and says that the bequest is more than she deserves. By a codicil, he leaves the surplus stock to be appropriated, as his executors think proper, among the several legatees. The executors, in appropriating the stock, cannot omit X. Y. *Inglefield* v. *Coghlan*, 2 Colly. 247.

9. Testator directed interest of sum of money to be paid to his sisters, during their lives, in equal proportions, and, at their death, gave to their children the inheritance their mother derived from his estate, and desired that his sisters should be residuary legatees in proportions already mentioned:—Held, that sisters were entitled absolutely to residue, and that their children took no interest. *Grassick* v. *Drummond*, 1 Sim. & S. 517.

10. Under a gift of the residue to all the testator's legatees, in equal shares (which were twenty-three in number), each legacy will have added to it one twenty-third part of the residue. *Taniere* v. *Perks*, 1 L. J., Ch., 79.

11. P. bequeathed the residue of her personal estate unto all those of her legatees thereinbefore named whose legacies did not exceed 300*l.*:—Held, that a specific legatee, to whom chattels valued at a less sum than 200*l.* were bequeathed, was not entitled to a share.

Nicholson v. *Patrickson*, 7 Jur., N. S., 987; 5 L. T., N. S., 202; 3 Giff. 208.

Held, also, that the legatees named in the codicil were not entitled to any portion of the residue. *Ib.*

An annuity of 20*l.*, valued at less than 200*l.*, was given by the will to P.:—Held, that she was entitled to a share of the residue. *Ib.*

The testatrix bequeathed sums of 200*l*, and of less amounts, to certain charitable institutions:—Held, that they were not entitled to any portion of the residue. *Ib.*

1. Under devise of personal residue to relations in such proportions as testator had given other part of his fortune, pecuniary legatees only are entitled, and not a devisee of real estate. *Adair* v. *Maitland*, 7 Bro. P. C. 587; 3 Ves. 231.

2. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees specially named, except one of the classes described:—Held, that this showed that by the words specially named the testator meant described or mentioned; and that all the legatees, whether named or only described, took shares. *Re Holmes' Trusts*, 1 Drew. 321; 22 L. J., Ch., 393.

3. Where testator, by his will, gave his residue among certain legatees in proportion to the amount of their legacies thereinbefore given, and afterwards by codicil gave other legacies to some of the same legatees, "in addition to what he had given them by his will":—Held, that the shares which the former took in the residue should be proportioned to their legacies under the will only. *Hall* v. *Severne*, 9 Sim. 515

The legatees under the codicil were held not to be entitled to share in the residue. *Ib.*

4. A testator, after sundry other legacies to B. and others, gave B. a sum of 1,000*l* in trust to invest and accumulate, and pay the accumulated fund to any son he might have named John who should attain twenty-two years of age; and if the first son he should have, and called John, should die before twenty-two, then to the next, and so on; and if no son called John should attain twenty-two years, then B. was to retain the 1,000*l.* for his own use. The testator then declared that his residuary estate should be divided among his pecuniary and particular legatees in proportion to the particular legacies:—Held, that B. was not entitled to retain the sum of 1,000*l.* for his own use (the gift to the son John at twenty-two being void for remoteness), but that the same fell into the residue. *Joy* v. *Aspinwall*, 18 Jur. 284.

5. A testator by his will bequeathed a legacy of 70,000*l.* to trustees upon certain trusts in favour of one of his adopted daughters therein named, and a legacy of 80,000*l.* upon similar trusts in favour of another adopted daughter, also named; and, after declaring that the term "the said residuary legatees" thereinafter used should be considered to designate all persons thereinbefore named as pecuniary legatees, he bequeathed his residuary estate in trust for and to be divided among "the said residuare legatees" *pro ratâ* in proportion to thy amounts of the legacies thereinbefore bequeathed to "the said residuary legatees" respectively. By a codicil the testator revoked the legacy of 70,000*l* given by the will, and, "in substitution for and not in addition to" the same, gave to his trustees the sum of 80,000*l.* upon the same trusts as those declared in the will concerning the revoked legacy of 70,000*l.*. and "in the same manner as if they were there repeated;" and in terms substantially identical the testator revoked the legacy of 80,000*l.* given by the will, and gave a legacy of 140,000*l.* "in substitution for and not in addition to" the revoked legacy of 80,000*l.* A question arose as to whether, in the division of the residuary estate, any and what share of it should be allotted in respect of the two increased legacies, or in respect of the two for which they were substituted:—Held, that, in the absence of authority, the fullest meaning must be given to the words "in substitution for and not in addition to," and, reading the will and codicil together, the effect was as if the testator had directed that the increased legacies should be read as if they were inserted in the will for all purposes; and that the residue must be divided among the legatees as if their original legacies had been the amounts mentioned in the codicil, and not in the will. *Re Cortauld, Cortauld* v. *Cawston*, 47 L. T. 647.

3. Revocation of Share of Residue.

6. A. by his will gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint tenants. But by a codicil he revoked his daughter M. from being one of the residuary legatees, and in lieu thereof gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong to the two other residuary legatees, as such. *Cheslyn* v. *Cresswell*, 3 Bro. P. C. 246. Affirming S. C. *sub nom. Cresswell* v. *Cheslyn*, 2 Eden 123. And see *Ramsay* v. *Shelmerdine*, 11 Jur., N. S., 903; 14 W. R. 46; 13 L. T., N. S., 392.

7. A testator gave his residuary real and personal estate to trustees for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son R., or his interest therein, and in lieu gave a pecuniary legacy upon trust for R., his wife and children, and if R. should have no children, he directed that the legacy should sink into the residuary estate, but so that R. or his representatives should not take any share or interest therein:—Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate and not out of the share which was undisposed of. *Sykes* v. *Sykes*, 3 L. R., Ch., 301; 37 L. J., Ch., 367; 16 W. R. 545; 4 L. R., Eq., 200; 36 L. J., Ch., 938.

8. Gift by a testator of six-sevenths of his residuary estate unto and equally between six individuals; but in a certain event, in order to secure to all an equal participation in the property, A. and B. (two of the six) were not to receive any share:—Held, that upon the

happening of the event the six-sevenths became divisible among the four, and that there was no intestacy as to the share of A. and B. *Vaudrey* v. *Howard*, 2 W. R. 32.

1. Testator, by a will made since the statute 1 Vict., c. 26, after directing payment of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M., N., O., and P, or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin. M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other. M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for benefit of the next of kin; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and;" thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

4. Direction that Share of Residue shall fall into Residue.

2. A gift by a will of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly:—Held, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of. *Humble* v. *Shore*, 7 Hare 247; 1 Hem. & M. 550, n.

3. Where a testator gave one-third of the proceeds of the conversion of his real and personal estate to A. for life, with remainder to his children, and declared that on failure of A.'s issue the one-third should sink into his residuary estate, and be held and applied accordingly; and then gave the other two-thirds to other persons; and A. died without issue:—Held, that A.'s one-third was not given to the other residuary legatees, but was undisposed of. *Humble* v. *Shore* (7 Hare 247) followed. *Lightfoot* v. *Burstall*, 3 N. R. 112; 12 W. R. 148; 10 Jur., N. S., 308; 33 L. J., Ch., 188; 1 Hem. & M. 546.

4. A testator gave the residue of his real and personal estate to trustees to convert, and as to two-fourths of the proceeds to pay the same to his sisters A. and M., and to stand possessed of the two remaining fourths upon trusts—as to one such fourth, in favour of his sister J. for life, and her children; and as to the other such fourth, in favour of his sister E. for life, and her children; and declared that in the event of either or both of his sisters J. and E. dying without issue, the share or shares of either or both so dying should sink into and form part of his residuary estate, and be paid and divided accordingly, but so that the husband of the one so dying should take no share therein as representing his wife. The testator died in 1863, M. in 1867, and J. in 1870:—Held, that as to the share of J. there was an intestacy, and that the clause in the will relating to the share of J. or E. dying without issue was inoperative. *Re Beviss*, 20 W. R. 359; 26 L. T., N. S., 239.

5. A testator bequeathed the residue of her personal estate, "and also all such and so much of her personal estate, the trusts, bequests, or dispositions whereof in the will contained should fail, or become incapable of being performed," in eleven equal parts, among different persons. The legacy of one-eleventh part lapsed:—Held, that the lapsed legacy fell into the residue, which became divisible into ten parts, amongst the remaining residuary legatees. *Evans* v. *Field*, 8 L. J., N. S., Ch., 264. And see *Atkinson* v. *Jones*, Johns. 246.

6. A testator, by his will dated in 1853, after appointing trustees and executors, gave to them his residuary real and personal estate in trust for sale, and to divide the proceeds "among all his children in equal shares" on their respectively attaining twenty-one, but to stand possessed of the share of his married daughter I. upon trusts for her during her life, and after her death for her children, and in default of children upon trust for such persons as she should appoint; and in default of appointment the testator directed that such share should "fall into and become part of his said residuary personal estate, and be paid and applied accordingly." By a codicil the testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, and that the other moiety should "fall into and become part of his residuary personal estate, and be paid and applied according to the trusts of his will." The testator left seven children, including his daughter I., all of whom attained twenty-one. The daughter died without issue, but having appointed the first moiety of her one-seventh share of the residuary estate to her husband:—Held, that the second or unappointable moiety of her one-seventh was not undisposed of by the testator, but was divisible equally among his other six children as residuary legatees. *Crawshaw* v. *Crawshaw*, 14 L. R., Ch. D., 817; 49 L. J., Ch., 662; 43 L. T. 309; 29 W. R. 68.

7. A testator by his will directed that his trustees should stand possessed of the residue of his estate upon trust, as to one-seventh part thereof, to invest the same and pay the income to his daughter for life, and after her death to hold the same in trust for her child or children who should attain the age of twenty-one years; but if there should be no

such child, then he directed his trustees "to apply the said share as part of his residuary estate." He afterwards declared trusts of the remaining six shares of his residuary estate. F. survived the testator, but left no child who attained the age of twenty-one years:—Held, that the share of F. was undisposed of by the will. *Humble* v. *Shore* (7 Hare 247; 1 Hem. & M. 550. n.) and *Lightfoot* v *Burstall* (1 Hem. & M. 546) followed. *Crawshaw* v. *Crawshaw* (14 L. R., Ch. D, 817) distinguished. *Re Savage's Trusts*, 50 L J., Ch., 131.

1. A. B. by will gave real and personal estate to a trustee to sell and convert, and out of the moneys to pay debts, and to divide the residue equally between five persons named. By a codicil A. B. bequeathed to the issue of S. R., one of such persons, all the effects which by the will she had bequeathed to S R., who was stated to be dead; but if there should be no issue living at A. B's decease, or being such if such effects should not be claimed by such issue within twelve months after her decease, then such effects should fall into and be considered as part of the residue of the personal estate. S. R. never had any issue:—Held, that S. R.'s share of residue under the will was undisposed of. *Re Barker's Estate, Hetherington* v. *Longrigg*, 15 L. R., Ch. D., 635; 29 W. R 281.

Humble v. *Shore* (7 Hare 247) and *Lightfoot* v. *Burstall* (1 Hem. & M 546) followed. *Ib.*

Crawshaw v. *Crawshaw* (14 L. R., Ch. D., 817) distinguished. *Ib.*

5. Whether General Residue or Residue of a Particular Fund.

2. The following passage at the end of a will, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E M. to do, and keep the residue for her own use and pleasure," was held, under the circumstances and upon the whole context of the will, to amount to a gift of the general residuary personal estate to E. M. *Boys* v. *Morgan*, 3 Myl. & C. 661; 9 Sim. 289; 7 L. J., N. S., Ch, 247; 2 Jur. 514; *id.* 608.

3. A testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind," and he appointed that certain specified moneys should be divided as follows after all his debts should be paid off. He then specified certain legacies, and proceeded, "three or four thousand pounds or whatever remaining sum or sums to A.":—Held, that A. did not take the general residue. *Wrench* v. *Jutting*, 3 Beav. 521; 5 Jur. 145.

4. The words "what remains" at the close of a bequest of a specific fund:—Held, a general residuary disposition, the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death. *Crook* v. *De Vandes*, 11 Ves. 330.

5. It is a question to be determined by the particular words of each will whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were, "and the overplus which the said, etc., do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum)," they were held to mean surplus, and not proportional share. *Southmolton (Mayor)* v. *Att.-Gen*, 5 H. L. Ca. 1; 18 Jur. 435; 23 L. J., Ch., 567.

6. Testator, after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A. and B. to be his executors, and gives to them as such one hundred guineas each; he then orders his books, jewels, plate, and household furniture to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his executors for a ring as a token of remembrance, concludes his will in the following manner: "In case there is money remaining, I should wish it to be given in private charity":—Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold. *Ommaney* v. *Butcher*, T. & R. 260.

7. Testatrix by her will disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed, I desire it may be given in charity":—Held, that the general residue of the testatrix's personal estate, including a sum of 2,500*l.* trust moneys, in which she had a vested reversionary interest at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Legge* v. *Asgill*, cited in T. & R. 265. See note there.

8. A testatrix having two leaseholds, at X. and Y., bequeathed those at X. to one for life, and directed that after her decease they should "form the residue of her leasehold estates thereinafter bequeathed." She then bequeathed all the residue of her leaseholds, "whatsoever and wheresoever," not thereinbefore otherwise disposed of —Held, that the leasehold at Y. also passed under the residuary gift. *Markham* v. *Ivatt*, 20 Beav. 579.

9. A testator, after disposing specifically of most of his property, enumerated funds out of which he directed that his debts, funeral and testamentary expenses should be paid, and added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:—Held, that, considering the general frame of the will, only what was left of the particular funds passed. *Jull* v. *Jacobs*, 3 L. R., Ch. D., 703; 24 W. R. 947; 35 L. T., N. S., 153.

10. A feme coverte had power by will to appoint a trust fund, of which 2,000*l.* was payable immediately, and the remainder subject to her husband's life interest therein.

She appointed the 2,000*l.*, and directed the trustees, after the decease of the husband, to stand possessed of the "residue" of the stock, after payment thereout of the 2,000*l.*, upon trust to pay 5,700*l.* as the husband should appoint, and to apply the residue in payment of a number of legacies. The husband appointed the 5,700*l.* to himself:—Held, notwithstanding there was a probability that the fund would prove insufficient for the payment of all the legacies, that he was entitled to immediate payment of the 5,700*l.* *Vivian* v. *Mortlock*, 21 Beav. 252.

The "residue" applicable to the payment of the legacies (other than the 5,700*l.*) being held to mean simply what remained after payment of the 5,700*l.*, and not a proportionate share of the fund. *Ib.*

1. Testatrix gave nine legacies of 1,000*l.* each, part of 14,500*l.* South Sea annuities, and as to the residue of the said fund and all other her personal estate, including such of said legacies as should lapse by death, before they should be transferable, upon trust to convert into money such part of her residuary personal estate as shall not consist of South Sea annuities, and invest such money with any money belonging to her at her decease in said fund, South Sea annuities, and from time to time invest the dividends, etc, of all such South Sea annuities as shall constitute her residuary personal estate in the same fund, till the youngest of the said legatees shall or would, if living, have attained twenty-one, and then to transfer the whole of such South Sea annuities to said nine legatees equally, with such survivorship as their original shares. The nine legacies of 1,000*l.* each only are specific; the remainder of the South Sea annuities is part of the general personal estate. *Richardson* v. *Brown*, 4 Ves. 177.

2. A testator having stated in his will that he had four shares in the National Bank, and an insurance policy, a bond and half an annuity, gave the bank shares to his sister S., as a trustee for his niece; and having disposed of the other property already mentioned, he bequeathed the "remainder of those effects (all my just debts being paid), if any remain," to his sister, adding, "and I beg she will apportion between the above-named [naming four of his legatees]; and as my nephew John Corbet has a less secure position in life than his brothers, to him such portion or portions as she shall seem fit. I would also wish that she should have power to give some small amounts for charity, especially to L.'s family," etc.:—Held, that the residuary bequest was confined to the property specifically enumerated, and did not pass National Bank shares or other property acquired after the date of the will. *Corbet* v. *Corbet*, 7 Ir. R., Eq., 456.

Held, also, that his sister took the residue as a trustee for the persons named, and not beneficially. *Ib.*

3. A testator, after bequeathing some pecuniary legacies, and some specific articles, directed "the residue" to be given to A.:—Held, that A. was entitled to the general residue of the testator's estate, and not the residue of such articles only as were *ejusdem generis*. *Bainbridge* v. *Bainbridge*, 7 L. J., N. S., Ch., 4.

4. In December 1867 J. devised her moiety of the freehold lands of B. to her sister L. for life, to whom she also left certain personalty absolutely, and appointed her "residuary legatee." The testatrix then proceeded, subject to L.'s life estate, to declare a trust for the sale of the premises, and out of the proceeds gave two effectual legacies, and several charitable bequests which subsequently failed from her dying within three months of the date of her will. In July 1868 L. devised the other moiety of the lands to trustees to sell, and out of the proceeds to pay certain pecuniary legacies, and she gave "whatever residue" there might be after such payment to certain charities. She then directed her railway shares to be sold, and after charging her debts and some more legacies on the produce, she gave the residue to W., to whom, with others, she subsequently bequeathed several specific chattels. L. having died in July 1869:—Held, first, that the words "residuary legatee" referring *primâ facie* to personalty, there was nothing in the context of J.'s will to enlarge their operation into a gift of real estate, and that consequently her heir-at-law took the realty or its proceeds, which became undisposed of from the failure of the charitable bequests charged thereon; but that, since the purpose for which a conversion had been directed had not wholly failed, he took such real estate as personalty. *Hamilton* v. *Foot*, 6 Ir. R., Eq., 572.

Held, secondly, that the gift of "the residue" did not constitute W. general residuary legatee, but only referred to the residue of the produce of the railway shares, and that this view was confirmed by such gift being followed by that of specific chattels to W., which a bequest of general residue would have included. *Ib.*

5 A father, having bequeathed the residue of his estate to trustees, directed that they should convert into money such parts as did not consist of money at his death, and should stand possessed of the proceeds upon trust to divide the "residue thereof" among his daughters:—Held, that the trusts applied to the whole of the residuary estate. *Wood* v. *Evans*, 22 W. R. 438.

See also TRUSTS, VII. III. 1.

6. Fund set Apart for Annuitants.

6. A. gives 800*l.* to his executors, on trust to pay annuities to B. and C. for their lives, exceeding the interest of the 800*l.*, and gives the surplus of his estate to D. and E. The annuitants being dead, the 800*l.* shall go to the residuary legatees, and not to the executors. *Cock* v. *Burrish*, 1 Vern. 425.

7. Gift of a particular fund for life, then to residuary legatees as such, then the residue given to them as tenants in common; the particular fund is part of the residue, and vests accordingly in them as tenants in common. *Pitt* v. *Benyon*, 1 Bro. C. C. 589.

8. A testator having bequeathed annuities issuing out of a leasehold estate to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or

diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of some of the annuitants for life, their portions should be paid to the survivors: the annuities given indefinitely are payable during the continuance of the fund; and the amount of annuities ceasing by the death of annuitants for life not named in the particular provision belongs not to the survivors, but forms part of the residue. *Hack* v. *Tuck*, 3 Swan. 270. And see *Hedges* v *Harpur*, *Hedges* v. *Blick*, 3 De G. & J. 129; 4 Jur., N. S., 1209; 27 L. J., Ch, 742.

1. The testator desired that A., B., and C. might each enjoy during life the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue. The testator's estate was not sufficient to pay the legacies in full:—Held, upon the death of one of the tenants for life, that an apportionment of the legacy of 800*l.*, set apart to answer her life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund. *Arnold* v. *Arnold*. 2 Myl. & K. 365, 4 L. J., N. S., Ch., 79.

2. N. T. devised an annuity of 300*l* per annum to his wife for life, then to accumulate, to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body, and in case of his having no issue remainder to the next eldest son and his heir male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue. This is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise on the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it, as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C 317; Ambl. 776.

3. A testator, after giving legacies, directed the conversion and investment of his real and personal estate, and the appropriation of a sufficient sum to produce an annuity to be paid to his wife for life, and then to a charity, and the testator gave the residue of the net produce of his real and personal estate to certain persons named. The gift to the charity failed by reason of there being no pure personalty:—Held, that the annuity fund fell into the residue. *Pearson* v. *Hullah*, 17 L. T., N. S., 113.

4. A testator by his will gave certain annuities, and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of the personal estate. By a codicil to his will he stated that in case his property would not provide an income equal to the annuities, they should be ratably reduced. His estate was deficient, and the annuities were ratably reduced. Upon the death of any annuitant, the sum set apart to secure the reduced annuity will belong to the residuary legatee, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer* v. *Mills*, 4 Russ. 86.

5. A testator gave 400*l* a year to his wife if she recovered her mental faculties, otherwise 200*l.* a year, and to be paid out of his government stock; and he directed, as soon as conveniently might be after her death, the investment of the stock out of which the annuity was payable in land to be conveyed in strict settlement. The wife did not recover:—Held, that the extra 200*l* a year became part of the residue to be invested, and did not belong to the tenant for life. *Tucker* v. *Boswell*, 5 Beav. 607.

6. The testator, after directing that his property should be realised, and after payment of his debts and funeral expenses should be invested in the 3 per cent. consols, left the annual interest to his executor, to be paid to five persons by way of annuities, two of which were given simply in the words "30*l.* to A., 20*l.* to B." In a subsequent part of his will he gave all his household furniture, the whole of his personal property of every kind not specified above, to his wife:—Held, that the capital producing the two sums above mentioned, subject to the life interest of the annuitants, passed to the wife. *Clowes* v. *Clowes*, 9 Sim. 403.

7. A testator directed his trustees to set apart sufficient stock to produce 700*l.* a year, and pay, among others, an annuity of 200*l* a year to his brother Thomas for life, and after his decease to continue it amongst his brother's children then living in equal shares during their lives, and at the decease of any of them the stock from which the 200*l.* a year arose was to be sold, and the produce divided equally amongst the children of him or her so dying as they should severally attain twenty-one, with interest in the meantime to be applied for their benefit; and he said, "I give them vested interests therein;" and if any of his brother's children should at his decease be dead and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of the parties anticipated the payment or sold his interest before due, it was declared to be forfeited, and applied as if such parties had died before the legacy fell due. The testator then appointed his trustees executors and residuary legatees. 23,333*l.* 6*s.* 8*d.* was set aside, to answer the 700*l.* a year. The testator's brother Thomas died, leaving six children, of whom Richard was one living at the date of the will; and he, after the decease of his father until his death, received an annuity of 33*l.* 6*s.* 8*d.*, being one-sixth of the 200*l.* a year. Richard died, leaving three children surviving, one of whom was born in the lifetime of the original testator:—Held, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into

the testator's residuary estate. *Greenwood* v. *Roberts*, 21 L. J., Ch., 262.

Destination of Income of such Funds.] See LII. IX. *post.*

7. Contingent Legacy which Fails.

1. Devise of lands to his executors to be sold, and thereout to pay 500*l.* to A. if he return from beyond sea, and the residue to B. A. died before testator. This 500*l* legacy, being given on a contingency that never happened, is as no legacy, and falls into the residue; otherwise, if it had been an absolute legacy of 500*l.* *Sprigg* v. *Sprigg*, 2 Vern. 394.

2. The words "what remains" at the close of a bequest of a specific fund:—Held, a general residuary disposition, the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote; not being to take place until thirty years after the testator's death. *Crooke* v. *De Vandes*, 11 Ves. 330.

3. Construction of a residuary clause as comprehending a legacy given upon a contingency which did not happen. *Bird* v. *Le Fevre*, 15 Ves. 589.

4. Testator gave 1,000*l.* to his natural son, and if he died under twenty-one then that sum and the residue to go to the testator's family, and he gave the residue to his natural son, to be applied as above directed. The son died under twenty-one:—Held, that the 1,000*l.* was part of the residue, and did not pass to the testator's next of kin as a legacy. *Breashur* v. *Dor*, 4 Sim. 21.

5. Construction of a trust by deed, of money to accumulate, until the grantor's grandchildren, then living, or to be born, respectively attain twenty-one; and on attaining, etc., to pay to each as they should respectively attain such age, their respective shares to be ascertained by the number in being as they respectively attain twenty-one, without regard to such as might afterwards be born. No interest vested until payment. The measure of distribution is the number existing at each period. Those who had received have no further claim upon the fund, increased by shares falling in; therefore one dying under twenty-one after all the others had either received their shares or died under twenty-one, that share is undisposed of by the deed, and passed by a bequest of "all effects whatsoever," following specific descriptions of property. *Campbell* v. *Prescott*, 15 Ves. 500.

8. Lapsed and Undisposed-of Interests.

6. Residuary bequest of personalty includes everything; as a void or lapsed legacy. *Durour* v. *Motteux*, 1 Ves. 320.

7. General residuary disposition of real and personal estate, not hereinbefore specifically disposed of:—Held, to comprehend specific legacies lapsed, the word "specifically" being construed "particularly." *Roberts* v. *Cook*, 16 Ves. 451.

8. General residuary clause passes all that is not sufficiently disposed of, as in case of lapse. *Brown* v. *Higgs*, 4 Ves. 708.

9. Legacies bequeathed by the will of a husband, and subsequently of the widow, proving void, they fall into the residue of the estate, and are not to be distributed among the remaining legatees. *Lake* v. *Cook*, 2 Ken. Ch. 54.

10. A leasehold house, the bequest of which, being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of. *Shanley* v. *Baker*, 4 Ves. 732.

11. Testator, intending to dispose of all his personal estate, gives the residue in fifth shares, but appoints his brother "heir to whatever part of his estate should be unappropriated by his will" One of the five shares lapsed in testator's lifetime:—Held, that the above was an ultimate general residuary clause, and comprised this as including not merely what was not mentioned, but everything not effectually given. *Jackson* v. *Kelly*, 2 Ves 285.

12. Testator, after devising his real estate to his natural son T. A., bequeathed as follows: "I give and bequeath unto my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of 250*l.* per annum, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay, and farming utensils and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either event, then to go to T. A.; but should she marry, then my will and mind is that my executors shall pay her 100*l.* per annum for her own use during her natural life out of the rents and profits of my said estate." The sister married in the testator's lifetime:—Held, that the consumable articles did not go to T. A., but fell into the residue, and that the annuities of 250*l.* per annum and 100*l.* per annum were not cumulative. *Andrew* v. *Andrew*, 1 Colly. 690.

13. Testator gave 19,000*l.* consols to trustees in trust for E. B. for life, and after her death for her children; and in case she should die without leaving a child, he directed that the trust fund should be considered as part of his personal estate, and be disposed of in due course of administration; and he gave the residue of his effects to E. B., her executors and administrators, to and for her own use and benefit, she and they paying thereout all the debts due from him at his decease, together with the expenses of his funeral, the charges of proving and establishing his will, and other incidental expenses, and he appointed her his executrix. E. B. survived the testator, and died without leaving a child:—Held, that thereupon the trust fund did not become undisposed of, but formed part of the testator's residuary estate, and belonged as such to E. B.'s estate. *Scott* v. *Moore*, 14 Sim. 35; 13 L. J., N. S., Ch., 283; 8 Jur. 281.

14. A testator bequeathed an annuity to D., and to A., B., and C. his residue, to be equally divided, etc., except the Swansea canal shares, which were not to be sold till after the death of D.:—Held, that the Swansea canal shares passed by the residuary gift. *James* v. *Irving*, 10 Beav. 276.

15. A testator gives to A. B. the residue of

his personal estate, except South Sea stock, which he gives to C. D. The stock is afterwards converted into money. It falls into the residue given to A. B. *Wingfield* v. *Newton*, 2 Colly. 520. n

1. Testator bequeathed all his personal estate, except the money laid out in stock, mortgages, and bonds, to A.; and as to his money in stock and on mortgages and bonds, he gave the same to B. The gift to B. failed by an event analogous to a lapse —Held, the property which was intended to be given to B. passed under the residuary bequest to A. *Evans* v. *Jones*, 2 Colly. 516.

2 "I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that as she had not disposed of it during her life it fell into the residue *Espinasse* v. *Luffingham*, 3 J. & L. 186; 8 Ir. Eq. R. 129.

3. A testator, after giving a fund to his executors upon certain trusts, declared it to be his will that in the event of the failure of those trusts (an event which happened) his said trustees, and the survivors or survivor of them, his executors or administrators, should apply the fund for charitable or other purposes as they or he should think fit, without being accountable to any persons whomsoever for such their dispositions thereof:—Held, that these words created a trust, but a trust of so indefinite a nature that it could not be carried into effect; the bequest therefore failed, and the fund fell into the residue. *Ellis* v. *Selby*, 1 Myl & C. 286; 5 L. J., N. S., Ch. 214. Affirming 7 Sim. 352; 4 L. J., N. S., Ch., 69

4. A testatrix having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons Joseph and John, and her other children, equally; and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S to be divided amongst such of her children as might be living at her death; and she constituted Joseph her residuary legatee. John died before her:—Held, that Joseph was entitled to the share of the stock intended for John. *Re Spooner's Trust*, 2 Sim., N. S., 129; 21 L. J., N. S., Ch., 151.

5. Residuary clause passes all personal property that is not disposed of, as by lapse, though it was contended upon the particular expressions to have been separated, and not intended to pass with the residue. *Cambridge* v. *Rous*, 8 Ves. 13.

6. A bequest of "all and singular other my property and estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee. *Bernard* v. *Minshull*, 1 Johns. 276; 5 Jur., N. S., 931; 28 L. J., Ch., 649.

7. A., having a power to appoint 1,000*l.* by will, and which in default of appointment was given over to B., duly appointed it to C, who died in the testator's life. He afterwards made a codicil, giving his residue, and the dividends due at his death on the 1,000*l.*, to his wife:—Held, that, under the 7 Will. 4 & 1 Vict, c. 26, the 1,000*l.* passed to the wife under the residuary gift. *Bush* v. *Cowan*, 32 Beav. 228.

8. Testator, disposing "of the property of which he should be possessed at his death, after payment of debts and expenses," first made several bequests, specific and general, and then, after directing a certain purpose to be fulfilled out of the surplus property which should remain, gave the remainder in a certain way:—Held, that the latter gift was a gift only of the residue that should remain after deducting what would be required for the object proposed, and that, in the event of that object failing through illegality, the failure would not inure for the benefit of the residuary legatee. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., N. S., Ch., 40.

9. Testator in the eighth clause of his will directed his executors to purchase a piece of ground which he described, and to erect a monument upon it, for the interment of his own body and the bodies of his parents and sisters, and to pay the expense out of the surplus of his property after discharging his debts and legacies. By the ninth clause he gave the remainder of his property to a charity. The owner of the piece of land refused to sell it:—Held, that the subject-matter of the ninth clause was not so implicated with the subject-matter of the eighth as that the eighth having failed the ninth must fail also; and that the eighth having failed the whole surplus of the testator's property passed by the ninth clause. *Mitford* v. *Reynolds*, 16 Sim. 105; 17 L. J., N. S., Ch., 238; 12 Jur. 197.

10. A testator, after sundry other legacies to B. and others, gave B. a sum of 1,000*l.* in trust to invest and accumulate, and pay the accumulated fund to any son he might have named John who should attain twenty-two years of age; and if the first son he should have, and call John, should die before twenty-two, then to the next, and so on; and if no son called John should attain twenty-two years, then B. was to retain the 1,000*l.* for his own use. The testator then declared that his residuary estate should be divided among his pecuniary and particular legatees in proportion to the particular legacies:—Held, that B. was entitled to retain the sum of 1,000*l.* for his own use (the gift to the son John at twenty-two being void for remoteness), but that the same fell into the residue. *Joy* v. *Aspinwall*, 18 Jur. 284.

Excess of Accumulations.] See ACCUMULATION, IV.

9. Lapsed Legacies Excluded. Contrary Intention.

11. Residuary clause passes all personal property that is not disposed of, as by lapse, though it was contended upon the particular expressions to have been separated, and not

intended to pass with the residue. *Cumbridg* v. *Rous*, 8 Ves. 13.

1. A., by will, declares his intention to dispose of his household goods by his codicil, etc., and devises the residue of his personal estate not disposed of nor reserved to be disposed of, by his codicil, to his wife. Afterwards the testator makes a codicil, and does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the Statute of Distributions. *Davers* v. *Dewes*, 3 P. W. 40.

2. Residue under particular circumstances will not take in lapsed legacies, the residue being given as a small remainder of about 100*l*., and the lapsed legacies amounting to 20,000*l*. In general, the residue takes in lapsed legacies; as to real estates it is otherwise. But the legatee must be a general legatee. *Att.-Gen.* v. *Johnstone*, Ambl. 577, 580.

3. A testator bequeathed to his executors and trustees all his personal estate (except such goods as were by his will especially bequeathed, and also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts and legacies), upon trust, in the first place, to pay his debts, funeral and testamentary expenses, and legacies; and in case there should be any residue of his personal estate (except as aforesaid) he gave the same to his son R. And after giving certain specific legacies, the testator gave all his freehold hereditaments to the same trustees, upon trust for his said son R. for life, with remainder to his grandson W. for life, with divers remainders over in tail. And the testator gave all his leasehold estates to the same trustees, in trust to permit the clear rents thereof to be received, taken, and enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession; and then in trust to convey and assign the leaseholds to him:—Held, that the limitations of the leaseholds beyond the life estates of R. and W. were void for remoteness; and that the interest thus improperly attempted to be given did not belong absolutely to W. as the last tenant for life, nor did it pass by the residuary bequest to R., because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from payment of the debts and legacies; and therefore held, that, beyond W.'s life estate, the leaseholds were undisposed of by the will, and belonged to the next of kin of the testator. *Wainman* v. *Field*, 1 Kay 507.

4. A general residuary gift carries with it every legacy which fails to take effect, unless the testator has shown an intention that property which he has excepted from the residue is never to fall into it. *Re Blight*, *Blight* v. *Hartnoll*, 19 L. R., Ch. D., 294; 51 L. J., Ch., 162; 45 L. T. 524; 30 W. R. 513. Affirmed 23 L. R., Ch. D., 218; 52 L. J., Ch., 672; 48 L. T. 543; 31 W. R. 535.

E. B., by her will, bequeathed to C. H. all her personal property, with the exception of a certain wharf upon which she had charged certain annuities and had given directions for the payment off of certain mortgages upon it:—Held, that E. B. had treated the wharf as part of her own personal property, and had shown no intention inconsistent with its falling into residue, and that after satisfaction of the annuities and mortgages it passed to C. H. under the residuary gift. *Ib.*

Davers v. *Dewes* (3 P. W. 40) doubted. *Wainman* v. *Field* (Kay 507) distinguished. *Ib.*

5. A will contained a devise and bequest to T. of "all my real and personal property except such parts as are or shall at my decease be subject to the trusts of my marriage settlement and are hereinafter otherwise disposed of." The will contained a subsequent gift of 1,000*l* out of the settled property to R., and of the rents and profits of the remainder of the settled property to R's wife, in case R. should predecease T., but if R. should survive T. upon other trusts —Held, that the income of the settled property during the joint lives of T. and R. being undisposed of by the will passed to T. under the previous residuary gift. *Torrens* v. *Millington*, 26 W. R. 753.

6. The wife of A., being entitled in fee, devised to him the B. property. A., under a wrong impression that his wife had no power of testamentary disposition, made his will containing this clause: "And I am wishful here to observe that my son, as heir-at-law of his mother, will inherit the B. property, and is therefore further provided for. A. then devised his residuary estate to other persons:—Held, that he died intestate as to the B. property, notwithstanding the residuary devise. *Hawks* v. *Longridge*, 29 L. T., N. S., 449.

7. A testator gave to each of his brothers and sisters named in his will, "or to their legal representatives," 500*l*., to be paid them in two years after his death. He then gave legacies to several nephews and nieces by name. The whole amount of the legacies was 6,100*l*. He gave the residue to his wife "except 4,100*l*., of which she is only to have the use during her life, and which I wish to be divided amongst my relatives to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacies double the first bequest." On inspecting the original will, which was a holograph, 4,100*l*. seemed to have been substituted for 5,100*l*.:—Held, that the 4,100*l*. was not so taken out of the residue as to prevent the shares of it which lapsed from going to the residuary legatee. *Thompson* v. *Whitelock*, 4 De G. & J. 490; 5 Jur., N. S., 991; 28 L. J., Ch., 473; 7 W. R. 625.

8. Testatrix bequeathed certain leaseholds to trustees upon trust for sale, and to apply the proceeds in or towards payment of her debts, funeral and testamentary expenses, and legacies as far as the same would go; and as to all the moneys and personal estate not thereinbefore by her disposed of, and not consisting of lands, tenements, or hereditaments, or the produce thereof, she bequeathed the same for charitable purposes. The produce of the leaseholds was more than sufficient for payment of her debts, funeral expenses, and legacies, and she had not devised any other than leasehold lands to be sold:—Held, that the surplus produce of the leaseholds did not fall into the residue, but was undisposed of. *Russell* v. *Clowes*, 2 Colly. 648; 10 Jur. 732.

1. A testator gave all his real and personal estate to trustees, except as to money due to him from E., to convert by sale and invest in the funds, "and pay the interest thereof unto his wife" for life, with remainder over:—Held, that the widow was entitled to the interest arising from the debt from E. *Dobson* v. *Banks*, 32 Beav. 259.

2. A testator bequeathed an annuity to D., and to A., B., and C. his residue, to be equally divided, etc., except the Swansea canal shares, which were not to be sold till after the death of D.:—Held, that the Swansea canal shares passed by the residuary gift. *James* v. *Irving*, 10 Beav. 276.

10. Lapsed Gift falling into Particular Residue.

3. Upon the construction of a will:—Held, that lapsed legacies fell into the general and not into a particular residue. *Master* v. *Laprimaudaye*, 2 Colly. 443. And see *Patching* v. *Barnett*, 49 L. J., Ch., 665; 43 L. T. 50; 28 W. R. 886.

4. Distinction between a general and a particular residue. *De Trafford* v. *Tempest*, 21 Beav. 564.

A testator bequeathed particular chattels at his residence to A., and his chattels there "not thereinbefore otherwise disposed of" to B., and his general residue to C. The gift to A. lapsed by her death in the testator's lifetime:—Held, that the chattels bequeathed to A. passed to B., as part of a particular residue, and not to C as part of the general residue. *Ib.*

5. A testatrix, after bequeathing divers annuities and legacies, and amongst others a sum of stock to M. M., to vest at twenty-one or marriage, devised and bequeathed a West India plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books, and certain portraits, to E. G. T. and M. T. for their lives equally, and after the death of either the whole to the survivor for life, and after the decease of the survivor then unto such children of M. T. as he should by deed or will appoint, and in default of appointment then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child the whole to such child and his or her heirs, the funded property to be an interest vested in them being sons at twenty-one, and being daughters at twenty-one or marriage; but in case M. T. should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A. W. and their heirs; and in case M. T. should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits, unto M. T. for life, and after his decease to his eldest son for ever; but in case T. M. should die under age and without issue, then the said residue of her money in the funds, plate, books, and portraits unto M. M. absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E. G. T. and M. T. absolutely. M. T. having survived E. G. T., and died without having been married:—Held that the stock legacy to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property for the benefit of T. M., and did not sink into the general residue. *Malcolm* v. *Taylor*, 2 Russ. & M. 416.

6. Testatrix, after giving certain legacies, bequeathed "all her moneys, securities for money, moneys secured on mortgage, railway stocks and shares, moneys to be produced from sale of any property at S. or P. to which she was entitled, all moneys to which she was entitled under the will of her late grandfather, and also all her moneys secured upon any securities or in any way or manner howsoever," to trustees, upon trust, after payment of her legacies and debts, to invest and pay the income to A. for life, and after her decease to pay thereout a certain charitable legacy, and as to the residue thereof upon certain trusts in favour of the defendants. The will contained a residuary bequest in favour of A. The charitable legacy was partially invalid under the Statute of Mortmain:—Held, that the portion of such legacy which failed passed to the defendants under the particular gift of residue, and not to A. under the general residuary gift. *Champney* v. *Davy*, 11 L. R., Ch. D., 949; 48 L. J., Ch., 268; 40 L. T. 189; 27 W. R. 390.

11. Lapsed Share of Residue where Residue divided into Shares.

7. Where a residue was to be divided in three portions, and one-third was given to A., another third to B., and as to the other third "500*l.* part thereof to C., and the residue and remainder of such third to other parties," and C. died in the lifetime of testatrix:—Held, that the 500*l.* lapsed to the next of kin. *Lloyd* v. *Lloyd*, 4 Beav. 231; 10 L. J., N. S., Ch., 827; 5 Jur. 673.

8. A testator bequeathed the residue of her personal estate, "and also all such and so much of her personal estate, the trusts, bequests, or dispositions whereof in the will contained, should fail, or become incapable of being performed," in eleven equal parts, among different persons. The legacy of one-eleventh part lapsed:—Held, that the lapsed legacy fell into the residue, which became divisible into ten parts amongst the remaining residuary legatees. *Evans* v. *Field*, 8 L. J., N. S., Ch., 264.

9. A testator having by his will directed his executors to transfer 500*l.*, part of his residuary estate, to H. N., and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H. N., and by a codicil declared that he razed her name out of his will with his own hand, the 500*l.* belongs as undisposed of to his next of kin. The costs of ascertaining the right to that sum paid thereout in exemption of the general residue. *Skrymsher* v. *Northcote*, 1 Swan. 566; 1 Wils. 248.

10. Testator gave the whole of his personal property, after payment of his debts, to his wife during her widowhood, remainder to his son, his only child; and if his son should die under twenty-one, he expressed it to be his wish to give 500*l.* to each of his brothers and

sister, Joseph, James, and Mary, "and any further surplus to be equally divided between these my said brothers and sister, or their legal heirs and successors." The testator's son survived him, and died under twenty-one. His brother Joseph died in his lifetime:—Held, that the gift of the further surplus was not a residuary gift, but was a gift of the surplus of the testator's property after the three sums of 500*l.* each should be subtracted from it, and that the legal heirs and successors to the brothers and sister were not intended to take unless all of them died, so as not to take; and consequently that there was an intestacy as to the 500*l.* and the share of the further surplus given to Joseph. *Gibson* v. *Hale*, 17 Sim. 129; 14 Jur. 27.

1. Testator bequeathed Greenacre to Catherine S. for life, with remainder to her son John S. in fee; provided that if he should die in his mother's lifetime, then and in such case the testator gave Greenacre, together with the residue of his real and personal estate, to trustees, in trust for Isabella A. for life, remainder in trust as to one-fourth for such persons as she should appoint by will; and upon further trust, to divide, convey, assign, and transfer all the rest, residue, and remainder of the trust property unto and to the use of Maria C., Rose B., and John S. absolutely. John S. survived his mother, and Isabella A. died intestate:—Held, that the trustees took the residuary real estate on the testator's death; and that Maria C., Rose B., and John S. were not entitled to the one-fourth of the property which was subjected to Isabella A.'s appointment, but that it was undisposed of. *Simmons* v. *Rudall*, 1 Sim., N. S, 115; 15 Jur. 162.

2. The testator gave his real and personal estate to his executors upon trust, after conversion and payment thereout of his debts, funeral and testamentary expenses, and legacies, to stand possessed of the residue, and divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, and he declared that if the net residue of his property, after payment of the debts, etc., should exceed 10,000*l.*, then 10,000*l.* only should be applicable to the said trust, 1,000*l.* in each share; and in that case the testator gave the residue of his said property beyond the 10,000*l.* to his nephews and nieces in equal shares. The net residue after the payment of debts, etc., exceeded 10,000*l.* One of the tenth shares lapsed by the death, in the testator's lifetime, of one of the ten legatees:—Held, that the lapsed share of 1,000*l.* did not pass as residue to the nephews and nieces, but was undisposed of. *Green* v. *Pertwee*, 5 Hare 249; 10 Jur. 538. S. C. *nom. Greer* v. *Pertwee*, 15 L. J., N. S., Ch., 372.

3. Residue divided between certain residuary legatees, one of whom dies in the lifetime of the testator. By codicil the testator confirms his will except as to any legacy lapsed:—Held, that the share of the deceased legatee was undisposed of. *Re Wood's Will*, 29 Beav. 236.

12. Other Cases.

4. Though not at law, yet in equity a man may die partly testate and partly intestate; but when a whole residue is given, it is a contradiction to say any part of that estate is undisposed of; and if personal estate is increased by any event after the testator's death, it is a part of the residue, and will pass as such; and so will the interest of that residue, for that interest is assets and part of the estate. *Green* v. *Ekins*, 2 Atk. 475; 3 P. W. 306. And see *Heath* v. *Perry*, 3 Atk. 102.

5. Reasons for the rules on which a residuary bequest of personal estate is extended to that which testator subsequently acquires. *Bland* v. *Lamb*, 2 Jac. & Walk. 405. Affirming 5 Madd. 412.

Very special words required to confine a residuary bequest to property belonging to testator at date of his will. *Ib.*

6. Arrears of income of separate estate, pass by a general gift in a will of "the residue of the said trust fund comprised in my marriage settlement." *Tatham* v. *Drummond*, 2 Hem. & M. 262.

7. Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus; if less, in similar proportions: then subject to some legacies, debts, etc., the residue of her estate in sixteenths; two to her mother for life, the others to different persons absolutely. She then made three residuary legatees. The shares given are only of the 20,000*l.* subject to charges: all beyond that goes to the residuary legatees. Legacy decreed to feme covert: settlement directed. *Green* v. *Scott*, 1 Ves. J. 282.

8. Under a proviso in a partnership deed that in the event of the death of one partner a certain proportion of the subsequent profits should be payable to his "widow or family," such profits were held to form part of his residuary estate, subject to the trusts of his will. *Re Tibbs*, 17 W. R. 304.

9. A tradesman bequeathed his residuary estate, including his stock-in-trade, to trustees, with a direction to convert into money all such parts as should consist of leaseholds or money in the funds, and to invest the same and pay the annual income to Sarah his wife; and after her decease to Mary his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of will Mary married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who under this provision claimed his interest in the partnership:—Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share. *Page* v. *Cox*, 10 Hare 163.

10. A testatrix directed her residuary estate

to be divided into three equal shares, and gave one share to the children of T. M., one share to the children of W. H. (subtracting from their share 2,000*l.* that W. H. owed the testatrix), and the remaining third part to the children of R. H.:—Held, that the 2,000*l.* was to be considered as part of the residue, that the residue was to be divided into the equal parts, and that the 2,000*l.* was to be taken as part of the share of the children of W. H. *Murray* v. *Samson*, 3 Sim. 536.

1. A domiciled Englishman dies abroad, having by an instrument which was admitted to probate in England, appointed K. to make a will for him conformably to instructions given or to be given to him, and nominated him as his universal heir. Evidence being given that by the foreign law the universal heir would take all that was not otherwise disposed of by the testator's instructions, and the instructions referred to not being proved:—Held, that K. was entitled to the whole of the testator's property for his own use. *Reynolds* v. *Kortright*, 2 W. R. 445; 2 Eq. Rep. 784; 18 Beav. 417.

2. Certain real estates were settled, on an event which happened, to the use of the survivor of the intended husband and wife, in fee. The wife survived. The husband by his will devised all his real estates to his wife for life, and after her death to executors upon trust to sell, and subject to certain bequests, etc., gave one-fourth of the proceeds to such persons as his wife should appoint, and the remainder equally amongst his executors. All the executors died in the lifetime of the wife, and previously to the date of her will. The wife by her will (made since the passing of the Wills Act), acting upon the supposition that her husband had intended to include in his will the settled estates, which came to her by survivorship, devised them to the uses concerning the same declared by him in his will:—Held, that the settled estates were not well devised by the testatrix to the uses of her husband's will, but that they fell into and formed part of her residuary estate. *Culsha* v. *Cheese*, 7 7 Hare 236; 18 L. J., N. S., Ch., 269; 13 Jur. 802.

3. Trustees of a settlement were to stand possessed of the trust fund (consisting of twelve-fifteenths of a larger fund), in trust, as to one share, for the settlor's daughter A. for her life, and then for her children, who were to take vested interests, if sons at twenty-one, and if daughters at twenty-one or marriage; and if A. should have no children who should live to attain a vested interest in the fund, then to stand possessed of the share so given to A. and her children, in trust as to one moiety for the settlor's daughter B. and her children, and as to the other moiety for his daughter C. and her children, under the same limitations and restrictions to which the gift to A. and her children had been subjected. Then followed similar dispositions of the remainder of the trust fund in favour of B. and her children and C. and her children, with limitations over of each share (in the event of either B. or C. dying without leaving children who should attain a vested interest) to the other two daughters and their children, in moieties as before. But in case there should not be any child or children of A., B., and C., who should live to gain a vested and transmissible interest in the said twelve-fifteenth parts, or any part thereof, under and by virtue of the settlement, then the trustees were to pay, assign, and transfer the whole of the twelve-fifteenth parts unto the next of kin of the settlor. The settlor died, having by his will made A., B., and C. his residuary legatees. After his death C. died without issue; then B. died without issue, leaving A. surviving her, who had two children, one of whom, a daughter, was married:—Held, that A., having a child who had lived to gain a vested and transmissible interest in the fund, was not entitled to any portion of it under the limitation to the "next of kin" of the settlor; consequently, that so much of the fund as did not pass under the limitations, other than that to the next of kin, resulted to the settlor, and passed under his will to his residuary legatees. *Westwood* v. *Slater*, 1 De G. & Sm. 1.

4. Testator by his will gave real estate with various limitations, and also stock to his wife for life or widowhood, and after her death to the person who should be entitled to his residuary real estate, either as tenant for life or in tail male. By his first codicil he gave his residuary estate to his widow. By the fourth codicil he revoked the dispositions made of his real and personal estate, and instead he gave his real and personal estate to his daughter, remainder as to the same to his grandson and his heirs in strict entail, as in his will directed, but he was not to take possession till he should attain thirty-one; and on failure of issue of his grandson he ordered that his estate and effects should go and descend as by his will directed:—Held, that the gift of the residuary property by the first codicil was not revoked by the fourth codicil; that the funded property did not fall into the residue, but was given for life to the daughter, remainder in strict settlement to the grandson for life, remainder to his eldest son. *Patch* v. *Graves*, 3 Drew. 348.

5. A testator gave to his daughter all his books, plate, linen, china, wearing apparel, watches, jewels, and money (except money at the bankers', or in the funds, or placed on security), and all other property not otherwise disposed of. And he directed that, unless indispensably necessary, his funded and other property should remain as it was until the decease of certain annuitants under the will; and on the decease of the annuitants he directed the whole of his personal estate to be invested in Government securities, and one-fourth part to be transferred to the Royal Society, and the other three parts to other specific public institutions:—Held, that the daughter was not entitled to railway shares, foreign securities, or other investments forming parts of the testator's personal estates; but that these descriptions of property passed under the residuary bequest. *Ludlow* v. *Stevenson*, 1 De G. & J. 496.

6. Trust by will to permit testator's wife to receive interest and rents for life, for the maintenance of herself and children, and in case of her marriage that the interest, etc., shall not be paid to her any longer, but be applied by his executors and trustees (she being an executrix with them) for maintenance of the children, revoked on her marriage,

and not restored by a general residuary disposition to her *Duncan* v. *Duncan*, 19 Ves. 396.

1. A testator gave the residue of his moneys, railroad shares, and personal estate to trustees, in trust to invest; and after the death of his wife and failure of issue, he gave to trustees "his residuary personal estate and effects, in trust to invest and stand possessed of the investment," as well as "the stocks, funds, and securities" which composed his personal estate, upon trusts over:—Held, that the railroad shares passed by the bequest over. *Surtees* v. *Hopkinson*, 18 L. J., N. S, Ch, 188; 13 Jur. 181.

2. The executors of a deceased partner are all, except one, partners in the firm, and leave his estate, or a portion thereof, invested in the business. This portion, to the amount of 19,000*l.*, is entered in the books to the credit of the executors, on an account of a residuary legatee, to whom it belonged when he should attain twenty-five. Moneys were advanced by the firm to this legatee on the credit of this and security of another fund to an amount which, after making the security available, left the sum of 11,000*l.* due. The firm became bankrupt. *Quære*, whether the 11,000*l.* could be recovered by way of set-off:—Held, the residuary legatee was entitled to it. *Fairlie* v. *Hartwell*, 3 Jur. 791.

3. Testator gave after his wife's death four pictures to the trustees of the National Gallery, and "all the rest, residue, and remainder of my pictures . . . and other articles and effects . . . not herein or by any codicil specifically bequeathed," to his wife absolutely; and after certain other bequests he gave "all the residue and remainder of my moneys, . . . goods, chattels, and personal estate and effects whatsoever not herein specifically bequeathed" to his trustees on certain trusts. The trustees of the National Gallery declined the bequest:—Held, that the bequest of the four pictures fell into the second residuary bequest. *Patching* v. *Barnett*, 49 L. J., Ch., 665; 43 L. T. 50; 28 W. R. 886.

4. Testator divided his will into several clauses or articles, which he numbered; and after appointing several trustees, and providing for their succession, he by the second article of his will bequeathed to his trustees in trust for the use of his wife and children as thereinafter detailed, viz., all his household furniture, plate, medals, china, linen, books, paintings, prints, wines, provisions, horses, carriages, cows and sheep, and all other live and dead stock in and about his premises, with all his ready money in his house and at his agent's and banker's, with all moneys due to him at the time of his decease; also he gave and devised all and every his dwelling-house and mansion, buildings, gardens, and lands, with the appurtenances, and all his real estates, upon trust as aforesaid, and upon the uses thereafter stated, that is to say, all his real estate in and about Denne Hill, etc., until the youngest of his surviving children attained the age of twenty-five years; at that period he willed that his eldest surviving child should be put in possession of all his freehold and leasehold property, including all timber and underwood, and all personal property on the estates. By a subsequent article he appointed his eldest son, or next surviving child in seniority, his residuary legatee. There were other clauses in the will, and also a testamentary writing, from which it appeared to have been a principal object of the testator to give his children the advantage of having the same home for a period after his death as they had enjoyed in his lifetime:—Held, upon these clauses taken together, that the enjoyment and rents of the testator's real estates devised by the will belonged to the testator's wife and children generally (subject or not subject to a discretionary power of regulation in the trustees) until the attainment by the youngest surviving child of the age of twenty-five; held, also, that the property described as all the testator's ready money in his house, etc, did not belong to the residuary legatee, and did not fall within the description of all personal property on the estates, etc., but was to be applied for the benefit of the wife and children. *Montresor* v. *Montresor*, 1 Colly. 693.

Failure of Charitable Gifts.] See TRUSTS, VII. III.

Leaseholds passing.] See XLI. II. *post.*

XLI. General Devise. Operation of on Real Estate.

I. IN CASE OF LAPSED, VOID, OR PARTIAL SPECIFIC DEVISES.

1. Before the Wills Act.

5. If devise of land is revoked or does not take place, the land does not pass by the residuary clause. *Watson* v. *Lincoln*, Ambl. 328.

6. Where testatrix by will directed a sum of money to be laid out in land, and settled, after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate:—Held, that upon the evident intent of the testatrix to exclude the residuary devisee, the heir-at-law was entitled to a remainder in fee in the lands to be purchased. *Robinson* v. *Knight*, 2 Eden 155.

7. A. devised part of his real estates to his son W. in settlement, and other parts in fee,

and the residue not specifically devised to W., whom, with E., he appointed executor and executrix. A., by codicil reciting the death of W. and the devises of the particular estates to him, devised the aforesaid estates, in case E. should die without issue in his wife's life, to his wife for life, with remainder to R., and appointed E. his sole executrix and residuary legatee. A died seised of other estates than those specifically devised:—Held, that E. did not take the residuary realty. *Hillas* v. *Hillas*, 10 Ir. Eq. R 134.

1. A testatrix, having the moiety of an estate, directed her executors to purchase the other moiety, and if the purchase should be completed within twelve months after her death, she gave the entirety on certain trusts; but in case her executors should not be able within that time to purchase it, she directed her moiety to be sold, and the produce, together with 1,100*l.*, to be held on other trusts. The will contained a gift of the residue of her estate of whatever kind, etc. The purchase was completed within the time, although the executors were able, so that neither of the expressed events happened:—Held, first, that the trusts, both of the estate and 1,100*l.*, failed; and, secondly, that, as between the devisees and heir-at-law, the latter was entitled to the testatrix's moiety of the estate. *Upjohn* v. *Upjohn*, 7 Beav. 59.

2. Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D., who should attain twenty-one, for that son, and, in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased, and by codicil declared that he intended to erase, the direction to sell only; he then gave all his estates to the son of D., who should first attain twenty-one, and change his name to E. D., at death of testator, had a son who was still an infant, and afterwards had another son:—Held, that codicil revoked the devise of the S. and H. estates, and also the devise of the residue of the estate to the trustees, and that D.'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will, and those he afterwards purchased, and consequently was entitled to the receipts during his infancy. *Duffield* v. *Elwes*, 2 Sim. & S. 544; 4 L. J., Ch., 189. See this case on appeal, 3 Bli., N. S., 260.

Residuary Devise when Specific.] See EXECUTOR AND ADMINISTRATOR, XIII. VII.

2. Under the Wills Act.

3. If a specific devise of lands fails, it will fall into and pass by a general devise of all real estates not before devised. *Green* v. *Dunn*, 24 L. J., Ch., 577.

Devise of lands in E. to A. in fee, with other specific devises, and a devise of "all my lands not herein before devised" to trustees upon trust for A. for life, with limitations over. A. dies in lifetime of testatrix, who makes a subsequent codicil varying the will in other parts, but leaving the devises to A. unaltered:—Held, that the lands in E. passed by the residuary devise since the 7 Will. 4 and 1 Vict., c. 26. S. C. 20 Beav. 6; 3 W. R. 277.

4. A testator, in 1847, devised specific real estate to his daughter M., and, after making several specific bequests, devised and bequeathed all other real and personal estate of which he might die possessed to M. and others of his children. M. died in his lifetime:—Held, that the devise expressed by the words "all other," etc., was a residuary devise within the 7 Will. 4 and 1 Vict., c. 26, s. 25, and included the real estate devised to M. *Cogswell* v. *Armstrong*, 2 Kay & J. 227; 1 Jur., N. S., 1162.

5. The 25th section of the Wills Act is to be construed upon the principle of assimilating a residuary devise of real estate with a similar bequest of personalty. A devise which was, by construction, residuary:—Held, accordingly, to pass lands which had been included in a devise void as contrary to law. *Carter* v. *Haswell*, 5 W. R. 388; 3 Jur., N. S., 788; 26 L. J., Ch., 576.

C., in 1854, gave to trustees, their heirs, executors, administrators, and assigns, all his real and personal property, of whatever nature or kind, in trust for his sister S. The testator directed that certain farms should be sold, and that the money obtained, together with moneys due to him, should be vested in the names of the treasurers of the Wesleyan Methodist Missionary Society on annuity such as the law directed, such annuity to be paid to his sister as she might direct. After the decease of a brother and another sister and C., the claim to the annuity was to cease:—Held, that the testator had given his property, of every description, upon trust for one particular person, and everything given to the Wesleyan Methodist Missionary Society was given by way of charge thereon, which having failed, there was an absolute trust in favour of S. *Ib.*

6. Testator by his will recited that he left nothing to his nephews and nieces, as they would be entitled to the property held by testator under their grandfather's will on his (testator's) death without issue, and devised all his real estate and his residuary personal estate to trustees upon certain trusts. The remainder after his own life, supposed by the testator to belong to the nephews and nieces, had in fact descended to the testator himself:—Held, that under the circumstances it did not pass by the residuary gift, but was undisposed of. *Circuitt* v. *Perry*, 5 W. R. 15; 2 Jur., N. S., 1157.

7. Upon the marriage of a testator and testatrix, certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, and in default of issue of the marriage to the use of the survivor of the husband and wife, and his or her heirs and assigns. The testator, by his will, made during coverture (having other estates not in settlement), devised all his real estates to the testatrix for her life, and upon her decease to the use of A., B., and C., in trust for sale, and out of the proceeds of such sale, and the residue of his personal estate, to pay certain legacies, and subject thereto to stand possessed of one-fourth part of the said trust moneys for such purposes as the testatrix should appoint, and in default of appointment for her next of kin;

and to pay and dispose of the other three-fourths equally amongst A., B., and C., their executors, administrators, and assigns. The testator died in the lifetime of the testatrix, leaving no child of the marriage. The testatrix, by her will, made in 1839, after the deaths of A., B., and C., reciting that she believed it was the testator's wish that the settled estates should pass by his will, and she was desirous of fulfilling his wishes, devised the settled estates to the uses by the testator's will declared concerning the same, and, in exercise of the power of appointment given to her by the testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, and directed her real estate to be sold and fall into such residue, which she bequeathed to several legatees:—Held, that there being, in the events which happened, no uses declared of the settled estates by the will of the testator, the specific devise of such settled estates by the will of the testatrix was void, or incapable of taking effect; that the heir-at-law of the testatrix did not take the settled estates as the subject of a void or ineffectual devise; but that, under the Wills Act (7 Will. 4, and 1 Vict., c. 26), the settled estates passed by the residuary devise in the will of the testatrix, for the benefit of her residuary legatees, the case not being one in which a contrary intention appeared, within the meaning of that statute. *Culsha* v. *Cheese*, 7 Hare 236; 18 L. J., N. S., Ch., 269; 13 Jur. 802.

1. A married woman, having a power of appointment under her marriage settlement over estates A. and B., appointed by will in September 1838 estate A. to her husband in fee, "and all other the hereditaments comprised in the settlement not hereinbefore disposed of to another person." By codicils to her will she revoked the appointment of estate A. to her husband, and gave him the same estate for life, with remainder to trustees to sell and pay certain legacies and pay the residue to charities:—Held, that the devise of "all other the hereditaments," etc., by the will was not residuary, but specific; and that the void gifts to the charities did not pass by it, but lapsed as unappointed. *Re Brown*, 1 Kay & J. 522.

2. A testator made a will (dated before the Wills Act), by which he directed his residuary real estate to be sold and the proceeds to be divided (in the events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the Wills Act), by which he directed certain real estate acquired subsequently to the date of the will to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to the prior codicil:—Held, that the second codicil did not operate as a re-publication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legatees. *Burton* v. *Newbery*, 1 L. R., Ch. D., 234; 45 L. J., Ch., 202; 24 W. R. 388; 34 L. T., N. S., 15.

3. A lady who had executed a deed of gift (which was enrolled) of lands at H. to three trustees for founding a charity, died within a year of its execution, having devised the same lands, in case she should not in her lifetime have effectually disposed of them, to A., B., and C. (two of whom were trustees of the deed) as joint tenants, and she devised certain lands to the plaintiff by the following description: "the rest of my hereditaments at H., and all my hereditaments at S. and W." The plaintiff filed a bill impeaching the devise as being a secret trust for charitable purposes, and claiming to be entitled to the lands:—Held, that as the testatrix devised the lands in full reliance that the devisees would carry out her object, and that the trust was tacitly accepted by them, the devise was therefore void:—Held, also, that the words "the rest of my lands at H." were not a residuary devise within the Wills Act, 7 Will. 4 and 1 Vict., c. 26, s. 25, and that the lands in question were undisposed of. *Springett* v. *Jennings*, 10 L. R., Eq., 488; 39 L. J., Ch., 652; 18 W. R. 962; 23 L. T., N. S., 132. Affirmed 6 L. R., Ch., 333; 40 L. J., Ch., 348; 24 L. T., N. S., 643; 19 W. R. 575.

4. N. devised an estate at R. to such of the children of J. as J. should by will appoint, and in default to them equally. By the death of four of J.'s children, J. took half the estate as heir of his deceased children. J., by his will, devised all his real estate to his children equally, and he directed that the estate at R., devised by the will of N., over which he might have any power of appointment by will, should not be included in or affected by his own will, but should go according to the limitation contained in N.'s will:—Held, that J.'s moiety in the R. estate passed under the residuary devise in his will, and did not descend to his heir. *Atherton* v. *Langford*, 25 Beav. 5.

5. The wife of A., being entitled in fee, devised to him the B. property. A., under a wrong impression that his wife had no power of testamentary disposition, made his will containing this clause: "And I am wishful here to observe that my son, as heir-at-law of his mother, will inherit the B. property, and is therefore further provided for. A. then devised his residuary estate to other persons:—Held, that he had died intestate as to the B. property, notwithstanding the residuary devise. *Hawks* v. *Longridge*, 29 L. T., N. S., 449.

II. IN CASE OF LEASEHOLDS.

1. Leases for Lives.

6. A testator, seised of estates in fee, and holding certain lands and titles in the county of H., under church leases for lives, devised all his lands and hereditaments in the counties of H. and G. and all other his real estate to his daughter, and the heirs of her body, and, for default of such issue, to F. and his heirs.

The daughter at the testator's death, and ever afterwards, was of unsound mind. Her husband, having taken out administration to the testator, with the will annexed, procured from time to time renewals of the leases. She survived him as well as all the *cestuis que vient* named in the testator's leases, and died without issue, and without having done any act to bar such interest as F. had under the devise:—Held, that the leaseholds for lives passed by the will, and that F. was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases. *Fitzroy* v. *Howard*, 3 Russ. 225; 7 L. J., Ch., 16.

1. Devise of all freehold lands would include leases for lives, though the limitations are inapplicable. *Watkins* v. *Lea*, 6 Ves. 642. And see *Mogg* v. *Mogg*, 1 Meriv. 654.

2. A testator seised of an estate *pur autre vie*, and possessed of personal property to the amount of about 4,500*l*., by his will bequeathed "the sum of 1,500*l*., the other part of the 4,500*l*., together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among testator's brothers, H. and J., and the daughter or daughters of his sister E. The will contained a residuary clause in these words: "As to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, J. C., and his heirs, executors, and administrators for ever":—Held, that the estate *pur autre vie* passed under this residuary clause, and not under the words "any further property," upon the true construction of the entire will. *Acheson* v. *Fair*, 3 Dr. & War. 512; 2 Con. & L. 208.

3. A testator, seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever":—Held, that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. *Weigall* v. *Brome*, 6 Sim. 99.

2. Leases for a Term of Years.

4. If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the Court will give effect to his intention. *Goodman* v. *Edwards*, 2 Myl. & K. 759.

5. One devises all his freehold houses in A., and hath none but leasehold houses there; the leasehold shall pass. *Secus*, in a grant. *Day* v. *Trig*, 1 P. W. 286.

6. A testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments, and real estate, situate at Market Rasen, to his wife for life, and then to his son, his heirs and assigns, for ever. The testator had no property at Market Rasen except a leasehold estate held for 1,000 years:—Held, that the leasehold estate passed under the above clause. *Nelson* v. *Hopkins*, 31 L. J., N. S., Ch., 410.

7. One seised in fee, and possessed by lease for twenty-one years of lands in D., devises all his lands in D., whereof he is seised, possessed, or anyways interested in, to A. for life; remainder to B., in tail; remainder to C., with power to make a jointure; remainder to trustee to preserve contingent remainders, etc.:—Decreed, the leasehold should pass as well as the freehold. *Addis* v. *Clement*, 2 P. W. 456.

8. A. devised all his estates to B., and had only leaseholds:—Held, they shall pass. So, where a man, having lands in fee, and for years, devised all his lands, the fee-simple only shall pass; but where he had a lease for years, and no fee-simple, the lease for years shall pass, for otherwise the lease would be void, and the Court directed a trial at law upon the issue. Whether the testator had both freehold and leasehold, and in the same parish, *quære*. *Knotsford* v. *Gardiner*, 2 Atk. 451.

9. Testator, having tithes in fee, and likewise tithes by leases perpetually renewable, devised all his lands, tenements, and tithes to defendant; the leasehold tithes pass as well as the freehold. *Turner* v. *Hustler*, 1 Bro. C. C. 78.

10. Devise of all testator's real estates wheresoever situated, lying, and being:—Held, not to include leaseholds as well as freeholds. *Whitaker* v. *Ambler*, 1 Eden 151.

11. One, having freehold and leasehold estate in C., devises all his manors, lands, tenements, mines of coal and lead, to, etc.:—Held, the leasehold as well as freehold passed. *Lowther* v. *Cavendish*, Ambl. 366; 1 Eden 99.

12. Devise of all lands and tenements in or near F., by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold; *contrà*, if he had only had leasehold. *Chapman* v. *Hart*, 1 Ves. 271.

13. Testator devised all his manor, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively, in strict settlement, and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine paid out of his personal estate; he gave part of his personal estate specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real estate; but afterwards, by a testamentary paper unattested, he disposed of his personal estate otherwise: the heir contracted to sell the lease of the rectory, and upon a case directed to the Court of King's Bench on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the Lord Chancellor considered that title too doubtful to be forced on a purchaser: an Act of Parliament was therefore obtained. *Sheffield* v. *Mulgrave* (*Lord*), 2 Ves. J. 525.

14. General devise of all manors, messuages, lands, tenements, and hereditaments, in the county of Y., or elsewhere, with long limitations in strict settlement, and a residuary disposition of the personal estate, also by very general words. The Lord Chancellor was clearly of opinion that two leasehold houses passed with the personal estate, and not

under the devise of the land; but granted a case. *Thompson* v. *Lawley*, 5 Ves. 476.

1. Leasehold for years, being mentioned in former part of will:—Held, to pass by the residuary devise, in which, although the word "leasehold" occurred, yet, unless extended beyond the antecedent, it could have comprised only the leasehold for life. *Sherratt* v. *Sherratt*, Coop. *temp* Brough. 35.

2. A devise of lands and tenements without more, or a devise of messuages and tenements to uses applicable only to the freehold property without more, will not pass the testator's leasehold property. But a devise of messuages or tenements, with the appurtenances, to uses applicable only to freehold property, will comprise leasehold property, where a clear intention to that effect can be collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold. *Hobson* v. *Blackburn*, 1 Myl. & K. 571; 2 L. J., N. S, Ch, 168.

3. Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, and premises in C. and W., and all other his freehold lands and tenements whatsoever, to hold all such his real estate upon trust for his wife for life, remainder to other parties in tail. He also gave all his household goods, etc, and all other his personal estate, to his wife absolutely. The testator was seised in fee of freehold lands in C. and W., and also in S.; but there was no messuage or building on any of the freehold lands, except a barn in S. He also had land in C. for a long term of years, on which there was a farm and buildings; and at his death, and for six years before, he occupied the freeholds and leaseholds as one farm, but they were not contiguous:—Held, that the freeholds only passed by the devise to the trustees, but that the leaseholds did pass to the wife as personalty under the residuary bequest. *Arkell* v. *Fletcher*, 10 Sim. 299; 3 Jur. 1099.

4. A testator devised all his real estates to trustees; as to his freehold messuages, farm lands, and hereditaments in the county of B., in trust for C. The testator had a farm in that county consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold, and the other parts leasehold for long terms of years at peppercorn rents: and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm, at one entire rent, and the testator had always treated and dealt with them as freehold:—Held, nevertheless, that the leasehold parts were not comprised in the trust. *Stone* v. *Greening*, 13 Sim. 390.

5. Absolute interest in leaseholds bequeathed to trustees in trust for two persons:—Held, to pass. *Bradshaw* v. *Bradshaw*, 5 Ir. Eq. R. 310.

6. Testator devised certain specified messuages and lands, and all other his messuages, lands, tenements, and hereditaments, which might not be in his will particularly described or mentioned, to trustees upon certain trusts. The Court declined to decide whether a leasehold house passed under the general words without directing a case for the opinion of a court of law. *Parker* v. *Marchant*, 1 Y. & Coll. C. C. 290. The Court of Common Pleas, to whom a case was sent:—Held, that the leaseholds did not pass, and their certificate was confirmed, etc. 2 Y. & Coll. C. C. 279; 12 L. J., N. S., Ch., 314; 7 Jur. 318. And see S. C. at law, 5 Mann. & Gr. 496; 6 Scott 478; 12 L. J., N. S., C. P., 170.

7. Testator gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments whatsoever and wheresoever, and all moneys in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein, and declared the trust of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground rents and other outgoings in respect of the said messuages, lands, etc.; the leasehold estates pass with the freehold upon the subsequent words. *Hartley* v. *Hurle*, 5 Ves. 540.

8. A. gave all his real estate situate as described in his will to trustees to have and to hold to them, and the survivor of them, for ever or otherwise, according to the several and respective natures and tenures thereof, on certain trusts:—Held, that the leasehold as well as the freehold property of the testator at the place mentioned passed. *Swift* v. *Swift*, 1 De G. F. & J. 160; 29 L. J., Ch., 121.

9. A testator devised to A. and B., and their heirs, all his "freehold land, messuages or tenements, and hereditaments, respectively situate and being in, or forming the whole or part of," a set of buildings which he named, all in a particular parish. Of one part of the property thus described the testator at his death was seised in fee, subject to a lease; of a second part he was possessed for a term of years; and of (X.) a third part (now in question) he was possessed for a term of years, and he was also seised of the reversion of the same in fee, from the expiration of three years after the end of the term:—Held, that both the leasehold and the freehold interest of the testator in the portion (X) passed under the bequest. *Matthews* v. *Matthews*, 4 L. R., Eq., 278; 15 W. R. 761.

10. A devise, dated after 1837, of "all my real estate," without any words of locality or description, will pass leaseholds if the testator has no other landed property. *Gully* v. *Davis*, 39 L. J, Ch., 684; 10 L. R., Eq., 562.

A testator devised all his real estate whatsoever and wheresoever to trustees. The will contained a residuary bequest of personal estate. He was at the date of his will and of his death possessed of property which he believed to be freehold, but which proved to be leasehold. He had no other landed property:—Held, that the leasehold passed under the devise. *Ib.*

11. A residuary devise of manors, messuages, lands, farms, tithes, tenements, hereditaments and real estate, as well copyhold as freehold, was held not to include long leaseholds which had been occupied in one farm with freeholds. *Holmes* v. *Milward*, 47 L. J., Ch., 522; 26 W. R. 608; 38 L. T., N. S., 381.

The dealing with land originally of leasehold tenure for a long period by persons in possession of it was held to afford a presumption, as between those claiming under such persons, that the reversion had been got in. *Ib.*

A testator, after certain devises and after charging his real estate with certain payments,

gave and devised "all the rest and residue of my manors, messuages, farms, and real estate, whatsoever and wheresoever, in possession as in reversion, remainder as expectancy, and whether vested in me or any other person or persons in trust for me, or which I am entitled to at law or in equity," to the uses in his will mentioned. The will dealt separately with personal estate:—Held, that leaseholds had not passed under the residuary devise, notwithstanding the inconvenience of separating them from freeholds of the testator with which they were let to one tenant at and before the date of the will. *Ib.*

3. Leases for a Term of Years. Contrary Intention under the Wills Act.

1. A testator, after charging his debts, funeral and testamentary expenses, and pecuniary legacies on his real and personal estate, but directing his personal estate not specifically bequeathed to be the primary fund for payment, and charging the annuities given by his will on his real estates, and directing certain charity legacies to be paid out of his personal estate only, and the duties payable on his legacies and annuities to be paid out of his personal estate, gave the residue of his personal estate to his brother M. J. D. absolutely. Then followed a devise of the testator's manors, lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate at A., B., C., and D., in the counties of Durham and York, and of his other real estates in those counties and elsewhere in Great Britain, upon certain trusts for the benefit of M. J. D. and his issue, with remainder to Sir W. Eden in fee simple. The will contained a power for M. J. D when in possession to grant a jointure of 1,000*l.* a year, and also to demise the demised premises for any term not exceeding twenty-one years in possession, at the most approved yearly rents. M. J. D. died before the testator without issue. The testator died seised of freehold estates, on which the mansion house was situate, and also possessed of considerable leasehold estates, held by him on renewable leases for twenty-one years, granted by the Dean and Chapter of Durham. The freeholds and leaseholds were not intermixed, but adjoined each other, and in some instances parts of the freehold and parts of the leasehold estates were let to the same tenant at one undivided sum:—Held, first, upon the context of the will, that the testator's leaseholds for years passed under the residuary bequest to A., absolutely, and not in strict settlement with the real estates; and, secondly, that, although the Wills Act (1 Vict., c. 26) was applicable to this case, still that the 26th section (which enacts that a devise of the land of a testator, etc., shall be construed to include leasehold estates to which such description shall extend, unless a contrary intention shall appear) did not affect the above construction. *Wilson* v. *Eden*, 11 Beav. 237; 17 L. J., N. S., Ch., 459; 12 Jur. 488.

In the very numerous cases in which the rule in *Rose* v. *Bartlett* (Cro. Car. 293) has been referred to and discussed, it does not appear to have been intentionally or substantially varied; but when the words describing the subject of the devise have not been simply "lands and tenements," but the words "farms, messuages, and mines," or any of them have been added, or the testator has, in addition to the words simply describing the subject of the devise, used other words descriptive of the nature or extent of his interest in the thing given, and that interest, as described, is properly applicable to leaseholds, or has used words plainly connecting property which was leasehold with the lands or tenements on hereditaments the principal subject of the devise, the additional words have (although not in a manner always approved of) been held to warrant the conclusion that leaseholds were within the description of the thing devised. *Ib.*

2. A testator having devised the residue of his personal estate, whatsoever and wheresoever, to A. B, devised all his manors, lands, etc., at W., in the county of Durham, and at B., in the county of York, and a parcel of land purchased of M. L., and all other his real estates in the counties of Durham and York and elsewhere, and all his estate and interest therein, to C. and D. and their heirs, to certain uses:—Held, under the 1 Vict., c. 26, s. 26, that his leaseholds in Durham passed to C. and D. with the real, and not to A. B. with the personal estate. *Wilson* v. *Eden*, 16 Beav. 153.

The case of *Wilson* v. *Eden* (11 Beav. 237) reversed. *Ib.*

3. The Wills Act, s. 26, which provides that a general devise of the testator's lands shall include leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, and not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded. *Prescott* v. *Barker*, 9 L. R., Ch., 174; 43 L. J., Ch, 498; 22 W. R. 422; 30 L. T., N. S., 149. Affirming 29 L. T., N. S., 727.

A husband, after devising his mansion house to his wife for life, devised his mansion house and "lands" in strict settlement. There was a direction to trustees to receive and accumulate the rents during the minority of any tenant for life or tenant in tail by purchase, and to stand possessed of the accumulations, if such tenant for life or in tail attained twenty-one, or died under that age leaving issue entitled or inheritable under the will, to pay or transfer the funds to such tenant for life or in tail, his executors or administrators, as personal estate; but if such tenant for life or in tail died under twenty-one without leaving such issue, then to lay out the fund in the purchase of freeholds in fee-simple to be settled to the same uses as the devised estates. There was a power of sale, and a direction to invest the moneys arising from sales in the purchase of freehold lands, to be settled to the same uses, or leaseholds convenient to be held therewith, with a direction to settle the purchased leaseholds on like trusts, but so that they should not vest absolutely in any tenant in tail by purchase

who did not attain twenty-one; but on his death under that age should devolve as if they had been freeholds of inheritance, and been settled accordingly. There was also a bequest of heirlooms to be held on trusts corresponding with the uses of the mansion house, with a similar proviso against their vesting absolutely in any tenant in tail by purchase who did not attain twenty-one. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding with the uses of the devised estates, with a proviso that it should not vest absolutely in any tenant in tail by purchase dying under twenty-one, but on his death under that age should devolve as if it had been freehold of inheritance included in the devise:—Held, that there was sufficient indication of an intention not to include leaseholds for years in the devise of lands, and that they passed under the residuary bequest. *Ib.*

1. A husband devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his real estate at, in, or near E., and in or near W, out of the rents and profits during the life of J. T. W. to repair and insure, and to pay an annuity, and subject thereto in trust for J. T. W. and his assigns for life; and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders. The testator had both freeholds and leaseholds for a term of 1,000 years at E.; at W. he had leaseholds only for a term of 900 years:—Held, that the leaseholds at E. and also at W. passed under the devise, the exception of leaseholds in the gift of residue not showing a contrary intention. *Moase* v. *White*, 3 L. R., Ch. D., 763; 24 W. R. 1038.

III. IN CASE OF REVERSIONS.

2. A. devised a farm to B. for life, and after some legacies devises all other his personal estate lands, tenements, and hereditaments, not before devised, to C. The reversion of the farm passed by the general devise to C. *Kingsman* v. *Kingsman*, 2 Vern. 560.

3. A., seised in fee, and in possession of several real estates, and of the reversion in fee of the manor of S., subject to the estate tail of three persons who were living, devises all his estates generally to trustees in trust to be sold and to invest the money for benefit of younger children. This reversion falls in after the death of A.:—Held, that reversion passed by will, and was well vested in trustees for the benefit of the testator's younger children. *Atkyns* v. *Atkyns*, 3 Bro. P. C. 408; Cowp. 808.

4. Construction of devise, as applying to the body of the estate, or merely a reversion from the combination of it with other estates, and the general inaptitude of the expressions, etc. *Welby* v. *Welby*, 2 Ves. & B. 192.

5. J., having lands in A. and B., settles lands in A. to particular uses, remainder to his own right heirs; then devises all his lands in B., and elsewhere, not formerly settled; hereby the reversion of lands in A. passes. *Chester* v. *Chester*, Fitzg. 150; 3 P. W. 55; 2 Eq. Cas. Abr. 330. pl. 9.

6. A devise of lands, out of settlement, will pass as well those lands of which the testator was seised in fee at the time of making his will, as those which were comprised in a settlement made on his marriage, the particular uses of which were determined by his having no male issue. *Falkland (Viscount)* v. *Lytton*, 3 Bro. P. C. 24.

7. A., by virtue of several settlements, being tenant in tail after possibility of issue extinct, of some lands, remainder in fee, to trustees in trust for him and his heirs, and to some other lands being tenant for life, remainder to his first, etc., sons, remainder to trustees in fee, in trust for the right heirs of B., whose heir he was, and as to other lands, being tenant in tail, remainder to the right heirs of his father; and having no issue, by will devised to his nephew all his lands, tenements, and hereditaments, out of settlement:—Decreed, all the lands so settled to pass by this devise. *Strode* v. *Russel*, 2 Vern. 621; 3 Ch. Rep. 169.

Lands with a power of revocation will not pass by a devise of lands out of settlement. *Id.* 624.

8. Devise of lands not in settlement will pass the reversion of the settled lands. *Glover* v. *Spendlove*, 4 Bro. C. C. 337.

9. A devise "of all property which I am possessed of, which is not settled by either of my marriage settlements," will pass a reversion in fee, of an estate limited to the testator by his marriage settlement. *Jones* v. *Skinner*, 5 L. J., N. S., Ch., 87.

10. Testator was seised of one estate in fee-simple, and of another settled by marriage articles upon himself for life, remainder in tail to his first and other sons, etc., and, in default of such issue, to his own right heirs, provided that "in case he should die without issue, or intestate, the said lands" were to go to A. L., her heirs and assigns. By his will he devised all his "unsettled estate":—Held, that the reversion in fee in the settled estate passed. *Incorporated Society* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

11. A., seised in fee, devised Black-acre to B. for life, and devised to C. all his lands not before devised, to be sold. By this devise of all his lands, etc., the reversion of Black-acre was well devised to C. *Rooke* v. *Rooke*, 2 Vern. 461; Pre. Ch. 602; 1 Freem. 219. And see *Taaffe* v. *Ferrall*, 10 Ir. Ch. R. 188.

12. A testator, entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate or of whatsoever kind, to his wife for life; and, at her decease, he gave all the property then left by him, and of which she was to have the income for her life, to his children; and, at his wife's death or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same to the maintenance of his children until the youngest should

attain twenty-one:—Held, that the interest of the testator in remainder in the copyhold estate passed by his will. The tendency of modern decisions is to read the different clauses of the same will referentially to each other, unless they are clearly independent. *Ford* v. *Ford*, 6 Hare 486, 492.

1. Where a testator gives a real estate to A. for life, and then makes a residuary devise to A., B., and C. for their lives, there is no such inconsistency as to exclude the remainder in that real estate from the residuary devise. *Allston* v. *Chapple*, 6 Jur., N. S., 288.

2. Where a testator devised (by will dated in 1827) all the hereditaments to which he should be entitled at his death to trustees for sale:—Held, that a contingent interest in an estate in fee both by virtue of a shifting use, and also of an ultimate limitation in default of issue of his brother, did not pass by such devise. *Honywood* v. *Honywood*, 2 Y. & Coll. C. C. 471.

3. A contingent interest in real estate transmissible to heirs may be disposed of by a residuary devise made in general words, though the testator could not become entitled to such real estate, except on events depending on his own death without issue. *Ingilby* v. *Amcotts*, 2 Jur., N. S., 556; 25 L. J., Ch., 769.

4. Lands, parcel of the duchy of Cornwall and governed by the custom of that duchy, the tenure of which was originally a holding or convention from seven years to seven years, which ultimately grew into a holding to the tenant and his heirs and assigns, subject to the payment of a fixed fine every seven years under penalty of forfeiture, no surrender to the uses of a will being required.—Held, to pass by a general devise made previously to the 55 Geo. 3, c. 192; and the circumstances of such general devise being followed by a devise of all testator's duchy lands to one for life:—Held, not to prevent its passing the revision. *Ustieke* v. *Peters*, 1 Kay & J. 437; 4 Jur., N. S., 1271.

5. A., at the time of making his will, was seised in fee of the manor of G., and was tenant for life, under his father's will, of the mansion-house of C. and the manor of W., with an ultimate reversion in fee after the determination of life estates and estates tail. By his will he devised the mansion-house of C. and the manors of G. and W. to C. for life, with remainders over. The limitations of the will corresponded in a great measure to those of the father's will. The will gave to the tenants for life, several of whom were tenants for life under the father's will, powers of jointuring, to be capable of being exercised as they should come into possession of the estates by virtue of the limitations in the testator's will:—Held (affirming 21 Beav. 447; 2 Jur., N. S., 456), that it was not the intention of the testator to dispose only of his reversion in the mansion-house of C. and manor of W., but to deal with the present interest in them; and that C., who had become absolutely entitled to those properties under the will of the testator's father, was put to his election. *Watson* v. *Clifton*, 3 L. J., N. S., 74; 26 L. J., Ch., 213.

Although the inaptitude of some of the limitations in a devise to a reversion will not prevent a reversion from passing, it may furnish a sufficient ground for holding that something more than a reversion was intended to pass. *Ib.*

Where a testator devises property in which he has a devisable, but only partial, interest, it is a question of construction whether he has shown an intention to dispose of more than the devisable interest that he has, and an express declaration of such intention is not necessary in order to raise a case of election. *Ib.*

Reversion Purchased after Devise of Lease.] See XXXIX. IV. *ante*.

XLII. Lapse and Interests undisposed of.

See also XL. and XLI. *ante*—LVIII. I. *post*—POWER, VI.—SETTLEMENT, X. XV.—TRUSTS, VII.—TERMS, I. 2.

I. *Lapse*, 7882.
II. *Acceleration of Remainders*, 7894.
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V. *Resulting Trust under Trusts for Conversion.* See CONVERSION, II.
VI. *In Case of Charitable Gifts.* See TRUSTS, VII. III. *and Cross References there.*
VII. *Legacy to Executors Virtute Officii and Title of Executors to Residue.* See EXECUTOR AND ADMINISTRATOR, VIII.
VIII. *Right to Interim Rents and Profits.* See LII. *post.*
IX. *Secret or Parol Trusts.* See XLVI. *post.*
X. *Failure of Prior Gift by Lapse. Effect on Executory Gift over.* See VESTED, CONTINGENT, AND FUTURE INTERESTS XIV. II.

I. LAPSE.

1. *In General*, 7882.
2. *Express Declaration against Lapse*, 7884.
3. *Effect of Wills Act*, 7884.
4. *Gift to A. or his Heirs*, 7886.
5. *Gift to A. or his Heir*, 7887.
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7. *Gift to A. and his Heirs or Heirs of his Body*, 7887.
8. *Gift to Joint Tenants*, 7888.
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12. *Gift to Creditor*, 7892.
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1. In General.

6. By the law of Scotland, as well as of

England, a legacy lapses by the death of the legatee in the testator's life. *Rose* v. *Rose*, 17 Ves. 351.

1. One devises to his sister 350*l.* on condition that, at or before her death, she gives 200*l.* thereof to her children. The sister dies in the life of the testator. The whole legacy is lapsed. *Birkhead* v. *Coward*, 2 Vern. 116.

2. Testator gave 1,000*l.* to D.; but if D. should not be alive, and there be certain intelligence thereof, the testator willed that the same should be divided between A. and B. D. appeared to have been alive at the time of the will, but died in the lifetime of the testator. A. and B. are entitled to the 1,000*l.* *Parry* v. *Boodle*, 1 Cox 183.

3. No difference between a lapse and what is not disposed of, except for construing intention. *Bennet* v. *Batchelor*, 1 Ves. J. 67; 3 Bro. C. C. 28.

4. A testator authorised his trustees to apply any sum not exceeding 600*l.* in the purchase of church preferment for D. D. died before any sum had been so applied:—Held, that the gift wholly failed. *Cowper* v. *Mantell*, 22 Beav. 231; 2 Jur., N. S., 745.

5. Legacy to a person, dead in the lifetime of the testator, lapsed, although the words are, to M., his executors, administrators, and assigns; and parol evidence inadmissible that the testator knew at the time of making the will that the legatee was dead. *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

6. If a testator bequeaths a legacy to A. so long as A. shall remain unmarried, and A. marries in the testator's lifetime, the legacy as regards A. is in the nature of a lapsed legacy. *Andrew* v. *Andrew*, 1 Colly. 690.

7. A testator, after bequeathing a sum of long annuities to his wife for life, gave the capital after the death to A., if he shall be living at her decease, and if not to A.'s son. A. outlives the wife, but both he and the wife die in the testator's lifetime:—Held, that the legacy to A. lapsed, and that the gift to his son did not take effect. *Williams* v. *Jones*, 1 Russ. 517.

8. A testator and two of the legatees in his will perished in a ship which was supposed to have foundered. There being no evidence of survivorship:—Held, that the bequest failed. *Barnett* v. *Tugwell*, 31 Beav. 232.

9. Testator bequeathed a bust, after his wife's death, to "J., now Duke of B.," on condition that he caused it to be placed and remain in W. Abbey, and at the time of the delivery of it to him settle it so as to be held as an heirloom by the persons who under the limitations to which the abbey should be subject should then be entitled to the possession thereof, with a gift over in case J. should neglect to do so for twelve months after request by the trustees. J., Duke of B., had died in 1839. F. was Duke of B. at the time of the testator's will and death, and was owner in fee of W. Abbey. F. died during the lifetime of the tenant for life, and consequently never received the bust. The present Duke of B. was willing to allow F.'s executors to place the bust in the abbey:—Held, that the condition could not be performed by the duke's executors, and that the bequest fell into the residue of the testator's personalty. *Patching* v. *Barnett*, 51 L. J., Ch., 74; 45 L. T. 292. Reversing 43 L. T. 50; 28 W. R. 886.

10. A testatrix, after bequeathing diamonds and china to L., Baron L., declared that she made "the bequest to Lord L. as head of the existing family," and so far as she lawfully could directed that the diamonds and china should be "deemed heirlooms in the family of L., and be held and enjoyed by the person for the time being bearing the title of Baron L." She then made a further bequest to "the said Baron L." L., Baron L., died in the lifetime of the testatrix, being succeeded in the title by E.:—Held, that, although the first bequest was not executory, L., if he had survived the testatrix, would only have taken a life interest in the diamonds and china, with remainder to the person who should succeed him, and that consequently E. was entitled to have the chattels delivered to him, but without prejudice to the question whether he was entitled for life or absolutely. *Montagu* v. *Inchiquin*, (*Lord*), 23 W. R. 592; 32 L. T., N. S., 427.

Held, also, that the second bequest was to L., and lapsed by his death in the lifetime of the testatrix. *Ib.*

11. Devise of 400*l.* to be laid out in finishing a house. Testator lives to lay out as much himself, but leaves the house unfinished. The 400*l.* shall not be laid out. *Husbands* v. *Husbands*, 1 Vern. 95; 2 Ch. Ca. 127.

12. Testator gave his sister M. and his brother W. the interest of the residue equally; at the death of M. one-half of the principal to her children, her husband by no means to have any part of it, but to be entirely for the children; if none, to W.'s children; and after the death of W. and his wife the other half to his children; and he excluded his eldest brother from any benefit. M.'s life interest is not to her separate use; the interest of the other moiety during the lives of W. and his wife would have vested in W., and therefore lapsed by his death in the lifetime of the testator. *Brown* v. *Clark*, 3 Ves. 166.

13. By marriage articles the father of the lady covenanted that if she should survive him, or die before him leaving any child or children, he would by will give and devise or otherwise well and effectually settle and assure to trustees a "child's share" in his real and personal estate upon trust for his daughter for life, with remainder to the children of the marriage, the shares of sons to vest at twenty-one, with remainders over. One child only of the marriage, a son, attained twenty-one, and he died a bachelor in the lifetime of the covenantor:—Held, that the covenantor was not bound to provide by his will against a lapse, and that the representatives of the deceased child took no interest under the covenant. *Re Brookman*, 39 L. J., Ch., 138; 5 L. R., Ch., 182; 22 L. T. N. S., 891.

14. A testator, after giving specific legacies to his "brother D., his sister M., the widow of his late brother J. C., and the eight children of D. J.," gave the residue of his estate upon trust for the "said D. M. and J. C. and the eight children of the said D. J. in equal shares as tenants in common":—Held, that the words "the widow of" could not be inserted before J. C. in the gift of the residue, although the testator had noticed the fact of J. C.'s death

in the preceding bequest. *Clarke* v. *Clemmans*, 36 L. J., Ch., 171; 15 W. R. 250.

Held, also, that in the division of the residue there was no intestacy as to J. C.'s share. *Ib.*

Where a testator names several objects of bounty, who are clearly intended to take an entire fund between them, but one of whom is incapable, and known by the testator to be so at the time of making his will, those of the donees who are capable will take all. *Ib.*

2. Express Declaration against Lapse.

1. To prevent the lapse of a legacy a will ought to be specifically penned. *Sibthorp* v. *Moxom*, 3 Atk. 582. S. P. *Elliot* v. *Davenport*, 1 P. W. 86; 2 Vern. 521.

2. A testator has an undoubted right and power to prevent a legacy from lapsing, but to be effectual it must be exercised by express terms. *Bone* v. *Cook*, M'Clel. 177; 13 Price 333.

3. A. gave several legacies, and declared that if any of the persons should die before they became due, they should not be deemed lapsed legacies; and then said "to B., the wife of R., and to her executors or administrators, I give 50*l.*" B. died in testator's lifetime, and her husband administered:—Held, not a lapsed legacy, but shall go to the husband. *Sibley* v. *Cook*, 3 Atk. 572.

If a man devises his real estate to S. and his heirs, signifying his intention, that if S. die before him, it should not lapse, the heir is not excluded, unless the testator nominates another devisee. *Id.* 573.

4. By will a testator gave a legacy "equally between my brothers and sisters now living;" and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date he bequeathed another legacy, "between my brothers and sisters, in like manner as I have directed by my will":—Held, that the class mentioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class was to take, and not to the class itself; and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy. *Re Wilder*, 27 Beav. 118.

5. A father gave property to trustees for sale and investment, and directed that the proceeds should constitute a general trust fund; and he directed that his trustees should appropriate one-sixth of this fund as a maintenance fund for his son J., which on his death was to fall into and again become part of the general trust fund, and that subject thereto the fund should be held upon trust as to one moiety for his wife for life, and upon her death upon the trusts and subject to the provisions contained relative to the other moiety, and as to the other moiety as to three fifths for his daughters, E., C., and S., each to take one fifth part, and as to the remaining two fifth parts for his son A., provided that if any of his daughters should die in his lifetime, without leaving issue living at the death of the testator, the shares in the general trust fund for each daughter so dying should not lapse, but should sink into and form part of the general trust fund and maintenance fund in the same manner as if the same share had never been so provided, and the name of the daughter had accordingly been omitted in the gift and disposition and trusts of the general trust fund. One of the daughters died in the lifetime of the testator:—Held, that the one fifth was undisposed of by the will. *Smith* v. *Stone*, 25 L. T., N. S., 893.

6. A testator bequeathed his residue to B. and six others "and their respective executors, administrators and assigns, to whom I bequeath the same accordingly, and I declare that such shares shall be vested interests in each of my residuary legatees immediately upon the execution hereof":—Held, that on B.'s death before the testator died her share lapsed, and did not go to her personal representatives. *Browne* v. *Hope*, 41 L. J., Ch., 475; 14 L. R., Eq., 343; 20 W. R. 667; 27 L. T., N. S., 688. And see *Re Featherstone's Trusts*, 22 L. R., Ch. D., 111; 47 L. T. 538; 31 W. R. 89; 52 L. J., Ch., 75.

7. Gift to a class. Effect of express declaration against lapse. See *Aspinall* v. *Duckworth*, 35 Beav. 307.

See also III. 2 (*a*) *infra.*

3. Effect of Wills Act.

8. A testator, by a will made since the Wills Act, 7 Will. 4 and 1 Vict., c. 26, gave to his son a residuary share of his estate. The son died after the Act came into operation, and before the date of the will, leaving children:—Held, that under sect. 33 of the Wills Act the gift took effect, although, according to the law prior to the statute, there would have been no actual devise or bequest. *Mower* v. *Orr*, 7 Hare 473; 18 L. J., N. S., Ch., 50, 361; 12 Jur. 997. And see *Ward* v. *Reynolds*, 5 Romilly's Notes of Cases, 1.

9. A bequest to a child of a testator, which child is dead leaving issue at the time of making the will, is valid under the 7 Will. 4 and 1 Vict., c. 26. *Barkworth* v. *Young*, 4 Drew. 1; 3 Jur., N. S., 34.

10. J. W., a devisee, died in his father's (the testator's) lifetime, and before the date of the will, leaving an only son, who was his heir-at-law:—Held, that upon the construction of stat. 7 Will. 4 and 1 Vict., c. 26, s. 33, the estate devised to J. W. descended to his son. *Wisden* v. *Wisden*, 18 Jur. 1090; 2 Sm. & G. 396; 2 W. R. 616.

11. The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. *Re More's Trust*, 10 Hare 178.

12. The testator, by a will made before the Wills Act, 7 Will. 4 and 1 Vict., c. 26, came into operation, bequeathed a share of his residuary estate to one of his sons, who was also thereby made one of the devisees in trust and executors of his estate; the son died after the Wills Act came into operation, leaving issue, and after his death the testator made a codicil to his will altering a bequest to another child, but in other respects confirming his will:—Held, that the gift to the son did not lapse,

but that the same, so far as it was real estate, descended to the heir-at-law of the son, and so far as it was personal to his executrix under a will made before the Wills Act came into operation; and that, under the 34th section of the Wills Act, the effect of the re-publication of the will by the codicil was the same as if the testator had at the date of the codicil made a will in the words of the will so re-published. *Winter* v. *Winter*, 5 Hare 306.

1. The 33rd section of the stat. 1 Vict., c. 26, which provides that where a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator, leaving issue, and any such issue shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of the testator, does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator. *Johnson* v. *Johnson*, 3 Hare 157; 13 L. J., N. S., Ch., 79; 8 Jur. 77.

2. Under sect 33 of the 7 Will. 4 and 1 Vict., c. 26, which excludes from lapse a bequest to the issue of a testator, "where the legatee shall die in the lifetime of the testator, leaving issue, and any such issue shall be living at the time of the death of the testator," it is not necessary to prevent a lapse that the issue living at the time of the death of the testator should have been living when the legatee died. *Parker, In goods of*, 31 L. J., Prob., 8; 6 Jur., N. S., 354.

The legacy in such case must be considered the property of the deceased legatee, and passes to his representatives and not to the issue. *Ib.*

A. bequeathed all her personal estate to her daughter B., who died a widow and intestate in the lifetime of the testatrix, leaving a daughter C. C. also died in the lifetime of the testatrix, intestate, leaving a husband and a daughter, D., her surviving. Upon the death of the testatrix, in the lifetime of D., C.'s husband took out the administration to his wife, and applied for administration with the will of the testatrix annexed, as representative of B., his wife's mother:—Held, that as D., a grandchild of the legatee, was living at the time of the death of the testatrix, the legacy had not lapsed, and that C.'s husband was entitled to the grant as the representative of the legatee. *Ib.*

Held, that although "the issue" left by the legatee was not the issue living at the time of the death of the testatrix, there was issue of the legatee "living at the time of the death of the testatrix;" so that the legacy did not lapse, and that it was payable to the person who would have been entitled thereto had the legatee died immediately after the testatrix. S. C. 1 S. & T. 523.

3. M. by her will gave to her daughter, a married woman, a legacy of 1,000*l.* and half her residue, which were settled to the daughter's separate use. The daughter died in the lifetime of the testatrix leaving her husband her surviving, who died before the testatrix:—Held, that the fund thus bequeathed passed by the daughter's will; but, *quære*, whether, in construing the 33rd section of the Wills Act, the gift is to be considered as taking effect immediately before the actual death of the legatee, or as taking effect immediately after the actual death of the testator. The daughter's will appointed two specific sums of money, and all other her "moneys or securities for money" on a certain trust, and gave all personal estate not thereinbefore disposed of to S. and W.:—Held, that the legacies given by M.'s will passed to S. and W. under the general residuary gift. *Re Mason's Will*, 6 N. R. 193.

4. The fiction introduced by sect. 33 of the Wills Act is not to be extended further than is necessary to prevent a lapse. *Pearce* v. *Graham*, 1 N. R. 507; 11 W. R. 415; 32 L. J., Ch., 359.

The fiction, by which the 7 Will. 4 and 1 Vict., c. 26, prolongs the life of a legatee who dies before, but leaves issue surviving, a testator, does not prolong the coverture for any other purpose than to prevent a lapse of the legacy. S. C. 32 L. J., Ch., 359; 11 W. R. 415; 8 L. T., N. S., 378; 9 Jur., N. S., 568.

Accordingly, where the husband of such a legatee had covenanted to settle property which should come to or be vested in her during the coverture:—Held, that the legacy was not within the covenant. *Ib.*

5. A testator gave his residuary personal estate to his children in equal shares, and directed that the share of his daughter Mrs. B., if she survived him, should be subject to the trusts of her marriage settlement and paid to the trustees thereof. Mrs. B. died in the testator's lifetime, but left children surviving him. Her husband having taken out administration to her he claimed her share:—Held, that under sect. 33 of the Wills Act (1 Vict, c. 26) Mrs. B. must for all the purposes of the will be taken to have survived the testator, and that the share must be paid to the trustees of the marriage settlement and not to the administrator. *Re Hone's Trusts*, 22 L. R., Ch. D., 663; 52 L. J., Ch., 295; 48 L. T. 266; 31 W. R. 379.

6. A father by his will devised a freehold house to a son, and his residuary real estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death, and having by his will devised all his real estate to his father:—Held, that as, under the 33rd section of the Wills Act, the son must be deemed to have survived the father, the property passed to the son absolutely under his father's will, and became subject to testamentary disposition by the son. But that as by the will of the son the property was devised to his father, the devise by the son failed, and his heir-at-law was entitled to the property. *Re Hensler, Jones* v. *Hensler*, 19 L. R., Ch. D., 612; 51 L. J., Ch., 303; 45 L. T. 672; 30 W. R. 482.

7. The 33rd section of the 7 Will. 4 and 1 Vict., c. 26, does not apply where the devise or bequest is to the testator's "children," as a class. *Browne* v. *Hammond*, Johns. 210.

A devise or bequest over, in terms made

dependent upon the marriage of the donee of the preceding estate, will be extended by implication, so as to take effect on the determination of that estate by death. *Ib.*

1. Testator gave real estate to his wife for life, and after her death on trust to sell twelve months after her death, the proceeds to go "equally between all his children; but if any of them should be then deceased, leaving lawful issue surviving them, then the respective share or shares of such deceased child or children should be given to such issue, if more than one, in equal proportions." The widow died, leaving the testator; one of the children of the testator survived the widow and died, living the testator, leaving a husband and children:—Held, that her share went to the surviving children of the testator, and not to her issue, nor to her personal representatives under the Wills Act. *Olney* v. *Bates*, 3 Drew. 319; 3 W. R. 606.

The 33rd section of the Wills Act applies only to cases of strict lapse, not to the case of gifts to a class. *Ib.*

2. Devise and bequest to all the testator's children living at his decease (without naming them). A subsequent codicil confirmed the gift, as mentioned in his will, "to his surviving children" (naming them all). One died in the testator's lifetime, leaving children who survived the testator:—Held, the survivorship had relation to the testator's death, and not to the date of the will, and that the representatives of the deceased child took nothing under the 1 Vict., c. 26, s. 33. *Fullford* v. *Fullford*, 16 Beav. 565; 1 W. R. 315.

3. Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son John, by reason of his becoming entitled to a piece of property by a different title, should receive 30*l.* "less than each of my other children":—Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the Wills Act 1837. *Re Stansfield, Stansfield* v. *Stansfield*, 15 L. R., Ch. D., 84; 49 L. J., Ch., 750; 43 L. T. 310; 29 W. R. 72.

4. A testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter (the plaintiff's wife), her heirs and assigns, for her separate use. The daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress-at-law. The plaintiff claimed to be entitled for his life as tenant by the curtesy:—Held, upon demurrer, that the plaintiff was entitled for his life to the property devised by the testator as tenant by the curtesy. *Eager* v. *Furnivall*, 17 L. R., Ch. D., 115; 50 L. J., Ch., 537; 44 L. T. 464; 29 W. R. 649.

In Case of Powers of Appointment.] See POWER, VI. 11. 3.

4. Gift to A. or his Heirs.

5. A testator gave to the children of his sister, the late E. W., whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator:—Held, that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. *Gittings* v. *M'Dermott*, 2 Myl. & K. 69; 2 L. J., N. S., Ch., 212.

6. A testator gave the sum of 500*l.* to each of three persons, and gave his further surplus to be equally divided between the same three persons or their legal heirs and successors. One of the three died in the testator's lifetime:—Held, that the testator was intestate as to the legacy of 500*l.* and as to the share of surplus expressed to be given to that one who died. *Gibson* v. *Hale*, 17 Sim. 129; 14 Jur. 27.

7. A testatrix gave the whole of her residuary estate to her sister P. for life, and on the decease of P. gave the legacy to her brother S. "or his heirs." S. died in the lifetime of the testatrix:—Held, that the legacy did not lapse, but went by substitution to the heirs of S. *Re Porter*, 4 Kay & J. 188; 4 Jur., N. S., 20; 27 L. J., Ch., 196; 6 W. R. 187.

On a gift to "S. or his heirs," the question of lapse or no lapse, which arises in the event of the decease of S. in the lifetime of the testatrix, is to be answered by reference to the question, "substitution or no substitution." *Ib.*

If the gift is substitutionary, then there is no lapse. If there is no substitution, then there will be a lapse in the event of S. predeceasing the testator. *Ib.*

8. Testator, by a will made since the statute 1 Vict., c. 26, after directing payment of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M., N., O., and P., or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin; M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other; M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and;" thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning

"other." *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

5 Gift to A. or his Heir.

1. Legacy to A. of 600*l.*, to be paid at end of one year after testator's death, or to her respective heir:—Held, lapsed by death of A. in lifetime of testator. *Tidwell* v. *Ariel*, 3 Madd. 403.

6. Gift to A. or his Executors or Personal Representatives.

2. A legacy given out of the personal estate of the testator, in trust, to pay the interest to a legatee for her life, and after her death to pay the principal absolutely in certain shares to and amongst several legatees, and in case of the death of such legatees (naming them) or any or either of them before such their respective legacies should or might become payable, then the legacy, or part, of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate:—Held, as to one of such shares to have lapsed, notwithstanding the intervening life estate, on the death of one of the legatees in the lifetime of the testator, and that the mention of the executors and administrators in the clause of the will did not amount to a substitution, so as to vest any interest in them and prevent the lapse. *Bone* v. *Cook*, 13 Price 332; M'Clel. 168.

A legacy bequeathed out of personal estate, also, after the death of a legatee, of the interest and dividends thereof for life, in precisely the same words, except that there was this further provision introduced after the bequest to the several legatees: "And in case of the death of any of the said legatees before their legacies should become payable, then the said testatrix willed and directed that the legacy of each of them so dying should go to be paid amongst his, her, or their children, share and share alike, and in case of such decease of any of the said legatees without leaving a child or children, the legacy of him or her so dying should go to her or his executors or administrators, as part of his or her personal estate":—Held, also, to be lapsed as to the share of a legatee dying unmarried in the lifetime of the testatrix, and of the tenant for life, and consequently that the executors and administrators of the legatee so dying were not entitled to it. Such a legacy so lapsing lets in the next of kin of the testator. *Ib.*

3. Legacy to a person, dead in the lifetime of the testator, lapsed, although the words are, to M., his executors, administrators, and assigns; and parol evidence inadmissible that the testator knew, at the time of making the will, that the legatee was dead. *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

4. Gift of residue to the widow for life, and afterwards to fifteen designated persons, or their executors, administrators, or assigns, and to be absolutely vested on the testator's death, and to be payable at twenty-one, provided the widow had died:—Held, that the shares of two of the fifteen, who predeceased the testator, lapsed. *Leach* v. *Leach*, 35 Beav. 185.

5. Testator gave the residue of his estate to his executrix, or her heirs, executors, administrators, or assigns. She died in his lifetime:—Held, it was given her as executrix; and she dying before him, he is dead intestate as to the residue. *Stone* v. *Evans*, 2 Atk. 86.

6. Bequest of the residue to A. for life, and after her death legacies were given to B., or to her proper representative, in case she should not be living at the decease of A., and four other persons, or their representatives or representative. One of the four died in the life of A., the former lapsed, and the last vested. *Corbyn* v. *French*, 4 Ves. 419.

7. A testator bequeathed a fund to his nephew A. and the children of his late sister B., as tenants in common; but in case any died before the testator, leaving issue, his share was not to lapse, but to go to his executors as part of his personal estate. Three of the children of B. died before the testator, and left no issue:—Held, that there was no lapse, but that the whole went to the other members of the class. *Aspinall* v. *Duckworth*, 35 Beav. 307.

8. A testator gave a legacy to each of his brothers and his sisters, "or to their legal representatives," to be paid to them two years after his death, and legacies to his nephews. He then gave the residue of his property to his widow absolutely, except 4,100*l.*, which she was only to take for life; and after her death it was to be divided among his relations before mentioned. One of the sisters, to whom a legacy was given, died in the interval between the date of the will and the death of the testator; and after the death of the widow a petition was presented for determining as to who was entitled to the share of such deceased sister in the sum then to be divided:—Held, first, that the share of the deceased sister in the 4,100*l.* had, notwithstanding the words "or to their legal representatives" attached to the former gift, lapsed. *Thompson* v. *Whitelock*, 5 Jur., N. S., 991; 28 L. J., Ch., 793; 4 De G. 490; 7 W. R. 625.

Held, secondly, that as the sum of 4,100*l.* was given not as a part of his residue, but as an exception out of it, the personal representatives of his widow, and not his next of kin, were entitled to the share of his deceased sister, which had lapsed. *Ib.*

9. A testator directed real estate to be sold, the proceeds to go in equal moieties between A. and B. as tenants in common, and their respective heirs or representatives:—Held, that these were words of limitation, and that the share of A., who predeceased the testator, lapsed. *Appleton* v. *Rowley*, 38 L. J., Ch., 689; 8 L. R., Eq., 139; 20 L. T., N. S., 600.

7. Gift to A. and his Heirs or Heirs of his Body.

10. Lands are devised to A. and the heirs of his body. A. dies in the lifetime of the testator:—Held, that the devise thereby became void, and that the only son of A. could derive no title under it. *Wynn* v. *Wynn*, 3 Bro. P. C. 95.

11. Devise to A. for life, remainder to B. for life, remainder to the right heirs of A., and A. dies in the testator's lifetime. His right heirs

shall never take. *Goodright* v. *Wright*, 1 P. W. 397.

Devise to A. and his issue, remainder to B. and his issue, remainder to the heirs of A. A. dies without issue in the life of the testator; B. dies in the life of the testator, leaving issue, who is also the heir of A. The issue shall not take an estate tail as issue of B., nor the remainder in fee as heir of A. *Ib.*

1. Devise of lands to A. and the heirs male of his body. A. dies in the life of the testator, leaving issue. The devise is void, and the issue cannot take. *Hutton* v. *Simpson*, 2 Vern. 722; Pre. Ch. 439; Gilb. Eq. Rep. 115, 120.

2. A. devises lands to her sister B. for life, remainder to trustees to preserve, etc., remainder to the heirs of the body of B., remainder to her other sister C. for life, with remainders to trustees to preserve, etc., remainder to the heirs of the body of C., remainders over. B. died in testatrix's lifetime; C. suffered a recovery, and then contracted to sell estate. On a bill by C. against the purchaser:—Held, that B. would have taken an estate tail in the premises if she had survived testatrix; and that having left an only daughter, C. could make no title, and therefore bill was dismissed. *Ambrose* v. *Hodgson*, 3 Bro. P. C. 416.

8. Gift to Joint Tenants.

3. A. devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executor to lay it out for their benefit. One of them died in the testator's lifetime. The whole decreed to the survivor, not to the executors, the testator not intending them any benefit. *Cock* v. *Burrish*, 1 Vern. 425.

4. Where testator devises four parts of his personal estate to B. and the children born of her body, and B. had no child at the date of the will, but had one child born afterwards, and B. died in testator's lifetime:—Held, that the legacy was not lapsed; for B. did not take an estate tail, but as a joint tenant with the child, and that the child took the whole by survivorship. *Buffar* v. *Bradford*, 2 Atk. 220.

5. One joint legatee being outlawed, a codicil revoked his share. The other takes the whole. *Alexander* v. *Alexander*, 2 Ves. 645.

6. Devise of residue to A. and B. Codicil revokes every legacy, thing, and part as to A. B. shall take the whole. *Humphrey* v. *Tayleur*, Ambl. 138; Dick. 161. And see *Dowsett* v. *Sweet*, Ambl. 175.

If an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. *Id.* 138.

7. If a man devises lands to A. and B. and their heirs, and A. dies in the life of the devisor, B. shall take the whole land. *Davis* v. *Kemp*, 1 Eq. Abr. 216.

8. Where there is a joint tenancy under a will, and one of the joint tenants witnesses the will, the others take the whole. *Young* v. *Davis*, 1 N. R. 419. S. C. *nom.* *Young* v. *Davies*, 9 Jur., N. S., 399; 32 L. J., Ch., 372; 8 L. T., N. S., 80; 2 Dr. & Sm. 167.

9. Gift to Tenants in Common.

9. Testator directed his residue to be divided amongst the children of L. D., to wit, I. D., E. D., and A. D.:—Held, that the gift was not made to the children as a class, but as individuals; and that one of them having died in the testator's lifetime, the share intended for that child was undisposed of. *Bain* v. *Lescher*, 11 Sim. 397.

10. Bequest of a moiety between two. One of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of. *Peat* v. *Chapman*, 1 Ves. 542.

11. One devises the surplus of his personal estate to four equally, and leaves J. S. executor in trust. One of the four dies in the life of the testator; his share, as so much of the testator's estate, undisposed of by the will, shall go according to the Statute of Distributions. *Bagwell* v. *Dry*, 1 P. W. 700.

12. A. by his will gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint tenants. But by a codicil he revoked his daughter M. from being one of his residuary legatees, and in lieu thereof gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong to the two other residuary legatees, as such. *Cheslyn* v. *Cresswell*, 3 Bro. P. C. 246. Affirming S. C. *nom.* *Cresswell* v. *Cheslyn*, 2 Eden 123.

13. Bequest of residuary estate to accumulate for ten years, and then to be distributed in seven equal shares unto seven persons, named in the will, and appointment of the same seven persons residuary legatees, creates a tenancy in common, and the share of one dying in the testator's lifetime belongs to the next of kin of the testator. *Norman* v. *Frazer*, 3 Hare 84; 7 Jur. 763.

14. A testator ordered that his real and personal property should be divided into as many equal parts as he should have children living at the date of his decease, and that one such part should be given to or held for each of such children. Afterwards he made a codicil revoking and annulling every bequest and provision in his said will in favour of his daughter E.:—Held, that there was no class, and consequently that there was an intestacy as to the share of E., so that E. herself, who, with three other children, survived the testator, was entitled as one of the next of kin to take a fourth part or share of the property originally bequeathed to her. *Ramsay* v. *Shelmerdine*, 11 Jur., N. S., 903; 14 W. R. 46; 13 L. T., N. S., 393.

15. Gift of share to the children of my late cousins W. and J., share and share alike, at their respective ages of twenty-one. This is a tenancy in common among those then living, and one of them dying in the lifetime of the testator, that share is lapsed. *Martin* v. *Wilson*, 3 Bro. C. C. 324.

16. Bequest (charged upon land) to each and every the younger child or children of testator living at his decease, to be paid to sons when they shall severally and respectively attain the age of twenty-one, and to daughters at that age or marriage; some not to vest until the time aforesaid, but interest on the shares to be paid from the testator's death, provided that, in the event of any of the sons becoming

an eldest son, his share should be divided amongst his brothers and sisters:—Held, that the shares of two daughters who died under the age of twenty-one and unmarried did not survive to the others, but merged for the benefit of the inheritance, the gift not being to the younger children as a class. *Carroll* v. *Barry*, 15 W. R. 212.

1. A testator gave a sum of money to be divided between the relations of his late wife, in such shares as if she had died a spinster and intestate. The wife had sixteen next of kin at her death, five of whom died in the lifetime of the testator:—Held, that those living at the death of the testator each took a share, and that five shares went to the residuary legatees. *Re Ham's Will*, 2 Sim., N. S., 106; 21 L. J., N. S., Ch., 217; 15 Jur. 1121.

2. A testator by his will gave several pecuniary legacies, including one to his son E., and devised his freehold, copyhold, and leasehold estates to his sons T. and A. as tenants in common, and he appointed them as his residuary legatees and executors. T. died, and by a codicil the testator appointed E. executor in the room of T., and revoked the legacies given to A. and E. by the will, and he appointed them "residuary legatees," and he declared that the freehold and leasehold property comprised in his marriage settlement, and which he had power to appoint, should go to the residuary legatees, his sons A and E.:—Held, that the moiety of the real estate devised by the will to T. had lapsed and descended on A. as the testator's heir-at-law, he taking also the other moiety as devisee under the will. *Windus* v. *Windus*, 6 De G. M. & G. 549; 2 Jur., N. S., 1101; 26 L. J., Ch., 185; 21 Beav. 373; 2 Jur., N. S., 269.

3. A testator bequeathed several sums of money to several pecuniary legatees by name, including one of 500*l.* to his sister, and the residue of his personal estate "unto all the before-mentioned pecuniary legatees (with certain exceptions), to be divided among them in proportion to their respective pecuniary legacies:—Held, that the residue was not given to the pecuniary legatees as a class; and that the testator's sister having died in his lifetime, the surviving pecuniary legatees were not entitled to her share. *Re Gibson*, 2 John. & H. 656; 31 L. J., Ch., 231.

By a codicil the testator, after reciting his sister's death, bequeathed 500*l.* to a trustee for her children, but was silent as to the residue:—Held, that the children were not entitled to their mother's share of the residue, and that there was an intestacy as to that share. *Ib.*

4. A. devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executors to lay out for their benefit. One of them died in the testator's lifetime. The whole decreed to the survivor, not to the executors, the testator not intending them any benefit. *Cock* v. *Burrish*, 1 Vern. 425.

5. A. by will devises lands to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail, with remainders over. The daughter died during the mother's life:—Decreed, this to be a tenancy in common between the mother and daughter; and that during the mother's life the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy *pur autre vie*, and should go to the administrator of the daughter. *Phillips* v. *Phillips*, 2 Vern. 430; Pre. Ch. 167; 1 P. W. 34.

6. Gift to A. for life, and afterwards to seven named persons equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless A. (one of them) should die, leaving children; in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, A. being the survivor of them:—Held, first, that the seven took equally; secondly, that the children of A. took no more than one-seventh; and, thirdly, that the share of one of the seven, who predeceased the testatrix, was undisposed of. *Cambridge* v. *Rous*, 25 Beav. 409.

7. Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son, John, by reason of his becoming entitled to a piece of property by a different title, should receive 30*l.* "less than each of my other children":—Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the Wills Act 1837. *Re Stansfield*, *Stansfield* v. *Stansfield*, 15 L. R., Ch. D., 84; 49 L. J., Ch., 750; 43 L. T. 310; 29 W. R. 72.

10. Gift to a Class.

8. Gift to B. for life, with remainder to the children of B. living at his decease equally between them. B. died in the lifetime of the testatrix, leaving three children, one of whom afterwards died in the lifetime of the testatrix:—Held, that there was no lapse of the third part of the legacy by the death of one of the children of B. after him and before the testatrix, and that the two surviving children were entitled to the whole legacy. *Lee* v. *Pain*, 4 Hare 250; 14 L. J., N. S., 346; 9 Jur. 247. And see *id.* 24.

The testatrix bequeathed 1,500*l.* to Mrs. B. for life for her separate use, with remainder to her husband for his life, and with remainder to all and every the child and children of Mrs. B. living at her decease in equal shares; afterwards, by a codicil, the testatrix revoked the said legacy of 1,500*l.* given by her will to Mrs. B., her husband and children, and instead thereof gave 1,000*l.* to each of them upon similar trusts for the said Mrs. B., her husband and children, as were contained in her will as to the 1,500*l.* The legatee, Mrs. B., died in the lifetime of the testatrix, leaving her hus-

band and seven children. One child afterwards died in the lifetime of the testatrix:—Held, that the husband and six children who survived the testatrix were entitled to 8,000*l.* to be settled for the benefit of the husband, with remainder to the children. As to the legacy in respect of any child of Mrs. B. who (if Mrs. B. had herself survived the testatrix) should have survived the testatrix, and died in the lifetime of Mrs. B., *quære*. *Id.*, 4 Hare 225.

1. Bequest to A. B. for life, and after his death to "all the present born children of A. B. equally." One of them died between the date of the will and the death of the testatrix:—Held, that his share did not lapse, but that the bequest being to a class, the whole was divisible amongst those who survived the testatrix. *Leigh* v. *Leigh*, 17 Beav. 605; 18 Jur. 115; 23 L. J., Ch., 287; 2 W. R. 205.

2. A testator bequeathed a fund to his nephew A. and the children of his late sister B., as tenants in common; but in case any died before the testator leaving issue, his share was not to lapse, but go to his executors as part of his personal estate. Three of the children of B. died before the testator, and left no issue:—Held, that there was no lapse, but that the whole went to the other members of the class. *Aspinall* v. *Duckworth*, 35 Beav. 307.

3. Under a devise of freehold property, among all such children of the testator as should be living at his death:—Held, that the testator having by a codicil revoked the devise as to one child, that revoked share went among all the other children, and did not descend to the heir. *Shaw* v. *M'Mahon*, 2 Con. & L. 528; 4 Dr. & War. 131.

4. A testator gave after the death of A., one of his children, to such of his other children as should be living at the death of A.:—Held, this was a gift to a class, and that one of the children having died before the testator, the survivors took the whole. *Cruse* v. *Howell*, 4 Drew. 215; 6 W. R. 271.

5. Devise to five in fee, to be equally divided between them, "if more than one." One died in the testator's life:—Held, that there was no lapse, but that the four survivors took equally. *Sanders* v. *Ashford*, 28 Beav. 609.

6. Devise and bequest to all the testator's children living at his decease (without naming them). A subsequent codicil confirmed the gift, as mentioned in his will, "to his surviving children" (naming them all). One died in the testator's lifetime, leaving children who survived the testator:—Held, that the survivorship had relation to the testator's death, and not to the date of the will, and that the representatives of the deceased child took nothing under the 1 Vict., c. 26, s. 33. *Fullford* v. *Fullford*, 16 Beav. 565; 1 W. R. 315.

7. A testatrix, having a general power of appointment over a fund which was settled on her husband for life, by her will bequeathed legacies thereout; and the remainder or residue of the fund, share and share alike, to her sisters; and as to "any other" residue of moneys or property not specified and disposed of, she directed it to be given, share and share alike, to her then surviving sisters, who might be living when her will and the bequests therein might become available. One of the sisters died in the lifetime of the testatrix, who died before her husband:—Held, first, that the lapsed share of a deceased sister passed under the general residuary clause to the surviving sisters. *Hickson* v. *Wolfe*, 9 Ir. Ch. R. 144.

Held, secondly, that those sisters only who survived the husband took under the general residuary clause. *Ib.*

8. The wife of F. S. was the only child of a person who was entitled to certain shares in the N. canal, which, upon that person's death, were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was ever afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was a member of a committee which, by the company's Act of Parliament, was required to consist of proprietors of two or more shares. F. S. bequeathed "all my shares in the canal navigation," and all other his personal estate, to trustees, in trust for his wife for life; and after her death, if he should leave no issue (which happened), in trust to apply the same equally between all and every his brothers and sisters, their respective executors, administrators, and assigns, absolutely and for ever. The testator had no canal shares at all, unless those so transferred into the names of himself and his wife could be considered his. Two of his brothers and a sister, who were all living when he made his will, died in his lifetime:—Held, that the representatives of the brothers and sister who died in the testator's lifetime were not entitled to any share of his personal estate under his will, but that the whole vested in the brothers and sisters who survived him. *Shuttleworth* v. *Greaves*, 4 Myl. & C. 35; 8 L. J., N. S., Ch., 7; 2 Jur. 957.

9. Testator gave 300*l.* to A. if living, and if dead the 300*l.* to become part of the residue. The will contained a gift of the residue to B., C., D., and A. if living. A. was dead at the date of the will:—Held, that the gift to A. had not lapsed, but was contingent upon his being alive, so that the residuary legatees, and not the next of kin, took the share to which he would have been entitled. *Re Hornby*, 7 W. R. 729.

10. By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one. There were five children, of whom four attained twenty-one, and the fifth died an infant:—Held, that the whole fund vested in the four children who attained twenty-one. *Re Colley*, 1 L. R., Eq., 496; 14 W. R. 528.

11. A testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain or marry under that age, in equal shares as

tenants in common; and if there should be but one child, then the whole in trust for that one child. And he declared that the share to which each of his daughters, on her attaining twenty-one, or marrying under that age, should become entitled under the trusts aforesaid should be held by the trustees in trust for such daughter for her life, and afterwards for her children:—Held, that the children of a daughter who died in the lifetime of the testator did not take any interest. *Stewart* v. *Jones*, 3 De G. & J. 532.

1. An aunt gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A. and B., as tenants in common. Two nephews, who would otherwise have taken under the bequest, died before the testatrix, one before and the other after the will:—Held, that the gift was to a class, and not to designated persons, and therefore that there was no lapse, but the fund was divisible among those of the class who survived the testatrix. *Dimond* v. *Bostock*, 10 L. R., Ch., 358; 23 W. R. 554; 33 L. T., N. S., 217.

2. A father made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters. A daughter having died in the testator's lifetime leaving children who survived him:—Held, that the gift of the daughter's share did not fail, and that her children were entitled. *Re Speakman, Unsworth* v. *Speakman*, 4 L. R., Ch. D., 620; 46 L. J., Ch., 608; 25 W. R. 225; 35 L. T., N. S., 731.

3. In gifts to a class the true rule is that those members take the whole who are capable of taking, however the incapacity of the others may arise. *Coleman* v. *Jarrom*, 25 W. R. 137; 35 L. T., N. S., 614.

Where there was a devise to the children of the testator's late brother who should be living at his decease, or who should have died in his lifetime leaving issue living at his death as tenants in common:—Held, that the survivors took to the exclusion both of the issue of a child dying in the testator's lifetime and of the testator's heir-at-law. *Ib.*

4. When there is a gift to a class, the rule is that those members of the class who are at the testator's death capable of taking, take the whole, the gift being construed as showing an intention on the part of the testator that the class shall take so far as the law allows. *Re Coleman*, 4 L. R., Ch. D., 165; 46 L. J., Ch., 33.

Where a gift is to a class, either as joint tenants or as tenants in common, the shares of members becoming incapable of taking, for any reason, before the period of distribution, do not lapse, but are divisible among the rest of the class. *Ib.*

A testator devised five freehold houses to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime leaving issue living at my death, in equal shares." By a codicil, after reciting that some of the children of his late brother J. C. had lately died without issue, he revoked his previous devise, and devised one of the houses to A., and the remaining four in the same terms as the original devise. Four children of his late brother were living at the testator's death, and one other child died in his lifetime leaving children living at the testator's death:—Held, that the four children who survived the testator took the whole property. *Ib.*

Class Gift. What Amounts to.] See XXXII. 1. *ante*.

Gifts to Executors] See Executor and Administrator, VIII. iii.

11. Gift to a Class and Named Individuals.

5. Bequest of residue to the children of A., the children of B., to C. to the children of D., and to E, in equal shares. Revocation by codicil of the gifts to C. and to the children of A., with a declaration that they should not be residuary legatees:—Held, the gift of residue was to the residuary legatees as a class, notwithstanding that some of the individuals to take were named; and that the effect of the will and codicil, taken together, was to give all the residue to the legatees whose bequests were not revoked. *Clark* v. *Phillips*, 17 Jur. 886.

6. A testator bequeathed the residue of his property equally to all and every the children of R. B. and B. B. who should be living at his decease, and to ten other persons by name; and one of the latter died in the testator's lifetime:—Held, that the ten persons named were not members of a class, and that the share of the deceased legatee lapsed. *Clark* v. *Phillips* (17 Jur. 886), commented on. *Re Chaplin*, 33 L. J., Ch., 183.

7. Bequests to a brother for life, and at his death to be equally divided amongst his surviving children "and my niece R.":—Held, that this was not a gift to a class; and, R. having died in the life of the testator, that R.'s share lapsed. *Drakeford* v. *Drakeford*, 33 Beav. 43. And see *Aspinall* v. *Duckworth*, 35 Beav. 307.

8. A gift in a will "equally amongst all the children of R. W., the child of W. W. and L., his wife, and A. W., the widow of H. S. W., share and share alike," is not a gift to a class:—Held, therefore, that there was an intestacy as to a share of the child of W. W. and L., his wife, such child having predeceased the testator. *Re Allen, Wilson* v. *Atter*, 44 L. T. 240; 29 W. R. 480.

9. Where there was a gift of residue among such of the children of A. as are now alive, and fourteen named persons, and there were no children of A.:—Held, that there was no lapse, but the residue was divisible among the fourteen persons named. *Re Spiller, Spiller* v. *Madges* or *Madge*, 18 L. R., Ch. D., 614; 50 L. J., Ch., 750; 45 L. T. 41; 29 W. R. 782.

10. Testator devised, that in case of failure of issue descending from himself and his wife,

a trustee and his heirs should stand seised of freehold lands, for the use and benefit of B. W. and his children, share and share alike, at his disposal. B. W. died in testator's lifetime:—Held, that the children of B. W. took the entire interest in those lands as tenants in common. *Hayes* v. *Ward*, 2 Ridgw. P. C. 85.

1. A testator gave freeholds and leaseholds to trustees, upon trust to pay the income to C. for life, or at their discretion to invest it, with remainder to his children, and in default of children, on trust to sell and divide the produce in manner afterwards directed. He made similar gifts for the benefit of his other children and their issue, and directed the trustees to divide the produce in sixths, and apply one-sixth to the purchase of an annuity to C. C. died without children, and the trustees sold:—Held, that the one-sixth of the product of the sale was undisposed of, and went to the next of kin of the testator. *Walters* v. *Corpe*, 16 Jur. 764.

2. A testator having five daughters gave a legacy to one, and the residue to the remaining four (by name) "and their issue;" but he afterwards directed that any subsequent born daughters and their issue should be entitled to equal shares with the four daughters. One of the four died without issue in the life of the testator:—Held, that there was no intestacy, that the daughters took as a class, and that those who survived took absolutely. *Re Stanhope's Trusts*, 27 Beav. 201.

3. A testator by his will gave his residuary estate to trustees in trust for five of his children (naming them), and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject as to the share of any daughter, whether now living or a child hereafter to be born, to the trusts following. The testator had six children only—viz., the five named and one other—all of whom had attained twenty-one at the date of the will. Two of the five named died in the testator's lifetime without issue:—Held, that the gift was a gift to a class, and not to individuals. *Re Stanhope's Trusts* (27 Beav. 201) followed. *Re Jackson, Shiers* v. *Ashworth*, 32 W. R. 194.

4. Testator gave to trustees all his estates upon trust to sell, and directed that the proceeds of sale should be part of his personal estate and be subject to the dispositions concerning his residuary estate, and after giving legacies—one to R. A., and another to the children of J. D.—he gave the residue unto and equally amongst all the children of his brother-in-law, J. D., and the said R. A., and directed that the same should be vested legacies at the time of his decease. R. A. died before the testator, leaving children living at the testator's death. Three children of J. D. were living at the testator's death:—Held, that R. A. would, if living, have taken a share of the residue and not his children, and that, as he died before the testator, the share which he would have taken belonged to the three surviving residuary legatees, not as a class with R. A., but under the special term of this will. *Re Featherstone's Trusts*, 22 L. R., Ch. D., 111; 52 L. J., Ch., 75; 47 L. T. 538; 31 W. R. 89.

12[1] Gift to Creditor.

5. Testator by his will declared that one fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively:—Held, that the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. *Williamson* v. *Naylor*, 3 Y. & Coll. 208.

6. The testator gave the residue of his estate to trustees, upon trust to divide the same amongst the several persons who were his creditors at the time he executed a certain conveyance for their benefit, their executors and administrators; such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, ratably and in proportion to the quantum or amount of the original debt or debts due from him to such person or persons respectively: and if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of the testator's decease, such share or shares of the residue to go to certain residuary legatees:—Held, that the residue was to be divided into parts corresponding in number and proportion with the original debts; that the shares attributed to the debts of executors who died in the lifetime of the testator did not lapse by their death; that the surviving partners were the persons to receive and give receipts for the share of the residue attributed to a joint debt, and that it was not necessary, before carrying over the shares in this suit, to inquire into the state of the accounts as between the surviving and the representatives of the deceased partners; that a claim made by the representatives of a partner beneficially interested in a joint debt was a sufficient claim, although such partner was not the last survivor of the partners in the firm to which the debt was owing; that the share of the residue attributed to a debt, in respect of which no claim was made, belonged to the residuary legatees; that the amount of the residue, whether as exceeding or falling short of the amount of the unpaid debts, did not affect the construction of the will. *Philips* v. *Philips*, 3 Hare 281; 13 L. J., N. S., Ch., 445.

Semble, that the trust must be considered as proceeding upon a mixed principle of bounty and obligation, and that the will must be read as to some extent directing payment of debts. *Ib.*

Quære, as to the construction of such a bequest if the debts had all been paid in full before the date of the will. *Ib.*

7. Testator bequeathed 1,000*l.* to the trustees of a chapel "towards the reduction of their debt on the chapel," and after certain other gifts he bequeathed the residue of his personal estate to the treasurer of the fund called the S. fund. He then charged all his legacies bequeathed to charitable purposes on his Bank and India Stock, etc., and gave all his real estate to trustees upon trusts for sale,

with a direction to apply the proceeds in part payment of the legacies bequeathed by his will and not being charitable. On a suit instituted for the administration of the testator's estate, and the usual inquiries having been directed, the chief clerk found that the testator had no real estate, but was possessed of some Tothill Fields Improvement Bonds, leaseholds, and considerable personal estate. That there had been a debt on the chapel which had long before the date of the testator's will been paid off. That there was no fund answering to the exact description of the S. fund; but there were two funds, the W. fund and the T. fund, the names of which were nearly resembling the S. fund, and the objects of which were somewhat similar. On the several questions arising in the suit:—Held, that though the debt on the chapel was discharged, the gift to the trustees was good. That as there was no contest between the W. fund and the T. fund, there was no intestacy; but that the T. fund, as the W. fund did not dispute it, was entitled to the gift to the S. fund, although the leaning of the Court was in favour of the W. fund. That the leaseholds must be applied as far as they would extend in paying the legacies not charitable, that the deficiency must be made up and out of the residuary personal estate, and that the Tothill Fields Improvement Bonds were not within the Statute of Mortmain. *Bunting* v. *Marriott*, 19 Beav. 163.

1. A testator, who had been bankrupt, and had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved and not paid in full in the bankruptcy, and directed his executors to pay to the official assignee in the bankruptcy, in trust to pay all such creditors, so much money as would make the dividend in the bankruptcy equal to 20*s.* in the pound:—Held, that the benefit thereby intended to be conferred on a creditor did not lapse by his death in the testator's lifetime. *Re Sowerby*, 2 Kay & J. 630; 7 De G. M. & G. 429.

2. A testator by his will directed his just debts to be paid, including "the unpaid-in-full debts proved on the estate of" himself and his father, who were bankrupts in 1822; and he directed his executors to pay to the official assignee, in trust for all the creditors under the commission, so much money as would make the dividend equal to 20*s.* in the pound on the debts so proved:—Held, that the official assignee was entitled to receive the amount found to be due to the creditors, less legacy duty; and that the shares of those who died before the testator did not lapse, but were payable to their representatives. *Turner* v. *Martin*, 5 W. R. 277; 26 L. J., Ch., 216; 3 Jur., N. S., 397.

13. Gift to Debtor.

3. A. devises to B. 400*l.* which he owed him, provided he should thereout pay several sums to his children; the rest he freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debts, but to give such release as B., his executors, etc., should require. B. dies in the life of A.:—Decreed, this was a lapsed legacy. *Elliot* v. *Davenport*, 1 P. W. 83; 2 Vern. 521.

4. "I return A. his bond," in a will, is not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland* v. *Adair*, 3 Ves. 231.

5. J. bequeathed in these words: "I give to N. the sum of 400*l.* which he owes me on mortgage of his estate in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon." N. had given the testator a bond as a collateral security for the mortgage money. N. died before the testator. This is a lapsed legacy, and the executor of N. must pay the money. *Toplis* v. *Baker*, 2 Cox 118.

In order to prevent a legacy from lapsing by the legatee's death, it is necessary to substitute another legatee in his stead. *Id.* 119.

6. Bequest by obligee to one of joint obligors of debt due on bond in these terms: "I remit and forgive to A. the sum of 500*l.*, which he stands indebted to me on his bond; and I direct said bond to be delivered up to him and cancelled":—Held, merely a personal bequest to A., and lapses by his death in lifetime of testator; therefore surviving obligors and representatives of A. are not released from bond. *Izon* v. *Butler*, 2 Price 34.

7. Where a testator forgives a debt it will not be good against creditors, but against an executor it may; and if an action should be brought for it, the Court will grant an injunction. *Sibthorp* v. *Moxon*, 3 Atk. 581.

Plaintiff's grandmother by her will forgave her son-in-law C. a debt of 500*l.*, due to her on bond, which she desired her executors to deliver up to be cancelled. The legatee died in the life of the testatrix:—Held, that plaintiff, as representative of C., should have the benefit of the discharge of this debt, and decreed that the bond should be delivered up to be cancelled. *Ib.* And see S. C. 1 Ves. 49.

14. Gift over after an Absolute Interest. Death of First Donee.

8. If a testator possessed of a specific chattel, or chattel real, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime without issue does not enable B., though surviving the testator, to take under the will, but causes a lapse. *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

9. Devise of 100*l.* and of 50*l.* per annum to A. and his heirs, and if A. die without heirs then to a charity; A. dies without issue, living the testator: the will void as to the whole, and the charity cannot take. *Att.-Gen.* v. *Gill*, 2 P. W. 369.

10. A legacy to the testator's daughter, with a gift over, in the event of her dying unmarried, to such of the testator's other children as she should appoint, and in default of appointment to and amongst his other children equally, is not an absolute gift, and does not lapse by the death of the daughter unmarried in the lifetime of the testator; and consequently, the power of appointment not having been exercised, one of the testator's other children was held to be entitled to a distributive share of his sister's legacy;

with interest in the absence of laches on his part, from the death of the testator in 1847, according to the express trust in the will. *Kellett* v. *Kellett*, 5 Ir. R., Eq., 298.

1. A testator gave all his residuary estate to his wife, her heirs, executors, and administrators; but "if she should die intestate," then over. The wife died in the testator's lifetime:—Held, that the gift over was inoperative, and the bequest lapsed. *Hughes* v. *Ellis*, 1 Jur., N. S., 316; 24 L. J., Ch., 351; 20 Beav. 193; 3 W. R. 310. And see *Andrew* v. *Andrew*, 1 Colly. 690.

2. A testator gave and devised to his brother all his real and personal estate and effects whatsoever and wheresoever, with full power to dispose thereof by deed or will, and then provided that if his brother should not dispose thereof the real estate should go to H. for life, with numerous limitations over. He then bequeathed his furniture, etc., to executors, as heirlooms, and gave all the residue of his estate and effects to the executors upon trust, after the decease of the survivor of his brother and himself, to sell and dispose thereof, and invest in other real estates to be settled to the same uses as he had declared concerning the real estates devised by his will, with powers of investment in the meantime. The brother died before the testator. On the death of the testator in 1803 H. entered into possession, and held the estates till his death in 1869. On the death of H. the persons entitled under his will took possession of the property, which was then claimed by the persons entitled under the limitations in the will of the original testator:—Held, that though the first clause in the will amounted to an absolute gift, the whole will showed a clear intention to give the testator's brother an estate for life only with a power of appointment, and that as that power of appointment had not been exercised, the limitations over took effect. *Re Stringer*, *Shaw* v. *Ford*, 6 L. R., Ch. D., 1; 46 L. J., Ch., 633; 37 L. T. 233; 25 W. R. 815.

Semble, that if no such intention had appeared on the will, the limitations over would have taken effect, as the brother died in the lifetime of the testator. *Ib.*

II. ACCELERATION OF REMAINDERS.

3. Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and, by the previous death of the devisee, the remainder accelerated. *Chambers* v *Brailsford*, 18 Ves. 368. Affirmed 19 Ves. 652.

4. The words "from and immediately after his decease," following a limitation for life, in general point out the order of limitation merely. *Lainson* v. *Lainson*; *Lainson* v. *Ede*, 5 De G. M. & G. 754; 1 Jur., N. S., 49; 24 L. J., Ch., 46; 3 W. R. 31; 3 Eq. Rep. 43. Affirming 23 L. J., Ch., 170; 17 Jur. 1044, 1172; 2 W. R. 82. And see *Carrick* v. *Errington*, 2 P. W. 361.

Where, therefore, a testator revoked a limitation for life, which was followed by those words, introducing subsequent limitations:—Held, that the remainders were accelerated. *Ib.*

A testator gave all his freehold and leasehold estates to trustees, in trust (subject to an annuity to his wife) to pay the rents and profits thereof to his son for life; and from and immediately after his decease to stand possessed of the same in trust for his (the son's) first and other sons in strict settlement. By a codicil to his will the testator revoked such gift in favour of his son, and in lieu thereof gave him an annuity. He made no further disposition of the rents of the estates during the life of the son:—Held, that the revocation of the estate for life operated as an acceleration of the estate in remainder, which took effect immediately. S. C. 17 Jur. 1172.

5. Lands were settled to the use of a man for life, remainder in fee to such one or more of his children as he should by deed or will appoint, and in default of appointment to the children equally. The father by his will devised the lands to his wife for her life, upon condition that she should thereout maintain and educate his children in such manner as his executors should think proper; and that, at the end of every year, whatever sum should be in her hands, after defraying all necessary expenses, should be accumulated in order to form a fund for payment of the legacies thereinafter given by him; and he gave to each of his younger children 500*l.*, and devised the lands to his eldest son in tail, with a direction that if at the death of his wife, there should be accumulated a sufficient fund for the payment of the legacies, those lands, together with certain other lands not the subject of the power, should stand charged with the deficiency:—Held, that the devise to the eldest son was not invalidated by the previous devise to the wife, although the devise to the wife was void, as an excess of the power. *Crozier* v. *Crozier*, 5 Ir. Eq. R. 540; 3 Dr. & War. 353.

6. A will directed a settlement to be made of the G. estate, which should contain a shifting clause, providing, that if any person taking the G. estate should not re-settle the De Ligne estate (acquired through another title) to like uses, the G. estate should go to such uses as if the limitation in his favour had not been inserted. It also directed the insertion of a name and arms shifting clause in a very different form. A., a tenant for life with remainder to his children, refused to re-settle the De Ligne estate, and he had no issue:—Held, thereupon, the next remainderman was entitled to the rents of the G. estate until A. died or had issue. *D'Eyncourt* v. *Gregory*, 34 Beav. 36.

7. There is no case in which the contingent estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. *Sidney* v. *Wilmer*, 25 Beav. 260.

8. A testator appointed, under a general power, real estate, and devised other real estate to his wife and her assigns during her life, and after her death to his son, with a proviso, that if his wife should "do, make, or execute any deed, matter, or thing whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." By a codicil he gave his personal

estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement:—Held, that notwithstanding the limitation to her and "her assigns," and the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; and that the remainder both in the appointed and devised estates was accelerated. *Craven* v. *Brady*, 4 L. R., Ch., 296; 38 L. J., Ch., 345; 16 W. R. 505. Affirming 39 L. J., Ch., 905; 4 L. R., Eq., 209; 15 W. R. 952.

1. Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age":—Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same rule as the realty; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately. *Jull* v. *Jacobs*, 3 L. R., Ch. D., 703; 35 L. T. 153; 24 W. R. 947.

Held, also, that the remainder to the daughter's children created vested interests. *Ib.*

2. A devise expressly conditional upon particular contingencies in defeasance of a preceding absolute devise will not take effect by acceleration when the prior estate is avoided by an event which is in no way comprised within the conditions specified. *M'Carthy* v. *M'Carthy*, 1 L. R., Ir., 189.

3. The same rules as to acceleration which relate to real estate do not apply to personalty. However, under a gift by will of money out of which there was to be set apart as much as would produce an annuity of a certain amount to be paid to A. for life, with a gift over after A.'s death of the sum set apart, and a revocation by codicil of the annuity given to A.:—Held, that the interest of the persons entitled under the gift over was accelerated and took effect at once without waiting for the death of A. *Eavestaff* v. *Austin*, 19 Beav. 591.

4. A testator, by a will dated in 1832, devised lands to T. during his natural life, and from and after his decease unto his eldest son, if he should have arrived at the age of twenty-one, and in default of his having a son then over. The legal estate in the lands was outstanding. T. died, leaving an eldest son, a minor:—Held, that on the death of T. the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 1 L. R., Ch. D., 410; 45 L. J., Ch., 232; 34 L. T. 82; 24 W. R. 349.

Acceleration of Powers.] See POWER, III.

Right to Interim Rents and Profits. In General.] See LII. *post.*

III. INTERESTS UNDISPOSED OF.

1. *Title of Heir*, 7895.
2. *Title of Next of Kin*, 7896.
3. *Title of Trustee*, 7897.
4. *Gift subject to Charges or for Purposes which Fail*, 7899.

1. Title of Heir.

(*a*) *In General*, 7895.
(*b*) *Attempts to Exclude*, 7895.
(*c*) *Disinherison by Implication.* See L. *post.*
(*d*) *Title to personalty where no Next of Kin.* See CROWN, V.

(*a*) *In General.*

5. In case of the lapse of a real estate the heir takes. *Cambridge* v. *Rous*, 8 Ves. 25.

6. W. H. by will devised the perpetual advowson of S. to W. C., upon trust to present his son to the living; and that, if the church shall next after his death be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale first to the payment of debts, and then to distribute the surplus in thirds to his daughters. The trustees presented the son, who died before the advowson was sold, leaving an infant daughter, who brought her bill, insisting upon a resulting trust in the advowson to her, as heiress-in-law, after debts and legacies paid:—Held, that the whole legal estate being devised away there could be no resulting trust for the heir. *Hawkins* v. *Chappel*, 1 Atk. 621.

At common law, where an estate is devised to trustees and their heirs, the whole is gone from the heir; but in equity there may be a beneficial interest remaining to the heir upon the trust. *Id.* 622.

It is a certain rule in equity, that where an estate is charged with an incumbrance for payment of debts, and after such payment the surplus is given over, the whole property vests in the residuary legatee. *Ib.*

7. A testator died in 1821, having devised and bequeathed his real and personal estates to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trust as to the personal estate. In 1847 a supplemental bill was filed, raising questions on the will, as to the real estate, in which the heir, who was then unknown, was interested; and in 1849 another supplemental bill was filed to bring the heir, who was then ascertained, before the Court:—Held, that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate as being, in the events that had happened undisposed of and held by the trustees in trust for him. *Simmons* v. *Rudall*, 1 Sim., N. S., 115; 15 Jur. 162.

(*b*) *Attempts to Exclude.*

8. A testator gave his real and personal estate to trustees for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his heir-at-law; and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds; but that the same as to freeholds should descend to his heir-at-law, and as to customary estates to his customary heir. At his death his sister was his heiress-at-law and customary heir:—Held, that she was not excluded from taking by descent the after-acquired copyholds. *Gould* v. *Gould*, 32 Beav. 391.

1. A bare intention, or even negative words, will not exclude an heir-at-law from insisting on a resulting trust; but a man, by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition; therefore where a testator appoints his executor to sell his estate, it is turned into personal assets, and leaves no resulting trust for the heir; but if the testator says, "I will my heir shall sell the land," he is not obliged to sell it. *Cook* v. *Duckenfield*, 2 Atk 566, 568.

2. Upon a devise of personal and real estate for sale, to be held by the trustees as a fund of personal estate only, and no part by reason of any event to lapse or result for the benefit of the heir-at-law; and the testatrix, after bequeathing certain legacies, directed the residue of her estate to be paid and applied as she should thereafter appoint, and she made no appointment:—Held, that the heir was entitled to the proceeds of the real estate undisposed of by the will. *Fitch* v. *Weber*, 6 Hare 145; 17 L. J., N. S., Ch., 361; 12 Jur. 645.

2. Title of Next of Kin.

(*a*) *In General.*

3. The legal interest in a lapsed legacy is in the executor; but the beneficial is in the next of kin of the testator. *Owen* v. *Owen*, 1 Atk. 496.

As an heir does not take real estate by the intention of his ancestor, but by act of law, so, with regard to the personal, the next of kin take in succession *ab intestato*, and not by the intention of the testator. *Ib.*

4. A legacy to the next of kin does not exclude him from taking the residue. *Att.-Gen.* v. *Parkin*, Ambl. 568.

5. The next of kin of a party who died leaving a codicil, but no will, allowed to take the residue, upon giving recognisances to refund in case a will should be found. *Bakewell* v. *Tagart*, 3 Y. & Coll. 173; 2 Jur. 699.

6. Residuary bequest cancelled by striking through with a pencil all the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles, a resulting trust for the next of kin. *Mence* v. *Mence*, 18 Ves. 348.

7. The next of kin stands as to personalty in the same position as the heir-at-law as to realty, and the person claiming against him must make out his title. *Underwood* v. *Wing*, 4 De G. M. & G. 633; 1 Jur., N. S., 169; 24 L. J., Ch., 293.

8. Testator gave a sum of money to trustees, in trust only and for the use and benefit of his adopted daughter, and which he desired might be paid to her and to be settled on her during her life, in case of her marriage, or in case she did not marry then the interest of the money, being vested in Government securities, to be paid to her, and in the event of her not marrying or dying then the money to go to his nephews. The daughter married and shortly afterwards died without issue:—Held, that her husband, who had taken out administration to her, and not the testator's nephews, was entitled to the fund. *Hawkins* v. *Hawkins*, 7 Sim. 173.

9. A testator directed his trustees to sell his leaseholds, and stand possessed of the moneys to arise therefrom as part of his personal estate. He gave the residue of his personal estate to trustees, and directed them to sell his real estate and to stand possessed of the produce of the sales of the real estate, and of his leasehold estate, and of his residuary personal estate, upon the trusts thereinafter declared. As to one equal fourth part thereof, in trust for A.; as to one other equal fourth part thereof, in trust for B. and her children; as to one other equal fourth part of the residue of the moneys to arise from the sale of his real estate, upon trust for C. and her children; and as to the remaining equal fourth part of the residue of the moneys to arise from the sale of his real estate, upon trust for D. and his children. He then gave power of maintenance and advancement for the children, in which no distinction was made between the different fourth parts:—Held, that there was intestacy as to two fourth parts of the leaseholds and personal estate. *Re Seymour*, 14 Jur. 585.

(*b*) *Attempts to Exclude.*

10. Where there is no gift of the undisposed-of residue, a testator cannot by negative words exclude one of his next of kin from participating in it *Johnson* v. *Johnson*, 4 Beav. 318.

Where a will declared that "testator's widow and her child shall be cut off from all part of my property," but contained no disposition of the property, it was treated as an intestacy, and the widow and child held entitled to a share of the undisposed of residue. *Ib.*

11. Testator gave real and personal estate to one daughter, in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate; he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity, or by any local custom, to any other part of his real or personal estate: the residue to his other daughter. Upon her death in his life, he by codicil gave it according to the appointment of his wife. The power not being duly executed, the residue goes according to the statute as undisposed of, and the widow and daughter are not barred. *Pickering* v. *Stamford* (*Lord*), 3 Ves. 355. Affirmed *id.* 492. And see 2 Ves. J. 272, 581.

12. A. devises to B. and C., his wife's children, as he called them (not owning them to be his), ten shillings apiece, and no more, and gave the children that he owned considerable legacies. B. and C. shall come in for a share of the undisposed surplus, for the words of exclusion must be taken strictly. *Vachell* v. *Jefferey*s, Pre. Ch. 170. S. C. *nom. Vachell* v. *Breton*, 5 Bro. P. C. 51.

13. A testator gave his residuary real and personal estate to trustees for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far

as the same trusts related to his son R., or his interest therein, and in lieu gave a pecuniary legacy upon trust for R., his wife and children; and if R should have no children, he directed that the legacy should sink into the residuary estate, but so that R. or his representatives should not take any share or interest therein:—Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate and out of the share which was undisposed of. *Sykes* v. *Sykes*, 3 L. R., Ch., 301; 37 L. J., Ch., 367; 16 W. R. 545; 36 L. J., Ch., 938; 4 L. R., Eq., 200.

1. A testator ordered that his real and personal property should be divided into as many equal parts as he should have children living at the date of his decease, and that one such part should be given to or held for each of such children. Afterwards he made a codicil revoking and annulling every bequest and provision in his said will in favour of his daughter E.:—Held, that there was no class, and consequently that there was an intestacy as to the share of E, so that E herself, who, with three other children, survived the testator, was entitled as one of the next of kin to take a fourth part or share of the property originally bequeathed to her. *Ramsay* v. *Shelmerdine*, 11 Jur., N. S., 903; 14 W. R. 46; 13 L. T., N. S., 393.

2. A testator by his will gave an annuity of 1,200*l.* to his wife, and after her decease he "directed that the said sum of 1,200*l.* per annum so to be paid should go to and be equally divided amongst all and every his children who should be then living, share and share alike." And the testator declared that the said annuity so given as aforesaid to his wife was by him "meant and intended to be and should by his said wife be accepted and taken in full and entire lieu, bar, recompense, discharge, and satisfaction of and from all and all manner of claims and demands whatsoever which she at any time might or could have, or which, without provision and declaration, she could or might have at the time of my decease, of, in, to, or out of any part or parts of any real or personal estate under or by virtue of any settlement or other writing by him at any time made upon or in favour of his said wife, or as for or on account of any dower or thirds which she, my said wife, might, could, or would in any manner have claim, challenge, or demand, out of or upon, or from or in respect of, any part of his estate or effects in any manner howsoever." The testator died, leaving a wife and several children; and in the events that happened there was an intestacy as to a part of his personal property:—Held, first, that the testator's widow was excluded by the terms of the will from a distributive share of the property so undisposed of; secondly, that the annuity of 1,200*l.* was not perpetual, but that on the death of such child who survived the widow his share should sink into the residue. *Lett* v. *Randall*, 3 Eq. Rep. 1034; 6 Jur., N. S., 1359; 9 W. R. 130; 3 L. T., N. S., 455; 30 L. J., Ch., 110; 3 Sm. & G. 83; 2 De G. F. & J. 388. Questioned in *Tavernor* v. *Grindley*, 32 L. T., N. S., 424.

3. Testator, after stating that it was his will that neither L. S. nor her children should take any benefit from his property other than what was given to her or them; and that it was not his intention that G. S., or any person claiming under him, should partake of any share in the distribution of his personal estate except what was given to him or them, said he considered that the provision which he had made for his brother and two sisters was adequate for their support, and therefore it was his intention that they should not, nor should any of them, take any benefit from his property except what was given for them; and he declared that L. S, G. S., and his brother and two sisters should not be entitled to take any share of his personal estate of which he might happen to die intestate, but should be wholly excluded therefrom in the same manner as if they had all died in his lifetime. There was an intestacy as to residue:—Held, that the next of kin other than the five persons named who were excluded were entitled. *Bund* v. *Green*, 12 L. R., Ch. D., 819.

3. Title of Trustee.

(*a*) *Failure to Declare the Trust.*

4. If A. gives 40*l.* to S., to be disposed of as A. by private note should acquaint him, and A. dies without making any appointment, this is a good bequest to S. *Martin* v. *Clerk*, 2 Ch. Ca. 198. S. P. *Lambert* v. *Bainton*, 1 Ch. Ca. 199.

5. A testator bequeathed certain parts of his personal estate to A., B., and C., as joint tenants upon trust, and he also gave, devised, and bequeathed his residuary real and personal estate to the same three persons as tenants in common, "subject, however, to such disposition, limitation, or appointment thereof as he might, by any deed or writing duly executed, thereafter direct, limit, or appoint." He made no such disposition, limitation, or appointment before his death:—Held, that A., B., and C. took the residuary real and personal estate equally between them. *Fenton* v. *Hawkins*, 9 W. R. 300; 4 L. T., N. S., 737.

6. A testator being possessed of real estates in England and Canada, by his will, made in England in 1801, devised all his estate to trustees, upon trust to sell, and to divide the net proceeds between his brothers and sisters and their children. In 1804 the testator went to Canada, and by a codicil made there in that year he devised and bequeathed all his real and personal estate in Canada to other trustees resident there, upon trust to convert the same, and out of the proceeds to pay his debts in Canada, and legacies, and to remit the surplus to one of the trustees named in his will, to whom the testator gave all the residue of his estate and effects, in Canada or in Great Britain, not otherwise disposed of by that codicil, or by his will then in England, to hold to him, his heirs, executors, administrators, and assigns for ever; and the testator thereby

revoked everything contained in his will which might be construed to be contrary to the above disposition of his said estates:—Held, that this devisee took the surplus proceeds of the sale of the property in Canada beneficially. *Schofield* v. *Cahuac*, 15 Jur. 1069.

1. Testator gave real estates to be sold, and the produce to be considered as part of his personal estate, and thereout and out of his personal estate gave legacies to his next of kin, heir, and others. He gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following. He then gave legacies and some estates specifically, and other legacies out of his said trust moneys and personal estate, and gave his executor 1,000*l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects whatsoever, subject to debts, legacies, etc. No instructions being found, the heir is entitled to the 1,000*l.* *Collins* v. *Wakeman*, 2 Ves. J. 683.

2. A testator made a general devise of all his property to A. upon trust, for purposes or legacies he should make in any codicil he might add to his will; and afterwards made a codicil which was unattested:—Held, that A. was not entitled in his own right to the property, but was a trustee for the heir-at-law of the testator. *Darall* v. *North River Co.*, 18 L. J., N. S., Ch., 299; 13 Jur. 761.

(*b*) *Trust Declared, but too Uncertain or Indefinite.*

3. If a testator means to create a trust, and the trust be ineffectually created or fails, the next of kin take. *Ommanney* v. *Butcher*, T. & R. 270.

4. Residue to trustees on trust for purposes too general for Court to execute. Next of kin shall take. *Vezey* v. *Jamson*, 1 Sim & S. 69.

5. A testator, after giving a fund to his executors upon certain trusts, declared it to be his will that, in the event of the failure of those trusts (an event which happened), his said trustees and the survivors and survivor of them, his executors or administrators, should pay and apply the fund to and for such charitable or other purposes as they, his said trustees, and the survivors or survivor of them, his executors and administrators, should think fit, without being accountable to any person or persons whomsoever, for such their dispositions thereof:—Held, that these words created a trust, but a trust of so indefinite a nature that it could not be carried into effect; the bequest therefore failed, and the fund fell into the residue. *Ellis* v. *Selby*, 1 Myl. & C. 286; 5 L. J., N. S., Ch., 214. Affirming 7 Sim. 352; 4 L. J., N. S., Ch., 69.

6. E. I. indorsed a promissory note for 2,000*l.*, and sent it to S. S. in a letter, whereby she gave the same to S. S. for her sole use and benefit, for the express purpose of enabling her to present to either branch of her family any portion of the interest or principal thereof as she might consider most prudent; and in the event of the death of S. S., by that bequest she empowered her to dispose of the said sum of 2,000*l.* by will or deed to those or either branch of the family she might consider most deserving thereof:—Held, that this letter created a trust, the objects of which were too undefined to enable the Court to execute it, and that the 2,000*l.* formed part of the testatrix's general personal estate. *Stubbs* v. *Sargon*, 2 Keen 255; 6 L. J., N. S., Ch., 254. Affirmed 3 Myl. & C. 507; 7 L. J., N. S., Ch., 95; 2 Jur. 150.

7. Where the trust is too vague for the Court to execute, the next of kin are entitled. A testatrix bequeaths the residue of her property to her executors upon trust, to dispose of the same at such times and for such purposes as they should think fit, it being her intention that the distribution thereof should be left entirely to their discretion:—Held, that the executors were trustees of the residue of the property for the next of kin of the testatrix. *Fowler* v. *Garlike*, 1 Russ. & M. 232; 8 L. J., Ch., 66.

8. The testatrix by her will, after giving among other legacies a sum of 3,000*l.* to S. P., and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said S. P., "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed S. P. sole executrix of her will:—Held, that S. P. did not take the residue for her own benefit, but that the words of the bequest created a trust. *Briggs* v. *Penny*, 3 Macn. & G. 546; 21 L. J., N. S., Ch., 273; 16 Jur. 93. Affirming 3 De G. & Sm. 525; 21 L. J., N. S., Ch., 265; 13 Jur. 905.

It is not necessary to exclude the legatee from a beneficial interest that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. *Ib.*

9. If trust is mentioned, but is not expressed, or is ineffectually created or fails, the next of kin are entitled; but if the person taking has a discretion whether to make the application or not, it is an absolute gift and not a trust. *Morice* v. *Durham* (*Bishop*), 10 Ves. 535.

10. Devise and bequest to trustees of freehold, leasehold, copyhold, and personalty, upon trusts, which were declared, of the freehold, leasehold, and personalty only:—Held, that the *cestui que trust* was not interested in the copyholds which descended to the customary heir. *Jackson* v. *Noble*, 2 Keen 590. 7 L. J., N. S., Ch., 133; 2 Jur. 251.

11. An aunt gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." The nieces both survived the testatrix:—Held, that they took the residue for their own benefit. *Stead* v. *Mellor*, 5 L. R., Ch., 225; 46 L. J., Ch., 880; 25 W. R. 508; 36 L. T., N. S., 498.

(*c*) *Title to Land where no Heir or Cestui que Trust.*

12. A., being seised in fee *ex parte paternâ*,

conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, etc., and for no other use, intent, or purpose whatsoever. A. dying without appointment, and without heirs, *ex parte paternâ*:—Held, per Henley, Custos Sigilli, and Clarke, Master of the Rolls, first, that the maternal heir was not entitled; secondly, there being a terre-tenant, the Crown, claiming by escheat, has not a title by subpœna to compel a conveyance from the trustee, the trust being absolutely determined; no opinion was given on the right of the trustee. Per Mansfield, Chief Justice, the heir *ex parte paternâ* was not entitled; secondly, that from the analogy between trusts and legal estates the Crown was entitled by escheat, but that if the conveyance had barred the Crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess* v. *Wheate*, 1 Eden 177; 1 W. Black. 121.

1. Devise of copyhold (duly surrendered) to A. and his heirs, in trust for B. and his heirs; upon the death of B., without heirs, the heir of the trustee has no equity to compel the lord to admit him, and his bill was dismissed without costs. *Williams* v. *Lonsdale* (*Lord*), 3 Ves. 752.

2. In *Att.-Gen* v. *Sands* (Hardr. 488; 2 Freem. 129; 3 Ch. Rep. 33) it was held that the trust of a term attending on the inheritance was not forfeited by the felony of *cestui que trust*, because it was no more than an accessory to the inheritance, which was not forfeited. It is not denied, however, that where a term is attending on the inheritance, and the king extends the inheritance, he shall have a right to the term. *Nicholls* v. *How*, 2 Vern. 389.

3. Trustee not having the legal estate, cannot hold against the Crown, claiming by escheat. *Walker* v. *Denne*, 2 Ves. J. 170.

4. A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son William until he attained twenty-one, "and when and as soon as" he should attain twenty-one, she devised to him in fee. But in case he should die before attaining twenty-one, to his children, if any; or if none, then to the defendant. The son did not attain twenty-one, and died without issue in the lifetime of the testatrix. There being no heir or next of kin of the testatrix:—Held, that the trustee was entitled to hold the real estate beneficially. *Cox* v. *Parker*, 22 Beav. 168; 2 Jur., N. S., 842; 25 L. J., Ch., 873; 4 W. R. 453.

5. A., by will in 1837, bequeathed the residue of her real and personal property to trustees, "their heirs, executors, administrators, and assigns," to sell and convert such parts of her estate as should not consist of money or stock in the public funds, and to stand possessed thereof, to pay thereout two life annuities, and subject thereto upon such trusts as she should thereafter by any codicil or codicils direct. The testatrix died without making any further bequest. By an order in an administration suit the trustees were declared entitled to the residue of the real estate, and the Crown to the personalty. One of the trustees and an annuitant had since died. A petition was presented by the surviving trustees for the payment of the sum arising from the real estate which had been set apart to answer the annuity:—Held, that the trustees took as joint tenants for their own benefit, and that the surviving tenants were therefore entitled. *Taylor* v. *Haygarth*, 6 L. T., N. S., 95; 14 Sim. 8.

6. A trustee under a deed held freehold premises in trust for L. S., her heirs and assigns, for her and their own use and benefit. L. S. by her will devised these premises, among others, to trustees, in trust to sell, and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper not being forthcoming, the trustee of the deed, offering to pay the debts, claimed to be entitled to retain the trust premises for his own benefit. On a bill filed, however, by the trustees of the will, a conveyance to them was directed, the Lord Chancellor holding that the will gave them a title as against the trustee of the deed, who had nothing to do with the question how the premises would be disposed of in consequence of the trustees of the will not being able to carry the trusts into full effect. *Onslow* v. *Wallis*, 1 Macn & G. 506; 1 H & Tw. 513; 19 L. J., N. S., Ch., 27; 13 Jur. 1085. Affirming 16 Sim. 485.

Escheat. In General.] See ESCHEAT AND FORFEITURE.

4. Gift subject to Charges or for Purposes which Fail.

(*a*) *Where Charge or Purpose is wholly Void or wholly Fails.*

7. Wherever land, etc., which would descend to heir-at-law is devised for purposes which law will not suffer to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended he should have it or not. *Tregonwell* v. *Sydenham*, 3 Dow 194.

Testator, limiting a remainder to his right heirs, showed his intention that, failing the devise, the heir should take. *Id.* 208.

Heir-at-law can only be disinherited by express words or necessary implication. *Id.* 210.

Where a devise is made subject to be reduced to a certain extent on the happening of a given event, that is the condition or ground of reduction, and if the event never happens the ground of reduction is gone, and the devise remains entire and absolute. *Id.* 210.

8. A Scotchman, by trust, disposition, and settlement, gave the whole of his real and movable estate to three persons by name—first, to pay debts; secondly, to pay certain specified sums; thirdly, to lend out 2,000*l.* on security, taking the interest, payable to A. for life, and the said principal sum payable to his said trustees at A.'s death:—Held, that this was not a gift to the trustees for their own benefit, but that the 2,000*l.* at A.'s death fell

into the general trust estate. *Miller* v. *Rowan*, 5 Cl & F. 99.

1. Devise to trustees for ninety-nine years upon the trusts hereinafter expressed, and from and after the expiration or other sooner determination of the said term in strict settlement. The term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir upon apparent intention to devise immediate estates, subject to the term, not future estates, expectant on its determination. *Sidney* v. *Shelley*, 19 Ves. 352; Coop. 206.

2. Devise on condition to pay 500*l.* in six months, upon trust to pay the interest to the devisor's wife for life, and after her death the principal, according to her appointment in writing, with witnesses, whether sole or married, provided she shall release her dower within six months, and in case of her marriage, without consent of the trustees, one moiety to go over. The wife, who took other interests under the will, died within the six months, and not having married nor released dower, the 500*l.* did not vest in her. *Croft* v. *Slee*, 4 Ves. 60.

3. A. and B. are made executors, and land devised to C., paying 1,000*l.* to executors, the residue to a charity. This 1,000*l* is a charge on the real estate, which, by the Mortmain Act, is not well disposed of, and results to the heir. This devise held a sale of the land for 1,000*l.*, and the bequest of this 1,000*l.* held intended to the executors as such, for the purpose of the will, or as assets for debt, and not otherwise; so that, if good, it would not have lapsed by their deaths. *Arnold* v. *Chapman*, 1 Ves. 108.

4. If a child who has a legacy payable out of land dies before the contingency happens, it goes to the heir; *à fortiori* where it is given to a stranger. *Att.-Gen.* v. *Milner*, 3 Atk 114.

5. Devise of lands subject to and charged with legacies in mortmain the legacies sink for benefit of devisee. *Jackson* v. *Hurlock*, Ambl. 487; Eden 263.

6. Trust of an annuity for a charity charged upon a devised estate being void, under the Act 9 Geo. 2, c. 36, does not pass by a residuary disposition, but sinks for the benefit of specific devisees. *Baker* v. *Hull*, 12 Ves. 497.

7. Where a testator directs his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gives the residue of the mixed fund to A. and B., the failure of the charitable legacies, as far as they would affect the real estate, will inure to the benefit of A. and B. *Green* v. *Jackson*, 5 Russ. 35.

8. If an estate is devised charged with legacies which fail, the devisee, not the heir, shall have the benefit of it. *Kennell* v. *Abbott*, 4 Ves. 811.

9. Money charged upon a real estate for a charity, void by the Statute of Mormain, shall sink in favour of the specific devisee; not go to the heir-at-law or residuary legatee. *Secus*, when it is an exception out of the devise. *Wright* v. *Roe*, 1 Bro. C. C. 61. And see *Bland* v. *Wilkins*, cited *id.* in notes.

10. Devise of a specified real estate to trustees, upon trust, in the first place, to raise, either by sale or otherwise, out of such estate, within one year next after his decease, the sum of 2,000*l.*, and invest the same on good security, and pay and apply the same in manner hereinafter directed; also on trust to permit the testator's son P. to enjoy the said real estate (after raising as aforesaid) for life, and then upon certain trusts for his children; and in case he should happen to die without leaving issue, then the testator devised the said estate to his sons S. and T., their heirs and assigns, as tenants in common, and not as joint tenants. The testator then gave 1,000*l.*, part of the 2,000*l.* directed to be raised as aforesaid, upon trust to pay the interest thereof to his daughter M. for life, and after her decease upon trust to divide the said sum of 1,000*l.* amongst her children equally; and the testator gave the other moiety of the said sum of 2,000*l.* upon similar trusts for the benefit of his daughter E. C. and her children. Finally, the testator gave all his residuary real and personal estate to his sons S. and T., their heirs and assigns for ever. The testator's three sons all survived him, and S. and T. then died, without having disposed of their interest in the estate out of which the 2,000*l.* was to be raised, or of their interest (if any) in such sum of 2,000*l.* After the death of P, the son of the testator who survived his brothers, and not till then, the 2,000*l.* was raised for the purposes of the trusts declared thereof in the testator's will; and subsequently to that E. C. died without having had a child:—Held, upon the true construction of the will, and in the events which had happened, first, that the 2,000*l.* directed to be raised by the testator's will was a charge upon the estate out of which it was to be raised, and not an exception out of the devise of such estate. Secondly, that the 1,000*l*, part thereof, the trusts whereof had partially failed, sank into the said estate as realty, for the benefit of the devisees thereof, and belonged to the devisee in trust, under the will of P., the son of the testator, upon whom such estate had descended as heir-at-law of his brothers S. and T. *Re Cooper's Trusts*, 17 Jur. 1087; 2 W. R. 601; 23 L. J., Ch., 25; 4 De G. M. & G. 757; 2 Eq. Rep. 65. Affirming 1 W. R. 231.

11. Where a real estate is directed to be sold, and a part of the produce is to be applied to a purpose which fails, and the residue of the produce is given over, the heir and not the residuary devisee will take the sum intended for that particular purpose. Where the real estate is not directed to be sold, and the residuary gift is not of the produce, but of the corpus of the estate, then if a gift intended for a particular purpose, which fails, is to be considered as an exception from the residuary gift, the heir will take. If it is to be considered as a charge from the devised estate, the residuary devisee will be entitled to the benefit of the failure. *Cooke* v. *Stationers' Co.*, 3 Myl. & K. 262.

12. Bequest to executors of a sum of money, "to be chargeable and paid as thereinafter mentioned," upon trust for the testator's wife for life, remainder for his children; then a gift of freehold and leasehold property to his nephew, subject to the payment of the said sum, and to the testator's debts, with a residuary devise and bequest to the wife absolutely:—Held, as between the testator's widow and his nephew, that the sum was a charge on the gift to the nephew, and not an

exception out of the gift; and the testator never having had any child, the sum, subject to the widow's life interest, belonged to the nephew, the principle being, that where there is a gift by will of any property, whether real or personal, subject to a particular charge, if any of the purposes of the charge fail before all are satisfied, the donee takes the property relieved from the residue of the burthen which, in the events that have happened, the testator no longer intended him to bear. *Tucker* v. *Kayess*, 4 Kay & J. 339.

That in all such cases is the thing in question excepted out of the devised property; in other words, did the testator mean to give that property, minus the thing in question, or is it a charge on that property? If the former, then, the purpose failing, it goes to the residuary devisee; if the latter, to the devisee of the property charged. *Ib.*

Quære, whether a sum of money to be paid out of an estate has ever been held to be an exception. *Ib.*

1. A testator, owing his sister 10,000*l.* on mortgage and 3,788*l.* on a promissory note, and having power of appointment by deed or will under her will, gives an estate (not in mortgage) to W. H. C., subject to a charge of 7,000*l.*, which he directed his executors to raise by mortgage or sale of part thereof, such sum to be appropriated—1,000*l.* to his mother, 1,000*l.* to his sister, and 1,000*l.* to his uncle's children, and the remaining 4,000*l.* to be appropriated towards payment of the debt due on the note; and there was a declaration that the mortgages should be employed in paying his debts remaining after the appropriation of the 4,000*l.* W. H. C.'s sister died before the testator; and on the question whether her legacy lapsed for the benefit of W. H. C.:—Held, that it did; that there was a devise of the whole estate to W. H. C., subject to the charge, and that the 4,000*l.* was subject to the payment of debts generally. *Sutcliffe* v. *Crosse*, 3 W. R. 265; 3 Drew. 135.

2. Land was devised subject to a charge of a certain sum. The will contained no other reference to the charge, and no specific disposition of it:—Held, that the charge sank in the estate for the benefit of the devisee. *Heptinstall* v. *Gott*, 2 John. & H. 449; 8 Jur., N. S., 1091; 31 L. J., Ch., 776; 10 W. R. 708; 7 L. T., N. S., 92.

3. A. makes a lease to B. (his wife's nephew) for twenty-one years, for payment of his debts and legacies, and at the same time by will, taking notice of the said lease, devises the lands, after the expiration of the said lease, to C., his nephew and heir, and makes B. executor. A. lives twelve years, and pays all his debts himself, and the personal estate was sufficient for the legacies. C. brings his bill to have the lease delivered up, the trusts being performed; but dismissed, the reversion only after the expiration of the term being devised to him. *Bushnell* v. *Parsons*, Pre. Ch. 218.

4. A. gives 800*l.* to his executors on trust to pay annuities to B. and C. for their lives exceeding the interest of the 800*l.*, and gives the surplus to D. and E. The annuitants being dead, the 800*l.* shall go to the residuary legatee, and not to the executors. *Cock* v. *Burrish*, 1 Vern. 425.

5. If a testator devised land for purposes altogether illegal, or which altogether fail, the heir takes it as undisposed of; so if he bequeath personalty under the same circumstances, the next of kin are entitled. *Cogan* v. *Stephens*, 5 L. J., N. S., Ch., 17.

If a testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for the purposes of the will; and so conversely in the case of personal estate, the next of kin are entitled. *Ib.*

A testator directed his executors immediately to lay out 30,000*l.* in the purchase of an estate in his name, the income of which he settled to one for life, with remainder to others in tail, with remainder to a charity; the money was not actually laid out previous to the estate for life and the estates tail being spent. The gift of the charity failing by reason of the Mortmain Act, and the estates tail not having been barred:—Held, that the next of kin, and not the heir-at-law, were entitled to the 30,000*l.* *Ib.*

6. Where devisor directs that after payment of 800*l.* to charity, to be raised by sale of real estate, the residue thereof should go to a legatee. Legacy to charity being void, 800*l.* goes to heir, and not to the legatee. Costs to be borne equally by each party. *Jones* v. *Mitchell*, 1 Sim. & S. 290; 1 L. J., Ch., 163.

7. Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death, under that age, a resulting trust for the respective representatives. *Chambers* v. *Brailsford*, 18 Ves. 368. Affirmed 19 Ves. 652. And see *Spencer* v. *Wilson*, 16 L. R., Eq., 501; 42 L. J., Ch., 754; 29 L. T., N. S., 19.

8. A tenant for life of real estate under a settlement, having power to charge it with 6,000*l.*, to be raised and paid at such time and to such purposes as he should think fit, by deed charged the estate with that sum, payable to trustees for such purposes as he should by will appoint, and afterwards appointed the same by his will for certain purposes, which partially failed:—Held, that the part of the money undisposed of was personalty, and went to the estate of the next of kin. *Simmons* v. *Pitt*, 43 L. J., Ch., 267.

(*b*) *Title to Surplus Undisposed of.*

9. J. S. by her will made H. N. her executor, and gave all her estates, real and personal, to be disposed of for the payment of her debts, and all such legacies as she therein or by codicil bequeathed to her said executor. She gave several money legacies, and among others 200*l.* to her heir-at-law; and by codicil she gave her executor's sister 500*l.*, but nothing to her executor:—Held, that there was no resulting trust for the heir, but that H. N., the executor, had a fee, for otherwise he would have no benefit by the devise. *North* v. *Crompton*, 1 Ch. Ca. 196.

10. Resulting trust for the heir; the only express devise being to convey to the devisor's son from and after his age of thirty, which he did not attain; and no devise by implication from a declaration that he shall have no power over the estate until his age of thirty. *Nash* v. *Smith*, 17 Ves. 29.

1. It is not universally true that the expression of a purpose, for which even a devise of land is made, limits the devise to the purpose expressed. Where, for instance, there is a devise of land for payment of debts, it does not necessarily follow that there is a trust for the heir after the debts are paid. Each case depends upon the circumstances. Where the purpose expressed is in favour of the party to whom the bequest is made, the presumption for limiting the bequest is rather stronger. *Walton* v. *Walton*, 14 Ves. 322.

2. Construction of a devise in fee, subject to and chargeable with annuities, upon the intention, collected from the whole will, a beneficial devise and not a trust resulting to the heir as to the surplus beyond the annuities. *King* v. *Denison*, 1 Ves. & B. 260.

Distinction between a devise charged with debts and on trust to pay debts: the former a beneficial devise, subject to the particular purpose; the latter limited to the particular purpose; and therefore the interest not exhausted, a resulting trust for the heir. *Id.* 272.

No resulting trust for an heir taking a benefit by the will; but subject to circumstances. *Id.* 278.

3. A. devised to his wife a rent-charge of 200*l.* for thirteen years, in trust, nevertheless, for the payment of his debts and legacies; he also devised to her certain lands, in augmentation of her jointure. The surplus of this rent-charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *Wych* v. *Packington*, 3 Bro. P. C. 44.

4. Lands are devised to three persons and their heirs, to the use of them and their heirs, upon the trusts after mentioned, and then the testator directs them to convey part to A. for life, and other part to P. in tail, but gives no direction as to the remainder in fee. Though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for the testator's son. *Hobart* v. *Suffolk* (*Countess*), 2 Vern. 644.

5. H. devises his manors, advowsons, etc., to trustees, to pay his son 1,000*l.* for life, and the rest of the profits to be laid out in land during his son's life, and then settled:—Held, the son had a right to present to the living when vacant, not under the devise, but as heir-at-law, it being a fruit undisposed of. *Sherrard* v. *Harborough* (*Lord*), Ambl. 165.

If under a will any part of the legal estate is undisposed of, it goes to the heir-at-law. So of the trust estate. *Id.* 166.

6. General devise and bequest upon trust, not sufficient to exhaust the whole property, a resulting trust for the heir and next of kin. *Dawson* v. *Clarke*, 15 Ves. 416. Affirmed 18 Ves. 247. And see *Burrs* v. *Ferkes*, 3 N. R. 704; S. C. 34 L. J., Ch., 522; 11 Jur., N. S., 669; 13 W. R. 987; 12 L. T., N. S., 727; 6 N. R. 355.

7. R. S., rector of B., devised his perpetual advowson of B. to G. S., willing and desiring her to sell it to Eton College, and on their refusal to Trinity College, and on the refusal of both to any other college in Oxford or Cambridge, being the best purchaser. This is not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to G. S., with an injunction only to sell to particular societies, and, on an avoidance by the death of the testator, the devisee and not the heir shall present. *Hill* v. *London* (*Bishop*), 1 Atk. 618.

Where a real estate is devised to be sold for payment of debts, and no more is said, there is clearly a resulting trust; but if a particular reason occurs why the testator should intend a beneficial interest to the devisee, there is no precedent that it shall not be held a beneficial interest. *Id.* 619.

It seems to have been a general rule, that where lands were devised for a particular purpose, that which remains after the purpose is satisfied results. *Ib.*

8. If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper* v. *Aston*, 2 Ch. Ca. 115.

9. Real and personal estate devised to the executor in trust to pay debts and legacies, the rest and residue to himself, the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir:—Held, only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday* v. *Hudson*, 3 Ves. 210.

10. Term raised for a particular purpose; when that purpose is answered the term shall be in trust for the heir. *Levet* v. *Needham*, 2 Vern. 139.

11. The distinction between a direction to sell real estate out and out, for payment of debts, and a charge for payment of debts, is exploded, as to any effect in exempting the personalty. In either case, the residue, if undisposed of, goes to the heir, unless there be a disposition made demonstrative of an intent that it shall change its nature and become personal. *Cleland* v. *Sharn*, 2 Seh. & Lef. 538.

12. J. by will bequeathed all his estate and effects, real and personal, whether in possession, reversion, or otherwise, unto his wife E., her executors, administrators, or assigns, upon trust to pay unto his daughter, during the lifetime of E., an annuity; and upon further trust that E., at the time of her decease, should cause her executors to pay certain legacies, but which did not exhaust the personal estate:—Held, that E. was a trustee only to the extent of the legacies, and that she was not deprived of a beneficial interest in the rest of the property. *Williams* v. *Roberts*, 4 Jur., N. S., 18; 27 L. J., Ch., 177.

13. A testator directed that his debts should be paid by his executors; he then gave two legacies, one to one of his executrixes, to be paid to her in addition to what was afterwards devised to her; and gave the residue of his personal estate and all his real estate to five persons, whom he appointed executors, in equal shares, as tenants in common:—Held, one of the five devisees having died in the testator's lifetime, that as between the heir and devisees the lapsed share was in the hands of the heir, liable to bear a ratable proportion only of the debts and legacies:—Held, one of the five devisees having died in the testator's lifetime, that as between the heir and devisees the lapsed share was in the hands of the heir, liable to bear a ratable proportion only of the

debts and legacies. *Peacock* v. *Peacock*, 11 Jur., N. S., 280; 34 L. J., Ch., 315; 13 W. R. 516; 12 L. T., N. S., 299.

1. Testator devised all his freehold estates to his most dutiful and respectful nephew, E. E., "upon the trusts and for the uses following;" but did not declare any use or trust except as to one of his estates:—Held, from the context of the will and a codicil thereto, that there was no resulting trust in favour of his son and heir as to any part of his estates. *Hughes* v. *Evans*, 13 Sim. 496; 7 Jur. 523.

2. Question of a resulting trust only arises between the real and personal representatives of the testator, not between the representatives of a party taking under the will. *Ashby* v. *Palmer*, 1 Meriv. 296.

3. A. B. by his will reciting that he had a clear yearly profit rent of 60*l.* out of his freehold lands, devised the same with the rents, etc., thereof to his nephew C. D., for the term of ninety-nine years upon trust, to pay testator's only son a yearly sum of 10*l.* during his life, and which was to be in full of all claim he might or could have hereafter upon his real or personal property; and from and after his death to pay said sum of 10*l* to his daughter M. and her issue, together with an additional sum of 18*l.* yearly, and upon this further trust to pay his other daughter N. and her issue the yearly rent of 28*l*; and in case his said daughters M. and N. should happen to die without issue, etc., the testator devised said freehold lands (out of which the annuities issued) to his said nephew C. D. for ever:—Held, that C. D. was not beneficially entitled to the surplus rents of the said lands, which remained after payment of said annuities, for the residue of the term of ninety-nine years, but that same was a resulting trust for the heir-at-law. An heir-at-law is not to be disinherited, unless by express words; and unless it be distinctly pointed out to whom the estate is to go, it devolves on him. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668.

4. Devise of real estate to W. R. W. and his heirs, upon trust to receive the rents and profits, and apply same in discharge of the testator's debts and legacies, and after payment thereof to convey a portion of said real estate to testator's brother, R. W., for his life, and the residue thereof, and the part so devised to R. W., after his decease, to such of the sons of W. R. W. as should at his decease be his second son for life, with remainder to his first and other sons in tail male, with remainder to the third and fourth, and every other son of W. R. W. successively in strict settlement. The will concluded thus: "And as to all my personal estate, etc., subject, however, to my debts and legacies hereinbefore bequeathed, I give and bequeath same to my relative W. R. W., whom I appoint executor of this my will, and also in case of any residue I appoint him my residuary legatee." The debts and legacies having being all paid, and R. W. having died in the lifetime of the trustee, W. R. W.:—Held, that the residuary clause was confined to the personal estate, and that under it these rents and profits did not pass to W. R. W. for his life. *Wills* v. *Wills*, 1 Dr. & War. 439.

5. A. directs 1,000*l.* to be laid out in the purchase of lands, that the rents and profits thereof might come to his nephew W. for his life; but the testator made no disposition of these lands after the death of W.:—Held, that the lands belonged to the testator's heir-at-law. *Fletcher* v. *Chapman*, 3 Bro. P. C. 1.

6. Testator gave the interest of the 4 per cent. bank annuities then standing in his name, together with the interest of a sum of money, then at his banker's, which he directed to be invested in the same stock, to his wife, with a power of disposing of one-third thereof, after her decease. "And as to the rest and residue of his estate," after payment of the said bequest to his wife, viz., two-thirds of the property he should die possessed of, he gave the same as follows:—First, to the children of A. 60*l.* of the 4 per cent. consols; also to the eldest of such children 30*l.* per annum for life, and to his lawful heir, payable out of the interest. He then made a similar bequest in favour of the children of B., and he appointed his second wife and C. to be executors of his will, and declared his intention, "if the residue of his said property after the payment of the children of B. was not sufficient to pay the specified annuities of 30*l.*, the residue should be equally divided as above specified." The money at his banker's having been invested in the 4 per cents, the whole of that sum was 5,306*l.*:—Held, first, that the children of A. and B. respectively were entitled only to 60*l.* stock, and that the residue of the fund, after satisfying the two sums of 60*l.* and the two annuities of 30*l.*, was undisposed of; secondly, that the testator having by his will professed to dispose of the whole of the property, although according to the aforesaid construction he had not in fact done so, yet this was not sufficient to exclude the executors from taking beneficially as such; and, thirdly, that the interest given to the wife in one-third, or the residue, did not prevent her taking her share of the remaining two-thirds under the Statute of Distributions. *Oldham* v. *Carleton*, 2 Cox 399.

IV. DEATH OR FAILURE OF DONEE IN TRUST. EFFECT ON CHARGE OR CESTUI QUE TRUST.

7. Where a bequest is made to A., in trust for B, the striking out of the gift to A. does not revoke the beneficial gift to B. *Shea* v. *Boschetti*, 18 Beav. 327; 18 Jur. 614; 23 L. J., Ch., 652; 2 W. R. 281; 2 Eq. Rep. 608.

8. As long as the fund itself exists upon which a legacy is charged, though it devolve either upon the heir or the executor, yet they take it, subject to the charge. *Hills* v. *Wirley*, 2 Atk. 605.

9. E. devises lands to his second son T., upon condition that T. or his heirs should pay to T.'s children 90*l.*, to be equally divided among them, and on default of payment a clause of entry or distress. T. died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir-at-law, and sold them. The legacy to the children of T., the testator's second son, is a continuing charge on the land in the hands of the purchaser, and they are entitled to be

satisfied for the same, with interest. *Wigg* v. *Wigg*, 1 Atk. 382.

A. devises lands to B., on condition to pay a sum of money, and no clause of entry. The legatee at law has no lien on the lands, but the heir of the testator shall enter for breach of condition, and yet in this Court is but trustee for the legatee. *Id.* 383

1. A wife having power to appoint 4,000*l.* to any of her kin, and for want of appointment to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of 100*l.* She then bequeathed to her niece, S., all the real and residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void; but not so as to the annuitant; and the remainder was held to pass by the above residuary bequest. *Oke* v. *Heath*, 1 Ves. 135.

2. Trust legacy cannot lapse by death of trustee. *Moggridge* v. *Thackwell*, 1 Ves. J. 475; 3 Bro. C. C. 517. Affirmed 13 Ves. 416.

3. Estate devised to a body corporate, which cannot take by the Statute of Mortmain, in trust to sell and apply the proceeds for persons competent to take; though the devise of the legal estate is void in law, yet the trust shall not be defeated. The heir-at-law therefore considered as a trustee for the purpose. *Sonley* v. *Clockmakers' Co.* (*Master, etc., of*), 1 Bro. C. C. 81.

4. Devise to trustees for a charity; the trustees die the testator's lifetime. This subsists in equity, though lapsed at law. *Att.-Gen.* v. *Hickman*, W. Kel. 4

5. A bequest of money connected with a devise void by the Statute of Mortmain fails, though the devise is revoked by a subsequent conveyance or surrender, *semble*. *Att.-Gen.* v. *Hinxman*, 2 Jac. & Walk. 270.

6. A testator bequeathed leaseholds, subject to the payment thereout of an annuity to A. He afterwards assigned the leaseholds on other trusts, and reserved a power to appoint a like annuity to A. Subsequently he confirmed his will, but he did not, in terms, execute his power:—Held, that the annuity failed. *Cowper* v. *Mantell*, 22 Beav. 223.

7. The testator directed the share of one of the nephews to be subject to the payment of 100*l.* to W. The share did not amount to 100*l.*:—Held, that W. took the share, so far as it went, towards the 100*l.* *Re Arrowsmith*, 7 Jur., N. S., 9; 30 L. J. Ch, 148; 9 W. R. 258; 2 De G. F. & J. 474; 6 Jur., N. S., 1231; 29 L. J., Ch., 774; 8 W. R. 555.

8. Testator devised land at M. to his son R. in fee, on the express condition that, within three months after testator's death, he should relinquish the debt owing to him from the testator, and deliver the promissory notes therefor to the executor to be cancelled. The testator devised land at S. to trustees upon trust for sale (with power to postpone the sale, the unsold portion being transmissible as personalty), to invest the net proceeds (after payment of the deficiency of his residuary personalty to pay debts), and pay the income to the widow, and after her death pay the capital to four grandchildren in equal shares. The testator devised his residuary realty to his sons R. and J. in equal shares in common. He also bequeathed his residuary personalty upon trust therewith to pay his debts (except a mortgage debt and the debts due to his sons), and to retain the surplus for the benefit of R. and J. equally; but in case the residuary personalty was insufficient to pay his debts (except as aforesaid) the deficiency was to be paid out of the realty directed to be sold. By a codicil the testator revoked the gift of one of the fourth shares in the proceeds of the S. estate, and gave such proceeds, subject to the widow's life interest and such deficiency of personalty, to pay debts, as to 900*l.* for certain persons, and he declared that the residue of clear proceeds should form part of the residuary personalty. R. died before the testator, without issue:—Held, that, although the devise of the M. estate to R. had lapsed, that estate, and not the residuary personalty, must bear the debt owing to R. Although a testator makes it a condition of a devise that the devisee should do something, the devisee by refusing to perform the condition, or dying before it is to be performed, cannot deprive the person who is to have the benefit of the condition from such benefit; and there is no distinction between a condition to pay a sum or an annuity, or to give a valuable thing to a legatee, and a condition that the personal estate shall be exonerated from a debt. *Re Kirk, Kirk* v. *Kirk*, 21 L. R., Ch. D., 431; 47 L. T. 36; 31 W. R. 94.

Death of Donee of Power.] See POWER, VI. 1.

XLIII. Estates for Life, in Fee-simple or in Fee-tail.

See also XLIV. II. and III.—XLV. V.—LVI.—LVII. *post.*—SETTLEMENT X. XI. *and* XIII.

I. BY LIMITATION TO A. AND HIS HEIRS.

See also XLII. *ante.*

1. Heir when construed Heir of the Body.

1. Under a devise to trustees, in trust for A. or life, and "after her decease to descend to her female heir. and whether sister or daughter," A. takes an estate in tail female. *Lewthwaite* v. *Thompson*, 36 L. T., N. S., 910.

2. Devise of land to W. for life, remainder to his first son for life, remainder to the right heirs male of his body, remainder to the second, etc., sons of W., and the heirs male of their bodies, remainder to T. for life, and after to his first heir male of his body, and for want of such over:—Held, T. took an estate in tail male. *Dubber* v. *Trollope*, Ambl. 453.

A devise to a man for life, and if he die without heir male remainder over, makes an estate tail. The words "for want of such issue" make an estate tail by implication. *Id.* 463.

2. Heirs when construed Heirs of the Body.

3. A. devises lands to J., his wife, for life, then to his son H. for life, then to his son G. and his heirs for ever; if he died without heirs, then to his two daughters K. and L. This is an estate tail in G. *Tyte* v. *Willis*, Forrest. 1.

4. One, having several children, devises land to one of them and his heirs, and for want of such, to the heirs of his other children:—Held, the first devise was an estate tail. *Pickering* v. *Towers*, Ambl. 363.

5. A. devised to B. and his heirs; and said afterwards, "if he shall die without heirs of his body": this controls the devise to an estate tail. *Lampley* v. *Blower*, 3 Atk. 398. And see *Lee* v. *Prieaux*, 3 Bro. C. C. 381, where this case is stated from the register book.

6. Where A. devised to B. for life and to his heirs, and, for want of heirs to C. in like manner, and for want of heirs of him, to D. and his heirs for ever; B. and C. were brothers, and D. was their cousin and heir:—Held, that B. and C. took an estate tail, and that the remainder over to D. was good. *Parker* v. *Thacker*, 3 Lev. 70.

7. Bequest to A. for life, remainder to his children; but if he shall die without children living at his death, to B. for life; remainder to her children; and if she should die without children living at her death, then to her executors, administrators, and assigns. By a codicil, the same is given over "after the decease of the before-mentioned persons in my will, A. and his heirs for ever, and B. and her heirs for ever." The meaning of the word "heirs" in the codicil not to be confined to children from comparison with the will and the bequest over, therefore too remote. *Griffiths* v. *Grieve*, 1 Jac. & Walk. 31.

8. A devise by a father to a second son and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail. But had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. *Nottingham* v. *Jennings*, P. W. 23.

9. A devise before 1838 of "my H. estate" to S., a grandson, with a gift over to the testator's other grandsons, should S. die without an heir, gives an estate tail in S., and not a devise in fee, for the persons to whom the limitation over was made were capable of being collateral heirs of S. *Hancock* v. *Clavey*, 19 W. R. 1044: 25 L. T. N. S., 323.

10. A. devised land to B. his son, and if C. his daughter survived B. and his heirs then she should have the land. Adjudged, that B. had but an estate tail; but if the will had said that S., a stranger, should have the land if he survived B., B. would have taken an estate in fee. *Webb* v. *Hearing*, Cro. Jac. 415.

11. A testator, having several children, directed the purchase of an estate for one of his daughters, "for her use and her lawful heirs," to be returned, "if she died without lawful heirs," to the other children that had heirs:—Held, upon the context, that "lawful heirs" must be construed "heirs of the body," that the daughter took an estate tail, and that the gift over was also an estate tail. *Simpson* v. *Ashworth*, 6 Beav. 412; 7 Jur. 410.

12. The word heirs, in a devise to first and other sons, construed heirs of the body, in order to give effect to the general intention, that the sons should take successively and in priority of birth. *Hennessey* v. *Bray*, 33 Beav. 96; 9 Jur., N. S., 1065; 11 W. R. 1053.

Devise to A. for life, and afterwards to his "first and other sons successively, according to the priority of their respective births, and their respective heirs" (omitting "of their bodies"), to the extent that the elder should be preferred to the younger, and "for default of such son or sons," to the daughters as tenants in common in fee:—Held, that the sons of A. took successively as tenants in tail general. *Ib.*

The will contained a proviso for the cesser of A.'s life interest on his executing a mortgage thereof. The trustee joined with A. in executing a mortgage to B. Upon a bill by the parties next entitled upon the cesser of A.'s life interest:—Held, that the account must be taken, as against A. and the trustee, from the time of the accruer of the plaintiff's right; and as to the mortgagee, from the time when he first had notice of the clause of forfeiture. *Ib.*

13. A., owner in fee of several denominations of land, devised different portions of the same to several of his sons respectively, such portions being devised to each individual devisee "and his heirs for ever." One of the devises was in these words: "I leave my third son M. T. the lands of G. for ever; but in case he should die unmarried, or without lawful issue, in that case he may will one half of it as he pleases, and the other half to go, share and share alike, between my surviving sons and their families." The concluding paragraph of the will ran thus: "All the bequests given to my son R. T., my son J. T., and my other three sons M. T., C. T., and H. T., of my property, no part of it shall or will be liable to pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs":—Held, that M. T. took an estate tail under A.'s will. *Re Thompson*, 16 Ir. Ch. R. 228. Affirming 14 Ir. Ch. R. 517.

14. The general scope and object, as explained by the testator in his will, of a devise, sufficient in itself to pass the fee:—Held, to render it

operative only to pass an estate tail. *Jenkins* v. *Hughes*, 6 Jur, N. S., 1043; 8 W. R. 667; 30 L. J., Ch., 870; 8 H. L. Ca. 571. And see *Jenkins* v. *Clinton* (*Lord*), 4 Jur, N. S., 887; 26 Beav. 108

A. had several great-nephews. His will was drawn up by himself while abroad. It contained the following passages: "I name and appoint my universal heir my great-nephew T., eldest son of my nephew W., to whom I give all my lands. The eldest son of my godson and great-nephew T., who may be living at his father's death, is always to be considered as heir to my estates." "If my godson and great-nephew T. should not leave any son at his death, I direct that his next brother and second son of my nephew succeed to my estate, and so on, in case of failure of male heirs to the third, fourth, etc." "The eldest great-nephew living always to be considered as my legitimate heir in case of failure of the other brothers, my express will and desire being that my estates do always descend in the male line":—Held, that the great-nephew T. should take an estate in tail male, and that that intent must prevail. *Ib.*

To A. and his heirs and if he dies without issue.] 1 A. having a son and two daughters, devised the estate in question to his son and his heirs, provided that, if the son should die before twenty-one, or without issue of his body, then it should go to the testator's two daughters. A. died, and the son lived to twenty-one, and made his will, and devised the estate to plaintiff. The Court inclined that the son had but an estate tail, and so the devise to the daughters took effect, the son having died without issue. *Helier* v. *Jennings*, 1 Freem. 509; 1 Ld. Raym. 505 S. C. *nom. Hilliard* v. *Jennings*, Com. 90; 1 Freem. 510; 12 Mod. 276; Carth. 511

2 A. by will gives all his real and personal estate to trustees, in trust for the payment of his debts and legacies, and then to the use of his eldest son J. and his heirs for ever; and failing issue of that son, to his third son G. and his heirs for ever; and failing issue of that son, "then to the use of every other son that I shall or may have, and their heirs for ever; and failing issue male, then to the use of my issue female, and their heirs for ever":—Held, that according to the intention of the testator, his sons took successively an estate in tale male, and that upon the death of the eldest son, leaving only a daughter, the second took in the order of succession. *Fitzgerald* v. *Leslie*, 3 Bro. P. C. 154.

3. S. devised lands to his sons, to hold to them their heirs and assigns, as tenants in common, and not as joint tenants, and he declared, that in case any of his sons should happen to die without any issue of his or their body or bodies lawfully begotten, that the share of him or them so dying should go to, and be equally divided amongst, the survivor or survivors of them in equal shares and proportions, to hold to them, their heirs and assigns, as tenants in common and not as joint tenants. S. charged a gross sum upon the lands in favour of his other children:—Held, that the words of the devise created an estate tail. *Taylor* v. *Walker*, 11 Jur., N. S., 723; 13 W. R. 986; 12 L. T., N. S., 793.

3. "Lawful Heirs," "Right Heirs," "Heirs Male."

4. The words "lawful heirs":—Held, upon the context of a will, to mean "heirs of the body." *Simpson* v. *Ashworth*, 6 Beav. 412; 7 Jur. 410.

5. A devise to A. and his "lawful heirs" creates a fee and not an estate tail. The addition "lawful" in no degree affects the word "heirs," for the qualification of being "lawful" is implied in the word "heirs." *Mathews* v. *Gardiner*, 17 Beav. 254.

Devise to testator's daughter "and her lawful heirs," "but in case she should not happen to leave any child," then to his nephew and his heirs:—Held, that the daughter took a fee-simple, with an executory devise over to the nephew. *Ib.*

6. The devise to J. W. and C, and their heirs in due succession as named, with usual limitations, gives an estate tail to the first taker, who having a son born alive, and since dead, is, as his personal representative, entitled to the personal estate absolutely. *Stratford* v. *Powell*, 1 Ball & B 1.

7. Consideration of the meaning of the words "son" and "heir" used by a testator indiscriminately. *Jenkins* v. *Hughes*, 6 Jur., N. S. 1043; 8 W. R. 667; 30 L. J., Ch., 870; 8 H. L. Ca. 571; 4 Jur., N. S., 887.

8. The word "son" in connection with the words "heir" and "issue":—Held, by force of context, to mean issue male. *Jenkins* v. *Clinton* (*Lord*), 26 Beav. 108; 4 Jur., N. S., 887.

The word "son" is quite as flexible as the word "hen," and can as easily be read "issue male" as the word "heir" can be turned into "son." *Ib.*

A testator appointed A. "his universal heir":—Held, that these words were sufficient, if uncontrolled, to give the fee-simple. *Ib.*

9. Devise of lands to A., and the heirs male of his body. A. dies in the life of the testator, leaving issue The devise is void, and the issue cannot take. *Hutton* v. *Simpson*, 2 Vern. 722; Pre. Ch. 439; Gilb. Eq. Rep. 120, 165.

10. Two testatrixes make mutual wills of property which they take as co-heiresses under the will of their uncle, and make devises in tail by apt words, with the ultimate gift as follows: "And for default of all such issue, to the right heirs of my grandfather Sir T. S., deceased (the father of my uncle Sir T. S.), by M. his second wife also deceased, who was the daughter of Sir. G. C., Knt., for ever." Upon the question whether by this clause a fee-simple or an estate tail special passed:—Held, that an estate in special tail was created, and the plaintiff, by the disentailing deed executed by his wife, became seised in fee in the property in question. *Wright* v. *Vernon*, 2 W. R. 693; 2 Drew. 439.

II. BY LIMITATION TO A. AND HIS ISSUE.

11. Devise of premises to A., and the issue of his body living at his death, and for want of such issue over, is an estate tail in A. *Oxford* (*University*) v. *Clifton*, 1 Eden 473; Ambl. 385.

1. Testator gave real and personal estate to his wife for life, remainder "to and amongst his three children and their lawful issue, in such proportions, manner, and form, and subject to such charges, etc., as the wife should appoint":—Held, that the words gave estates tail to the three children in default of appointment, and that an appointment to a deceased child and the heirs of her body was invalid. *Martin* v. *Swannell*, 2 Beav. 249; 9 L. J., N. S., Ch., 174.

2. A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interest in the personalty; and that cross-remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell*, 25 Beav. 551.

3. Devise of real estate upon trust for my nephews and nieces and their respective lawful issue, and also the issue of F. (if any) and their several and respective heirs and assigns for ever as tenants in common:—Held, that the nephews and nieces took in tail. *Campbell* v. *Bonskell*, 27 Beav. 325.

Construction of words "Die without Issue," "Default of Issue."] See LVI. *and* LVII. *post.*

Issue, Construction of. In General.] See XXVI. *ante.*

III. BY LIMITATION TO A. FOR LIFE, REMAINDER TO HIS ISSUE.

1. *Words of Explanation referring to word "Issue,"* 7907.
2. *Words of Limitation added to word "Issue,"* 7907.
3. *Words of Distribution or Modification with or without Words of Limitation added to word "Issue,"* 7908.

1. Words of Explanation referring to word "Issue."

4. It is a rule of construction, particularly in wills, that where words are of an ambiguous signification, or are of such a nature as that they may be sometimes considered as words of purchase, and sometimes as words of limitation, the intent of the devisor must fix the meaning of those words. The word "issue" is of this nature. In deeds it is a word of purchase, and technically speaking it is so. The case of *King* v. *Melling* (2 Lev. 58) was the first case where it was taken and considered as a word of limitation. *Mandeville* v. *Carrick*, 3 Ridgw. P. C. 365.

Where the issue cannot take but through the father, there, though the father has only an estate for life given him by express words, yet he must, by necessary implication to effectuate the intention of the devisor, take an estate tail to convey the estate to his issue. *Ib.*

Devise to E. during his life only, and after the determination of that estate to the said E.'s lawful issue male, and the lawful issue male of such heirs, the eldest always of such sons of the said E. to be preferred before the youngest, according to seniority in age, and, for want of such issue in E., remainder over. This gives E. an estate for life only.

5. A., by his will, left a certain leasehold for lives renewable for ever, and a leasehold for years, and his stock-in-trade, etc., to trustees, upon trust, for his daughter for life, and after her decease "to and amongst the issue of his said daughter, lawfully to be begotten, in such shares and proportions as his said daughter should by her last will and testament appoint; provided such child or children should arrive at the age of twenty-one years; and for want of such issue, or in case of the death of such issue, and of the death of his wife," then over:—Held, that the daughter took an estate for life only, and that the limitation over was good. *Ryan* v. *Comley*, Ll. & G. *temp.* Sugd. 7.

6. Devise of real and leasehold estates together to A. for life, and after his death to the male issue of the body of A., in equal shares and proportions, the leaseholds being the bulk of the property:—Held, that A. took an estate tail in the freeholds, and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 John. & H. 235.

7. Devise of "all my said manors, lands, tenements, and effects, real and personal," to one for life, and after his decease to his issue male, and the heirs male of such sons successively, one after another, with remainder to A., "and in default of his issue male, as before," then over to B., "and in default of his issue male, as before," then to the plaintiff: A. held entitled for life, with remainder to his first and other sons in tail male; B to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. *Macnamara* v. *Wentworth* (*Lord*), Coop. 241.

2. Words of Limitation added to word "Issue."

8. Lands were devised in trust for A. for life, remainder in trust for her issue male and their issue male, in such manner as A. should appoint, and in default of such issue male then in trust for B. for life, remainder in trust for such of his issue male and their issue as he should appoint; and in default of such issue, then over.—Held, that B took an estate tail. *Irwin* v. *Cuff*, Hayes 30.

9. Devise to J. for life; remainder to his issue male, and to his and their heirs, share and share alike; and for want of such issue, to his issue female, and her and their heirs; remainder to J. K., his heirs and assigns, with a proviso that if J. K. or his issue, or any of them, shall alienate, mortgage, or incumber, or do any act to defeat the bequests, he or they shall pay, and he charges the premises with 2,000*l.* to such persons who should or ought to take next under the above limitations. J. had two daughters and no son, and he and his daughter suffered a recovery. Bill to be paid the 2,000*l.*:—Held, J. K. took an estate tail, and that the proviso was repugnant to the estate. *King* v. *Burchell*, Ambl. 379; 1 Eden 424; 4 T. R. 296. n. See comments on this case in *Woodhouse* v. *Herrick*, 1 Kay & J. 352; 24 L. J., Ch., 649; 3 W. R. 303; 3 Eq. Rep. 317.

1. A. being seised in fee, devised one moiety of his estate to his sister M. for life, remainder to her first and other sons in tail male, and for want of such issue, remainder to her issue female, and the heirs of their body, with power to M to charge 1,000*l.* for younger children, and for want of such issue, remainder to his sister I. for life, with precisely similar remainders to her issue. The other moiety was limited to I. for her life and to her issue, and then to M. and her issue, in precisely the same way as the first moiety; and for want of issue of M. and I, the whole to L. for life, with remainders over. By codicil, reciting the marriage of M. and D., he devised one moiety to M. for life, remainder to the issue of M. successively, and the heirs of their bodies, "as in said will limited, and for default of such issue to D. for life, with remainder over, as in said will limited." The codicil contained the following clause: "I ratify my will with respect to my real estate in every particular not hereby altered; the only alteration I intend hereby is, that if my sister Margaret should die without issue, or failing issue, that the said D. her husband, or any other husband she may have, should hold a moiety of my estate during his life." M., after the death of D., suffered a recovery to the use of herself, her heirs and assigns for ever:—Held, that, under the limitations in the will, M. took only an estate for her life, and that she did not take an estate tail female, after the estate in tail male to her first and other sons; held, also, that from the words "in default of such issue to D.," etc., in the codicil there was no ground for implying an estate tail in M., the word "such" being referential to the devise in the will of her sons in tail male, and her daughters in tail general; held, also, that the devise in the codicil to D., or any future husband, if M. should die without issue, or failing issue, was to take effect on the determination of the express limitations in the will to M.'s first and other sons in tail male, and to her daughters in tail general, and not on a general failure of M.'s issue, and that therefore M. did not take an estate tail by implication. *Hamilton* v. *West*, 10 Ir. Eq. R. 75.

2. A. devised to B. an estate during the life of herself and her husband, and after their deceases to the lawful issue of B.'s body for ever:—Held, that B. took an estate tail. *Griffiths* v. *Evan*, 5 Beav. 241; 11 L. J., N. S., Ch., 219.

3. Devise of "all my said manors, lands, tenements, and effects, real and personal," to one for life; and after his decease to his issue male and the heirs male of such sons successively one after another, with remainder to A., "and in default of his issue male as before;" then over to B., "and in default of issue as before;" then to the plaintiff. A. held entitled for life, with remainder to his first and other sons in tail male; B. to take in remainder in the same manner; and that the plaintiff was entitled to the ultimate remainder in fee. *M'Namara* v. *Wentworth* (*Lord*), Coop. 241.

4. A testator, by a will made in 1838, devised his lands and all his estate and interest therein to trustees, to permit and suffer his four sons to receive the rents during their lives in equal shares, and after the decease of them, or either of them, leaving issue male lawfully begotten, then for such issue male, according to priority of birth and seniority of age; but in case of their decease without issue, or there being such, in case such male issue should die before attaining the age of twenty-one, then upon trust as to the share or shares of the one so dying, original as well as accruing share, for the survivor or survivors and their issue male, it being his intention that, in case of the decease of his sons without male issue, or there being such issue male, and they should die before attaining the age of twenty-one, then the share of the one so dying should go to the survivors and their issue:—Held, that the sons took estates tail in their respective shares. *Warren* v. *Travers*, 2 Ir. R., Eq., 455.

3. Words of Distribution or Modification with or without Words of Limitation added to word "Issue."

5. A testator devised all his freeholds to trustees, and he subsequently devised some freehold houses to A., to have and enjoy the same to the exclusion of her husband, for life, and at her decease the same to go to her lawful issue, share and share alike; but if A. should depart this life without leaving lawful issue, then the said houses to go to the issue of W.:—Held, that A. took an estate tail. *Heather* v. *Winder*, 5 L. J., N. S., Ch., 41.

6. Testator devised as follows: "I give and devise all that my freehold lease in P., and all and every my chief rents in the town of M., and also my two warehouses in the said town, unto my two sons, H. I. and O., in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof to my son H. I. for life, with remainders to his lawful issue, and their respective heirs, in such shares and proportions, and subject to such charges, as he the said H. I. shall by deed or will appoint; but in case my said son H. I. shall not marry and have issue who shall attain the age of twenty-one years, then to my son O. in fee:—Held, that H. I. took an estate for life in the moiety, with remainder to his children as tenants in common in fee. *Lees* v. *Mosley*, 1 Y. & Coll. 589.

7. Devise to A. for his life, and from and after his decease "unto all and every the issue of the body of the said A., share and share alike as tenants in common, and the heirs of such issue":—Held, that A. took an estate for life only. *Greenwood* v. *Rothwell*, 6 Beav. 492. And see S. C. at law, 6 Scott 670; 5 Man. & Gr. 628; 12 L. J., N. S., C. P., 259.

8. Lands were devised to A., the testator's widow, for life, with remainder to trustees upon trusts "to pay and divide the rents unto and among all the brothers and sisters of the testator who should be living at the time of A.'s death, and to their issue male and female after the respective deceases of his said brothers and sisters for ever to be equally divided between them:—Held, that the words "issue male and female" were words of limita-

tion, and that the children of a sister who died in the lifetime of A. took no interest. *Tate* v. *Clarke*, 1 Beav. 100; 8 L. J., N. S., Ch., 60.

1. Testator devised as follows: "I give and devise unto J. C. the lands of D., to hold to him during his natural life; and from and after his decease I give and devise the same unto the issue male and female of the said J. C., begotten or to be begotten upon the body of his present wife, C. C., to be divided between and amongst them in such manner, shares, and proportions as the said J. C. shall by his last will and testament limit and appoint:—Held, that J. C. took an estate for life only. *Crozier* v. *Crozier*, 2 Con. & L. 309; 3 Dr. & War. 353; 5 Ir. Eq. R. 415.

2. Devise of a freehold estate to the testator's illegitimate son W., "to have and to hold during the term of his natural life, and in case he has issue then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will the testator devised and bequeathed the rest and residue of his effects, real and personal, not thereinbefore disposed of, to his said son; but "in case my son W. dies without issue, then it is my will that the whole of my property be ascertained, and after bequeathing certain legacies and annuities, the rest and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportions to A. and B.":—Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward* v. *Bevil*, 1 Y. & J. 512.

3. G. G. devised his house in G—— Street, of which he was seised in fee, to his wife for life, with power for her to sell the same; and directed the purchase money, or so much thereof as might be necessary, to be applied by his executors in payment of his debts, and the surplus thereof he gave to his wife for her own benefit. He also devised the lands of B., of which he was seised under a lease for lives renewable for ever, to his wife for life, subject to the payment of his debts, and after her decease he devised the house in G—— Street, in case the same should not be sold by his wife, and also his lands of B., to his son C. G. for life, subject to the payment of his debts, with power to sell the house in G—— Street, the purchase money thereof to be applied as aforesaid, and the surplus thereof he gave to him for his own benefit; and after the death of his said son he gave all the premises to the use of the issue of his said son, with power by deed or will to appoint same to all or any of his children or issue, male or female: and in default of such appointment, then to the first and other sons in tail male, remainder to the issue female of his son, as tenants in common, and to their issue; and in default of such issue, to his two granddaughters C. G. and A. G. as tenants in common for their lives, with several limitations over. The testator declared his intention to be that every person who should come into possession of his estates, by virtue of the devises aforesaid, should hold the same as tenants for life only, and he gave them power of leasing and jointuring, and appointed his son and his daughter executor and executrix. C. G., the son, entered after the death of the testator's wife, was discharged as an insolvent, and died without issue:—Held, that C. G. took an estate for life only. *Flood* v. *Digby*, 1 Jones 520.

4. A testator, by will dated 1789, gave to his wife and granddaughter A., during their natural lives, all his freehold and leasehold lands, except the leaseholds therein mentioned. The testator then gave his mansion-house at Moat-house to his wife for life, and declared that if A. should die leaving issue, he gave unto her said issue (after the decease of his said wife and issue) all his said freehold lands, to be distributed among them, share and share alike, as three gentlemen learned in the law, or a major part of them, should affix the same; but in case A. should die leaving no issue, and after the decease of his said wife, the testator gave the same lands to trustees to sell, and distribute the purchase money among certain grandchildren therein mentioned:—Held, that A. took an estate tail in the premises at Moat-house. *Kavanagh* v. *Morland*, 18 Jur. 185; 23 L. J., Ch., 41; 1 Kay 16; 2 Eq. Rep. 771; 2 W. R. 8.

"Issue" may *primâ facie* be taken as equivalent to "heirs of the body;" but the Court will lean more to cut down this effect of the former word, by applying it to other portions of the will, than the effect of the latter. *Ib.*

If there be a gift to A. for life, with another gift over to his issue, with words of limitation superadded, the issue take as purchasers in fee, fee tail, etc., as the case may be; and therefore, where there has been a preceding gift to the issue of A. and their heirs, a subsequent gift over, upon A. dying without issue, operates nothing. *Ib.*

Gift of lands to "the issue of A., as three persons shall affix the same," does not of itself give to the issue anything beyond a life estate, but points only to a power of partition and distribution. *Ib.*

5. A testator devised a house and premises to M. for life, and immediately after her decease he gave and devised the same unto the issue of her body, to hold to them and their heirs for ever, as tenants in common; but in case M. should die without leaving such issue, then over:—Held, that M. took as tenant for life, and not as tenant in tail, with remainder to her children as tenants in common in fee. *Golder* v. *Cropp*, 5 Jur., N. S., 562.

6. In wills of real estate "issue," unless there be something to show a contrary intention, means "heirs of the body," and includes all descendants to all time. *Woodhouse* v. *Herrick*, 1 Kay & J. 352; 24 L. J., Ch., 649; 3 W. R. 303; 3 Eq. Rep. 817.

Devise in 1806 of lands to F., and M., his wife, for their joint lives, and the life of the survivor; remainder to all their children "already or hereafter to be born, for their joint lives, and the life of the survivor;" but all the sons to take testator's name and arms; "remainder to trustees to preserve contingent remainders;" but nevertheless upon trust to permit all the said children to receive the rents during their lives;" "and from and after their several deceases unto and equally between all their issue male and female," and "for want of such issue" a devise over to

another family:—Held, first, that the name and arms clause was not a condition precedent; secondly, that "already or hereafter to be born," like "born or to be born," denoted children living at testator's death; thirdly, that such children took as tenants in common in tail, with cross-remainders between them in tail, notwithstanding the limitation to the issue was in terms to them as tenants in common, and the limitation over was "in default of such issue," and not of issue absolutely. *Ib.*

King v *Burchell* (Ambl. 379; 4 T. R. 296. n.; 1 Eden 424) remarked on, and *Montgomery* v. *Montgomery*, (3 J. & L 47) explained. In the latter Lord St. Leonards did not disapprove of the rejection in a devise like the present, of creating a tenancy in common, but of the cases where, although words of limitation were superadded to the word "issue," as in a devise to one for life, with remainder to his issue, and their heirs, it has still been held that the issue took not as purchasers, but by descent through the first taker. *Ib.*

1. Devise to trustees "upon trust for the children of her niece during their lives, and after the decease of the survivor then for all and every the lawful issue male and female of such of the children of her niece as should be living at her decease as tenants in common, and the heirs of the body of all and every of the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original as the accrued share of him so dying, and of whom there shall be such, shall be in trust for the survivors or survivor of them as tenants in common, and for the heirs of the body of such surviving issue":—Held, that the rule in *Shelley's case* did not apply, and that the children of the testatrix's niece took estates for life only with remainder to their "issue" as purchasers. *Parker* v. *Clark*, 3 Sm. & G. 161; 1 Jur, N. S, 605; 3 W. R. 471. Affirmed 2 Jur., N. S., 335; 6 De G. M. & G. 104. And see *Colclough* v. *Colclough*, 4 Ir. R., Eq., 263.

Superadded words following "issue," or other words having no technically defined meaning, tend more strongly to show an intention that they should take as purchasers than when superadded to words having a technically defined meaning, such as the words "heirs" or "heirs of the body." *Ib.*

2. A will contained a direction to trustees to convey to the testator's son in strict settlement if he should marry, followed by a declaration that if the son should die unmarried, or without lawful issue, the property should be limited and devolve upon A. for life, remainder to A.'s eldest son for life, remainder to his issue male, and in failure of such issue to A.'s other sons in succession, the eldest of such sons and his heirs male always to be preferred:—Held, that the trusts in favour of A. and her sons were not executory; and that the testator's son, having died unmarried, and A. having died subsequently, her eldest son was entitled in tail male. *Re Nelley*, 26 W. R. 88.

3. Where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" has been used by the testator as meaning "heirs of the body." *Roddy* v. *Fitzgerald*, 6 H. L. Ca. 823.

When the word "issue" is so employed, it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning *Ib.*

Devise in 1817 of a freehold estate for lives, renewable for ever, "to my son W. during his life, and after his death to his lawful issue, in such manner, shares, and proportions as he by deed or will shall appoint, and for want of such appointment then to his issue equally if more than one, and if only one child to said child, and on failure of issue of W." to J. Another estate, consisting of fee-simple lands, was devised in the same terms to another son, J.; and on failure of issue of J. it was to go to W. J. and W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:—Held, that under these devises each of the first devisees took an estate tail by implication. *Ib.*

The remainders were contingent, and therefore the recovery suffered as to the fee-simple lands operated as a bar to them, whether the first devisee did or did not take an estate tail. *Ib.*

IV. OTHER LIMITATIONS CREATING AN ESTATE TAIL.

4 Construction of words of a devise as to giving an estate tail. *Willcox* v. *Bellaers*, T. & R 491.

5. Where the intent of a testator, in creating an estate tail, is very doubtful, the Court will lay hold of any circumstances rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier* v. *Tracey*, 3 Atk. 797.

6 Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase contrary to their ordinary sense, or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving an estate tail, and which intention can only be fulfilled by sacrificing the particular provision and regarding the expressions as words of purchase. *Fetherstone* v. *Fetherstone*, 3 Cl. & F. 67. S. C. *nom. Jack* v. *Fetherstone*, 9 Bli., N. S, 237.

7. Devise to A. and his posterity. Lord Keeper thought this would create an estate tail only; but the Master of the Rolls being of opinion that such a devise would amount to a fee, Lord Keeper ordered precedents to be searched. *Att.-Gen.* v. *Bamfield*, 2 Freem. 268.

V. WHAT WORDS WILL PASS THE FEE-SIMPLE.

1. *In General, and Effect of Want of Words of Limitation*, 7911.

1. In General, and Effect of Want of Words of Limitation.

1. In a devise of real estate words of limitation are required to give more than an estate for life, as are words of qualification to restrain the extent and duration of the interest in personal property. *Adamson* v. *Armitage*, 19 Ves. 418.

2. If lands are devised to one generally, he takes but an estate for life, unless it appear plainly the testator intended him a greater, or that he is likely to be a loser, or his person chargeable. *Fairfax* v. *Heron*, Pre. Ch. 67.

3. Testator gives freehold and leasehold estates to his heir-at-law for life, remainder to R. for life, and to his first and other sons, remainder to S. and W. for their joint lives, and to the survivor of them; the survivor is only to take an estate for life in the freehold, though he takes the whole interest in the leaseholds. *Awse* v. *Melhuish*, 1 Bro. C. C. 519.

4. Bequest of land, and of 5 per cent. stock, and 3 per cent. stock, to trustees, to apply a sufficient part to the support and education of R., the stock to remain in the testator's name, and the surplus of the dividends and rents to accumulate; and when R. attained twenty-one, to transfer to her the lands, stock, and accumulations; but if R. died under twenty-one (as happened to be the case) testator gave his lands to E., without any words of limitation, and his 5 per cent. stock to M., provided they were living at the decease of R., not else The plaintiffs were the residuary legatees. R. died under twenty-one:—Held, that E. took the lands in fee; that M. took the capital of the 5 per cent. stock; that the plaintiffs were entitled to the accumulations of the rents and dividends. *Powles* v. *Jopling*, 9 L. J., Ch., 224.

5. A devise of lands for ever conveys an estate in fee, and is not affected by subsequent words requesting the devisee, "in case of failure of issue of his said body," to give the estate to another. *Bland* v. *Bland*, 9 Mod. 478.

6. Devise to E. for ever, that is, if he leaves a son or sons who shall attain twenty-one, "but if E. should chance to die without son or sons to inherit, my will is, that the son of my son W. shall inherit." This is a fee-simple to E., with executory devise to the son of W. *Heath* v. *Heath*, 1 Bro. C. C. 147.

7. Devise in these terms:—I give to A. my farm and my lands at R., to him, his heirs and assigns for ever; and I also give to A. my farm and manor of E. An estate for life only in the latter. *Paice* v. *Canterbury* (*Archbishop*), 14 Ves. 364.

8. A testator seised of property in fee devised it (by description), with all outbuildings, etc, "according to the tenor of the testator's deeds," without any superadded words of inheritance. The Statute of Wills being inapplicable:—Held, that the devisees took life estates only. There were two devises of the same property to children in two different events:—Held, that the terms of the second devise could not, by construction, be introduced into the first, so as to extend the estate thereby given. *Sturgis* v. *Dunn*, 19 Beav. 135.

A testator devised freeholds in terms which gave life estates to his children equally, and unto the children of such children as might be dead, who were to take their parents' share only:—Held, that the life estates of the children were not enlarged by the substituted gift. *Ib.*

9. A legal fee will pass without the word "heirs" where a trust of land can be satisfied no other way. *Villiers* v. *Villiers*, 2 Atk. 72.

10. Devise to daughters to augment portions construed a devise of fee-simple. *Carpenter* v. *Chapman*, 9 Mod. 92.

11. The fee does not pass under a devise to two brothers, share and share alike, because one of them is the heir. *Bowen* v. *Scowcroft*, 2 Y. & Coll. 640; 7 L. J., N. S., Exch Eq, 25.

12. Devise to A. for life, the reversion to B. and C, to be equally divided betwixt them. B. and C. are tenants in common for life only. *Peiton* v. *Banks*, 1 Vern. 65.

13. The words "I appoint A. B. trustee of my real estate," to do such and such acts, constitute him in equity the taker of the estate. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

14. Testator, first giving all his estates real and personal to his executors in trust to be disposed of as after mentioned, then gave all his real estates to his wife for life, and after her decease he gave his lands and estates to J. B.; but at his decease the whole to be for the use of J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if they should die before twenty-one, he gave the houses and estates to H. S., to the use of himself and his children:—Held, on demurrer, that the children of J. B. took only joint estates for life. *Spry* v. *Bromfield*, 9 Sim. 534. But a case having been sent to law:—Held, by the Court of Exchequer, that the children of J. B. took an estate in fee as tenants in common. S. C. 10 Sim. 94; 5 Jur. 864. And see the argument at law, 7 Mees. & Welbs. 546; 10 L. J., N. S, Exch, 457.

15. A testator gave and bequeathed to his son R. (who was his heir-at-law) his freehold land in D., and directed that the residue of the property which he might leave at his death should be divided between that son and his two sisters in equal proportions, with a direction that whatever portion might devolve to him should be placed in the names

of trustees, and the interest paid to him during his life, and that after his death his share should be divided between his children and placed in the names of trustees, with a discretionary power to employ a portion of the capital for their advancement; and on the children respectively attaining twenty-five, their shares to be transferred to them. Should his son die without issue, the whole of his portion was to devolve to his two sisters during their lives in equal proportions, and after their deaths to their children:—Held, that under the terms of this devise the son took only a life estate in the freehold land in D. *Saumarez* v. *Saumarez*, 4 Myl. & C. 331.

1. The testator devised a freehold estate (which he declared should be considered as personalty) to his executors and trustees, upon trust "for the second surviving son of my brother James W., on his arriving at the age of twenty-five, the annual rental in the meanwhile (after all just and necessary expenses for the benefit and maintenance of the estate being deducted) to be annually divided between my surviving brothers. In failure of such second surviving son of James W. I leave the estate to my brother Daniel W., and his heirs male. Failing such heirs male, I leave and bequeath the estate to the heirs of the W. family." Daniel died in the lifetime of the testator. E. was the second son of James W.:—Held, that E. was entitled in fee-simple absolute to the estate, subject to a term from the death of the testator until such day as E. should attain, or but for death would attain, his age of twenty-five, which term was vested in the testator's three brothers as tenants in common. *Blount* v. *Wheble*, 21 L. J., N. S., Ch., 259.

2. Word "Estate."

2. The word "estate" in a will, without words to restrain the generality of the sense, will carry a fee. *Macaree* v. *Tall*, Ambl. 182.

3. The words "I devise all my temporal estate" the same as "I devise all my worldly estate" pass a fee, and this the plainer where it is afterwards said "all the rest of my real estate," the word "rest" being a term of relation. *Tanner* v. *Wise*, 3 P. W. 295; Ca. *temp.* Talb. 281.

4. Devise of all that "estate" testator bought of M., held to pass the fee; so held also as to another clause, which was a devise of "the reversion of that tenement his sister lived in," after her death:—Held, *contrà* as to other devises, being first, "all those houses he bought of T. W., containing three dwellings with all their appurtenances," and next, as to a devise of the tenement in the possession of M. B. presently after his death. *Bailis* v. *Gale*, 2 Ves. 48.

5. A. devises all the rest and residue of his real and personal estate whatsoever: this will pass a fee. *Murry* v. *Wyse*, 2 Vern. 564.

6. The word "estate" does not of necessity pass the fee-simple. *Rogers* v. *Waterhouse*, 6 W. R. 823; 4 Drew. 329.

7. Testator gave to his heir one shilling, and devised to W. B. all his lands, and in the next sentence gave to him all his goods, chattels, personal and testamentary estate:—Held, that the fee-simple of the lands passed to W. B. *Bradford* v. *Belfield*, 2 Sim. 264.

8. A testator devised in the following words: "As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and after her decease, that in St John's Lane to my daughter; the other between my two sons, to be equally divided":—Held, that the daughter took only an estate for life in the house in St. John's Lane. *Esdaile* v. *Gall*, 1 Russ. & M. 540; 8 L. J., Ch., 133.

9. B. devised thus, "all my freehold estate, of any nature or kind whatsoever, which at present is in my power to dispose of, I give to my wife." The question whether the wife took an estate for life or in fee was sent to B. R. *Snelson* v. *Corbet*, 3 Atk. 369.

10 One devises a third of all his estate whatsoever to his wife, and two-thirds of all his real and personal estate to his son J, and his heirs; the wife has but an estate for life in the third part of the real estate. *Chester* v. *Painter*, 2 P. W. 335. But this seems overruled in principle by *Stewart* v. *Garnett*, 3 Sim. 398, 406.

3. Word "Estate" coupled with Words of Locality or Occupation.

11. A testator setting out in his will, to give and dispose of his worldly estate, is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words, "estate at such a place," or "in such a place," may carry a fee. The whole complexion of a will ought to be considered. *Ibbetson* v. *Beckwith*, Forrest. 157. But see *Denn* v. *Gaskin*, Cowp. 657.

12. I devise all my land and estate in D. to J.; decreed, a fee passes; these words charging not only the lands, but also the testator's interest in the land. *Barry* v. *Edgeworth*, 2 P. W. 523.

13. A testator, after giving his wife an annuity for her life to be issuing out of "all his real estate, lands, and hereditaments in P.," devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but in case his daughter died under twenty-one and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and after his decease to the children of A., share and share alike —Held, that subject to the previous interests given to the daughter, and to the wife, the children of A. living at the testator's death took an estate in fee in the lands in P. *Wilkinson* v. *Chapman*, 3 Russ. 145.

14. Devise of all my estate at H. to A. for life, remainder to B. and C., is a devise in fee to B. and C. *Price* v. *Gibson*, 2 Eden 115.

15. Devise of "my copyhold estate at P., consisting of three tenements, and now under lease," etc., but not specifying for what interest. An estate for life only passes. *Pettiward* v. *Prescott*, 7 Ves. 541.

16. A testator, resident in Jamaica, devised the rents, issues, and profits of his estate, called Islington and Cove's Pen, in that island, to

A. B.:—Held, that the estate and the slaves, mules, cattle, and machinery thereon passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398. See *Exp. Rucker*, 3 Dea. & Ch. 704.

1. One devises to J. all his freehold, leasehold, and copyhold estates in E., and gave the rest of his estates, both freehold and leasehold, to M. He had freehold and leasehold in M., but no copyhold out of E.:—Held, J. took the fee in the freehold and copyhold, and the absolute property in the leasehold in E. *Macaree* v. *Tall*, Ambl. 182.

2. A testator devised in the following words: "As to the rest of my estate, the two houses, one in St. John's Lane, and the other in Foggwell Court, in Charterhouse Lane, I give to my wife for her life, and, after her decease, that in St. John's Lane to my daughter; the other between my two sons, to be equally divided":—Held, that the daughter took only an estate for life in the house in St. John's Lane. *Esdaile* v. *Gall*, 1 Russ. & M. 540; 8 L. J., Ch., 133.

3. Devise to executors of all real and personal estates in trust, as to his real estate, to his wife for life, and after her death he gave his houses, lands, and estates in B. to J. B., "but at his death I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives, and, if they shall die before twenty-one, I will that my houses and estates in B. go to H. S.":—Held, that the children took for their lives only, and that, upon their having attained twenty-one, the inheritance was undisposed of. *Spry* v. *Bromfield*, 9 Sim. 534. But the Court of Exchequer, on a case sent, decided otherwise. S. C. 7 Mees. & Welbs. 546; 10 L. J., N. S., Exch., 457. And see S. C. 10 Sim. 94; 5 Jur. 864.

4. Construction of will passing fee without words of limitation. As to effect of description of lands as in the occupation, etc., of particular tenant to restrain the legal effect of the word "estate" in a devise to pass the fee, *quære*. *Chorlton* v. *Taylor*, 3 Ves. & B. 160.

5. A devise before 1838 of all my estates in the occupation of A., in the parish of B., to C., without words of limitation, conferred upon C. the fee-simple. *White* v. *Coram*, 3 Kay & J. 658.

Devise of "all my estates in the parishes of P. and T., to J. B., if he is living at the time of my death; but if he is dead" then over:—Held, that the fee-simple passed to J. B. *Ib.*

6. A devise of testator's "estate at A.," without more, will comprehend his whole interest in the lands rather than be referable to the mere locality. If, however, words of limitation be added, they will determine the extent of the benefit. *Southby* v. *Stonehouse*, 2 Ves. 611.

7. Devise of land and houses in L. Street, with all outbuildings, etc., "according to the tenor of the title deeds of the said land and houses," without any words of limitation:—Held, to pass an estate for life only, although by the deeds the testator held the property in fee. And held also that, although in a certain event which did not happen, and in another event which might happen, words of a larger signification were used, the estate for life could not be extended or enlarged. *Sturgis* v. *Dunn*, 19 Beav. 135.

8. Devise of "my property in houses, etc., at G.":—Held (independently of Wills Act) to pass the fee. *Bentley* v. *Oldfield*, 19 Beav. 225.

9. A testator, before the Wills Act, devised his estate at A. to S. K. for life, charged with life annuities, but in case the annuitants or any of them survived S. K. he gave the aforesaid estate to S. K.'s eldest surviving son, charged with the annuities, but in default of issue male he gave the aforesaid estate to T. K., charged in like manner, and unto his eldest son upon the same conditions; but in default of issue male the premises were to descend to the testator's heirs as aforesaid:—Held, that the word "estate" was not sufficient to give the eldest surviving son of S. K. a fee-simple. *Key* v. *Key*, 4 De G. M. & G. 73; 17 Jur. 769; 22 L. J., Ch., 641; 1 Eq. Rep. 82.

4. Words "Property," "What I Possess," etc., coupled with Gift to Executor.

10. A gift to A. and B., "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or matter it may be," will pass the fee-simple of real estate. *Thomas* v. *Phelps*, 4 Russ. 348; 6 L. J., Ch., 110.

11. Testator gave a freehold house to his wife for her sole use and benefit, and another freehold house to her for her life; and he also gave to her all his household goods, plate, etc.; but if she married again, the whole of the above property was to become the property of his daughter; and in case his wife should remain unmarried, then he gave the second-mentioned house to his daughter for her life, and to her children after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease":—Held, that the fee-simple in the first-mentioned house passed to the wife. *Day* v. *Daveron*, 12 Sim. 200; 10 L. J., N. S., Ch., 349.

12. The words "I bequeath to my sons A. and B., and likewise constitute and ordain them my sole executors of this my will, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed":—Held, not to be a devise in fee. *Bromitt* v. *Moor*, 9 Hare 378; 22 L. J., N. S., Ch., 129.

13. A testator directed that all his just debts and funeral expenses be paid as soon as possible after his decease. He appointed three persons as joint executors of his "entire property, for the purpose of putting it to the best advantage of my sister, wife, and children":—Held, that fee-simple lands were devised by the will. *Murphy* v. *Donnelly*, 4 Ir. R., Eq., 111.

5. Words "Part," "Moiety."

14. Testator devised to his son W. his (testator's) part of the lands of A., describing them as "being lately part of the estate of I. K., and purchased by me, and in which X. is jointly concerned with me," to hold same to

W. and his assigns during his life and no longer, unless it should happen that W. should survive his then present wife and marry a second wife, by whom he should have issue living at the time of his death; and then and in that case he devised his said part of said lands upon the death of W., leaving issue male of such second marriage, to such issue male, share and share alike; and for want of issue male to the issue female of such second marriage, share and share alike; and in case it should so happen that W. should die without leaving any such issue of a second marriage, then and in that case he devised said lands to his two grandsons James and John and their heirs, and the survivor of them, share and share alike, to hold to their own use and benefit for ever; and in case James and John should die without leaving issue, then he devised said lands to his grandson M. M. and his heirs; and in case of his death without issue he devised said lands to his grandsons Robert and William, and their heirs, share and share alike, for ever. W. having married a second wife, died, leaving issue male by her, but no issue of his first marriage:—Held, first, that under a devise of the testator's "part" of the lands the fee will pass; secondly, that W. took an estate for his life only, with concurrent contingent remainders in fee; first to the sons, secondly to the daughters of W. by his second marriage living at his decease; and thirdly to the testator's grandson in tail, of which one remainder only was to start. Review of the cases upon the subject. *Montgomery* v. *Montgomery*, 3 J. & L. 47; 8 Ir. Eq. R. 740. See comments on this case in *Woodhouse* v. *Herrick*, Kay & J. 352; 24 L. J., Ch., 649; 3 W. R. 303; 3 Eq. Rep. 817

1. Devise of "my moiety" of closes at L. is insufficient, prior to the 7 Will. 4 and 1 Vict., c. 26, to pass the fee. *Re Arnold*, 33 Beav. 163.

6. Other Particular Words.

2. A messuage was settled upon A. for life, remainder to B. in tail, remainder to A. in fee. A. devises all his right, title, and interest in this messuage to B., who was his son, but without adding any words of inheritance:—Held, that by this devise the fee passes. *Cole* v. *Rawlinson*, 3 Bro. P. C. 7.

3. A devise of all my lands, tenements, and hereditaments to A will carry the fee, if that appears to be the general intent of the testator. *Dunn* v. *Moor*, 3 Anstr. 781.

Whether the word "hereditament" alone will carry a fee, *quære*. *Ib.*

4. The words "I bequeath to my sons A. and B., and likewise continue and ordain them my sole executors of this my will, all and singular my lands, messuages, and tenements, with all my goods and chattels, by them freely to be possessed and enjoyed":—Held, not to be a devise in fee. *Bramitt* v. *Moor*, 9 Hare 378; 22 L. J., N. S., Ch., 129.

5. Devise to the testator's three daughters of his property in dwelling-houses, land, etc., in T., to be equally divided between them, share and share alike; and the testator thereby further willed the several shares to his three daughters as before mentioned, to have the interest for their use during their natural life, and afterwards divided equally amongst their children; and, for want of child or children, to go to their husband if living:—Held, that the daughters took estates for life, and in default of children the husbands of the daughters took estates in fee-simple. *Bentley* v. *Oldfield*, 19 Beav. 225.

6. A testator gave specific real estate and his personal estate, property, and effects to his wife for life; and after her death he gave the aforesaid specific real estate, with all moneys, rights, credits, etc., "and all property whatsoever that should be remaining after his wife's decease," to his children:—Held, that the children took his real estate in fee. *Footner* v. *Cooper*, 2 Drew. 7; 23 L. J., Ch., 229; 2 W. R. 5.

7. A devise of a testator's "property to W. H., his executors or administrators," was held to pass the fee of the testator's real estates absolutely to W. H. *Hunter* v. *Pugh*, 9 L. J., N. S., Ch., 62; 4 Jur. 571.

8. Direction that all testator's children shall share equally in all his property, gives them the real estate in fee. *Patton* v. *Randall*, 1 Jac. & Walk. 189.

9. A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A. and B., and then gave an annuity for the life of C., and then gave all his lands in the county of Kent and elsewhere with his personal estate to three trustees (naming them), their heirs and assigns, in trust for the purposes above mentioned:—Held, that A. and B. took an equitable estate in fee in the lands in the county of Kent. *Torrington* (*Lord*) v. *Bowman*, 22 L. J., Ch., 236.

7. By Devise of Rents and Profits.

10. A sale directed on the words "rents and profits" alone, though generally contrary to testator's intention, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legatees, upon the addition of the words "as the rents and profits, etc., should advance the money." *Baines* v. *Dixon*, 1 Ves. 41.

11. Devise of profits is a devise of land. *Johnson* v. *Arnold*, 1 Ves. 171.

12. Under a devise to sons and daughters of an equal share in all the income of real property the fee passes. *Mannox* v. *Greener*, 14 L. R., Eq., 456; 27 L. T., N. S., 408.

13. Devise of "one moiety of the rents, issues, and profits of my estate named T., in the parish of M., to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to R. and his heirs":—Held, that the grandchildren take the fee as tenants in common in a moiety of the estate. *Stewart* v. *Garnett*, 3 Sim. 398.

14. Testator, by a codicil to his will, reciting that certain lands produced a clear yearly rent of 237*l.*, devised them to trustees in trust for charitable purposes; he then directed that, in the event of there being an increase of the rents of the said lands by any new letting, the surplus so to arise should go to the only use and behalf of the person or persons of the S. and C. families, who for the time being

should be lords or ladies of the manor of D.; and in case the said families did not protect the said charities, or if the said families should become extinct, then, and in either of such cases, the trustees were to apply the said surplus rents, in addition to the provision already made, for the charity:—Held, that the gift of the surplus rents to the members of the S. and C. families was a good equitable devise in fee, and that the gift over to the trustees of the charity was bad for remoteness. *Charitable Donations (Commissioners of)* v. *Clifford*, 1 Dr. & War. 245.

1. A father, after giving all the residue of his estate, both real and personal, to trustees, gave, devised, and bequeathed the yearly produce of his estate unto his six children, naming them, and the issue of them (such issue taking only their parents' share), to and for her or their own use and benefit absolutely, share and share alike:—Held, that the children of the testator, who all survived him, took absolute interests in his realty as tenants in common in fee. *Shacklock* v. *Jarvis*, 26 L. T., N. S., 682.

2. A testator in 1857 devised freeholds to trustees to pay the rents to his five children, "or their heirs":—Held, that the children took a fee. *Adshead* v. *Willetts*, 29 Beav. 358; 9 W. R. 405.

8. By Subjecting Land to Charges.

3. Whether a devise of lands to A., "after payment of my just debts and funeral expenses," will carry the fee, *quære*. *Denn* v. *Moor*, 3 Anstr. 781.

4. A., being seised of lands of 10*l*. per annum in possession, and 34*l*. per annum in reversion, gave certain legacies to be paid at certain different times, and then devised all his lands to his youngest son R., who did not pay the legacies within the time:—Held, that a fee passed to R., because it appeared that the sums to be paid were more than the profit of the lands in possession would amount to in that time. *Reake* v. *Lea*, 1 Freem. 479.

5. A testator, seised of lands under a lease for lives renewable for ever, gave his wife his dwelling-house for life, and certain benefits out of the farm, and gave his son John four acres of land, and his son Andrew the remainder of the farm, and directed his son Andrew to make good the benefits to his wife, and both Andrew and John to do all the labour belonging thereto:—Held, that John took the absolute interest in the four acres. *Morrough* v. *Dufferin (Lord)*, 2 Jones 719.

6. Devise of land to A., paying out of the rents or out of the land a certain sum, is no fee-simple, otherwise if the devise was paying a certain sum generally, without saying "out of the land." *Hawker* v. *Buckland*, 2 Vern. 106.

7. A. devises to his brother B. all his lands and hereditaments, and all his personal estate, desiring him to pay his debts and legacies. A fee passes. *Ackland* v. *Achland*, 2 Vern. 687.

8. If lands are devised to one generally, he takes but an estate for life, unless it appear plainly the testator intended him a greater, or that he is likely to be a loser or his person chargeable. *Fairfax* v. *Heron*, Pre. Ch. 67.

9. A. begins his will with disposing of all his worldly estate, and then wills that all his debts be first paid, and gives his wife a moiety of what is left after his debts paid. The real estate is charged with the debts, and a fee in a moiety of the surplus of the estate passes to the wife. *Beachcroft* v. *Beachcroft*, 2 Vern. 690.

10. Devise to testator's wife, she paying his debts, and 15*l*. to A. B., if so much can be spared, and the rest of the estate to go to A. B. after her death, gives her the fee and a power of sale. *Dolton* v. *Hewen*, 6 Madd. 9.

11. A devise of lands to A. "for paying his son 50*l*. when of the age of twenty-one years" gives A. the fee beneficially charged with the payment of 50*l*. *Abrams* v. *Winshup*, 3 Russ. 350.

12. A. gave B. all his lands, tenements, and messuages whatsoever, after debts and legacies and funeral expenses paid. The debts being charged only contingently on the real, if the personal estate should be deficient:—Held, that plaintiff took only a life estate. *Merson* v. *Blackmore*, 2 Atk. 341.

13. Testator, after expressing an intention to dispose of all his property, directed his just debts and funeral expenses to be paid by his executor thereinafter named, and then, after giving several pecuniary legacies, devised all copyholds, which were his only real estates, to his son J. without words of inheritance, and left all the rest and residue of his estate and effects to his said son, whom he appointed sole executor and residuary legatee, such son being also his heir:—Held, that the will was sufficient to pass the fee in the copyholds, and that it charged them with the debts. *Dover* v. *Gregory*, 10 Sim. 393; 9 L. J., N. S., Ch., 81.

14. Under a devise to R. and his heirs, and if he dies without issue then to W., he paying his two sisters 500*l*. apiece, and if R. and W. die without lawful issue then to testator's three daughters and their surviving issue:—Held, that R. took an estate in fee, which was not cut down to an estate in tail. *Fisher* v. *Barry*, 2 Hog. 153.

15. W. by will, dated before 1838, gave three parcels of land, A., B., and C, to his son J. in one gift, without any words of inheritance, and afterwards declared that J. should out of A. pay another son, D., an annuity of 10*l*. per annum during D.'s life:—Held, that this enlarged the previous indefinite devise to J. to an estate in fee-simple in the parcel of land A., but that he only took a life estate in the other parcels B. and C. *Matthews* v. *Windross*, 2 Kay & J. 406; 2 Jur., N. S., 926.

16. A devise in 1822 of real estate to S., upon condition that she pay 50*l*. to B. by instalments of 10*l*. a year; but in case S. dies without issue the land to go to S. or his heirs, "in consideration that he pays to J. or his heirs the sum of 250*l*. twelve months after the death of S.":—Held, that the gift conferred upon S. a fee-simple by reason of the charge of 50*l*.; and that the gift over was to take effect upon her death without issue then living, from the direction that the executory devise over was to pay the 250*l*. twelve months after the death of S. *Blinston* v. *Warburton*, 2 Kay & J. 400; 2 Jur., N. S., 858; 25 L. J., Ch., 468.

17. An indefinite devise of real estate by a will made before 1838 is enlarged into a fee-

simple by annexing a direction that the devisee should pay a sum of money to another person, or by a declaration that the devise is "subject to his making" such payment, or by any other expression in the will, showing that the payment is to be made by the devisee out of the interest devised to him, because if such interest were for life only it might determine before it enabled him to make such payment. *Burton* v. *Powers*, 3 Kay & J. 170.

But an indefinite devise before 1838 of real estate to A., "after" or subject to the payment out of the premises "of a sum of money to another person, has not this effect, because the sum is then charged upon the whole fee-simple, and nothing is given to A. until that charge is satisfied, and consequently no implication can be derived from the charge of an intention to enlarge A.'s estate. *Ib.*

A testator by his will, made in 1822, devised a farm and premises to A. for life, and after her decease to J. W., subject to the payment out of the aforesaid premises of the sum of 50*l.*, and ordered that the rents and interest that were behind, due, and unpaid should go and be paid to that person he had left the estates and property respectively to. The devise to J. W. contained no words of limitation, and the will contained a residuary devise:—Held, that J. W. took a life estate only. S. C. 5 W. R. 242; 26 L. J., Ch., 330.

1. A testator devised to his wife his lands. By a separate clause he gave her certain chattels, and then added, fourthly, "I order my wife to pay the following legacies," which he enumerated. He made her and another executors:— Held, the legacies were charged on the lands, and the wife took the fee. *Johnson* v. *Brady*, 11 Ir. Eq. R. 386.

Neither the word "thereout," nor "paying," is required to make the repayment of a legacy a condition, so as to give the devisee the fee in lands charged with it. *Ib.*

2. A testator, by will made in 1809, after giving all his "lands, tenements, chattels, and premises whatsoever" to his wife during her life, bequeathed at her death certain messuages "to his son W., he paying to certain legatees the sum of 50*l.* each, out of the aforesaid premises." By another devise he "gave to his son J. other messuages at the decease of his wife." The residuary clause was as follows: "All the rest and residue of my estate, of whatever nature, kind, and quality soever the same may be, and not herein disposed of, after payment of my debts, etc., first, I give to my grandson 5*l.*; lastly, I give and bequeath unto my four daughters equal share and share alike of the said residue and remainder, and to be paid to them one year after the death of my wife":—Held, that the devise to J. was not enlarged to a devise in fee by implication from the prior devise to W. (which was accompanied with a charge), and that J. took an estate for life only. *Morris* v. *Lloyd*, 33 L. J., Exch., 202; 10 L. T., N. S., 508.

Held, also, that the reversion in fee passed by the residuary devise, the words "to be paid, etc," being satisfied by being applicable to some part if not to the whole of the residue. *Ib.*

3. A father who died in 1806 by his will gave two freehold houses to one of his sons without any words of limitation, subject to legacies and annuities, with a gift over, in case of alienation or of death without issue, to his brothers and sisters, *nominatim*, also subject to the legacies and annuities, and with a direction to pay sums of 4*l.* to each of certain grandchildren as they attained twenty-three:—Held, that on the death of the devisee without issue, and without barring any estate tail he might have had, the brothers and sisters took as joint tenants. and as the gift was coupled with a direction to pay several gross sums, their estates would in a case coming under the old law be enlarged to a fee-simple. *Wilkinson* v. *Wilkinson*, 20 L. T., N. S., 416.

4. A testator, by will made before 1837, devised lands to trustees to raise 4,000*l.*, and subject thereto he gave the lands to W. for his own special use:—Held, that W. took an estate for life only. *Oakley* v. *Wood*, 37 L. J., Ch., 28; 15 W. R. 862; 16 L. T., N. S., 450.

9. Estate of Executory Devisee over after a Gift in Fee-simple.

5. Under a devise in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. In such circumstances effect is not given to any presumed intention on the part of the testator that the devisee over should take the same estate as the prior devisee would have taken. *Doe* d. *Brodbelt* v. *Thomson*, 12 Moo. P. C. 116; 2 L. T., N. S., 65.

A testator devised a house at Spanish Town, Jamaica, to M., in fee. By a codicil made shortly afterwards he revoked this devise in the following terms: "I hereby revoke the devise of my house in Spanish Town from M. and leave it to L., also with the furniture of the said house." The Supreme Court of Jamaica held that the words of the codicil which revoked the demise to M. substituted L. in the place of M.; and though there were no words of limitation in the devise to L., the Court was of opinion that the intention of the testator was to give the same estate to L. as he had by will given to M., and that the re-devise in the codicil carried the fee to L. But upon appeal:—Held (reversing such judgment), that L. took a life estate in the house only; for though it was probable that the testator meant to give to L. the same estate and interest that M. would have taken under will if the devise to him had not been revoked, yet, looking at the language of the codicil, which was all the Court could do, there was no express declaration to be collected of an intention to give L. more than a life estate. *Ib.*

10. Indefinite Gift enlarged to a Fee-simple by Nature of Gift over.

6. A. by his will, dated in 1819, devised his freehold estate as follows: "To my daughter Henrietta I bequeath the house I live in, being No. 11," etc.; "to my daughter Martha I bequeath my house No. 10," etc.; "but it is my will that the same be placed in trust, and that they shall only receive the

rent during their life." "In case of Henrietta's death without leaving behind her more than one child, then the house No. 11 shall revert to my son David, son John, and daughter Martha in equal shares; but if she leaves more than one (be it one, two, or more), they shall all share alike the said property left to their mother; but suppose that none of them live to twenty-one, the property shall revert to David, John, and Martha, as before mentioned." Henrietta survived the testator, and died, leaving two children, of whom one lived to attain the age of twenty-one, and the other died under that age:—Held, that the two children of Henrietta took an estate in fee-simple in possession in the house No. 11. *Burke* v. *Annis*, 11 Hare 232.

1. A testator devised realty to trustees on trust to pay the rents and income thereof to his wife for the maintenance, education, and benefit of his infant son until twenty-one, without liability to account for the same; and upon his said son attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for his said wife during life or widowhood, with remainder over:—Held, that the infant son was a tenant in fee-simple in possession, with an executory limitation over. *Re Morgan's Estate*, 24 L. R., Ch. D., 114; 48 L. T. 964; 31 W. R. 948.

2. A testator, by a will made in 1806, devised all his real estate to his two brothers during their joint lives and the life of the survivor; and after the death of the survivor, unto and equally amongst all the children of his brothers who should be then living; and in case of the death of any of the children in the lifetime of his brothers or the survivor of them, leaving lawful issue, then he devised the part or share of such deceased parent or parents unto and equally amongst all his, her, or their children who should be then living; and he devised the residue of his real and personal estate to his widow, her heirs, executors, administrators, and assigns:—Held, that the children and grandchildren of the testator's brothers took estates in fee-simple in their respective shares. *Re Harrison*, 5 L. R., Ch., 408; 39 L. J., Ch., 501; 18 W. R. 795; 23 L. T., N. S., 654.

In construing a will made before the Wills Act, the rule that an indefinite devise may be enlarged into a fee-simple by a gift over in a particular event is not confined to a devise of a vested interest, but is equally applicable to a contingent devise. *Ib.*

3. A testator, by a will dated in 1832, devised lands to T. during his natural life, and from and after his decease unto his eldest son, if he should have arrived at the age of twenty-one, and in default of his having a son then over. The legal estate in the lands was outstanding. T. died, leaving an eldest son, a minor:—Held, that on the death of T. the eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 1 L. R., Ch. D., 410; 45 L. J., Ch., 232; 24 W. R. 349; 34 L. T., N. S., 82.

4. Devise to the testator's son A.; in case of A. dying before his brother B. and leaving no issue, then to B.; should both testator's children die without lawful issue, then over:—Held, that A. took an estate in fee, liable to be divested; (1) in the event of his dying in the lifetime of B. without leaving children living at his death; and (2) in the event of both A. and B. dying without leaving any children. *Exp. Bate, Re Mid-Kent Railway Co.*, 11 W. R. 417.

5. The testator gave all his lands, tenements, and hereditaments, and the residue of his personal estates, to trustees, etc., to the use of his grandson H. T. for life, and after his decease in trust for the child and children of H. T. at his or their ages of twenty-one as tenants in common; but in case H. T. should happen to die without leaving any lawful issue of his body living at the time of his decease, then over. H. T. had two children, a son who died in his infancy, and a daughter who attained twenty-one, but died intestate in the lifetime of H. T., leaving children:—Held, that in the events which happened the personal estate belonged to the personal representative of the daughter of H. T., and that the real estate vested in her heir-at-law. *Hutchinson* v. *Stephens*, 1 Keen 240.

6. By a will made before 1838, a testatrix, as to the estates wherewith it had pleased God to bless her, gave, devised, and disposed thereof in manner following, that was to say:—First, she gave and devised to A. and B., and their heirs, certain specified hereditaments of gavelkind tenure (not using the word "estate"), to hold the several premises, with their appurtenances, unto A. and B, their heirs and assigns, to and for the several uses, estates, intents, and purposes thereinafter expressed, limited, and declared of and concerning the same (that was to say), to the use of her grandson S. for his life, and from and after the determination of that estate, to the use and behoof of A. and B., and their heirs, during the life of S., in trust to preserve the contingent uses and remainders thereinafter limited; and from and immediately after the decease of S., to the use of all and every of the child and children, if more than one, of his body lawfully begotten or to be begotten (without any words of inheritance); but if he should die without leaving such issue, then to the use and behoof of her grandson C. for his life. Then there were trusts to preserve contingent uses and remainders, and then the property was to go to the children of C. in precisely the same terms, without any words of inheritance; but if C. should die without leaving such issue, then to the use and behoof of the testatrix's three granddaughters D., E., and F., their heirs and assigns for ever, as tenants in common. These dispositions were followed by a devise of other lands to A. and B., to uses in favour first of C. and his children, and then of S. and his children in precisely the same terms *mutatis mutandis*. But beyond what is stated there was no devise of real estate in the will. S. died leaving children who survived him, but there was no child either of S. or C. at the date of the will or of the testatrix's death:—Held, that the children of S. took only life estates in joint tenancy in the specified hereditaments, and that, subject to such life estates, the beneficial inheritance descended as undisposed of to the testatrix's gavelkind heirs, the gifts over to C. and his

children, and to D., E., and F., their heirs and assigns, having failed by reason of S.'s death, leaving children. *Re Pollard*, 3 De G. J. & S. 541.

One of S.'s children mortgaged his interest in the property:—Held, that thereby the joint tenancy so far as it affected that share was severed, and the intestacy as to it after his death was accelerated. *Ib.*

See also LVI. III. 4 *post.*

11. Effect of the Wills Act.

1. A testator, subsequently to the 7 Will. 4 and 1 Vict., c. 26, gave to A. the house she lived in, and grass for a cow, in Gill Field:—Held, that she took an estate in fee-simple in the house, and the right of pasture of a cow during her pleasure. *Reay* v. *Rawlinson*, 29 Beav. 88; 7 Jur., N. S., 118; 30 L. J., Ch., 330; 9 W. R. 131.

2. The 28th section of the Wills Act (7 Will. 4 and 1 Vict., c. 26), which enacts that "where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of," applies to the devise of an existing estate or interest, and not to an estate or interest which the testator by his will creates *de novo*; and therefore a gift by will, since the statute, of an annuity to A. without words of limitation, but which was by the same will charged upon real estate, is not a devise of a perpetual annuity or rent-charge, and is a gift of an annuity for life only, as it would have been before the statute. *Nichols* v. *Hawkes*, 10 Hare 342; 22 L. J., Ch., 255. See also *Lord* v. *Wightwick*, 4 De G. M. & G. 803; 23 L. J., Ch., 235.

3. Devise by the testator by his last will, dated the 27th day of June 1840, to his three daughters of real estate with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or control of their husbands; the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship:—Held, that the daughters took as joint tenants in fee. *Wisden* v. *Wisden*, 2 Sm. & G. 396; 18 Jur. 1090; 2 W. R. 616.

XLIV. Successive and Concurrent Interests. Joint Tenancy and Tenancy in Common.

See also Joint Tenancy—Tenancy in Common.

I. DISTINCT GIFTS OF THE SAME PROPERTY TO TWO PERSONS.

4. It has been held, where there has been a devise of an estate to A. at the beginning and to B. at the end of a will, they shall take as joint tenants. *Ulrich* v. *Litchfield*, 2 Atk. 373.

5. Where a man gives a farm in Dale to A. and his heirs in one part of his will, and in another to B. and his heirs, it is now construed either as a joint tenancy or a tenancy in common, according to the limitation. *Ridout* v. *Pain*, 3 Atk. 492.

II. DEVISE TO SEVERAL PERSONS IN TAIL.

6. If the devise of real estate be "to the sons of A. in tail," *simpliciter*, the Court will not supply any words denoting that the sons are to take successively in order of priority of birth. *De Windt* v. *De Windt*, 4 N. R. 184.

A testator gave, devised, and bequeathed his freehold property in N. to his nephew J., and after his death to his sons lawfully begotten, and in the event of his or their death without sons lawfully begotten, then he left the estates to his cousin H., and after his death to his sons lawfully begotten, beginning with the elder. The residuary clause was as follows: "Whatever is left after what I now give or bequeath of my personal property, I leave to my nephew J., and to his sons in tail lawfully begotten." At the testator's death J. had one son, and subsequently another son was born to him:—Held, that these sons took estates tail male in remainder. S. C. 12 W. R. 776; 10

L. T., N. S., 568; 1 L. R., H. L., 1; 36 L. J., Ch., 332; 14 W. R. 545; 14 L. T., N. S., 529.

Held, also, that the younger son, who was an infant, was entitled to maintenance out of the income arising from the estates. *Ib.*

1. C., after devising an estate for life to A. and B. in succession, with remainder in each case to trustees, devised the estate to the first son of the body of B. in tail male; and in default of such issue, to the second, third, and all and every other the son and sons of B. severally and successively in tail male; and in default of such issue, to the third and all and every other the son and sons of the body of A., and the heirs male of such son and sons; and in default of such issue, to his own (the testator's) right heirs in fee. A. died in 1820, leaving six sons. B. died in 1845 without leaving issue male. Upon the death of B., J., the third son of A., entered into possession, and continued in possession to the time of his death in 1856, and thereupon his eldest son entered into possession. On a bill filed by the three younger sons of A.:—Held, that the devise to the third and all and every other the son and sons of the body of A. did not give them an estate in joint tenancy, or a tenancy in common, but an estate in succession in tail male, and that J. took the entirety; and he having executed a disentailing deed, his heir-at-law was entitled to the estate in fee. *Cradock* v. *Cradock*, 4 Jur., N. S., 626; 6 W. R. 710.

2. *Semble*, a devise to the children of A. and "the heirs of their bodies respectively" would give them estates tail as tenants in common. *Re Tiverton Market Act*, 1 Jur., N. S., 487; 24 L. J., Ch., 657. S. C. *nom. Exp. Tanner*, 20 Beav. 374.

3. A testator directed his trustees to purchase lands in certain counties, to be settled, on the death of the eldest son of S. without issue (which happened), to the use of every son of S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross-remainders over. *Surtees* v. *Surtees*, 12 L. R., Eq., 400; 25 L. T. 288; 19 W. R. 1043.

III. JOINT LIFE ESTATES WITH SEVERAL INHERITANCES.

4. A devise to two, and the heirs of their bodies; it is a joint estate for life, and several inheritances; and so it is if there is a devise over; but if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainderman. *Cook* v. *Cook*, 2 Vern. 545.

5. J. devised lands to be sold for payment of his debts and legacies, and the surplus to be laid out in the purchase of other lands to be settled on A. and B., and the survivor of them and their heirs, equally to be divided between them, share and share alike. A. died in the lifetime of the testator, and the question was, whether his moiety should descend to the testator's heir-at-law as a lapsed devise, or should go to B., the surviving devisee:—Held, that the first part of the devise made A. and B. plainly joint tenants, and therefore B., by survivorship, became entitled to the whole for life, but that the inheritance being devised to them as tenants in common, one moiety having lapsed by A.'s death in the lifetime of the testator, shall descend to the testator's heir-at-law, expectant on the death of B., and the other moiety shall go to the heir of B. *Barker Gyles*, 3 Bro. P. C. 104; S. C. 2 P. W. 280; Sel. Ca., Ch., 17; 9 Mod. 157; 2 Eq. Ca. Abr. 536, pl. 4.

A devise of lands to B. and C., and the survivor of them and their heirs, equally to be divided between them, share and share alike: B. and C. are joint tenants for life, with several inheritances. *Id.* 107.

6. Joint tenancy for life, the words of severance being confined to the subsequent limitations. *Folkes* v. *Western*, 9 Ves. 456.

7. Y., by his will dated in 1815, gave a copyhold estate held upon lives to his wife as long as she should remain a widow, and if his wife should marry, then to his daughters J. and S., and their heirs; and for want of such issue, then, etc.:—Held, and J. and S. took as joint tenants for life, with several inheritances in tail, and cross-remainder in tail. *Edwards* v. *Champion*, 1 W. R. 497; 1 Eq. Rep. 419; 3 De G. M. & G. 202.

8. A devise to A. and B. and their "respective heirs" gives to them a joint tenancy for life with several inheritances in fee. *Exp. Tanner*, 20 Beav. 374. S. C. *nom. Re Tiverton Market Act*, 1 Jur., N. S., 487; 24 L. J., Ch., 657.

N. M., by his will dated in 1776, devised certain lands to his daughter S. M. for life, and after her decease "unto the child and children of her body, if more than one, lawfully to be begotten, and the heirs of their respective bodies." N. M. died in the lifetime of S. M., who died leaving six children. One of these six children died a bachelor, two others died leaving issue. On the question what interest the children of S. M. took under the will:—Held, that they took joint estates for life with several inheritances in tail. *Semble*, that, if the devise had been "to the children of my daughter, and the heirs of their bodies respectively," the children would have taken estates as tenants in common in tail. *Ib.*

9. A testator devised an estate to trustees and their heirs, upon trust to permit the rents and profits to be received by A. and his wife for life; and after the death of the survivor he devised the estate unto and amongst his four granddaughters, to hold to them as tenants in common, and not as joint tenants, during their natural lives, with benefit of survivorship; the remainder to the trustees and their heirs, upon trust to support the contingent remainders thereinafter limited; the remainder to the issue male of his granddaughters successively lawfully to be begotten; with remainder, in default, to his own right heirs:—Held, that the four granddaughters took estates for life as tenants in common, with benefit of survivorship, with

several inheritances in tail male limited to their respective issue upon the death of the survivor. *Haddelsey* v. *Adams*, 2 Jur., N. S., 724; 25 L. J., Ch., 826; 22 Beav. 266.

Held, also, that the estate given to the trustees was not a general estate in fee-simple, and that no trust was created for the issue. *Ib.*

IV. GIFT OF CHATTELS TO SEVERAL WITHOUT WORDS OF DISTRIBUTION OR SEVERANCE.

1. Surplus of a personal estate bequeathed to A. and B.; it is a joint devise, and shall survive. There are two executors, and one dies; his executor or administrator shall not have an account against the survivor. *Shore* v. *Billingsly*, 1 Vern. 482.

2. Devise of a residue of a personal estate to three is a joint devise, and shall survive. *Webster* v. *Webster*, 2 P. W. 347.

3. "I give to my two sisters A. and B. the residue of my personal estate":—Held, joint tenancy. *Keys* v. *Luffkins*, Dick. 392.

4. Devise of the residue of personal estate to the wife for life; if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead to the survivor. They both died in the life of the wife; the legacy was vested in both as joint tenants, and therefore goes to the representative of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

5. A legacy given to two or more persons without words of severance makes a joint tenancy; therefore his Honour determined that where in a will as to a residue two-thirds were given to and amongst the children of A. and B, they took as tenants in common; but the remaining third being given to the children of C., they took as joint tenants. *Campbell* v. *Campbell*, 3 Bro. C. C. 15.

6. Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint unless there are words of severance, as "equally among," etc., or an inference of that sort arises in equity from the nature of the transaction, as in partnership, a joint mortgage, etc. *Morley* v. *Bird*, 3 Ves. 628.

Bequest to two without words of severance; they take jointly. *Ib.*

7. Residue bequeathed to two; they take a joint interest. Agreement for severance as to the whole may be inferred from their conduct, dividing as the property was received. *Crooke* v. *De Vandes*, 11 Ves. 330.

Legacy and residue bequeathed to two, without words of severance, is a joint interest, and cannot be taken in common, under effect of previous disposition of the interest, with words of severance, viz., to be equally divided. S. C. 9 Ves. 197.

8. Construction of will giving a vested interest, though subject to contingent charge, and creating a tenancy in common as to part of the property, and as to the residue a joint tenancy, there being nothing to control the legal effect of the words. *Jackson* v. *Jackson*, 7 Ves. 535. But on appeal it was held that, though by residuary disposition to testator's two sons "and the survivor, their or his heirs, executors," etc., they took as joint tenants the leasehold and personal estate embarked in trade, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied both as to the profits and the capital. S. C. *nom. Crooke* v. *De Vandes*, 9 Ves. 591.

9. Joint tenancy under a bequest of personal property to more than one, without words of severance. *Swaine* v. *Burton*, 15 Ves. 371.

Devise and bequest of leasehold, freehold, and copyhold estates to trustees, their heirs, executors, etc, upon trust to sell and pay debts, etc., and after payment thereof to pay and apply the rents, etc., to A. for life, and after his decease devising and bequeathing to the heir- or heirs-at-law of B., and the heirs, executors, etc., of such heir or heirs, to whom the trustees were directed to convey and assign accordingly; co-heiresses of B. being also co-heiresses of the devisor, take, not as coparceners by descent, but as joint tenants by purchase, and therefore subject to survivorship. *Id.* 365.

10. Testator bequeathed several legacies, and among others to S. W. 14,000*l.*, "and to the latter gentleman's family 6,000*l.*" S. W. had six children, all living at the date of the testamentary instrument and at the death of the testator, and no other issue:—Held, that such six children were, as joint tenants, exclusively entitled to the legacy of 6,000*l.* *Wood* v. *Wood*, 3 Hare 65. And see *Gregory* v. *Smith*, 9 Hare 708.

11. A testatrix, having three daughters, gave one-third of a fund to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives":—Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker* v. *Gibson*, 12 Beav. 101.

12. A direction in a will that the testator's wife and brother should be his residuary legatees, and enjoy all the benefits arising from that appointment, creates a joint tenancy in the residue. *M'Donnell* v. *Jebb*, 16 Ir. Ch. R. 359.

See also EXECUTOR and ADMINISTRATOR, VIII. III.

V. WORDS OF DISTRIBUTION OR SEVERANCE. "SHARE," "EQUALLY," ETC.

13. Devise to A. for life, the reversion to B. and C., to be equally divided betwixt them. B. and C. tenants in common for life only. *Perton* v. *Banks*, 1 Vern. 65.

14. A devise to two persons to be equally divided between them makes it a tenancy in common. *Thickness* v. *Vernon*, 1 Vern. 32.

15. The words "equally divided between them" make a tenancy in common in a will, but not in a deed. *Thrustout* v. *Peak*, 8 Vin. Abr. tit. Devise, pl. 11.

16. Survivorship by words creating a joint tenancy, the intention of severance not being sufficiently clear. *Whitmore* v. *Trelawney*, 6 Ves. 129.

17. One assigns a term to trustees, in trust to permit himself to receive the profits during his life, and after his death in trust to permit his

two daughters B. and C., the executors and administrators to receive the profits during the residue of the term, equally to be divided between them, they paying so much within two years to his other two daughters. B. dies; C. mortgages to D.:—Held, that B. and C. were tenants in common, and not joint tenants, by the intention of the father, which was to make distinct provisions for them. *Hamell* v. *Hunt*, Pre. Ch. 164.

1. A. by will devises lands to trustees and their heirs, in trust that the profits should be equally divided between his wife and daughter during the wife's life, and after her death he devised the same to the use of his daughter in tail, with remainders over. The daughter died during the mother's life:—Decreed, this to be a tenancy in common between the mother and daughter; and that during the mother's life the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy *pur autre vie*, and should go to the administrator of the daughter. *Phillips* v. *Phillips*, 2 Vern. 430; Pre. Ch. 167; 1 P. W. 34.

2. Testator devised to A. and B. generally, and then added, "My meaning is that the rents of my houses should be equally shared between A. and B.":—Held, that they take as tenants in common, and not as joint tenants. *Prince* v. *Heylin*, 1 Atk. 493.

3. Devise of the profits of land in trust for his six younger children, to be distributed in joint and equal proportions:—Held, a tenancy in common. *Ettricke* v. *Ettricke*, Ambl. 656.

4 Devise to trustees by sale or mortgage to pay debts, the remainder to go and be equally divided among three children, and the survivor of them and their heirs for ever. A tenancy in common. *Stones* v. *Hewrtly*, 1 Ves. 165.

5. Bequest in the form of a letter to the testator's mother and sisters, expressed thus: "To be divided among you." A tenancy in common among those living at that time, and the shares of those who died in the testator's lifetime lapsed. *Ackerman* v. *Burrows*, 3 Ves. & B. 54.

6. Bequests to several to be equally divided, share and share alike. They take in common, and no survivorship. *Bolger* v. *Mackell*, 5 Ves. 510.

7. Devise to A. for life of messuage and other freehold estate at ——; and after her decease "I give the same estate to all and every the child and children of A., equally to be divided amongst them; and for want of such issue" over:—Held, that the children of A. took as tenants in common in fee-simple. *Esdaile* v. *Wilshere*, 9 L. J., Ch., 71.

8. G., being seised of a gavelkind estate by deed poll, in consideration of natural love to his wife and children, granted to his daughters, M. and H., the rents of his lands, equally to be divided between them, paying 5*l.* to their mother for life, and after her decease to hold to his said two daughters and their heirs, equally to be divided between them. This creates a tenancy in common, whether the instrument be considered as a deed or a will. *Rigden* v. *Vallier*, 3 Atk. 731; 2 Ves. 252.

9. Testator devised residue of his estate to A. and B., and then added, "My will is, that my estate be equally divided between A. and B., whom I appoint executors." The devise is not a joint tenancy; for the words "equally divided," though not annexed to the clause which gives the residue, can relate to that only. *Owen* v. *Owen*, 1 Atk. 494.

Though the words "equally to be divided" in a strict settlement at common law have never been determined barely of themselves to make a tenancy in common, yet it has been settled that they do so in a will, both with regard to real and personal estate. S. C. 1 Atk. 495.

On the construction of Serjeant Maynard's will, 'heirs of the body" were held to be in the sense of the first and every other son. S. C. 2 Atk. 582.

10. Gift of a share over to the children of testator's late cousins, W. U. and J. U., share and share alike, at their respective ages of twenty-one; that is a tenancy in common among those then living, and one of them dying in the lifetime of the testator, that share is lapsed. *Martin* v. *Wilson*, 3 Bro. C. C. 324.

11. Legacy of 10,000*l.* to two sisters, to be equally divided when they should arrive at twenty-one, is a tenancy in common; and one dying under twenty-one, her share shall go to her representative. *Jolliffe* v. *East*, 3 Bro. C. C. 25.

12 A testator had two sisters, M. and E., and property of three classes: first, "his own property," in possession; secondly, property which had been left to him by his late wife, also in possession; and, thirdly, an absolute reversionary interest in two-thirds of the capital of a sum of 10,000*l.* consols standing in the names of trustees, his two sisters M. and E. being entitled to the dividends on the whole of that sum for their lives and the life of the survivor, and being also entitled in reversion to one-third of the capital. By his will he left the whole of his property in trust to A., B., and C., the interest of his own to be paid to his sisters in equal moieties during their lives, with benefit of survivorship, the interest of property that had been left to him by his late wife to be paid to H. (a woman); in case of the death of the above three females, the interest to be divided amongst his (the testator's) four cousins, A., B., C., and X., for their lives; and the property, including the 10,000*l.* 3*l.* per cent. trust money, to devolve to the children of three of the said cousins: viz., A., B., and C., in equal proportions:—Held, first, that on the death of the survivor of the two sisters, H. living, there was no gift over of the testator's own property to H.; secondly, that the property let loose on the respective deaths of the sisters and of H. was then to be divided amongst the four cousins for their lives; thirdly, that the four cousins took as tenants in common, and as they respectively died their respective shares of the property were to devolve on the children of A., B., and C., as tenants in common; fourthly, that the sisters were not entitled to retain both their rights under the will and in the reversionary one-third of the 10,000*l.* consols. *Swan* v. *Holmes*, 19 Beav. 471.

13. A testator gave a fund to the children of A. C., equally to be divided amongst them, share and share alike, during their lives, and after their decease to G. W. and J. W.:—Held, that the children of A. C. took as

tenants in common for life, with an implied clause of accruer, both of original and accruing shares, to the survivors and survivor. *Wood* v. *Draycott*, 2 N. R. 55. S. C. *nom. Draycott* v. *Wood*, 8 L. T., N. S., 304.

1. Bequest of legacies to R. and M. if they survive the testatrix; but if not, then R.'s legacy to be divided among his children, and M.'s legacy among hers; and gift of residue to all the children of R. and M. equally:—Held, that the children of R. and M. took the residuary estate in equal shares as tenants in common. *Re Lloyd's Estate, Baker* v. *Mason*, 2 Jur., N. S., 539.

2. A testator by his will gave his residuary estate to W. and S., "to be held jointly or divided equally at their pleasure":—Held, that W. and S. held as tenants in common. *Oakley* v. *Wood*, 37 L. J., Ch., 28.

3. A testator (under a power to that effect contained in a settlement) appointed a rent-charge to a person for her life, with powers of distress, and directed that after her death the rent-charge should be continued to her three daughters, and equally divided during their lives, and the life of the longest liver, with powers of distress during their lives and the life of the longest liver of them:—Held, to create a tenancy in common between the three daughters, with interests transmissible to their respective representatives during the life of the longest liver of them, notwithstanding that one of them predeceased the tenant for life. *Chatfield* v. *Berchtoldt*, 18 W. R. 887. And see *Fletcher* v. *Rogers*, 1 W. R. 125; 10 Hare (App.) xiii.

4. A devise of a term to A. and B., paying 25*l.* a year, out of the rents to one during his life, "viz, 12*l.* 10*s.* by each of them," is a tenancy in common. *Kew* v. *Rouse*, 1 Vern. 353.

5. A testator, after giving his residuary estate to J. and F., in terms which would create a joint tenancy, by codicil directed that W. should participate in the bequest with J. and F.:—Held, that the residuary legatees took as tenants in common. *Robertson* v. *Fraser*, 40 L. J., Ch., 776; 6 L. R., Ch., 696; 19 W. R. 989.

6. A devise of a leasehold interest to A. and her three sons equally amongst them creates a tenancy in common, though there is no mention of any division to be made. *Warner* v *Hone*, Pre. Ch. 491; Gilb. Eq. Rep. 146.

7. A money legacy to two (not executors), "jointly and between them," is not a joint legacy, but is a tenancy in common, the words meaning the same as to be equally divided between them. *Perkins* v. *Baynton*, 1 Bro. C. C. 118.

8. Devise to A. and B. "between them." These words constitute a tenancy in common. *Lashbrook* v. *Cock*, 2 Meriv. 70.

9. A direction in a will that a class should take "between them" creates a tenancy in common. *Att.-Gen.* v. *Fletcher*, 41 L. J., Ch., 167; 13 L. R., Eq., 128; 25 L. T., N. S., 892.

Under a gift in a will to such of the nephews and nieces of A. and the children of A.'s deceased niece B. thereinafter named (then followed the names of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally, and not *per capita*, the children of B. taking between them only the equal share to which B. would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix:—Held, that the children of B. took as tenants in common. *Ib.*

10. Though the words "share and share alike" in a will generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215. But see *Jones* v. *Randall*, 1 Jac. & Walk. 100.

11. The words "share and share alike" have been held for two hundred years to be a tenancy in common. *Heathe* v. *Heathe*, 2 Atk. 122.

Courts of equity are far from favouring joint tenants. The word "respectively" will separate an estate, and make it a tenancy in common. *Ib.*

12. Legacy to A. for life, and after her decease to her children; if she should leave none, to B. and C., share and share alike, or to the survivor, is a vested interest in B. and C. upon the death of the testator, as tenants in common; A., though she survived them, dying without children. *Perry* v. *Wood*, 3 Ves. 204.

13. Bequest to A. for life, and after her decease to B. and C. in equal moieties, and in case of the decease of either in the life of A., the whole to the survivor of them living at her decease. B. and C. have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison* v. *Foreman*, 5 Ves. 207.

14. When testator devised to trustees in fee, in trust for his three sisters and their assignees, and as his said sisters should severally die he gave the premises to their several heirs:—Held, that the sisters should take as tenants in common, and not as joint tenants. *Sheppard* v. *Gibbon*, 2 Atk. 441.

15. Bequest to A. and B., with direction that B. shall be maintained, etc., during minority out of fund, and power to place B. out apprentice.—Held, to create a tenancy in common. *Gant* v. *Lawrence*, Wightw. 395.

16. A testator devised real estates to trustees for five hundred years, in trust to pay life annuities and the residue of the rents to his two sons, "in equal shares," and subject thereto he devised them to his two sons in fee as joint tenants:—Held, first, that during the term they were tenants in common; and, secondly, that the employment by the two sons of the estates in their partnership trade had not the effect of making them tenants in common of the fee. *Brown* v. *Oakshot*, 24 Beav. 254.

17. A testator devised certain real property to A., B., and C., to possess and enjoy the same jointly during their lifetime, and on the death of any or some of them he devised their shares to be possessed and enjoyed by D., together with E., during their lifetime; provided that in the event (which happened) of E.'s marrying her share was to be lost immediately, and was to be possessed and enjoyed by the other mentioned parties, share and share alike:—Held, that the estate created in D. and E. was a tenancy in common, and not a joint tenancy; and that the heir-at-law was entitled, on the death of D., to her

share in the property. *Jones* v. *Jones*, 44 L. T. 642; 29 W. R. 786.

See also X. and XI. *infra*.

VI. WORD "RESPECTIVE."

1. H. devises three-fourths of his personal estate to his three sons, equally to be divided between them; and the other fourth to them, in trust for his two daughters; the interest to be paid them respectively during their natural lives, and afterwards to their or either of their child or children; and for default of such issue to his three sons, equally to be divided between them. One of his daughters leaves a son, under whom the plaintiff claims, and the other dies without issue. The moiety of the sister who died without issue shall not go to the three brothers, but to the representative of the nephew. *Stephens* v. *Hide*, Forrest. 27; Ca. *temp.* Talbot 37.

2. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint tenants; that, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près* or approximation, by giving an estate tail to the after-born child of A.; that the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the after-born child would alone be altered; that cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Vanderplank* v. *King*, 3 Hare 1; 12 L. J., N. S., Ch., 497; 7 Jur. 548.

3. Testator, after desiring his trustees to divide a principal sum into and equally between his nephew and four nieces, share and share alike, directed, in case any of them should die leaving issue of his, her, or their body or bodies before their shares of the trust fund should become payable under his will, that the share or proportion of each of them his said nephew and nieces so dying, of and in the said trust fund, should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, and to be entitled to receive their respective parents' shares of his trust funds accordingly:—Held, a gift to such children as joint tenants, the effect of the word "respectively" being to allot the several families of children each to its respective parent. *Re Hodgson's Trust*, 1 Kay & J. 178.

4. A gift to several persons "during their respective lives, and, subject thereto, in trust for their respective children," creates a joint tenancy for life, and the children take their parents' shares *per stirpes* as tenants in common. *Sutcliffe* v. *Howard*, 17 W. R. 819; 38 L. J., Ch., 472.

5. Bequest of personal estate upon trust to assign the same to four persons "and to each of their respective heirs, executors, administrators, and assigns:—Held, to create a tenancy in common. *Gordon* v. *Atkinson*, 1 De G. & Sm. 478.

6. Gift of a personal estate for the benefit of testator's brothers and sisters, their executors and administrators, respectively for ever:—Held, to create a tenancy in common, and not a joint tenancy. *Re Moore*, 10 W. R. 315; 6 L. T., N. S., 43; 31 L. J., Ch., 368.

7. Bequest to A. for life, with remainder to B., C., and D., with a substitutional gift of their "respective shares," in case of the death of any of them:—Held, that B., C., and D. took as tenants in common. *Ive* v. *King*, 16 Beav. 46; 16 Jur. 489; 21 L. J., Ch., 560.

VII. GIFT TO CHILDREN AFTER A PRIOR LIFE ESTATE.

8. Under the following bequest: "All my lawful debts to be paid, and the remainder for my daughter; and at her decease to be left to her children":—Held, that the children took as joint tenants. *Mence* v. *Bagster*, 4 De G. & Sm. 162.

9. A bequest of residuary personal estate to A. for life, and should she have a child or children, then to it or them for ever. After the death of the testatrix A. married, and had issue:—Held, that pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law, the children of A., notwithstanding their interests vested necessarily at different times as they came into *esse*, took as joint tenants. *Woodgate* v. *Unwin* (4 Sim. 129) commented on. *Kennorthy* v. *Ward*, 11 Hare 196; 17 Jur. 1047; 1 W. R. 493; 1 Eq. Rep. 389.

10. Under a gift to A., with a direction that upon her death the property is to be left to

her children, the children take as joint tenants. *Noble* v. *Stow*, 5 Jur., N. S., 1115; 29 Beav. 409.

1. Devise to a daughter for life, and afterwards to her children or heirs for ever:—Held, that the surviving children took as joint tenants. *Ruck* v. *Barwise*, 2 Dr. & Sm. 510; 35 L. J., Ch., 16; 13 W. R. 1016; 12 L. T., N. S., 841. S. C. *nom. Buck* v. *Barwise*, 6 N. R. 375.

2. A fund was bequeathed to be invested in stock, to pay an annuity to A., "the principal to go to her children at her death":—Held, a joint tenancy. *Williams* v. *Hensman*, 1 John. & H. 546; 7 Jur., N. S., 771; 30 L. J., Ch., 878; 3 L. T., N. S., 203.

There were eight children, who, in the life of the tenant for life, concurred in signing an authority to the trustee, which was acted on, to invest the fund or mortgage, three of the children being minors at the time:—Held, that the shares of the five were thereby severed from the three, though not from one another. *Ib.*

The trustee advanced to one of the children the estimated amount of his share, the tenant for life providing for the interest on the amount, and all the other children jointly and severally covenanted not to call upon the trustee to make up any deficiency in case the share should fall short of the advance, and also to indemnify the trustee against all claim, damage, and expenses by reason of the advance:—Held, that this severed all the shares. *Ib.*

Where joint tenants, by their conduct, treat their interests as several, the effect of this, in severing the joint tenancy, is not prevented by the circumstance that they were not aware that their interests were originally joint. *Ib.*

3. A testator gave a moiety of his residuary estate, as well real as personal, upon trust to pay the income equally amongst all his children who should be living when his youngest child attained twenty-one for their lives, and after the death of any of them, as to an equal portion of the moiety proportionate to the number of his children then living for the use of the issue of such child or children so dying, absolutely for ever:—Held, that pursuant to the intent of the gift, and by analogy to dispositions operating under the statute of uses, or of dispositions operating under wills as distinguished from conveyances operating at common law, the children of a child who died after the youngest child of the testator attained twenty-one took as joint tenants the proportionate share of the deceased child, although their respective interests in the proportionate part vested in them at different times as they respectively came into *esse*. *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63.

4. A gift in trust for all and every the child and children of A. and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit, creates a joint tenancy. *Morgan* v. *Britten*, 13 L. R., Eq., 28; 41 L. J., Ch., 70.

5. Personal property was bequeathed to trustees in trust for A. for life, and if she should have children that survived her then at her death for her children equally; but if she should have no heirs the trust fund was then bequeathed to B., who was A.'s mother, and her heirs:—Held, that upon the death of A., without having ever had any issue, the gift over took effect, and that B. and all her children, other than A., became entitled to the fund as joint tenants. *Dakin* v. *Nicholson*, 6 L. J., N. S., Ch., 329.

6. Bequest of leaseholds in trust for F. for life, and after his decease for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over:—Held, to confer a life interest upon F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants. *Hill* v. *Nalder*, 17 Jur. 224; 22 L. J., Ch., 242.

7. Gift of personal estate to C. during her life; and after her decease among all her children and their issue, such children and their issue to be entitled, as amongst themselves, to the benefit of survivorship, and accruer of surviving shares:—Held, that the children and grandchildren of C. took as tenants in common. *Law* v. *Thorp*, 4 Jur., N. S., 447; 27 L. J., Ch., 649; 6 W. R. 480.

8. By a will made before 1838, a testatrix, as to the estates wherewith it had pleased God to bless her, gave, devised, and disposed thereof in manner following, that was to say:—First, she gave and devised to A. and B., and their heirs, certain specified hereditaments of gavelkind tenure (not using the word "estate"), to hold the several premises, with their appurtenances, unto A. and B., their heirs and assigns, to and for the several uses, estates, intents and purposes thereinafter expressed, limited, and declared of and concerning the same (that was to say), to the use of her grandson S. for his life, and from and after the determination of that estate, to the use and behoof of A. and B., and their heirs during the life of S., in trust to preserve the contingent uses and remainders thereinafter limited; and from and immediately after the decease of S., to the use of all and every of the child and children, if more than one, of his body lawfully begotten or to be begotten (without any words of inheritance), but if he should die without leaving such issue, then to the use and behoof of her grandson C. for his life. Then there were trusts to preserve contingent uses and remainders, and then the property was to go to the children of C. in precisely the same terms, without any words of inheritance; but if C. should die without leaving such issue, then to the use and behoof of the testatrix's three granddaughters D., E., and F., their heirs and assigns for ever, as tenants in common. These dispositions were followed by a devise of other lands to A. and B., to uses in favour first of C. and his children, and then of S. and his children in precisely the same terms *mutatis mutandis*. But beyond what is stated, there was no devise of real estate in the will. S. died leaving children who survived him, but there was no child either of S. and C. at the date of the will or of the testatrix's death:—Held, that the children of S. took only life estates in joint tenancy in the specified hereditaments, and that subject to such life estates the beneficial inheritance descended as undisposed of to the testatrix's gavelkind heirs, the gifts over to C. and his children, and to D., E., and F., their heirs and assigns, having failed by reason of S.'s

death, leaving children. *Re Pollard*, 3 De. G. J. & S. 541; 32 L. J., Ch., 657; 2 N. R. 404; 11 W. R. 1083; 8 L. T., N. S., 710.

One of S.'s children mortgaged his interest in the property:—Held, that thereby the joint tenancy so far as it affected that share was severed, and the intestacy as to it after his death was accelerated. *Ib.*

1. A testator left property on trust for his widow for life, and after her death on trust for his brothers and sisters A., B., C., D., and E.; but in case any of them should die leaving lawful issue, he directed that the share or shares of him, her, or them so dying should go to his, her, and their respective issue. A. and B. died before the testator, leaving issue. D. and E. died after the testator, but before his widow, and left issue:—Held, that the persons taking as issue in each case took as joint tenants. *Hobgen* v. *Neale*, 11 L. R., Eq., 48; 40 L. J., Ch., 36; 25 L. T. 680; 19 W. R. 144.

See also next Subdivision.

VIII. GIFT TO SEVERAL IN REMAINDER OR QUASI-REMAINDER AT TWENTY-ONE.

2. Bequest to A. for life, and after her decease to her children, when they arrived at twenty-one. A. had two children, both of whom attained twenty-one:—Held, that they were tenants in common. *Woodgate* v. *Unwin*, 4 Sim. 129. See comments on the case in *Kenworthy* v. *Ward*, 11 Hare 196; 17 Jur. 1047; 1 W. R. 493; 1 Eq. Rep. 389.

3. Devise to trustees, as soon as testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants; this not a joint estate, but to be construed, as it may be, so that the conveyance must be at twenty-one respectively, with cross-remainders. *Marryat* v. *Townly*, 1 Ves. 102.

4. By will, after giving a life interest to A., in stock, "and after her decease I give and devise the said stock to her children when they attain the age of twenty-one years":—Held, that the children who attained twenty-one took vested interests as tenants in common. Only two children attained twenty-one, one of whom died in the lifetime of the tenant for life; and on a bill filed by the survivor for the whole stock, a general demurrer by the representatives of the other was allowed. *Woodgate* v. *Atkins*, 9 L. J., Ch., 166.

5. A devise or bequest to the children of A., as they should become of age, constitutes a tenancy in common, *Hand* v. *North*, 10 Jur., N. S., 7; 33 L. J., Ch., 556; 9 L. T., N. S., 634; 12 W. R. 229; 3 N. R. 239.

A gift to the children of A., as they shall come into *esse*, does not, by reason of its taking effect at different periods, prevent its being a joint tenancy; but a gift to the children of A. as they shall become twenty-one is a tenancy in common; these words being operative as words of severance, the children taking vested interests at different periods. *Ib.*

6. If testator devise lands in trust for his nephew A. and niece B., and the children of the said B. by her husband, to receive the profits when they come of age, and also bequeaths them money at their age of twenty-one, B. having but one child at the time, and afterwards makes a codicil confirming those bequests, all the children of B. take as tenants in common, and have an immediate vested right in the money. *Bateman* v. *Roach*, 9 Mod. 104.

7. A testator devised freehold estates to trustees in trust to settle and convey them to the use of G. R. for life, with remainder to his issue in tail male in strict settlement, and in default of such issue the estates to go over. G. R. had no son, but had several daughters, all born after the testator's death:—Held, that the words "in tail male" were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take under the limitation in remainder as tenants in common. *Trevor* v. *Trevor*, 1 H. L. Ca. 239. Affirming 13 Sim. 108; 11 L. J., N. S., Ch., 417; 6 Jur. 863.

8. A. devised his real estate to trustees to pay the rents and profits to his wife for life, she continuing his widow; and after her decease or second marriage, upon trust to pay the same rents and profits to "all and every the child and children" of his late sister T., until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then to sell the real estate and divide the moneys equally between and among "the said" children, share and share alike. A testator also bequeathed his personalty upon precisely similar trusts, as to the interest and capital, as he had previously declared with regard to the rents and corpus of his real estate:—Held, that the children of T. took interests as tenants in common, and not as joint tenants, in the rents of the realty and the interests of the personalty, and also in the corpus of either fund. *Re Groves*, 6 L. T., N. S., 376. S. C. *nom. Re Grove*, 3 Giff. 575; 9 Jur., N. S., 38.

9. A testator bequeathed property to a tenant for life, and after her death to her children:—Held, that the children took as joint tenants. *Semble*, had the gift been made contingent on their attaining twenty-one, they would have taken as tenants in common. *Buck* v. *Barwise*, 6 N. R. 375. S. C. *nom. Ruck* v. *Barwise*, 2 Dr. & Sm. 510; 35 L. J., Ch., 16; 13 W. R. 1016; 12 L. T., N. S., 841.

See also preceding Subdivision.

IX. ISSUE SUBSTITUTED FOR PARENTS WHO TOOK AS TENANTS IN COMMON.

10. Upon a gift of part of the residue to testator's wife for life, and after amongst such children as should be then living, equally to be divided, and the issue of such as should be dead to their parent's share:—Held, that the latter took as between themselves as joint tenants, and not as tenants in common. *Bridge* v. *Yates*, 12 Sim. 645.

11. G. by will gave the residue of his real and personal estate to trustees, upon trust to pay the interest and dividends to L. for life; and as to the principal, from and after her decease, he gave that as follows: "In trust for all the children of L. who shall be living at her decease, and the issue of such of them as

shall be then dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child shall take as a class, as if by representation, and not as individuals." One of the daughters of L. married P., and died in the lifetime of L., leaving two children, W. and J. J. died in the lifetime of L., an infant and unmarried:—Held, that upon the death of L. the fund became divisible between the surviving children of L. and the issue of deceased children, according to the *stirpes;* but that the issue of deceased children, in the shares they took, took as joint tenants *Penny* v. *Clarke,* 6 Jur., N. S., 307; 29 L. J., Ch., 370; 8 W. R. 286; 1 De G. F. & J. 424. And see S. C. Johns. 619.

1. A testator, after bequeathing the interest of 5,000*l.* upon certain trusts, directed that, after the determination of those trusts, his trustees should divide the above sum equally between his nephew and four nieces, share and share alike; and in case any of them should die, leaving issue of his, her, or their body or bodies, before their share of the trust fund should become payable under his will, then the testator directed that the share or proportion of each of them his said nephew and nieces so dying of and in the said trust fund should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, and to be entitled to receive their respective shares of his trust funds accordingly. Upon the question whether, under the trusts for the children of such of the testator's nephew and nieces as had died leaving issue before their share of the trust fund had become payable, such children took as joint tenants or as tenants in common:—Held, that the word "respectively" must be construed in its ordinary and legitimate sense; that the effect of the word was to allot the several families of children each to its respective parent, and consequently that there was a joint tenancy. *Re Hodgson's Trust,* 1 Kay & J. 178.

2. Where a testator gave a reversionary interest in a fund to his three sons, or such of them as should be then living, or the issue of such of them as should be then dead, share and share alike, the issue of each son taking only the share which he would have been entitled to if then living:—Held, that the issue took in joint tenancy. *Coe* v. *Bigg,* 1 N. R. 536.

3. Where a testator gave property, after the death of a previous tenant for life, to several of his nieces for life, and after their deaths to their children respectively; "but in case all the children of his nieces or of any or either of them should die (either in their respective lifetimes or after their decease) under age or without having issue, then upon trust that his trustees should pay the same unto and equally amongst all and every his nephews and nieces, and the issue of such of them as should be then dead":—Held, first, that the issue of the testator's deceased nephews and nieces to take under this last gift were to be restricted to their children; held, secondly, that the gift to such issue was an original gift, and not one by substitution; held, thirdly, that whether the gift were original or by substitution, it was not necessary for such issue to survive the tenant for life in order to take under it; held, fourthly, that the gift being original, it was not necessary for such issue to survive their own parents in order to take under it, but that it would have been necessary for them to do so had the gift been one by substitution; held, fifthly, that such issue took as joint tenants. *Lamphier* v. *Buck,* 6 N. R. 196; 2 Dr. & Sm. 484; 11 Jur., N. S., 837; 34 L. J., Ch., 650; 13 W. R. 767; 12 L. T., N. S., 660.

4. A testator gave the residue of his real and personal estate to his nephews and nieces living at his death; but if any should be then dead, their offspring was to be considered to stand in the place of their parents, and to take the same benefit:—Held, that though the nephews and nieces took as tenants in common, their offspring took as joint tenants. *Leak* v. *M'Dowall,* 32 Beav. 28.

5. In a gift among children and issue of children, but so that children should take in substitution for parents, the children and issue take as tenants in common, but children substituted for the parents take as joint tenants *inter se. Heasman* v. *Pearse,* 40 L. J., Ch., 258; 11 L. R., Eq., 522.

A father gave property to the children of A. living at a prescribed period, and the issue of deceased children, so as such issue should have no greater share than their parents would have taken if living, and he afterwards provided that if any one or more of such issue should be then dead, having left lawful issue, then the issue of such issue as should be so dead should receive the share which their, his, or her parent would have taken if living:—Held, that the effect was to create a joint tenancy amongst the members of the various families, subject to this, that if any one died leaving issue it must be considered for the purpose of determining the share which such issue were to take, as if he had survived the period of distribution, but had severed the joint tenancy at the date of his death. S. C. 7 L. R., Ch., 275; 41 L. J., Ch., 705; 26 L. T. 299; 20 W. R. 271.

6. Gift among all and every the testator's "brothers and sisters who should be then living, and the children of such of them as should be then dead, such children to take their respective parent's share only":—Held, that the children of the testator's brothers and sisters took their parent's share as tenants in common *inter se. Shepherdson* v. *Dale,* 12 Jur., N. S., 156; 13 L. T., N. S., 699. And see *Lyon* v. *Coward,* 15 Sim. 287; 15 L. J., N. S., Ch., 460; 10 Jur. 486.

7. A testatrix appointed property to trustees to sell all the property except certain real estate, and to hold the proceeds to pay the legacies thereinafter given, and to pay an annuity to A. for life, and subject thereto for B. and her children, and after B.'s death without children to sell the real estate not before sold, and out of the proceeds to pay A., his executors, administrators, and assigns, a legacy in lieu of the annuity, and to hold the residue for all the children of C., and the issue of such as should be then dead, equally to be divided between such children and issue, share and share alike, but so that such issue should take such share only as their respective parents would if living have been entitled to. A. died in the lifetime of B., who had no children:—

Held, that in the events which had happened the legacy to A. was payable, that it was a demonstrative legacy, and that the issue of the deceased children of C. took as tenants in common. *Hodges* v. *Grant*, 36 L. J., Ch., 935; 4 L. R., Eq., 140; 15 W. R. 607.

1. The testator gave the interest in a fund to his niece A., as long as she continued unmarried, but he declared that if she married or died unmarried the fund was "then to be divided between the brothers and sisters of the said A. and their children." A. had six brothers and sisters living at the testator's death. A. died unmarried, her sister B. having predeceased her. B. left two children, one of whom predeceased A.:—Held, that the two children of B. took vested interests at her death in one-sixth of the fund as tenants in common, subject to A's life interest. *Crosthwaite* v. *Dean*, 40 L. T. 837.

2 M. by her will gave the whole of her property to A. for her life, remainder as to one-fourth to L. or her issue, as to one-fourth to the issue of C., deceased, as to one-fourth to G. or his issue, and as to the other fourth to H. or her issue. The question having been raised as to the period at which the class of issue entitled under the gift was to be ascertained:—Held, that all issue coming into existence before the death of the tenant for life were included in the class, and that they took as joint tenants. *Re Jones*, *Hume* v. *Lloyd*, 47 L. J., Ch., 775; 26 W. R. 828.

X. WORDS OF SURVIVORSHIP BETWEEN LEGATEES.

3. Words "equally among them," coupled with subsequent words "and to the survivors and survivor of them," create a joint tenancy. *Oakley* v. *Young*, 3 Eq. Abr. 536.

4. Devise to two equally to be divided, and to the survivor of them; they are joint tenants. *Clerk* v. *Clerk*, 2 Vern. 223.

5. Devise of the residue of personal estate to the wife for life, if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead to the survivor. They both died in the life of the wife; the legacy was vested in both as joint tenants, and therefore goes to the representatives of the survivor. *Barnes* v. *Allen*, 1 Bro. C. C. 181.

6. J. devises lands to be sold for payment of his debts and legacies, and the surplus to be laid out in the purchase of other lands, to be settled on A. and B, and the survivor of them and their heirs, equally to be divided between them, share and share alike. A. died in the lifetime of the testator, and the question was, whether his moiety should descend to the testator's heir-at-law, as a lapsed devise, or should go to B., the surviving devisee:—Held, that the first part of the devise made A. and B. plainly joint tenants; and therefore B., by survivorship, became entitled to the whole for life; but that the inheritance being devised to them as tenants in common, one moiety having lapsed by A.'s death, in the lifetime of the testator, shall descend to the testator's heir-at-law expectant on the death of B., and that the other moiety shall go to the heir of B. *Barker* v. *Gyles*, 3 Bro. P. C. 104.

7. Devise of lands to younger children equally as tenants in common, with benefit of survivorship:—Held, to refer to a survivorship spoken of in the former part of the will, and therefore to be a tenancy in common, with a limitation to the survivors after the death of any before twenty-one without issue. *Hawes* v. *Hawes*, 3 Atk. 524; 1 Ves. 13; 1 Wils. C. B. 165.

The Court inclines against joint tenancy as an inconvenient estate; and so do courts of law now, though formerly they favoured it *Ib.*

8. Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common, but shall be referred to some time, as the death of the tenant for life, or even to the death of the testator, though a construction not to be adopted if there can be any other. *Russell* v. *Long*, 4 Ves. 551.

9. J., being entitled to a debt of 20,000*l.* due from the Crown, devised the same to six of his relations, equally to be divided between them, share and share alike, and if either of them die to the survivor or survivors of them. All the legatees survived the testator, but before the debt was recovered one of them died:—Held, that the legatees were joint tenants, and that the representative of the legatee dying, was not entitled to any part of this legacy. *Bindon* (*Earl*) v. *Suffolk* (*Earl*), 4 Bro. P. C. 574. Reversing 1 P. W. 96.

10. Legacy to A. for life, and after her decease to her children; if she should have none to B. and C., share and share alike, or to the survivor. A vested interest in B. and C., upon the death of the testator, as tenants in common, although she survived them, dying without children. *Perry* v. *Woods*, 3 Ves. 204.

11. Bequest of an annuity to the children of A., in equal shares and proportions, to continue during their lives, and the life of the survivor of them. The children take as tenants in common, and there is no survivorship between them by implication; therefore the share of one dying goes to its representative. *Jones* v. *Randall*, 1 Jac. & Walk. 100. See also *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215.

12. A testator by his will gives to his five daughters a sum of money in gross, the interest to be paid to them in equal parts or shares during their lives, the principal to be placed in the funds, in trust for them, or the survivor or survivors of them; the principal, after their deaths, in equal parts to the surviving children, as they arrive at the age of twenty-one. One of the daughters dies:—Held, that the surviving daughters take the whole for their lives, as tenants in common. *Minton* v. *Cave*, 10 Jur. 86.

13. A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper; but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons:—Held, that the sons were only joint tenants for life, with a power of sale; that they could make a good title, and give discharges for the purchase money; that they were joint tenants for life of the purchase money; and that, upon the

death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 1 Russ. & M. 413; 8 L. J., Ch., 104.

1. A testator, by will in 1819, devised freehold and copyhold estates to trustees, after the death of all his three children except one, in case there should be no issue of such deceased children, or being such, they should all die, to pay the rents to such one only child for life, and after the death of such surviving child, in the event aforesaid, leaving lawful issue, then to pay and divide the rents unto and among the children of such surviving child so dying, if more than one; and in case there should be but one child of such surviving child living at his or her death, or in case there should be more than one, and they should all except one depart this life, then, so soon as such event should happen, absolutely to convey the estates in fee to such only or surviving child of the survivor of his children so dying, on his or her attaining twenty-one, and in the meantime to apply the rents for his or her benefit:—Held, that this was a gift to the surviving children of the testator's surviving child for life, in equal shares as tenants in common, with remainder to the survivor of those children in fee; and that the remainder in fee was void for remoteness, and passed as undisposed of to the heir-at-law. *Garland* v. *Brown*, 10 L. T., N. S., 292.

2. By a will, made before 1838, a testator devised under his seven children, "and their heirs for ever, the fee-simple" of real estate; and if either of his children should die leaving children, the share of him or her so dying to go to such children; but if any of his children should die and leave no child, the share of him or her dying to go to his (the testator's) surviving children and their heirs for ever. All the seven children survived the testator:—Held, that the word "die" must be construed to mean die in the lifetime of the testator, and therefore that the seven children took as tenants in common in fee. *Apsey* v. *Apsey*, 36 L. T. 941.

3. W. by his will, subject to a life estate, gave all his real and personal property to seven children, equally to be divided among the survivors or survivor of them; and if any of them should die leaving issue, he gave the share of such child so dying equally to be divided among such issue:—Held, that the children took as tenants in common in fee-simple. *Bird* v. *Swales*, 4 W. R. 227; 2 Jur. 273.

4. A testator gave certain leasehold premises to trustees to pay for twenty-eight years the clear residue of the rents and profits for the benefit of his six children, or the survivors or survivor of them, in equal shares and proportions, share and share alike, and after the expiration of the twenty-eight years to sell the same premises and divide the proceeds as therein mentioned:—Held, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common; and that the interests were vested in the children on the death of the testator. *Ashford* v. *Haines*, 21 L. J., Ch., 496.

5. Devise to four to hold as tenants in common during their respective lives with benefit of survivorship, remainder to the issue male of the four successively, remainder over:—Held, that the survivorship had reference to the extent of the estate, and not to the persons who were to take; held, also, that the four took estates tail. *Haddelsey* v. *Adams*, 22 Beav. 266; 2 Jur., N. S., 724; 25 L. J., Ch., 826. And see *Taafe* v. *Conmee*, 10 H. L., Ch., 64; 8 Jur., N. S., 919 6 L. T., N. S., 666.

6. Bequest to A. and B., with benefit of survivorship as to the moiety of B., at B.'s death to A., her executors, administrators, and assigns —Held, that A. and B. took as tenants in common, and A. having died in the testator's life that her share lapsed, and that B. took a life interest only in the other moiety, which fell into the residue on his death. *Patterson* v. *Rolland*, 28 Beav. 347.

7. A gift to A. and B. (in terms creating a joint tenancy), followed by a proviso for survivorships to B. if A. died without children, creates a tenancy in common. *Ryves* v. *Ryves*, 40 L. J., Ch., 252; 11 L. R., Eq., 539.

8. A testator gave certain real estates to his three daughters to be jointly enjoyed, or divided in case of the marriage of any of them, and they, or the survivor in the case of death, were fully authorised to dispose of the same by will or assignment as they should think proper, giving preference to those of his (the testator's) name and relations according to behaviour. The testator also gave his personal estate in money, funds, debts, or otherwise to his said three daughters, to be by them equally divided; also to his said three daughters all his books, etc., also his leasehold house in Allsop's Buildings. All the daughters died unmarried.—Held, that they took the real estates as joint tenants in fee, and the leasehold house as joint tenants absolutely. *Cookson* v. *Bingham*, 1 W. R. 459; 17 Beav. 262; 17 Jur. 1039; 2 W. R. 45; 23 L. J., Ch., 127; 3 De G. M. & G. 668.

9. A devise of freeholds to C. and his heirs, and "in case he should die leaving no issue, then equally between my surviving children or their families," is a gift (on the death of C. without issue) to the children of the testator, and the children of such of them as were dead, as to such children in joint tenancy. *Burt* v. *Hellyar*, 14 L. R., Eq., 160; 41 L. J., Ch., 430; 26 L. T. 833.

10. Where a testator gives residuary property to trustees upon trust to pay the interest to one for life, and after her decease divide the same among her children and their issue, such children and their issue to be entitled as amongst themselves to the benefit of survivorship and accruer of surviving shares, all the children coming into *esse* during the lifetime of their mother are entitled as tenants in common, with benefit of survivorship. *Law* v. *Thorp*, 6 W. R. 480; 4 Jur., N. S., 447; 27 L. J., Ch., 649.

11. Bequest "to A. and B. of the sum of 25*l.* per annum each, for and during the term of their natural lives or the life of the longest liver of them, for their or her own absolute use and benefit":—Held, that on the death of A. her annuity survived to B. for her life. *Hatton* v. *Finch*, 4 Beav. 186; 5 Jur. 548.

12. On a bequest of an annuity of 200*l.* a year each to two persons for their lives, and the life of the survivor of them:—Held, that each

was entitled to an annuity of the same amount during their joint lives and the life of the survivor, and that the representative of one dying was entitled to it during the life of the survivor. *Eales* v. *Cardigan* (*Earl*), 9 Sim. 384; 8 L. J., N. S., Ch., 11; 2 Jur. 939.

1. Bequest of an annuity to the child or children of B. equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them, or longer liver of them:—Held, that the children took as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, and that the shares of those dying within that period went to their personal representatives. *Bryan* v. *Twigg*, 3 L. R., Ch., 183; 37 L. J., Ch., 249; 16 W. R. 298. Affirming 3 L. R., Eq., 433; 36 L. J., Ch., 45; 15 W. R. 37.

2. Testatrix gave an annuity of 50*l.* to her son-in-law for his life, provided he remained unmarried, but if he should marry the annuity to cease; and after his death or second marriage, whichever should first happen, she gave 1,000*l.* to be equally divided between her brother and sisters; and if they should not all be then living, she gave the share of him, her, or them so dying to be equally divided between them, her surviving brother and sisters. The testatrix's brother and sisters all died in her son-in-law's lifetime, and he died unmarried:—Held, that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. *Peters* v. *Dipple*, 12 Sim. 101.

XI. WORDS "EQUAL SHARES" WHERE GIFT OVER ON DEATH OF SURVIVOR.

3. Testator gave a residue to trustees to pay the interest to four persons for life, and after decease of the survivor then to divide the principal among their children; two died: the interest shall be paid to the other two. Though the words "share and share alike" in a will generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong* v. *Eldridge*. 3 Bro. C. C. 215.

4. Gift of the income of property to A, B., and C. for their lives and the lives of the survivors and survivor of them during their and her lives or life; and from and after the death of the survivor of them, then in trust for their children:—Held, that A., B., and C. took as joint tenants. *Pearson* v. *Cranswick*, *Cranswick* v. *Pearson*, 31 Beav. 624; 9 Jur., N. S., 397; 11 W. R. 229; 9 L. T., N. S., 215. Affirmed 9 L. T., N. S., 295.

5. A testatrix gave 50*l.* long annuities to her sister M. P., and her said sister's husband, for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities. *Townley* v. *Bolton*, 1 Myl. & K. 148; 2 L. J., N. S., Ch., 25.

6. A testatrix gave unto A. and B. a sum in the long annuities, to be equally divided during their lives, "after which" she gave the said sum to C.:—Held, that the survivor of A. and B. took for life. *M'Dermott* v. *Wallace*, 5 Beav. 142; 12 L. J., N. S., Ch., 237.

7. A gift upon trust to pay the income to wife for life, and after her death to pay the interest to the testator's three sons "for their natural lives, in equal shares," and after their decease he gave one-third of the fund to the children of each of them in equal shares and proportions, to be paid when and as they should respectively attain the age of twenty-one years, and directed that the interest be paid to the children until they should attain twenty-one; and he gave the residue to the same three sons:—Held, that the life interest was, notwithstanding the words "in equal shares," a joint tenancy; and one of the three sons having survived, took the whole income; and that, on the death of the survivor, the capital was divisible among the children of the sons in three shares *per stirpes*, and not *per capita*. *Begley* v. *Cook*, 3 Drew. 662; 5 W. R. 66.

8. A testator gave to A. an annuity of 50*l.* per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor to go to his nephew and his two nieces, equally between them. A. having died without issue:—Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares. as tenants in common. *Evans* v. *Walker*, 3 L. R., Ch. D., 211; 25 W. R. 7.

9. Testator gave to C. B. and J T. all his houses at W., "each to have one-half, share and share alike, and what debts he should owe at his death, both to pay a like share of the same; all the above premises he gave, devised, and bequeathed to C. B. and J. T., each to enjoy one-half during their lives, and at their decease the said premises to go to their children." J. T. died without issue and intestate, leaving C. B. his heiress-at-law, and also heiress-at-law of the testator:—Held, that C. B. and J. T. each took a life estate in the property, with remainders to their children in fee as joint tenants; and that in the events which had happened J. T.'s share went to C. B. in fee, and C. B.'s share to C. B.'s children in fee as joint tenants *Re Laverick's Estate*, 2 W. R. 113; 18 Jur. 304.

10. W. bequeaths the residue of his real and personal estate (directed to be converted) in trust for M. F. for life, and then upon trust to pay the interest, etc., unto and between his two grandchildren E. G. and G. G. during their respective natural lives in equal shares, and after their decease unto and between all and every their child and children in equal shares; and if no child, to the testator's legal personal representatives. There being several children, four of whom died before the death of the survivor of the testator's grandchildren, upon the question what was the period of division:—Held, that the children took equally vested interests on the death of the tenant for life. *Pearce* v. *Edmeades*, 2 W. R. 672; 3 Y. & C., Exch., 246.

Implication of Survivorship. In General.] See L. VII. *post.*

XII. ACCRUING SHARES WHERE ORIGINAL SHARES HELD IN COMMON.

11. A testator gave his real and personal

estate to A., B., and C., as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime, his estate and interest should "go to the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor." A. died in the testator's lifetime:—Held, that B. and C. took as joint tenants the share intended for A. *Leigh* v. *Mosley*, 14 Beav. 609.

1. A testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money, and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the Bank of England, or that of the United States of America, to his reputed children, Anthony, James, and Richard, and their heirs, share and share alike, as soon as they should have attained twenty-one, it being his will that if one of them should die before he attained that age his share should vest in and belong to the survivors. James died under twenty-one, leaving Anthony and Richard surviving:—Held, that the share of the testator's property which James would have been entitled to if he had attained twenty-one vested in Anthony and Richard as joint tenants. *Jones* v. *Hall*, 16 Sim. 500.

See also LI. III. 5 *post*.

XIII. JOINT TENANCY. EFFECT OF GIFT OVER OF ESTATE OF ONE OF DONEES.

2. A devise to two persons in terms importing a joint tenancy is not changed into a tenancy in common by a subsequent gift over of the estate of one of them upon a certain contingency. *Edwardes* v. *Jones*, 33 Beav. 341.

A testator devised his real estate to his wife and his son Daniel, and he then proceeded thus: "If my son Daniel shall happen to die without issue living, my will is that all his estate is to be divided between all my children in equal shares;" and, "If my wife will intermarry, she is to enjoy none of my property":—Held, that the wife and Daniel took as joint tenants. *Ib.*

Held, secondly, the wife having died in the life of the testator, and Daniel having survived the testator, and died a bachelor, that the whole estate was divisible between the testator's children, and that Daniel's representatives took his share of it. *Ib.*

XIV. TENANCY IN COMMON AND JOINT TENANCY. IN OTHER CASES.

3. The effect of the words "joint tenants" in a will held to be controlled by the context, and effect given to the bequest as a gift to tenants in common. *Booth* v. *Alington*, 5 W. R. 811.

W. bequeathed unto trustees a large sum, upon trust to pay the interest and dividends as his daughter should direct; and in default into her hands during her coverture, for her separate use. He gave his daughter a power of appointment over the principal; but in default of appointment then upon trust "to pay, assign, and divide the principal, . . . and the stocks, funds, and securities upon which the same should be invested, unto and equally between all the children of his daughter, if more than one, as joint tenants; and if but one, then to such one child." The testator gave all the residue of his money unto and equally between his grandchildren as tenants in common. The daughter appointed only one-fourth part of the principal, and died intestate, leaving three sons surviving, one of whom received from the trustees a third of the remaining fund:—Held, that the bequest was a tenancy in common, and not a joint tenancy, and that the residue of the fund must be carried to the separate accounts of the two surviving children. S. C. 3 Jur., N. S., 835; 27 L. J., Ch., 117.

4. A testator, in 1641, devised lands to two colleges, one at Cambridge and one at Oxford, for educating ten of the descendants of certain persons named in his will in piety and learning.—Held, that this was a gift to the two colleges as tenants in common, subject to the trusts of educating the persons specified in the will in piety and learning, according to the course and usage of education in the colleges respectively, and according to the regulations and discipline thereof. *Att.-Gen.* v. *Sidney Sussex College*, 38 L. J., Ch., 656.

5. A. by will directed that his sons should have the option of purchasing certain premises at a given sum. They agreed to do so, and signified their intention by a note in writing to the trustees, and they were let into possession of the premises. No conveyance had, however, been made of the premises to the sons, but a draft conveyance had been prepared, in which they were treated as tenants in common. They both subsequently executed marriage settlements, in which the shares which they took under the will were treated as separate shares. They both died. After the death of the sons their representatives received the rents and profits of the premises in moieties:—Held, that the sons took as tenants in common. *Harrison* v. *Barton*, 1 John. & H. 287; 7 Jur., N. S., 19; 30 L. J., Ch., 213; 3 L. T., N. S., 614.

6. A father, after giving all the residue of his estate, both real and personal, to trustees, gave, devised, and bequeathed the yearly produce of his estate unto his six children, naming them, and the issue of them (such issue taking only their parents' share), to and for her or their own use and benefit absolutely, share and share alike:—Held, that the children of the testator, who all survived him, took absolute interests in his realty as tenants in common in fee. *Shacklock* v. *Jarvis*, 26 L. T. 682.

7. A father, who died in 1806, by his will gave two freehold houses to one of his sons without any words of limitation, subject to legacies and annuities, with a gift over, in case of alienation or of death without issue, to his brothers and sisters, *nominatim*, also subject to the legacies and annuities, and with a direction to pay sums of 4*l.* to each of certain grandchildren as they attained twenty-three:—Held, that on the death of the devisee without issue, and without barring any estate tail he might have had, the brothers and sisters took as joint tenants, and as the gift was coupled with a direction to pay several gross

sums, their estates would in a case coming under the old law be enlarged to a fee-simple. *Wilkinson* v. *Wilkinson*, 29 L. T. 416.

1. A testator by his will gave "my landed estates in W., of whatever description, with their appurtenances, and all allotments of common now inclosed or hereafter to be granted to my daughters J., M., and S., to be jointly and equally enjoyed or divided in the case of the marriage of any of them; and they or the survivor, in case of death, are by this my will fully authorised to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour;" and he gave them also all his personal property, "to be by them equally divided and shared among them," and he recommended them to live together. The three daughters died unmarried. M. and J. survived S., and executed wills respectively devising all their real estate to each other for life, but with different remainders over. J. survived M. After the death of J., the plaintiffs claimed a moiety of the real estates under the will of M. The defendant claimed the entirety under the will of J.:—Held, that, though the power of disposition by deed might have been exercised by J., M., and S., or by J. and M., in their lifetime, yet that J., as the survivor, had alone the power of disposing of the estates by will, and that the defendant, as her devisee, was entitled to the entirety; and *semble*, that the will of the testator created a joint tenancy in fee. *Coolson* v. *Bingham*, 3 De G. M & G. 668; 17 Jur. 1039; 23 L. J., Ch., 127; 2 W. R. 45; 1 W. R. 459; 17 Beav. 262.

2. D. by his will settled certain real and personal estate upon trusts in favour of two of his daughters and their children. By a codicil he revoked this portion of his will, and empowered the husbands of his two said daughters to dispose of the property in question "for the good of their families":—Held, that the husbands took absolutely as tenants in common. *Alexander* v. *Alexander*, 4 W. R. 470; 2 Jur., N. S., 898. Affirmed 5 W. R. 28; 6 De G. M. & G. 593; 3 Jur., N. S., 28.

3. O. devised all his real estate, charged with an annuity and bequests, to his three sons, I., W., and C., "as tenants in common" in fee. I gave his property to his two brothers, "absolutely for their uses, under the directions of the will of my late father." C. devised all his estates to E.; when I. made his will, all the moneys charged on the estates by the will of O. had not been paid:—Held, that the will of I., the son, created a joint tenancy in the property to his father thereby devised, and that the plaintiff took the whole of his share. *Oliver* v. *White*, 31 L. J., Ch., 689; 10 W. R. 276; 6 L. T., N. S., 198; 4 De G. F. & J. 17.

4. A testator who was the proprietor of three hotels, after reciting that he was part proprietor with another of the S. Hotel owned by them in equal shares and proportions, share and share alike, directed that the entire of his interest therein "shall be vested and become the property of my present wife M. J., for her own benefit, and for the benefit of my two sons by her, viz., C. and E.; and my further wish in this respect is, that said M. J. shall, in the event of my decease, continue to carry on the business of the said S. Hotel until my sons C. and E. shall attain the respective ages of twenty-one years; at which periods respectively it is my wish and desire that my said wife M. J. shall make over one-third of such interest in said S. Hotel to my said sons C. and E. for their own sole and separate use and benefit." He bequeathed another hotel to two other sons "in equal shares and proportions share and share alike." E. died a minor. In an action by E.'s administrator, claiming his share in the S. Hotel:—Held, that on E.'s death under twenty-one the testator's widow and C. became entitled to E.'s share by survivorship. *Jury* v. *Jury*, 9 L. R., Ir., 207.

Joint Attesting Witness] 5. Where a joint tenant witnesses the will by which the joint tenancy is created, his share goes to the other joint tenants. *Young* v. *Davies*, 9 Jur., N. S., 399; 32 L. J., Ch., 372; 8 L. T., N. S., 80; 1 N. R. 419; 2 Dr. & Sm. 167.

XLV. Absolute Interests, and Gifts whether Beneficial or in Trust.

See also Settlement, X. xiii.

I. *Gift of Income. When it Passes an Absolute Interest*, 7932.

II. *Gifts to Benefit a Legatee alone in a Particular Way*, 7934.

III. *Gifts to Benefit a Legatee and other Persons in a Particular Way*, 7938.

IV. *Precatory Trusts*, 7944.
See also Power, II.

V. *Absolute Interests in Personalty where Estate Tail or Fee-simple in Realty*, 7955.

VI. *Absolute or Clear Gifts not Cut Down by Doubtful Expressions (Repugnancy)*, 7962.

VII. *Absolute Interests. How far Cut Down quà Enjoyment by Qualifying Trusts*, 7963.

VIII. *Interests Whether for Life or Absolute in Other Cases*, 7967.

IX. *Limitation of Personalty to Executors.* See XXI. *ante.*

X. *Implication of Absolute Interests.* See L. v. *post.*

XI. *Gifts. Whether Creating a Right of Property or a Power of Disposition.* See Power, II.

XII. *Creation of Trusts Generally.* See Trusts.

XIII. *Trusts for Maintenance or Advancement. Construction of.* See Trusts, VIII.

XIV. *Direction to Employ Particular Persons as Agents.* See Trusts, XXII. III.

XV. *Secret Trusts.* See XLVI. *post.*

XVI. *Validity of Gifts over of Undisposed-of Interests in Personal Estate.* See XLVII. *post.*

XVII. *Limitations of Chattels quæ consumuntur usu.* See Vested, Contingent, and Future Interests, XIII.

XVIII. *Limitations of Heirlooms and Chattel Interests on Trusts of Real Estate.* See Settlement, XV.—Trusts, V. vii and viii.

I. GIFT OF INCOME. WHEN IT PASSES AN ABSOLUTE INTEREST.

1. Indefinite bequest of the dividends gives the absolute property of stock. *Page* v. *Leapingwell*, 18 Ves. 463.

2. An unlimited gift of the produce of anything, as the interest of stock, gives the principal also. *Stretch* v. *Watkins*, 1 Madd. 253.

3. On construction of will:—Held, that the capital of the residue passed by implication, though the interest and dividends only were expressly given. *Phillips* v. *Chamberlaine*, 4 Ves. 51.

4. General gift of income, arising from personal property, is equivalent to general gift of property itself, and it makes no difference whether it be given through trustee, or to legatee direct. *Haig* v. *Swiney*, 1 Sim. & S. 487; 2 L. J., Ch., 26.

5. Construction of an obscure will, first, that the income only, not the capital, was disposed of; secondly, that the disposition was in favour of the younger children, excluding the eldest. A legacy, not as an independent bequest, with a time for payment or distribution, appointed afterwards, but the time annexed to the substance of the bequest; the interests do not vest before that period. *Sansbury* v. *Read*, 12 Ves. 75.

6. State of circumstances under which the capital of a legacy, the interest of which was given to one for life, was held, on his death, not to devolve as on an intestacy of the testator, but to form part of the personal estate of the legatee for life. *Johnson* v. *Johnson*, 11 Jur. 862.

7. Testatrix, being possessed of 3½ per cents. and long annuities, bequeathed to S. B., "if living, the interest of my property in the 3½ per cents.; if not living at my decease," the testatrix bequeathed the interest to E. S. for life, and, in case of her leaving children, directed the property to be divided between them at her decease; and subsequently directed that if E. S. left no child the capital should return to the children of J. B. As to her long annuities, the testatrix bequeathed the interest thereof to S. F. and M. S. jointly for their natural lives, and in case of "one or both their deaths before mine" the testatrix bequeathed the interest of the long annuities to J. B. for life, and after his death to A. E. B. and S. J. B. equally. S. B., S. F., and M. S. survived the testatrix. On the question as to who were entitled to the 3½ per cents. and the long annuities:—Held, that S. B. took the 3½ per cents. absolutely, and that the gift over only took effect in case he died in the lifetime of the testatrix:—Held, also, by the M. R., that S. F. and M. S. having survived the testatrix, she died intestate as to the long annuities, subject to the life estates to S. F. and M. S., and that her next of kin were entitled to them. But held, on appeal, that A. E. B. and S. J. B. were entitled to the long annuities from the death of J. B. *Boosey* v. *Gardner*, 18 Beav. 471.

8. Where there are words in a gift of interest which clearly shows that the testator intended to make a distinction between the capital and the interest, and the disposition of them separate and distinct, a gift of interest will not pass the capital. *Baker* v. *Smith*, 1 W. R. 490.

9. Gift of "all subsequent dividends" carries the principal. *Tyrrell* v. *Clark*, 2 Drew. 86; 18 Jur. 323; 23 L. J., Ch, 283; 2 W. R. 152; 2 Eq. Rep. 333.

T., by will, gave to his wife the dividends which might become due and payable in her lifetime in certain stock standing in her name, the name of D., and the testator, to which the latter would be entitled on D.'s death; with a gift of all subsequent dividends after the wife's death to certain charities "for ever." There were other gifts in like words, with an ultimate bequest to trustees on certain trusts. The testator survived D., and transferred the stock into his own name; the wife died; and on the questions—first, whether that was an ademption; secondly, whether the gift of the dividends carried the stock; and, thirdly, whether there was an apportionment of the dividends up to the day of the wife's death:—Held, that there was no ademption; that there was a gift of the stock; and that there was an apportionment, inasmuch as under the Apportionment Act there was no express stipulation to the contrary. *Ib.*

10. Indefinite bequest of the income of personalty:—Held, not to carry the corpus. *Buchanan* v. *Harrison*, 8 Jur., N. S., 965; 31 L. J., Ch., 74.

11. A bequest of the income of a fund until bankruptcy or alienation does not carry the corpus of the fund, but gives only a life interest, determinable on bankruptcy or alienation. *Banks* v. *Braithwaite*, 9 Jur., N. S., 291; 32 L. J., Ch., 198; 11 W. R. 298; 8 L. T., N. S., 80; 1 N. R. 306.

12. Bequest to Lady C., a widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C. The bequest was the bequest of a fund to trustees to pay to her the dividends so long as she should continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the testator's residue:—Held, that she took an absolute interest in the fund. *Rishton* v. *Cobb*, 9 Sim. 615; 5 Myl. & C. 145; 9 L. J., N. S., Ch., 110; 4 Jur. 261.

13. Bequest of interest of residue of personal estate, after payment of debts, etc., to A. for life, and after her decease to C.; passes an absolute interest to C., subject to prior life interest of A. *Clough* v. *Wynne*, 2 Madd. 188.

14. A testatrix by her will directed her executors to pay to M. S. or her assigns, or permit her to receive the income of her residuary personal estate, after payment of debts, and she then bequeathed certain legacies payable after the death of M. S. By a second codicil she gave a legacy payable after the death of M. S.:—Held, that M. S. took an absolute interest in the residuary

personal estate. *Jenings* v. *Baily*, 17 Beav. 118; 17 Jur. 433; 22 L. J., Ch., 977.

1. A testator, after bequeathing certain stock and other property for the benefit of his children, directed the trustee of his will to pay to his daughter the income of her share; and directed that neither the principal nor interest should be subject to the control or debts of any husband she married, but should stand under the direction of the Court of Chancery, subject to her will only. There was no gift over, and the daughter was unmarried at the testator's death:—Held, that the words of the will constituted an absolute bequest to the daughter for her separate use. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., N. S., Ch., 319.

2. Testator gave the residue of his real and personal estate to trustees, upon trust to pay the dividends of 1,500*l.* consols to S. T. for life, and after her death to divide the dividends of the said sum between his wife E. B. and his niece F. R., and the survivor of them. He then gave all the residue of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents, profits, and annual produce to his wife for life, with remainder to his niece F. R. for life, with remainders over. The testator died, being at the time possessed of leaseholds, shares in canal and insurance companies, and Dutch bonds; and F. R., after surviving the testator, died in the lifetime of S. T.:—Held, that, on the death of S. T., E. B., the testator's widow, became entitled, not to the capital of the 1,500*l.* consols, but to a life interest only in the dividends thereof. *Blann* v. *Bell*, 16 Jur. 1103; 2 De G. M. & G. 775; 22 L. J., Ch., 236.

3. A. bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal." He gave the residue to his brothers. The residue only produced 30*l.* a year, and the widow claimed the whole capital:—Held, that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life. *Re Pedrotti*, 27 Beav. 583; 6 Jur., N. S., 187; 29 L. J., Ch., 92.

4. Testator, after various directions, embracing almost every particular of his property (except cash in the house and at his banker's), directed certain leaseholds to be sold, and the produce to be invested in stock; the interest and dividends to be paid to his wife for life. He then directed the sale of other property, to be invested in like manner, and the interest and dividends thereof, and also of all such stock as should, at the time of his decease, be standing in his name, to be paid to his wife for life; and at her decease, "all interest and dividends" were to be accumulated and added to such stock, which stock, together with all accumulations, he gave to his nephew, J. C. There was no residuary bequest:—Held, as between J. C. and the next of kin, that the gift to J. C. carried the whole proceeds of the leasehold estates. *Re Curtois*, 17 Jur. 852; 22 L. J., Ch., 1045.

5. A testatrix gave all her leasehold and personal estate to trustees, upon trust, to pay the rents and profits of two specified houses to A., and she gave the sum of 100*l.* bank stock to B. when he attained the age of twenty-one years, and in case of his death to C. At her death the testatrix had bank annuities, but no bank stock:—Held, that A. took an absolute interest in the leaseholds. *Bignall* v. *Rose*, 24 L. J., Ch., 27; 3 W. R. 77.

6. A testator bequeathed the interest of certain personal property to his wife for life; "at her death one half of the said property I give to my son G. M., the remaining half to be equally divided between my two daughters, and at their deaths such shares to be equally divided among their children respectively":—Held, that the son took an absolute interest in the moiety. *Scrivener* v. *Smith*, 2 De G. M. & G. 399.

7. Testator bequeathed the dividends, etc., of all stocks he should be entitled to, at the time of his decease, in the public funds. He had 10,000*l.* consols at his death:—Held, that this was a specific bequest of that sum. *Stephenson* v. *Dowson*, 3 Beav. 342; 10 L. J., N. S., Ch., 93; 4 Jur. 1152.

Income Given for Separate Use.] 8. Testator gave the produce of his share and interest in his co-partnership business to his wife, and also the interest of the capital sum of 1,000*l.*, for her sole use and benefit, and free from the debts or control of any husband she might marry, and her receipt to be a sufficient discharge to his executors; and he gave all his furniture, plate, etc., to her absolutely:—Held, that the gift of the interest of the 1,000*l.* passed the principal. *Humphrey* v. *Humphrey*, 1 Sim. N. S. 536; 20 L. J., N. S., Ch., 425.

9. Bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use. *Adamson* v. *Armitage*, 19 Ves. 416; Coop. 283.

Bequest of the produce of a fund is a gift of that produce in perpetuity, and consequently of the fund itself, unless not the intention on the face of the will. *Id.* 418.

10. Bequest to the testator's wife of "200*l.* per year, being part of the moneys I now have in bank security, entirely for her own use and disposal," together with all his household furniture and effects, interests for life being expressly given to other persons, an absolute interest to the wife in bank stock sufficient to produce 200*l.* a year, not a mere annuity for her life. *Rawlings* v. *Jennings*, 13 Ves. 39.

11. A testator bequeathed leaseholds, upon trust to pay the rents to his daughter, a married woman, for her separate use; but if she should die before the expiration of the lease, then upon trust to invest the rents and to allow the same to accumulate for the benefit of the children of the daughter living at her death. Other leaseholds were bequeathed in favour of the testator's two sons and their respective children in the same terms, except that the limitation as to separate use was omitted. The daughter survived the testator, but she died before the expiration of the lease without ever having had a child:—Held, that upon the true construction of the will the daughter took an absolute interest in the first-mentioned leaseholds. *Watkins* v. *Weston*, 3 De G. J. & S. 434; 32 L. J., Ch., 609; 11

W. R. 408; 8 L. T., N. S., 406. Affirming 32 L. J., Ch., 396; 11 W. R. 196; 32 Beav. 238.

II. GIFTS TO BENEFIT A LEGATEE ALONE IN A PARTICULAR WAY.

1. In General.

1. Bequest to A for such purposes as he shall think fit is for his own benefit. *Paice* v. *Canterbury* (*Archbishop*), 14 Ves. 370.

2. Legacy given to an infant to put him out apprentice, and he dies before he is of competent age to be put out. It shall go to his executor or administrators. *Barlow* v. *Grant*, 1 Vern. 255.

3. A legacy being given to A. to bind her apprentice:—Held, that she was not entitled to the legacy while she refused to be bound apprentice. *Woolridge* v. *Stone*, 4 L. J., Ch., 56.

4. A legacy of 500*l.* is given to the eldest son of A., to be begotten, to place him out apprentice. A. has a son born after the testator's death, who brings a bill for the legacy; and it is decreed to be paid him forthwith, though not born in the testator's lifetime, and though the 500*l.* was given for a particular purpose. *Nevill* v. *Nevill*, 2 Vern. 431.

5. Legacy for the board and education of an infant until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee; the infant having attained nineteen, and not having been put out, was held entitled to the legacies. *Barton* v. *Cooke*, 5 Ves. 461.

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way; as if it were to put him into orders, and he became a lunatic. *Ib.*

6. Testator ordered and empowered the trustees of his will, at their free will and pleasure, to sell part of the trust property, and out of the proceeds to pay not exceeding 2,000*l.* to his son, for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial to him. The son survived the testator, and afterwards died without having entered into business, and without the 2,000*l.*, or any part of it, having been raised. A general demurrer to a bill filed by his personal representatives to have the 2,000*l.* raised was overruled. *Gough* v. *Bult*, 16 Sim. 45; 17 L. J., N. S., Ch., 10; 11 Jur. 958. Affirmed 17 L. J., N. S., Ch., 401; 12 Jur. 859.

7. A devise that if *cestui que vie* of a church lease which the testator had should die, the testator's executors should purchase the premises for the life of J., the testator's kinsman; but if such purchase could not be made, then the surplus of his personal estate to go to another: whether J. takes any interest by the will, *quære*. *Stephens* v. *Stephens*, 2 P. W. 323.

8. Trustees of a will were empowered to raise 600*l.* for church preferment for B. B. died before the money was raised:—Held, that the gift failed. *Cowper* v. *Mantell*, 4 W. R. 500; 22 Beav. 231; 2 Jur., N. S., 745.

9. A sum of money was paid by A. to B., for the purpose of purchasing C. a promotion in the army, and it remained unapplied in the hands of B at the death of A. C. having been compelled from the bad state of his health to quit the army, and having no prospect of being able able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche* v. *Kilmorey* (*Lord*), T. & R 207.

10. Bequest of 8,000*l.* to testatrix's daughter, a married lady, towards purchasing a country residence.—Held, to be an absolute bequest. *Knox* v. *Hotham* (*Lord*), 15 Sim. 82.

11. A direction by a testator to his executors "to take a suitable house for three daughters to reside in with their governess":—Held, to entitle the daughters to the sums which ought to have been expended in taking a house for such a purpose during their minorities. *Hutchinson* v. *Rough*, 40 L. T. 289.

A gift by will of "all my other real and personal estate," upon certain trusts, followed by two specific gifts:—Held, to include all property not previously or subsequently specifically given by the same will. *Ib.*

A testator gave his residuary estate to his executors "upon trust out of the rent or produce of my said real estate, and other moneys on loan or otherwise, to form a fund, the same to be applied in establishing my three sons in their several professions in such proportions as my executors deem fit." One of the sons had been entered in a profession by his father, but neither of the other two sons had adopted a profession or expressed an intention of doing so:—Held, that, notwithstanding the testator's purpose had failed, the sons were entitled to the whole residue in equal shares for their own benefit. *Ib.*

12 Testator, by his will, gave an annuity of 1,000*l* a year to his wife for her life, and directed his plate and furniture, and H., his family mansion, to be sold. By codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death: "I give to her absolutely any one of my silver inkstands which she may select: I also give to my dear wife any part of the beds, bedding, linen, carpets, or other household furniture at H., which she may require for her own use, as likewise any wardrobes or glass cases at H., according to her wish; and I give to her, in addition to all other provisions, 400*l.* per annum during her life, to be applied to the rent of any residence she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will":—Held, that the wife was entitled, absolutely, to such parts of the furniture as she might select; and that she was entitled to be paid 400*l.* a year, although she had fixed her residence with her son, at the family mansion. *Amherst* (*Lord*) v. *Leeds* (*Duchess*), 12 Sim. 476; 6 Jur. 141.

13. The testator, having given his wife the option to occupy his house at a certain rent, and if she should choose to do so declared she should have the use of the furniture, by codicil revoking the bequest of an annuity to her,

gave her a legacy to provide furniture in case she should not choose to occupy his house, or for any other purpose she should think proper. She occupied the house and furniture till her death, and her executor was held entitled to her legacy. *Isherwood* v. *Payne*, 5 Ves. 877.

1. An estate was mortgaged to A., who sub-mortgaged it to B. A. devised the estate to C., and bequeathed to B., the sub-mortgagee, through his executors, 1,000*l.* to clear in part the estate. The sub-mortgagee, after the death of the testator, foreclosed the estate:—Held, that the devisee of the estate was entitled to the 1,000*l.* *Lockhart* v. *Hardy*, 9 Beav. 379; 10 Jur. 728.

2. Where a benefit is conferred by will for a specific purpose, although that purpose cannot be achieved *modo et formâ* as intended by the testator, still, if there is a clear intention on the part of the testator that the benefit should be conferred, if the testator has excepted from the general property bequeathed to the residuary legatee the property the subject of the specific bequest, for the benefit of the specific legatee, the latter is entitled to the benefit of the bequest, and to enjoy it in manner he may think fit. *Lonsdale* (*Earl*) v. *Berchtoldt* (*Countess*), 3 Kay & J. 185; 3 Jur., N. S., 328. And see S. C. 1 Kay 646; 18 Jur. 811; 23 L. J., Ch., 816.

Where the purpose for which one of two bequests, given by will to the same parties, is expressed in the will to be for the better enjoying of the other, the mere circumstance that the legatees cannot enjoy the latter shall not deprive them of the benefit of the former. *Ib.*

Therefore, where the interest of a fund was directed to be laid out in payment of the rent and charges of leaseholds specifically bequeathed, and the leaseholds proved *damnosa hæreditas*, and could not be specifically enjoyed, and were therefore sold by order of the Court:—Held, that the legatees were entitled not only to the proceeds of the sale, but also to the interest of the fund set apart for the enjoyment of the leaseholds in specie. *Ib.*

3. A testator bequeathed a sum of stock to trustees, upon trust, during sixty years from his death, if the law should allow, or, if not, then during the lives of his two sons and of the survivor, and twenty-one years after his death, to lay out the dividends in repairing and insuring the houses, etc., on his farms called H. and S. (it being his desire that upon no account should the timber of such farms be cut down during the said term of sixty years, on pain that the person so cutting such timber should lose all interest in the said estates, as if he were dead), and upon trust to pay the surplus, if any, of the said dividends equally among the persons for the time being in possession of the estates under his will, during the continuance of the said trust; and immediately after the expiration thereof, to transfer one moiety of the said stock to the person then in possession of the H. farm, such person being one of his sons, or a descendant of a son; but if not, then to the descendants of the testator's brothers and sisters, and to pay the other moiety in like manner to the person in possession of the S. farm. And the testator devised the H. farm to the same trustees in fee, upon trust for his son John, for ninety-nine years, if he should so long live, remainder to the use of his first and other sons in tail, with divers remainders over. And the testator devised the S. farm in like manner for the benefit of his son James and his issue. John and James, and their eldest sons, barred the entail in remainder in the said farms, and re-settled the same, and the stock, having been transferred into court under the Trustee Relief Act (10 & 11 Vict. c. 96), petitioned for the payment out of the fund to them:—Held, that the fund being intended for the benefit of the sons and their issue, the period for the enjoyment of the capital had been accelerated by barring the entail, which had determined the restriction against cutting down timber. *Re Colson's Trusts*, Kay 133.

4. A testator bequeathed manuscripts to trustees "for my grandson, that they may provide for the books being published to the best advantage for the interests of the child, so as to contribute towards raising a fund to assist him when he goes to college," and bequeathed 1,000*l.* towards the printing.—Held, that the grandson was entitled to elect to take the 1,000*l.*, it appearing to be impossible to publish the book at a profit. *Re Skinner*, 1 John. & H. 102; 8 W. R. 605.

5. Testator authorised his executors, at any time before T. L. should attain the age of twenty-six years, to raise, by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L., as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to T. L. absolutely. The executors declining to act, the Court will not give this 600*l.* to T. L. before twenty-six, without referring it to the Master to inquire whether T. L.'s situation requires the 600*l.*, or any part thereof, to be advanced. *Lewis* v. *Lewis*, 1 Cox. 162. S. C. cited also 15 Ves. 527.

6. B. made his will in 1830, directing, after payment of debts and legacies, "all my remaining property to be placed in proper securities, and appropriated to the education of my sister C.'s children, as shall seem most meet and beneficial to them, by the executors of this my will, recommending to them that the boys receive a classical education, to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families, or in schools of the first respectability." B. died in 1859, having survived his executors, leaving a brother and three sisters his only next of kin, and children of his sister C., all grown up, surviving him. On a question as to administration with the will annexed:—Held, that C.'s children were entitled as beneficial residuary legatees. *Presant* v. *Goodwin*, 1 S. & T. 544; 29 L. J., P., 115.

7. Bequest of money and leaseholds to a feme sole "for her own absolute use, without liberty to sell or assign during her natural life":—Held, to confer an absolute interest without power of alienation during life. *Baker* v. *Newton*, 2 Beav. 112; 8 L. J., N. S., Ch., 306; 3 Jur. 649.

8. A testatrix directed a government annuity to be purchased for an annuitant, and declared that the annuitant should not "be allowed to accept the value of the annuity in lieu thereof":

—Held, that this declaration was ineffectual, and that the annuitant was entitled to receive the purchase money instead of the annuity. *Stokes* v. *Cheek*, 28 Beav. 620.

1. A. bequeathed 1,000*l.* to his solicitor by a payment of 50*l.* per annum for twenty years after his death, with a condition to attend meetings of his executors and assist in auditing the accounts of the estate:—Held, to be an absolute bequest of 1,000*l.* *Wells* v. *Wood*, 9 W. R. 780; 4 L. T., N. S., 768.

2. A testator left a certain sum to A. during his natural life, and his assigns, in trust to defray the expenses of a certain chapel:—Held, that this constituted a permanent gift, and not terminable at A.'s death. *Re Wall*, 12 Jur., N. S., 995.

3. A bequest of terms for years upon trust to permit S. M. to receive all rents and profits, and to dispose of the same as she might think proper, and upon further trust that S. M. should pay out of the rents, issues, and profits certain debts and legacies, and that the premises should revert for the residue of their different periods to T. H.:—Held, that S. M. took an estate for life only. *Egan* v. *Morris*, Ll. & G. *temp.* Plunk. 297.

4. "I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that, as she had not disposed of it during her life, it fell into the residue. *Espinasse* v. *Luffingham*, 3 J. & L. 186; 9 *id.* 129.

5. A testator directed his widow "to be in possession of all his furniture, plate, glass, and books, and for the time of her natural life to receive the yearly interest and profits of all his property that he was in possession of at his death":—Held, that the widow took a life interest only in the furniture, etc. *Low* v. *Carter*, 1 Beav. 426.

6. A testator gave shares of his property to his two infant daughters "to be settled on themselves at their marriage." Upon the daughters attaining twenty-one without having married:—Held, they were entitled to have their shares paid and transferred to them absolutely. *Magrath* v. *Morehead*, 41 L. J., Ch., 120; 12 L. R., Eq., 491.

7. One devises that his executors shall sell his lands and invest the money in purchasing an annuity for J. S., and gives her the residue of his personal estate; the testator dies, and the annuitant dies three months after the testator; yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale. *Yates* v. *Compton*, 2 P. W. 308.

8. Where testator directs government annuities of a certain amount to be purchased for his wife, within a given time, and the wife, at the request of the executors, assents to postpone the time of purchase, and afterwards dies before it is purchased, her personal representatives will be entitled to the sum which would have purchased the annuity. *Dawson* v. *Hearn*, 1 Russ. & M. 606; Taml. 465; 8 L. J., Ch., 153. And 9 *id.* 249.

9. A testator directed his executors to purchase, in their names, an annuity from government, or any public company, for A. B.:—Held, that A. B. was entitled to have a government annuity purchased, and, at his option, to take the price in lieu of the annuity. *Ford* v. *Batley*, 17 Beav. 303; 23 L. J., Ch., 225.

10. A., seised of an estate of 600*l.* per annum, devises 300*l.* per annum to an infant, whose father was his heir-at-law, and the other 300*l.* per annum he devises to the father for his care in looking after the son's estate till he should come to the age of twenty-one. The father dies, leaving the son six years of age, having by his will devised this 300*l.* to his wife, and desired her to save what she could out of it for a portion for his daughter, and appointed her guardian for his son. This 300*l.* per annum does not determine by the father's death, but the wife shall have it till the son arrives at the age of twenty-one. *Anon.*, Pre. Ch. 597.

11. A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A.; and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham* v. *Mee*, 1 Russ. & M. 631.

12. Devise of real estate in trust to raise an annual sum for the support and maintenance of an adult, held to create a trust for his benefit generally, and to pass to his assignees under the Insolvent Act, notwithstanding a clause in the will against anticipating or charging, etc. *Younghusband* v. *Gisborne*, 1 Colly. 400; S. C. 8 Jur. 750 Affirmed 15 L. J., N. S., Ch., 355; 10 Jur. 419.

13. A gift of income to arise from a fund during the life of A. to B. for his maintenance is an absolute gift to B., his executors and administrators during the life of A., and is not confined to the joint lives of A. and B. *Attwood* v. *Alford*, 2 L. R., Eq., 479; 14 W. R. 956.

14. Legacy of stock to A. to be laid out in annuity for her life. A. died two days after the testator, and before any alteration of the stock; her administrator is entitled to a transfer. *Barnes* v. *Rowley*, 3 Ves. 305.

15. A gift for the maintenance and education of a legatee during the life of a third party is an absolute gift, so as to entitle the representatives of the legatee to the income accruing after his death. *Webb* v. *Kelly*, 9 Sim. 469.

Testator directed his trustees to apply the rents of his freehold estates during the life of his wife for the maintenance and education of his two great-nieces, and after his wife's death to sell the estates, of which he gave the proceeds equally between both his great-nieces, or, if there should be but one of them then living, to her only. One of the great-nieces died an infant in the lifetime of the widow:—Held, that a moiety of the rents from her death to the death of the widow did not go to the surviving great-niece, or result

to testator's heir, but belonged to the deceased great-niece's representatives. *Ib.*

1. Under bequest to trustees for investment in government life annuities to be paid to C. during his life, C. is entitled absolutely to sum bequeathed, the sum not having been invested by reason of the inability of C. to attend at the public office, and an annuity (which the testator, during his life, gave to C., being appointed, by directions of testator to his agents, to be paid to C., after testator's death, until his executors could make such investment) having been paid to C. Up to C.'s death the annuity, since testator's death, was considered as payment on account of the sum to be invested, and representatives of C. held entrusted to receive the sum to be invested with interest after deduction of those payments. *Palmer* v. *Crawfurd*, 3 Swan. 482; 2 Wils. 79.

2. A testatrix directed her trustees to pay and apply the sum of 800*l.* in and upon the education of her grandson, it being her desire that her trustees should follow all the reasonable suggestions of the infant's father as to the school and mode of learning in which he should desire to have his son educated:—Held, that this was an absolute legacy vesting immediately, and fell within the general rule of legacies upon which interest was payable from a year after the death of the testatrix. *Noel* v. *Jones*, 16 Sim. 309; 17 L. J., N. S., Ch., 470; 12 Jur. 906.

3. Bequest for maintenance of a child, held not to cease on his death, but to pass to his representative. *Bayne* v. *Crowther*, 20 Beav. 400. S. C. *nom. Main* v. *Crowther*, 3 W. R. 395.

Bequest of leaseholds, in trust to pay half of the rents to A. for life, and the other half to B. for life, and in case of the death of either, his share of the rents "to be paid and applied for the maintenance of his children," until the decease of the survivor of A. and B., and then to sell and divide equally between the children of A. and B. After the death of A., one of his children died:—Held, that his representative was entitled to a share in the rents until the death of B. *Ib.*

See also next Subdivision.

2. Where Trustees have a Discretion.

4. Trust by will as to the residue of real and personal estate for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but in case no part should be advanced, the residue to be divided among the nephew's issue, with a limitation over if he should have no issue: the nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson* v. *Cleator*, 15 Ves. 526.

5. A testator bequeathed the residue of his personal estate to three trustees in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support, and benefit of his three children, and the survivors and survivor of them, in such shares and proportions, and in such manner, as the trustees should think most proper and advisable; and if all the children should die without leaving issue, then to two of the trustees upon another trust:—Held, that the whole income of the residue was given for the children's benefit, and, part only having been so applied, the surplus devolved to the personal representative of the survivor. *Beevor* v. *Partridge*, 11 Sim. 229; 10 L. J., N. S., Ch., 235.

6. Testator authorised his executors, at any time before T. L. should attain the age of twenty-six years, to raise, by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L., as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to T. L. absolutely. The executors declining to act, the Court will not give this 600*l.* to T. L. before twenty-six, without referring it to the Master to inquire whether T. L.'s situation requires the 600*l.*, or any part thereof, to be advanced. *Lewis* v. *Lewis*, 1 Cox 162; S. C. cited also 15 Ves. 527.

7. A testatrix gave a fund to A. and B., who were her executors, in trust to place out the same at interest, and to apply the interest thereof, or the principal, for the benefit of Mary Ann S., in such way as they might in their discretion think fit, during her life, it being the wish of the testatrix that they should dispose of the principal and interest, or any part, or should withhold the whole, and let the interest accumulate; and, upon the decease of Mary Ann S., in case the trust fund, or any part thereof, or interest, should then remain undisposed of, upon trusts for other persons. A. and B. paid the interest of the trust fund, and 100*l.*, part of the capital, to Mary Ann S., and died without any other exercise of their discretionary power:—Held, that Mary Ann S. was entitled to the whole of the trust funds. *Gude* v. *Worthington*, 3 De G. & Sm. 389; 13 Jur. 847; 18 L. J., Ch., 303.

8. A testator empowered his trustees to raise a sum of money to be applied in the purchase of church preferment for his nephew. The nephew died before the money was raised:—Held, that a discretion was vested in the trustees, which not having been exercised by them, the gift failed. *Cowper* v. *Mantell*, 2 Jur., N. S., 745; 22 Beav. 231; 4 W. R. 500.

9. Gift of a share of residue to trustees, at their discretion, to apply the whole or part of the capital or income for the benefit of J., or, at the option of the trustees, to apply the whole to the augmentation of the other shares. J. died, and the trustees refused to exercise their option:—Held, that the share was undisposed of. *Re Eddowes*, 1 Dr. & Sm. 395; 7 Jur., N. S., 354; 5 L. T., N. S., 389.

10. Devise of real estate and personal, to be laid out and settled, with directions to the trustees out of the rents of residue of testator's personal estate to raise and pay any money they should think proper and convenient, not

exceeding 3,000*l.*, for the advancement of the plaintiff in any business, art, or profession, or in any civil or military employment:—Held, to be a gift of the money. *Metcalfe* v. *Wilmot*, Ambl. 701.

1. A legacy was given to trustees to be expended by them for the benefit and advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the will, of the income of a share of the residue to the infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance and education. A suit for administration was instituted by the trustees immediately after the testator's death, and orders were from time to time made in it for the advancement, and also the maintenance and education of the infant out of the legacy. On his attaining twenty-one:—Held, that he was absolutely entitled to the unapplied residue of the legacy. *Furley* v. *Hyder*, 41 L. J., Ch., 583; 26 L. T., N. S., 864.

Held, also, that inasmuch as maintenance would have been ordered out of the income of the contingent share of the infant, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the legacy for his maintenance and education. *Ib.*

2. A., by will, gave all his real and personal estate to trustees, upon trust, during the life of J. (a person *non compos*), to apply the whole or any part of the income of the real and personal estate for his maintenance, attendance, and comfort. The testator directed a sale of his real estate after the decease of J., the moneys to be deemed part of his personal estate, and the rents and profits of his real estate until a sale to be deemed part of the income of his personal estate, and then made a disposition of all his personal estate to residuary legatees. During the life of J. the trustees maintained him out of the income of the real and personal estate, without trenching on his private property, and accumulated the savings. After the decease of J. the trustees sold the real estate, and then, doubts arising as to the rights of parties to the savings, and also to the produce of the real estate, paid the whole into court:—Held, first, that the expression "comfort" in the trust for J. was so wide as to justify the application by the trustees of all the income devoted to that purpose, however large. *Re Sanderson*, 3 Kay & J. 497; 3 Jur., N. S., 658; 26 L. J., Ch., 804; 5 W. R. 864.

But held, secondly, that the whole not having been so applied, the gift was not such a gift for the benefit of J. as that the savings belonged to J. or his personal representative, as part of his personal estate. *Ib.*

3. Bequest of consols in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity, for her maintenance, support, or otherwise for her personal benefit. The legatee being unmarried:—Held, that she was entitled to a transfer of the consols. *Re Brown*, 27 Beav. 324.

4. A testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands and children. He then declared that for making a further provision for the maintenance of his nephew, it should be lawful for his trustees, during the life of his sister-in-law upon her request in writing, to expend any sums not exceeding 6,500*l.* in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army. After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid 600*l.* for the exchange and 550*l.* for horses and outfit: after which, in May 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the 6,500*l.*, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son. From the 1st November 1871 purchase of commissions in the army was by royal warrant abolished:—Held, that the nephew was entitled to the full sum of 6,500*l.*, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty. *Palmer* v. *Flower*, 13 L. R., Eq., 250; 41 L. J., Ch., 193; 25 L. T., N. S., 816; 20 W. R. 174.

5. When by a separation deed a sum of money was directed to be held by trustees for the wife for life, and after her death, as to four-sixth parts, for W., one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children, and it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding 2,000*l.*, in or towards effecting the promotion of W. in the army, and the trustees applied 850*l.* in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army no further sum could be applied for the same purpose:—Held, that the purpose for which the power was given to the trustees having failed, the residue of the 2,000*l.* could not be raised and applied in any manner for the benefit of W. *Re Ward*, 7 L. R., Ch., 727; 20 W. R. 1024; 42 L. J., Ch., 4; 27 L. T. 668.

6. In the event of the object failing for which money has been advanced by trustees, under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. *Lawrie* v. *Bankes*, 4 Kay & J. 142; 4 Jur., N. S., 299; 27 L. J., Ch., 265; 6 W. R. 244.

Therefore where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fund:—Held, that he was, and not the trustees were, entitled to the purchase money. *Ib.*

III. GIFTS TO BENEFIT A LEGATEE AND OTHER PERSONS IN A PARTICULAR WAY.

7. If estate be given to father for the benefit of his children at twenty-one, and he

has no children, the father takes absolutely. *Salt* v. *Chambers*, 9 Mod. 260.

1. "I devise 100*l.* per annum to my son A. and his wife for their respective lives, 60*l.* whereof is to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to my son." The son dies; the wife shall have the whole 100*l.* per annum. *Cowper* v. *Scott*, 3 P. W. 121.

2. Legacy to a father the better to enable him to provide for his younger children; he consented to secure the capital, but was held entitled to the interest. *Brown* v. *Casamajor*, 4 Ves. 498.

3. A. devised his estate to his wife, she maintaining his four younger children; but if she married, she was to enjoy but one-half, and the younger children were to have the remainder. The wife did maintain the children, and did not marry:—Held, that she was entitled to the whole estate so devised. *Seagrave* v. *Eustace*, 3 Bro. P. C. 11.

4. Legacy given to A. to be divided between himself and his family, is well paid to A. *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186.

5. A testator, by his will, gave to his sister J. C., a married woman, 1,000*l.* for her or for her children's sole use, benefit, and behoof for ever, and desired his executors to pay the same to her as soon as practicable. By a codicil, reciting that he was desirous of making further bequests in relation to his sister J. C. and her family, he desired his executors to invest a sum of 1,000*l* upon certain trusts, for the benefit of J. C. and her children. J. C. survived the testator:—Held, upon a bill filed by J. C. and her husband against their children and the executors of the will, that J. C. was absolutely entitled to the 1,000*l.* legacy given by the will, and that it was not given to her separate use. *Chipchase* v. *Simpson*, 16 Sim. 483; 18 L. J., N. S., Ch., 145; 13 Jur. 90.

6. Testator bequeathed the remainder of his property to his sister, A. B., to dispose of amongst her children as she might think proper:—Held, that A. B. took no interest in the residue. *Blakeney* v. *Blakeney*, 6 Sim. 52.

7. Bequest to A. for her and her children's use: a transfer decreed to A. *Robinson* v. *Tickell*, 8 Ves. 142.

8. Under a bequest of stock in trust to pay the dividends to M., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M., until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over of principal, in default of such issue, to the nephews and nieces of the testator living at the death of M.; the dividends are payable to M. although she has no child. *Hammond* v. *Neame*, 1 Swan. 35; 1 Wils. 9.

9. Under a bequest of residue to wife of testator to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Raikes* v. *Ward*, 1 Hare 445; 11 L. J., N. S., Ch., 276; 6 Jur. 530.

10. A testator by his will directed that all his property should be "at the disposal of his wife for herself and children":—Held, reversing the decision below, that there was no joint tenancy between the widow and children; but that the widow, though not entitled to the property absolutely, had a personal interest in it, and, as between herself and her children, was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favour of the children, subject to a life interest in herself. *Crockett* v. *Crockett*, 2 Ph. 553; 17 L. J., N. S., Ch., 230; 12 Jur. 234. Reversing 1 Hare 451; 5 *id.* 326; 16 L. J., N. S., Ch., 214; 11 *id.* 279; 11 Jur. 98; 6 *id.* 531.

11. Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the said dividends to his brother A., to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, and, upon the demise of the annuitants, or any of them, the testator gave each annuitant's proportion of the before-mentioned dividends to his brother A., to be at his disposal, but the principal to remain in the bank:—Held, that no trust was created for the children of F., but that A. took absolutely the capital of the testator's stock, subject to the annuities. *Benson* v. *Whittam*, 5 Sim. 22.

12. Bequest to testator's daughter for life, and on her death to the testator's son and his children. The son had no child at his father's death; but had children living at the death of the daughter:—Held, that his children were neither joint tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely. *Scott* v. *Scott*, 15 Sim. 47; 14 L. J., N. S., Ch., 439; 9 Jur. 580.

13. Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease as she should think proper. The wife made no disposition of the estate. The children took no interest in the estate under the will. *Crossling* v. *Crossling*, 2 Cox 396.

14. A testator gave his residuary estate to trustees in trust for his sister's younger children equally, and to vest in them at the usual periods; and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sister, or to the guardians of the children, to be applied for their maintenance and education:—Held, that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. *Berkeley* v. *Swinburne*, 6 Sim. 613; 3 L. J., N. S., Ch., 165.

15. Testatrix gave one-third of his residue to his wife, the other two-thirds to trustees in trust for his two sons, to be paid them at twenty-one, in equal shares, with benefit of survivorship, the income, until the shares should be payable, to be paid to the wife, to be applied by her, or, in case of her death, by the trustees, for the maintenance and education of the two sons:—Held, that the wife was entitled to the income of the children's shares during their respective minorities, and one son having died, to the income of the whole during the minority of the survivor. *Hadow* v. *Hadow*, 9 Sim. 438.

16. Testator gave all his property in trust to pay the income to his wife for the support and education of his children, and after her death

to be divided among them:—Held, that the wife was entitled for life, she maintaining the children. *Gilbert* v. *Bennett*, 10 Sim. 371.

1. Testator directed his trustees to apply a fund to the support and maintenance of his son's wife, and for the support and education of his children born in wedlock. The son had no children living at the testator's death.—Held, that the wife took the fund absolutely for her separate use. *Cape* v. *Cape*, 2 Y. & Coll. 543; 1 Jur. 307.

2. Gift of residuary real and personal estate to the testator's wife, with power to her to dispose of the same unto and amongst all the testator's children, or to any one or more of them, for such estate, either in fee-simple or in tail, term of life, or other interest, temporary or lasting, or in such other shares, proportions, or interest, as his wife should, in her discretion, see most fitting and proper:—Held, to be an absolute gift to the wife. *Howarth* v. *Dewell*, 6 Jur., N. S., 1360; 9 W. R. 27; 29 Beav. 18.

3. A testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife to sell, to discharge all his creditors; and he constituted his wife and T. W. his executors, whom he appointed to sell and dispose of all his estates and chattels in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, all overplus to his wife, towards her support and her family:—Held, upon demurrer, that the testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of a fraud, and praying an account of the rents and profits. *Woods* v. *Woods*, 1 Myl. & C. 401.

4. Bequest to trustees to be divided between the testator's wife and six poor members of a chapel, share and share alike:—Held that the wife was entitled to one-seventh absolutely, and that the other six-sevenths formed a permanent charitable fund, the interest alone of which was from time to time payable to the poor. *Gregory* v. *Att.-Gen.*, 2 Beav. 366.

5. A testator devised his real and personal estate to his wife "absolutely, and at her own disposal, for the maintenance of herself and bringing up of my children":—Held, that she could sell the real estate. *Wood* v. *Richardson*, 4 Beav. 174; 5 Jur. 603. S. P. *Pratt* v. *Church*, 4 Beav. 177.n.

6. Bequest of residuary estate to trustees in trust to pay income to testator's wife for her life, to be by her applied for the maintenance of herself and children by the testator:—Held, not to be a gift to the separate use. *Wardle* v. *Claxton*, 9 Sim. 524; 8 L. J., N. S., Ch, 119; 3 Jur. 145.

7. A gift of income of residue to wife during widowhood not cut down by its being a gift for bringing up, maintenance, and education of, or by subsequent gift to, children. *Leigh* v. *Leigh*, 12 Jur. 907.

8. Construction of a will as to whether a bequest was to operate as a gift absolutely, or only for life. *Woodbridge* v. *Mears*, 6 L. J., Ch., 149.

9. A gift of dividends to A., to be by him used and applied for the maintenance of the children of his late wife during their minorities:—Held, to confer a life interest in A. for his own benefit after the youngest child had attained twenty-one. *Re Walker's Trusts*, 1 W. R. 408; 16 Jur. 1154.

10. Testatrix concluded her will as follows: "My house in Trevor Square I give to my brother as residuary legatee of my remaining property for the benefit of his children":—Held, that the brother took the residue as well as the house in trust for his children. *Inderwick* v. *Inderwick*, 13 Sim. 653; 8 Jur. 53.

11. Bequest of "everything to my trustees under my marriage settlement, adding the name of J. P. to the same, for the benefit of my wife and children":—Held, that the testator's estate was held subject to the trusts of his marriage settlement. *Pybus* v. *Cottell*, 30 Beav. 106.

12. S. G. granted and devised to trustees certain freehold property for the term of ninety-nine years, at a peppercorn rent, upon trust, to permit his wife and such persons as she should by will bequeath the same, to take to his, her, or their own use and benefit the rents, etc., of the said lands for the said term of ninety-nine years, exclusively of any husband of his said wife. The wife, after her husband's death, conveyed her interest in the property to certain persons represented by the defendant, and subsequently made her will, giving the property to the plaintiff:—Held, that the wife of S. G. took the property for the whole term of ninety-nine years, and not merely a life estate, with remainder to such persons as she should appoint by will; and that she had conveyed away all her interest to the defendant. *Glover* v. *Hall*, 16 Sim. 568; 18 L. J., N. S., Ch., 305.

13. Under a gift of a sum of money "to my daughter J. H., to be employed for her use in the following manner," accompanied by a direction that the fund should be invested, and the interest only paid to the daughter during her life, and, in case she should marry and have children, then the principal to be divided amongst such children:—Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund. *Campbell* v. *Brownrigg*, 1 Ph. 301; 13 L. J., N. S., Ch., 7.

14. A testator gave 50*l.* and certain houses to K., he paying the rent, and performing the covenants in the lease, to be solely applied for the benefit of his children:—Held, that the children took the whole beneficial interest, with a discretionary trust to K. as to the application during their minority. *Kennett* v. *Gadbury*, 12 W. R. 1072; 11 L. T., N. S., 17.

15. Testator gave to his wife the use of all his property for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live; and after her death, he disposed of it amongst all his children. The testator left four married and three unmarried children; one of the three married after his death:—Held, that the widow, and the three children who were unmarried at the testator's death, were entitled equally to the income of the property during the widow's life. *Jubber* v. *Jubber*, 9 Sim. 503.

16. Testatrix gave 1,000*l.* to her nephew to

maintain and bring up her natural son F. B.; and she directed the interest of one-fourth of her residue to be applied to the maintenance and education of F. B. during his infancy, and the capital to be paid to him on his attaining twenty-one:—Held, that the nephew was not a trustee of the 1,000*l.* for F. B., but was entitled to it for his own benefit. *Biddles* v. *Biddles*, 15 Sim. 1. S. C. *nom. Ward* v. *Biddles*, 16 L. J., N. S., Ch., 455; 11 Jur. 624.

1. Where the latter words of a sentence in a will go to cut down an absolute gift contained in the first part of the sentence, and are inconsistent with such gift, the Court will, if it can, give effect to the absolute gift. Where, therefore, a testator said, "All my property of whatever description, whether in possession, reversion, or expectancy, etc., I give unto my dear wife, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she will dispose of the same for the joint benefit of herself and my children"; the Court was of opinion that no trust was created for the children, but, declining to make a positive declaration to that effect:—Held, that it would be right to order the residuary personal estate to be transferred and paid to the widow. *Webb* v. *Wools*, 2 Sim., N. S., 267; 21 L. J., N. S, Ch., 625.

2. A testator devised his property as follows: "I give and bequeath all my property, real and personal, of whatever nature or kind, wheresoever to be found in possession, reversion, or expectancy, to which I am legally or equitably entitled, unto my dear wife, absolutely, and to be by her willed to any or either of my children in any manner suitable to her wishes, to hold to her for ever; and I appoint her executrix of this my will, revoking all other wills":—Held, that the wife took the property absolutely, but that a trust was engrafted on it for the benefit of the children who might survive her, with a power for her to appoint it among them by will, as she might think fit. *Evans* v. *Evans*, 33 L. J., Ch., 662; 12 W. R. 508; 10 L. T., N. S., 59.

The widow made a will, by which she devised part of his real estate to a son of his, in liquidation of a debt due to him from the testator; and she afterwards made an agreement with that son and another, that the latter should have the property on the terms of his paying the debt due to the former, and also stipulating for certain benefits for herself:—Held, that neither the will of the widow, nor the agreement, was an exercise of the power in the testator's will. *Ib.*

3. Bequest of household goods, etc., after payment of debts, etc., to testator's wife for life or widowhood, with power to her to sell same as she should think fit for her own benefit and the maintenance of testator's nephew, etc., during their minority, with a bequest over on death or second marriage of wife of the same, or so much as should then remain, to such nephew, etc.:—Held, that widow was entitled to residue for her life or widowhood, with power to apply any part of the capital for her own benefit, proper maintenance of nephew, etc., during minorities, and that, on death or marriage of widow, remainder of capital unapplied was well limited over. *Surman* v. *Surman*, 5 Madd. 123.

4. A testator bequeathed a house, etc., to his wife for the use of herself and his daughter, subject to the following trust: "that his wife and daughter should live together, and that his wife should take charge and see to the maintenance and support of his daughter during her minority, with the instructions of H. C." He also gave 100*l.* to his wife, in addition to the house, etc., for the further support of herself and his daughter:—Held, that the widow took absolutely, subject to a trust for the maintenance and support of the daughter during minority, and which did not cease upon her marriage under age. *Conolly* v. *Farrell*, 8 Beav. 347; 14 L. J., N. S., Ch., 189. S. C. *nom. Conolly* v. *Butcher*, 9 Jur. 242.

5. The testator, by his will, desired that everything, during the life of his wife, should remain as it was, for her use and benefit; and after her decease he gave his real estate to his male heir, and his personal estate to his children; adding, that he gave the above devise to his wife that she might support herself and her children according to her discretion; and for that purpose:—Held, that the widow took an absolute interest for her life in the real and personal estate. *Thorp* v. *Owen*, 2 Hare 607; 12 L. J., N. S., Ch., 417; 7 Jur. 894.

6. A testatrix, under a power given by her marriage settlement, bequeathed a sum of stock to trustees, in trust to pay the interest to her husband, in order the better to enable him to maintain the children of the marriage, until their shares should become assignable to them; and if no children, or none that should live till their shares became assignable, she gave the interest of the fund to her husband for his life, and after his decease the principal to such person or persons as should be her next of kin. There was only one child of the marriage:—Held, that this bequest was a trust for the benefit of the child, until the principal should become assignable to the child, and gave no beneficial interest, so as to entitle trustees for creditors, to whom the husband had assigned all his personal property, to claim the income, or any part of it. *Wetherell* v. *Wilson*, 1 Keen, 80; 5 L. J., N. S., Ch., 235.

7. Held, that a bequest of 30*l.* a-year to A., together with her children B., C, and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint tenants, for the life of the longest liver of them. *Wilson* v. *Maddison*, 2 Y. & Coll. C. C. 372; 12 L. J., N. S., Ch., 420; 7 Jur. 572.

8. A hotel-keeper by his will bequeathed his property to trustees, upon trust, to permit his widow to carry on the business so long as it could be carried on with advantage to his estate, and to permit her to receive the profit so that she might maintain herself and her family, and educate the testator's children. He also directed that if the profits were insufficient for this purpose, the deficiency should be supplied out of the income of the general estate, which, subject to this direction, was to be accumulated, and, with the principal, to be divided among the testator's children on their attaining twenty-one. There was a proviso that if from any cause it should be advisable to discontinue the business (which the trustees were to have power to do), the stock-in-trade should be sold, and the proceeds

form part of the general estate, and that the income of the whole, or so much of the income as should be required, should be applied in the maintenance of the testator's wife and family, and the education of the children:—Held, that on the widow, by misconduct, becoming unfit to maintain and educate the children, she was not entitled to the surplus profits, after setting apart sufficient for their maintenance and education, but could only claim maintenance for herself. *Castle* v. *Castle*, 1 De G. & J. 352; 3 Jur., N. S., 723.

1. A bequest of a fund to trustees, in trust to pay the dividends to A, the wife of B., for the benefit of B., herself, and children, during B.'s life, and at B.'s death the fund to remain in trust for the benefit of A. and children for her life, and at her death to be equally divided among the children:—Held, that A. was a trustee of the interest for herself, her husband, and children in equal shares during her life. *Taylor* v. *Bacon*, 8 Sim. 100.

2. A testator bequeathed to his daughter A., the wife of B, a legacy of 10,000*l.* payable six months after his decease, and he recommended his daughter and her husband to settle it, together with such sum of money of the husband as he should choose, for the benefit of A. and her children:—Held, a trust for the children, and that the legacy did not lapse by the death of A. in the lifetime of the testator. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., N. S., Ch., 352; 4 Jur. 958.

3. Bequest to A., his heirs and assigns, "for his and their own use and benefit, and for the maintenance and education of his children"—Held, that A. took no beneficial interest under this gift, which constituted him a trustee for the children. *Steadman* v. *Rodwell*, 1 W. R. 161.

4. A testatrix, by her will, directed her trustee to pay 1,000*l.* into the hands of C. H., to be laid out by him in the education of his two eldest sons, who should be alive at testatrix's death; if only one son, then 500*l.*, for the like purpose; if no son of C. H. living at her death, she directed the legacy in his favour to fall into the residue. C. H. died before the testatrix, leaving two sons living at her death:—Held, that the legacy was not an absolute gift to C. H., but a trust to some extent for the sons, and therefore the limitation over did not take effect by the predecease of C. H. *Hodgson* v. *Green*, 11 L. J., N. S., Ch., 312; 6 Jur. 819.

5. Direction for payment of residue to E., to be applied by her at her discretion, for or towards the education of her sons, and that she should not be liable to account to him or any other person for the disposal or application of it, the residue being considerable:—Held, that E. was entitled to it, subject to the application of so much as the Court might think fit to the education of the son during his minority. *Hamley* v. *Gilbert*, Jac. 354.

6. One devises a house to his cousin, directing that an annuity of 1,200*l.* per annum shall be paid her, and that she should maintain her son there; the son chooses to go from her; still the cousin shall have her annuity in the same manner as if the son had died. *Blackborn* v. *Edgley*, 1 P. W. 604.

7. A gift for the "present expenses of a wife and the children"—Held, that she was absolutely entitled, though one of the children was an adopted child, and was taken away from her. *Hart* v. *Tribe*, 23 L. J., Ch., 462; 18 Beav. 215.

A testator constituted his widow guardian of his two children then living with him (one, a boy, being the child of another woman), and he gave her 4,000*l.* "to be used for her own and the children's benefit, as she should, in her judgment and conscience, think fit":—Held, that the fund must be invested, and that she was entitled to the income for her life, and that the children had an interest in the capital, and that the wife had a discretion as to the application of the income between the three objects, which the Court would not control, if *bonâ fide* exercised. S. C. 19 Beav. 149; 2 W. R. 289.

8. Gift of income to testator's wife, with request to dispose of the savings among his children, does not entitle the children to the savings. *Cowman* v. *Harrison*, 1 W. R. 96; 17 Jur. 313; 10 Hare 234; 22 L. J., Ch, 993.

9. A testator gave the residue of his estate to trustees upon trust to permit his wife to receive the rents, issues, and profits, and carry on his trade for her own benefit, and to enable her to bring up, maintain, and educate his children, *durante viduitate*:—Held, that the wife was absolutely entitled to the business. *Jones* v. *Greatwood*, 16 Beav. 527.

10. Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter":—Held, that this was not a discretionary trust, but that they were equally entitled. *Bibby* v. *Thompson*, 32 Beav. 616.

11. Where a devise is made in terms which do not necessarily amount to an absolute gift, so that, though not technically accurate, they may fairly be considered to create a trust, such a construction is not negatived by the presence of precatory words. *Godfrey* v. *Godfrey*, 11 W. R. 554; 8 L. T., N. S, 200.

Such a devise does not come within that class of cases in which it is sought to construe words of absolute gift as creating a trust, by reason of the addition of precatory words. *Ib.*

A testator expressed his wish that property bequeathed to his wife should be used as to her seemed best for her own and her children's welfare—Held, on demurrer, that the widow was not absolutely entitled. S. C. 2 N. R. 16.

12. S. devised and bequeathed all his real and personal estate unto his wife C. M. S. and her heirs, absolutely for ever, "entertaining as he did the most entire and implicit confidence that she would, during her life, appropriate the same, or the interest thereof, with maternal discretion, prudence, and economy, as well towards the maintenance, support, and liberal education of their children as towards the immediate support and maintenance of herself; and that she would bequeath so much and such part of his estate thereby devised to her, as might be by her judicious management preserved for their family, unto and equally between and amongst all and every their children who should be living at the time of the decease of C. M. S., and the lawful issue of such of them as should be then dead, in equal shares." C. M. S. was ap-

pointed sole executrix of the will and guardian of the children. S. died in October 1826, leaving real and personal estate of large amount; and there remained, after payment of all the debts, a considerable residue, which under the management and control of C. M. S. was increased in value, and became greatly augmented. The testator left five children and two granddaughters (the children of a daughter of the testator who died in his lifetime), one of whom died an infant, and the other, A, him surviving. Subsequently to the testator's decease his eldest son died, leaving two sons him surviving C. M. S, on the supposition that under the will of S. she took an absolute estate for her own benefit in the property thereby devised and bequeathed to her by her will, dated in April 1856, devised and bequeathed the real and personal estate in manner therein mentioned, for the benefit of her sons, daughter, granddaughter A., and two grandsons. Questions having arisen as to whether the real and personal estate of S. became absolutely vested in C. M. S., and whether the same was effectually disposed of by her will, a bill was filed by one of her sons:—Held, that the widow did not take the property absolutely; that the granddaughter A. was, under the will of S, entitled to a share of the property; and that a granddaughter who died in the lifetime of the widow was not entitled to a share. *Smith* v. *Smith*, 2 Jur., N. S, 967.

1. A testator gave a sum of money to trustees to pay the income to his then unmarried daughter for life, and after her decease to permit her husband to receive the income for his life, nevertheless to be by him applied for the maintenance and education or benefit of the children of his daughter. The daughter afterwards married, and her husband subsequently took the benefit of the Insolvent Debtors Act; his wife afterwards died, leaving her husband and two children surviving:—Held, that he took beneficially a life interest in the legacy. *Byne* v. *Blackburn*, 27 L. J., Ch., 788; 6 W. R. 681; 26 Beav. 41; 4 Jur., N. S., 803.

2. Where there is a gift by will to a person "for the maintenance or support of himself and his family," such gift is not clothed with any trust; but the legacy having been paid into court under the Trustee Relief Act, the Court will order payment to the legatee in the words of the bequest. Costs out of the fund. *Re Robertson's Trust*, 6 W. R. 405.

3. Under a residuary devise and bequest to a wife, "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children," the wife takes the testator's residuary estate absolutely, unaffected by any trust in favour of the children. *M'Alinden* v. *M'Alinden*, 11 Ir. R., Eq., 219.

4. A bequest of the principal and interest of one-third of the residue to a widow, "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and children," does not raise a precatory trust, and the widow takes absolutely. *Scott* v. *Key*, 35 Beav. 291; 11 Jur., N. S., 819; 13 W. R. 1030; 6 N. R. 349.

5. A testator devised all the rest, residue, and remainder of his real and personal estate to a married woman, her heirs and assigns, for ever; but upon trust, "as to all the freehold," as he proceeded to declare; "and as to the personal property so given as aforesaid to her to and for her own proper use and benefit for ever," separately from her husband, "and the proceeds to be applied by her in the bringing up and maintenance of" all her children. She died, leaving several infant children:—Held, that she took an absolute interest in the personalty, unaffected by any trust. *Mackett* v. *Mackett*, 14 L. R., Eq, 49; 41 L. J., Ch., 704; 20 W R. 860.

6. A testator gave his residue to his wife for the support and maintenance of herself and children and for their education:—Held, that she took the absolute interest. *Bond* v. *Dickinson*, 33 L. T., N. S., 221.

7. A husband devised a freehold house to his wife, and all his personal property to be at her will and disposal in any way she might think best for the benefit of herself and family:—Held, that the widow took the fee simple of the house unfettered by any trust, and that she was absolutely entitled to the personalty. *Lambe* v. *Eames*, 10 L. R., Eq., 267; 18 W. R. 972; 40 L J., Ch., 15. Affirmed 40 L. J., Ch., 447; 6 L. R, Ch., 597; 25 L. T., N. S., 175; 19 W. R. 659.

8. A testatrix bequeathed 500*l.* to A. absolutely, but revoked the gift by codicil, whereby she gave a like sum to A. for life, with a direction to the trustee to sell the same for the benefit of A.'s children, or to purchase an annuity for A. A. died a spinster, and no settlement was made or annuity purchased:—Held, that the legacy formed part of A.'s estate, and did not sink into the residue. *Re Traill*, 18 L. T., N. S., 176.

9. A testator thus expressed himself: "It is my wish that 10,000*l.* be given to my dear brother, knowing that he is not so well off pecuniarily as he ought to be with his large family, and the kind obligations which he imposes on himself in aiding poor relations, and I should wish the 10,000*l.* held by trustees for the benefit of his family, the interest paid half-yearly, and the principal divided among them according to the discretion of the trustees or their executors after the children shall have come of age":—Held, that the brother took a life interest in the legacy, with remainder to his children as tenants in common. *Gladstone* v *Gladstone*, 18 L. T., N. S., 49; 16 W. R. 537.

10. A testator by his will, having enumerated the particulars of his property, gave certain portions to his daughter A., and other portions to his daughter B, subject to legacies charged thereon respectively. By a codicil he cancelled that part of his will, and said that his sons-in-law C. and D. might "dispose of the property which he had left for the good of their families," subject to legacies;—Held, that C. and D. respectively took absolute interests in the portions given by the will to their respective wives. *Alexander* v. *Alexander*, 5 W. R. 28; 6 De G. M. & G. 593; 3 Jur., N. S., 28. Affirming 2 Jur., N. S., 898; 4 W. R. 470.

11. A testator gave his property to trustees for the benefit of his daughter "for her use and the use of" certain of her children for their education, etc., adding a direction that his daughter should only use the income until

the youngest child attained twenty-one or married. Six of the children specified attained twenty-one, and survived their mother:—Held, that there was a gift of the income to the daughter for life, subject to the trust for the education, etc., of her children, and a gift of the capital at her death to the six children as joint tenants. *Re Whitty, Evans* v. *Evans*, 43 L. T. 692.

IV. PRECATORY TRUSTS.

See also POWER II.

1. Uncertainty as to Persons, Purposes, or Property. General Principles.

1. It seems that any words of a testator intimating a request, wish, desire, recommendation, etc., are sufficient to create a trust; provided there be certainty of the gift and of the object to be benefited thereby. *Harding* v. *Glyn*, 1 Atk. 469. n.

2. Bequest in will will raise a trust, if the objects and property are described with such certainty that the Court can execute it; but otherwise the devisee takes absolutely. *Eade* v. *Eade*, 5 Madd. 119.

3. It seems that any words of a testator intimating a "request, wish, desire, recommendation," etc., are sufficient to create a trust, provided there be certainty of the gift and of the object to be benefited thereby. *Brest* v. *Offley*, 1 Ch. Rep. 246. *Pary* v. *Juxon*, 3 Ch. Rep. 38.

4. Words of desire will raise a trust where the property and object are certain. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201. And see S. C. *id.* 226.

5. Words of recommendation or precatory, or expressing hope, etc., if the objects and subject are certain, are imperative and create a trust. *Paul* v. *Compton*, 8 Ves. 380.

6. Words of recommendation are not considered imperative, unless the objects and subjects are certain. *Moggridge* v. *Thackwell*, 7 Ves. 85. Affirmed 13 Ves. 416.

7. No trust arises on words of request or recommendation, unless the objects and subjects are certain. *Morice* v. *Durham* (*Bishop*), 10 Ves. 536.

8. Precatory words held imperative where the object and subject are certain. *Dashwood* v. *Peyton*, 18 Ves. 41.

9. Recommendation in a will, where the object and subject are certain, amounts to trust. *Forbes* v. *Ball*, 3 Meriv. 664.

10. Words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions,—first, that they are so used as to exclude all option or discretion in a party who is to act as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the object expressed must not be too vague or indefinite to be enforced. *Briggs* v. *Penny*, 3 Macn. & G. 546; 21 L. J., N. S., Ch., 273; 16 Jur. 93. Affirming 3 De G. & Sm. 525; 21 L. J., N. S., Ch., 265; 13 Jur. 905.

Vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations, which show that a trust was intended, while, at the same time, such trust is not sufficiently certain and definite to be valid and effectual. *Ib.*

11. The maxim, that when words expressive of hope, desire, or request are used by a testator, there must be a certain subject and a certain object to create a trust, explained. *Bernard* v. *Minshull*, Johns. 276; 5 Jur., N. S., 931; 28 L. J., Ch., 649.

The Court, having to consider whether the precatory words are mere words of recommendation, or whether they amount to an imperative direction creating a trust, if it finds an uncertainty in reference to the subject given, or the object to be benefited, infers that the words are used, not to create a trust, but as mere words of recommendation. *Ib.*

But if the Court finds that a definite object was absolutely intended, although that object may from circumstances not be ascertainable, and in that sense uncertain, in such a case a trust is the clear result, and the donee, as such, takes no beneficial interest. *Ib.*

By will, under a power, a married woman appointed "13,000*l.* to go as follows; that is to say, the whole to my husband absolutely; but it is my request to him, that after reserving for his own absolute use and benefit 2,000*l.*, and applying all the interest to his own use and benefit during his natural life, he will make such disposition of the remainder, by deed, will, or settlement, as he may deem most desirable to carry out my wishes, often expressed to him by word." She had not, in fact, expressed her wishes:—Held, that as to the 11,000*l.*, a trust was intended, and that though the object was not ascertainable, the husband was excluded from taking any beneficial interest. *Ib.*

If in such a case the testatrix had declared by word that "her own relatives, of different degrees, or some of them, should be benefited," such a description would be too indefinite to raise a trust for a particular class. *Ib.*

Such a declaration could not be imported into the will for the purpose of giving a beneficial interest to the husband. *Ib.*

The will contained also the following residuary clause—"As to all and singular other my property," she gave the same to her husband:—Held, that thereby the 11,000*l.* passed to the husband. *Ib.*

1. Where property is given absolutely, with a recommendation as to its disposal in favour of others, in such terms as ought to be construed imperative, and the objects of recommendation are certain:—Held, to create a trust in their favour; but if the terms are such as that the words are not to be intended as imperative, or if the donee have a discretionary power, as to withdrawing the benefit from the objects, or if they are not clearly ascertained, no trust is created: where, therefore, a party, who acquired by suffering a recovery a fee of settled family estates, devised the same, with limitations, in favour of the male line, and, after several legacies to dependants, declared his trust in the liberality of his successors to reward any other of his servants and tenants, according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family:—Held, that the terms were not sufficiently imperative, nor the subjects to be effected, nor the interests to be enjoyed, sufficiently defined to create a trust for the male line, and that the devisee took the estates unfettered by any trusts in their favour. The principles of construction as to words of recommendation considered in the judgment. *Knight* v. *Knight*, 3 Beav. 148; 9 L. J., N. S., Ch., 354; 4 Jur. 839. Affirmed *sub. nom. Knight* v. *Boughton*, 11 Cl. & F. 513; 8 Jur. 923. See *Dorchester* (*Lord*) v. *Effingham* (*Earl*), 3 Beav. 180. n.

2. Uncertainty as to Persons or Purposes in Particular Cases.

2. Bequest to A. B., "trusting she would use it" to indefinite purposes, creates no trust for those purposes. *Curtis* v. *Rippon*, 5 Madd. 434.

3. When a testator expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command. *Cary* v. *Cary*, 2 Sch. & Lef. 189.

4. A gift of residuary real and personal estate to an executor, "to enable him to carry into effect the purposes of the will".—Held, on demurrer, to create a trust:—Held, also, that the objects of the trust not exhausting the gift, there was a resulting trust in favour of the heir-at-law of the surplus realty. *Cary* v. *Cary* (2 Sch. & Lef. 189) commented on. *Barrs* v. *Fewkes*, 3 N. R. 704. And see S. C. 34 L. J., Ch., 522; 11 Jur., N. S., 669; 13 W. R. 987; 12 L. T., N. S., 727; 6 N. R. 355.

5. A devise to A. for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment. *Randal* v. *Hearle*, 1 Anstr. 124.

6. Words of confidence, desire, or request, in order to raise a trust, not only attach on a precise subject of property, but also describe with precision the objects of bounty. In this case, a bequest of leaseholds to a brother, "hoping he will continue them in the family," was held insufficient. *Harland* v. *Trigg*, 1 Bro. C. C. 142.

7. Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in fullest confidence that after her decease she will devise the property to my family":—Held, an estate for life only, with remainder in trust for the devisor's heir as *persona designata*. *Wright* v. *Atkyns*, 17 Ves. 255. Affirmed 19 Ves. 299. *See also* Coop. 111; 1 Ves. & B. 313; T. & R. 143.

8. Testator by his will gave certain shares of freehold and leasehold houses to his wife, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave all his moneys in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting that at her death she would give and bequeath what should be remaining, in such sums as she should think proper, unto such members of her own and his family as she should think most deserving, and were entitled to the same. He made a codicil, by which he gave in terms his residuary estate to his wife:—Held, that both as to the freehold and leasehold property and the moneys, there was no trust, but the wife took absolutely. *Green* v. *Marsden*, 1 Drew. 646; 22 L. J., Ch., 1092; 1 W. R. 511; 1 Eq. Rep. 437.

9. A testator, having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would consider, his near relations, as he would have done if he had survived her:—Held, that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale* v. *Moore*, 1 Sim. 534.

10. A. M. devised certain estates to his nephew R. M., and his heirs, "not entertaining the least doubt but that he will in due time, and upon the first proper occasion, take care not only to have the said estates, so devised to him by me, but my paternal estates, settled in such manner, that the said estates may continue in the male line of our family, and in our name and blood." At the death of the testator there were seven persons of the male line of his family, and of his name and blood alive, one of whom was the plaintiff's paternal grandfather, who was descended from the paternal great-grandfather of the testator:—Held, that the objects were sufficiently defined and certain to enable the Court to execute the trusts created by the words of recommendation in the will, and that the Court in executing the trusts might go into the ascending line, and was not confined to the descendants of the father of the testator; a general demurrer to the bill for want of equity was therefore overruled. *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunk. 465.

11. A father gave his real and personal estate to his son, appointing him his executor, "in trust for the payment, execution, and discharging the intentions and devises thereinafter made, and to which my property, real and personal, so devised, is hereby made subject." The testator then made several bequests, and gave the residue of his real and personal estate to the son after payment of his debts, "requesting him that if he should not find an

opportunity to dispose of my freehold estate at Winterborne Whitchurch greatly to his advantage, and for the benefit of his family, that the said estate should belong after him to his eldest son:—Held, that no trust was created of this estate in favour of the son's family or his eldest son, but that the son took it absolutely. *House* v. *House*, 31 L. T. 427; 23 W. R. 22.

1. A testator bequeaths to "his only son 60*l.* a-year for ever, also to provide for the two daughters of H. E., and the remainder of his property to the two children of S. A.":—Held, that, under these words, the two daughters of H. E. do not take any benefit. *Abraham* v. *Alman*, 1 Russ. 509.

2. Testator gave all his property to his son, his heirs, executors, administrators, and assigns, for his and their own use and benefit, "well knowing that he would discharge the trusts the testator reposed in him, by remembering his (the testator's) sons and daughters":—Held, that no trust was created, by reason of the vagueness of the words. *Bardswell* v. *Bardswell*, 9 Sim. 319; 7 L. J., N. S., Ch., 268.

3. A testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will; "and my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide;" and at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children:—Held, that no trust was created for the children. *Pope* v. *Pope*, 10 Sim. 1.

4. Testator, after reciting that he was desirous of making a suitable provision for his wife as well as for his daughter and grandchild, in order to mark his unbounded confidence in his wife, and his belief that she would be actuated by the most maternal regard towards his child, gave her all his property for her own use, benefit, and disposal absolutely, implicitly relying on her attachment to his daughter and grandchild. He then directed his executors to sell his property, and to invest the proceeds on government or real securities in his wife's name alone, or jointly with his executors (with power to change the securities), "to hold the same unto my wife for her own absolute use, benefit, and disposal: and whereas I have hereby manifested abundant proof of entire confidence in my said dear wife by thus giving her the sovereign control over the whole of my property for her sole use and benefit, which she will duly appreciate accordingly; but in so doing I nevertheless earnestly conjure her, under the advice of my executors, to proceed forthwith to make ample provision, by deed or will, for our only child and grandchild." The will concluded with a power to the wife, who was executrix, and to the executors, to retain their expenses out of the testator's estate:—Held, that no trust was created by the will in favour of either the daughter or granddaughter. *Winch* v. *Brutton*, 14 Sim. 372; 8 Jur. 1086.

5. A testator devised and bequeathed his real and personal estate to his widow, "to and for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for my dear children":—Held, that there was no trust in favour of the children. *Fox* v. *Fox*, 27 Beav. 301.

6. Under a bequest by a husband of "all my property and effects, whatsoever and wheresoever, unto my dear wife (trusting that she will do justice to any children we may have) for her own absolute use and benefit," she is entitled to the property absolutely. *Ellis* v. *Ellis*, 44 L. J., Ch., 225; 23 W. R. 382; 31 L. T., N. S., 875.

7. A testator gave all his property to his wife, her heirs, executors, administrators, and assigns, absolutely for ever, in full assurance and confidence that she would bring up his children in the fear of God, and educate and provide for them as it would have been his intention to do if it had pleased God to spare his life:—Held, to be an absolute gift to the wife. *Macnab* v. *Whitbread*, 1 W. R. 473.

A testator gave all his real and personal property to his widow, her heirs, etc., "absolutely and for ever, in the full assurance and confident hope" that she would bring up, educate, and provide for his children, as it would have been his intention it living:—Held, also, that though the words "full assurance and confident hope" would create a precatory trust, yet the trusts were too obscure to carry into effect, and that the widow took absolutely. S. C. 17 Beav. 299.

8. R. P. K., being entitled, under a settlement and will of his grandfather, to real estates in tail male, with remainder to his cousins in tail, with remainder to himself in fee as right heir of the settlor, suffered a recovery and acquired a fee simple. He had other estates in fee simple by purchase, and considerable personal estate. He by his will gave all his estates, real and personal, to his brother I. A. K., if living at his own decease, and if not to I. A. K.'s son, I. A. K. the younger; and in case he should die before the testator, to his eldest son or next descendant in the direct male line; and in case he should leave no such descendant, to the next male issue of his said brother and his next descendant in the direct male line; but in case no such issue or descendant of his said brother or nephew should be living at the time of the testator's decease, to the next descendant in the direct male line of his said grandfather, according to the purport of his will, under which the testator inherited those estates, subject in every case to certain reservations out of the rents; and he appointed the person who should inherit his said estates under his will his sole executor "and trustee, to carry the same and everything contained therein duly into execution, confiding in the approved honour and integrity of his family to take no advantage of any technical inaccuracies, but to admit all the comparatively small reservations which he made out of so large a property, according to the plain and obvious meaning of his words". He then, after giving some legacies, gave his gems and

other articles to the British Museum, "on condition that the next descendant in the direct male line then living of his said grandfather should be made an hereditary trustee, to be continued in perpetual succession to his next descendants in the direct male line." And he concluded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." I. A. K. survived the testator, and died without leaving any son:—Held, that I. A. K. took the estates in fee, absolutely, and that no trust was or was intended to be created by the will, a discretion being left to the devisees to defeat the testator's expressed desire. *Semble*, that the property to which the words of desire applied, and the nature of the estate to be taken in it, were not sufficiently certain to raise a trust. *Knight* v. *Boughton*, 11 Cl. & F. 513; 8 Jur. 923. Affirming S. C. *nom. Knight* v. *Knight*, 3 Beav. 148; 9 L. J., N. S., Ch., 354; 4 Jur. 839.

1. A testator gave all the residue of his property to his wife, "her heirs and assigns, for ever, being fully satisfied that she would dispose of it, by will or otherwise, in a fair and equitable manner, to their united relatives, bearing in mind that his relatives were generally in better circumstances than hers".—Held, that no precatory trust was created. *Reeves* v. *Baker*, 18 Beav. 372; 18 Jur. 588; 23 L. J., Ch., 599; 2 W. R. 354; 2 Eq. Rep. 476.

2. Testator in India gives all his estates and effects to A. in England, in trust, and directs his property to be remitted to him; and, after several legacies, he gives A. 800*l*., and requests him, as soon as the property is remitted, to lay out the same in the funds or other securities, which shall appear most advantageous for those who shall be benefited by it hereafter. The 800*l*. is a benefited legacy, not in trust. *Wadley* v. *North*, 3 Ves. 364.

3. A husband gave, devised, and bequeathed all his real and personal estate and effects whatsoever "unto and to the absolute use of my dear wife, her heirs, executors, administrators, and assigns, in full confidence that she will do what is right as to the absolute disposal thereof between my children, either in her lifetime or by her will after her decease." The construction of this gift was submitted to the Court by all the beneficiaries, and a declaration was asked as to the respective rights of the testator's widow and children. The widow was in possession of the property which formed the subject of the gift, and all the children were *sui juris*. The Court, under the above circumstances, refused to make any further declaration than that the widow was lawfully in possession; and made no order as to costs. *Smith* v. *Gibson*, 25 L. T., N. S., 559; 20 W. R. 88.

4. A testator bequeaths the whole of his property to Lady C., the wife of his elder brother, "for her to manage and appropriate in the best manner for the welfare of her family." He then mentions that he makes this disposition on account of the exceedingly embarrassed circumstances of his elder brother, which might leave nothing for his family; to obviate which the testator adds, that all his property is to be placed in trustees' hands, for Lady C.'s sole and separate use:—Held, that there was no trust for the children of the elder brother; and that Lady C. was entitled to the fund absolutely. *Crawfurd* v. *Crawfurd*, 3 L. J., Ch., 103.

5. A. gave two-thirds of his residuary property to his wife, to be at her sole and entire disposal, for the maintenance of herself and such child or children as he might leave; and as to the other one-third he bequeathed it to his wife, "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her".—Held, that as to the one-third, the widow took it absolutely; and as to the two-thirds, that she took a life interest only coupled with a trust for the maintenance of an only child, a married daughter, if she should ever require to be maintained by her. *Scott* v. *Key*, 11 Jur., N. S., 819; 13 W. R. 1030; 35 Beav. 291; 6 N. R. 349.

6. A will in these words: "I give and bequeath all my property of what kind soever that I may die possessed of to my dearly-beloved wife, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children," does not create a precatory trust for the children, but the wife takes all the property absolutely. *Greene* v. *Greene*, 3 Ir. Eq. R. 90; 17 W. R. 487.

7. A testator gave all his real and personal estate to his wife and her heirs absolutely, "relying on her doing what is right":—Held, that the words were too vague to create a trust, and that the wife took the property absolutely. *Re Crockford*, 17 W. R. 1004; 21 L. T., N. S., 85.

8. An aunt gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes" The nieces both survived the testatrix:—Held, that they took the residue for their own benefit. *Stead* v. *Mellor*, 5 L. R., Ch. D., 225; 46 L. J., Ch., 880; 36 L. T. 498; 25 W. R. 508.

9. A testatrix left all her property to M., "to be disposed of by him as to him might appear just, having every confidence he would act fairly and in accordance with her wishes." In a conversation between the testatrix and M., previously to the date of the will, she said to him she would wish him to give some of her property to the plaintiffs, but without specifying any particular portion:—Held, that no trust binding upon M. was created by the will. *Creagh* v. *Murphy*, 7 Ir. R., Eq., 182.

10. A husband left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having com-

municated some wishes to his wife, but none as to what they were:—Held, that the terms of the gift to the wife did not amount to a precatory trust, and that she took the property, both real and personal, absolutely. *Reid* v. *Atkinson*, 5 Ir. R., Eq., 373.

1. A testator, after devising his real estate upon certain limitations, bequeathed all the residue of his property to trustees "to form a trust fund to purchase land to go with the inheritance in a manner as described in a paper marked B*." After his death no such paper could be discovered:—Held, that notwithstanding the non-existence of the paper, there was an imperative trust declared for the conversion of the residuary estate into land, which was to go according to the limitations affecting the real estate. *Willoughby* v. *Storer*, 22 L. T., N. S., 896; 18 W. R. 658.

3. Uncertainty as to Property in Particular Cases.

2. Devise to testator's wife, "not doubting she will give what shall be left to my grandchildren," not sufficiently certain to raise a trust. For such purpose, the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the party. *Wynne* v. *Hawkins*, 1 Bro. C. C. 179.

3. No trust under words of recommendation and confidence applied to an uncertain subject; as what shall be left after the death of a person to whom the property is given in the first instance. *Forbes* v. *Ball*, 3 Meriv. 437.

4. A testator bequeaths to his wife the residue of his estate, requesting that she would at her death leave three legacies of 200*l.* each to three persons, whom he describes, and that she would leave the remainder of her property to his two nephews, in such proportions as she thought proper:—Held, that, subject to the three legacies, the widow was entitled to the residue absolutely, and that no trust as to any portion of it was raised in favour of the nephews. *Eade* v. *Eade*, 4 L. J., N. S., Ch., 44.

5. R., by will, gave all the remainder of her property to H., his heirs and assigns, for ever, as she had full confidence that, if he should die without issue, he would, after providing for his widow during her life, leave the bulk of her residuary estate to four parties named. H.'s wife being dead, he left all his property to trustees, to convert and hold the same, after payment of debts and legacies, in trust for the objects named in R.'s will and six others. On the question whether H. took the property clothed with a precatory trust:—Held, that he did not, but took the absolute interest, the word "bulk" applying to a portion only, and not being a certain fixed subject. *Palmer* v. *Simmonds*, 2 W. R. 313; 2 Drew. 221.

6. A husband gave his wife the whole of his real and personal property for her sole use and benefit, and continued, "It is my wish that whatever property my wife might possess at her death be equally divided between my children":—Held, that this was not a gift coupled with a trust, and that the widow took an absolute interest in the property. *Parnall* v. *Parnall*, 9 L. R., Ch. D., 96; 26 W. R. 851.

7. A testator gave to his widow the whole of his real and personal property, "feeling confident that she will act justly to our children in dividing the same when no longer required by her":—Held, that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply. *Mussoorie Bank* v. *Raynor*, 7 L. R., App. Cas., 321; 51 L. J., P. C., 72; 46 L. T. 633; 31 W. R. 17.

8. Testator bequeathed 10,000*l.* to his daughter A., the wife of B., recommending her and her husband to settle it, together with such sum of money as the husband should choose, upon A. and her children:—Held, that a trust was created, the uncertainty of the addition not affecting the primary sum, and that the benefit to the children did not fail by the death of A. in the lifetime of the testator. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., N. S., Ch., 352; 4 Jur. 958.

9. A. bequeathed to his two sons all his property, real and personal, to have and to hold the same in the most absolute manner; and he declared it to be his will and intention that his sons should, at their discretion and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of the property and goods, be the same more or less, as to them should seem fit and suitable; and he appointed his sons his executors:—Held, coupling the will with an admission in the petition by the sons of the testator's intention, that a trust had been created, and that the sons were trustees for the other children of the testator as to the entire property of the testator, both real and personal. *Gray* v. *Gray*, 11 Ir. Ch. R. 218.

10. A testator, by will, gave the residue of his personal estate to trustees, upon trust to his wife for life; and after her death, for his nephew R. absolutely. After his death, a letter in his own handwriting, but without date, was found among his papers, addressed to R, and he therein, after requesting that it might be accepted in explanation of his will, lest there should be anything not fully explanatory of his intention in the terms of such will, expressed a wish that his property, at the death of his wife, "should be R.'s." He also expressed a wish that R. should educate some one nephew as a physician, and bequeath to such nephew all, or the greater part, of the property bequeathed to R. by the testator, adding that he wished finally to benefit such nephew as R. might select as his successor. This letter was admitted to probate. The testator died, leaving his wife and R. surviving. R. by will gave the property bequeathed to him by the testator to his (R.'s) brothers and sisters:—Held, that although the letter addressed to R. was a distinct testamentary instrument, it was recommendatory only to, and not obligatory on, R., and that it was not sufficiently definite to destroy the effect of the absolute gift to R. contained in the will. *Re Pinchard's Trust*, 4 Jur., N. S., 1041; 27 L. J., Ch., 422; 1 L. T., N. S., 67.

11. Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter, A., out of the same, as long as she, his wife, should live, and, at her decease,

to dispose of what shall be left among his children, in such manner as she shall judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman* v. *Filliter*, 3 Ves. 7.

1. No trust, under words of recommendation and confidence, applied to an uncertain subject, as what shall be left after the death of a person to whom the property is given in the first instance. *Tibbits* v. *Tibbits*, 19 Ves. 656; Jac. 317.

2. B. A. by will gave five shares of freeholds and leaseholds which belonged to him, to his wife for her sole use, begging and requesting that at her death she would give the same in such shares as she should think proper to such members of her family as she should think most deserving of the same; with a like gift of all moneys, adding the words "what shall be remaining." The widow having left the mass of her property to a stranger—on the question whether there was an implied trust.—Held, that there was not; the words "share" and "sole use" showing that the beneficial interest was given, and the request only applied to what might remain. *Green* v. *Marsden*, 1 W. R. 511; 1 Eq. Rep. 437; 1 Drew. 646; 22 L. J., Ch., 1092.

3. A gift of the yearly interest, dividends, proceeds, and profits, to arise from the shares of the testator in a pottery, shipbuilding yard, shipping, trust moneys, effects, and premises, to his wife for her life, for the maintenance, education, and support of herself and his children, and subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally; and the testator particularly recommended, desired, and directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children, in equal shares:—Held, that the attempted disposition of the savings of the widow was in the nature of a precatory gift; but, the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift, and no trust created of the savings in favour of the children; and that the same, therefore, belonged to the estate of the widow. *Cowman* v. *Harrison*, 10 Hare 234; 17 Jur. 313; 22 L. J., Ch., 993; 1 W. R. 96.

4. Words of Confidence.

4. Devise to wife "in confidence" that she will leave, etc., to testator's son, not relievable. *Anon.*, Cary 22.

5. Devise, not doubting but she will give, etc., is a trust. *Massey* v. *Sherman*, Ambl. 520.

6. Devise to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line;" a trust in the event described for the sister's children. *Parsons* v. *Barker*, 18 Ves. 476.

7. Testator devised a copyhold estate to his wife, upon trust to sell, and invest the money in the funds, and gave and bequeathed the interests and dividends to her use. He also gave and bequeathed to her all his effects, whatsoever and wheresoever, for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares. The widow, executrix:—Held, entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson* v. *Major*, 11 Ves. 205.

8. Testator, by his will, gave "all my property, of whatever description, whether in possession, reversion, remainder, or expectancy, or what I may be possessed of at the time of my death; and give and bequeath the same, and every part thereof, unto my dear wife, Jane, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her, that she shall dispose of the same to and for the joint benefit of herself and my children." The Court gave an opinion that there was no trust created for the children; but declining to make a positive declaration to that effect:—Held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly. *Webb* v. *Woods*, 2 Sim., N. S., 267; 21 L. J., N. S., Ch., 625.

9. If property be given by will absolutely and without restriction, the Court will not lightly impose upon it a trust upon mere words of recommendation or confidence. *Lawless* v. *Shaw*, Ll. & G. *temp.* Sugd. 164.

10. A testator bequeathed stock to A. B., trusting that he would preserve the same, so that after his decease it might go to his four children, or such of them as should survive him:—Held, to create a trust in favour of the survivor of the children after the decease of A. B. *Baker* v. *Mosley*, 12 Jur. 740.

11. A testator leaves all his property, real and personal, to his wife, "under the firm conviction that she will dispose of and manage the same for the benefit of our children." On the question what estate the wife took:—Held, that she took nothing but an estate in trust for the children. *Semble*, where an estate is left to a wife for the benefit of children, there must be words of beneficial enjoyment to confer any estate upon her for her own benefit. *Barnes* v. *Grant*, 5 W. R. 14; 26 L. J., Ch., 92; 2 Jur., N. S., 1127.

12. A person gave his real and personal estate to trustees, on trust to sell the same, and after payment of his debts, to pay the same, and he gave and bequeathed the same to I. (to whom he was engaged to be married) "absolutely, trusting she would carry out his wishes with regard to the same, with which she was fully acquainted." Shortly before the date of his will the testator had verbally expressed to I. his wish that she should make certain gifts out of the property to be bequeathed to her, and she had afterwards written down his

wishes for her own use, but not in the testator's presence:—Held, that I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself. *Irvine* v. *Sullivan*, 38 L. J., Ch., 635; 8 L. R., Eq., 673; 17 W. R. 1083.

1. A court of equity will look at the circumstances existing at the date of a will, and, if necessary, construe words importing a trust as an expression of hope or confidence. *Quayle* v. *Davidson*, 12 Moo. P. C. 268; 7 W. R. 164; 3 L. T., N. S., 362.

A testator devised real estate, consisting of a farm, to his wife for life, and after her death to D., "in trust for his son being brought up to work the farm," with a gift over in the event of D. having no male issue. D. had no male issue at the date of the will, but had a son born after the testator's death:—Held, that under the will, D.'s son did not take any beneficial interest in the real estate, the words "in trust for his son being brought up to work the farm," being a mere recommendation or expression of hope or confidence that his eldest or only son should be brought up to work the farm. *Ib.*

2. Bequest of all testator's property real and personal to his wife, her heirs, executors, etc., absolutely, for ever, "entertaining as I do the most entire and implicit confidence that my said dear wife will during her life appropriate the same or the interest thereof with maternal discretion, prudence, and economy, as well towards the maintenance, support, and liberal education of our dear children, as towards the maintenance of herself; and that she will bequeath so much and such part of my said estate and property hereby devised to her as may be by her judicious management preserved for our family unto and equally between and amongst all and every our dear child and children already born, and who may hereafter be born, that shall be living at the time of her decease, and the lawful issue of such of the said children as shall be then dead, in equal shares, but so that the issue of any of the said children who shall have died in the lifetime of my said wife shall only receive in equal proportions, if more than one, the share to which their, his, or her deceased parent would, if living, have been entitled; and if there should be but one such child, or the issue of but one such child then living, then I should wish the whole to be paid and transferred to such one child, or his or her issue":—Held, that the wife was not absolutely entitled for her own use; that the child of a child dead at the date of the will took a share; but that a grandchild who died in the lifetime of the widow did not. *Smith* v. *Smith*, 2 Jur., N. S., 967.

3. A testator gave all his property to his wife, her heirs, executors, administrators, and assigns for ever; in full assurance and confidence that she would bring up his children in the fear of God, and educate and provide for them as it would have been his intention to do if it had pleased God to spare his life:—Held, to be an absolute gift to the wife. *Mainah* v. *Whitbread*, 1 W. R. 473; 17 Beav. 209.

4. The testatrix by her will, after giving among other legacies a sum of 3,000*l.* to S. P. and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix, bequeathed all her residuary personal estate and effects unto the said S. P., "well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." The testatrix appointed S. P. sole executrix of her will:—Held, that S. P. did not take the residue for her own benefit, but that the words of the bequest created a trust. *Briggs* v. *Penny*, 3 Macn. & G. 546; 16 Jur. 93; 21 L. J., Ch., 265.

Words accompanying a gift or bequest expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions; first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced. *Ib.*

Vagueness in the object will, unquestionably, furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which show that a trust was intended, while, at the same time, such trust is not sufficiently certain and definite to be valid and effectual. *Ib.*

It is not necessary, to exclude the legatee from a beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. *Ib.*

5. A husband, by his will, gave all his property to his wife absolutely for her own sole and separate use, in the full belief that she would so dispose thereof by deed, will, or otherwise, that at her death the whole might be equally divided between his children, share and share alike:—Held, that a precatory trust was created in favour of the children. *Fordham* v. *Speight*, 23 W. R. 782.

6. A testator devised his estates to his son and his heirs male, "in the fullest trust and confidence" that he would not do, nor permit to be done, "any act, in law or otherwise," to defeat the thereinafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one fourth portion to D. The son having entered into possession of the devised estates, suffered a recovery:—Held, that the words of the will did not create a trust, and that the entail was barred by the recovery. *Dawkins* v. *Penrhyn* (*Lord*), 4 L. R., App. Cas., 51; 48 L. J., Ch., 304; 27 W. R. 173; 39 L. T. 583

See also 1 to 3 *supra*.

5. Words of Request or Entreaty.

7. Words of entreaty in will:—Held, to raise a trust on construction. *Prevost* v. *Clarke*, 2 Madd. 458.

8. There can be no constructive trust, but where the intent of testator is apparent,

"Willing and desiring G. to sell, etc.," are more properly words of injunction than trust. *Hill* v. *London* (*Bishop*), 1 Atk. 619.

1. Whether a testator uses terms expressive of his desire, hope, request, etc., or words of command, direction, etc., it is the same thing; in either case he intimates or expresses what his will is, and that ought to be observed, and to prevail. *Bute* (*Earl*) v. *Stuart*, 1 Bro. P. C. 485.

2. The words "I desire," or "I will," in a will, amount to an express devise. If a devise is to A. for life, directing him at his death to give it to B., that amounts to a devise of the use of it only to A. for life, remainder to B. *Eeles* v. *Englund*, 2 Vern. 467; Pre. Ch. 200.

A. by will gives 300*l.* to B., and declares her will and desire that he should give the 300*l.* to his daughter at his death, or sooner, if there be occasion for her advancement. B. dies eight days before A.; and the daughter dies at sixteen, unmarried. The 300*l.* decreed to the administrator of the daughter. S. C. 2 Vern. 466; Pre. Ch. 200.

3. Codicil requiring and entreating the executor, who was also residuary legatee, by will or deed to settle and secure 500*l.* to be paid at his decease; the testator declaring that he had omitted to express it in his will, not doubting that the executor will readily comply with the request; a trust by way of legacy out of the assets: not a condition enforced independently of them. *Taylor* v. *George*, 2 Ves. & B. 378.

4. Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sisters: a trust for her next-of-kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 Ves. & B. 198.

5. "I give to A. 500*l.*, and it is my will and desire that A. may dispose of the same amongst her relations, as she by will may think proper":—Held, a trust for the relations of A., and the 500*l.* well bequeathed by the will of A. to her sister and her sister's children, though made without reference to the will of the first testator. *Forbes* v. *Ball*, 3 Meriv. 437.

6. A testator gave all his property to trustees, and declared that he had made no provision for his granddaughter K. H., because her deceased father had, in his lifetime, received more than his other children would become entitled to under his will. He then declared trusts of an equal share of his property for each of his surviving children for their lives, with remainders to their children. He then made a codicil as follows: "My wish, my dear daughters, is that you do give my dear granddaughter K. H. 1,000*l.*, and that you will be kind to E. J. And it is my desire that you do give her some part of my table-linen and sheeting. This is my last wish." By a subsequent codicil he made some alteration in the bequest made by his will in favour of one of his daughters, and, subject thereto, confirmed his will:—Held, that the second codicil confirmed the first, as being part of the will, and that the concluding sentence of the first codicil was sufficient to create a bequest of the 1,000*l.* to K. H., and that, as the articles specifically given by it to E. S. passed by the will to the trustees, and not to the daughters, so the 1,000*l.* was to be paid, not by the daughters out of their life interests, but by the trustees out of the testator's general personal estate. *Hinxman* v. *Poynder*, 5 Sim. 546.

7. Where a testator gave his real estates, and also his residuary property, to his wife for life, with remainder to an infant great-nephew for life: a statement in the will that it was his particular wish and bequest that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was:—Held, under the circumstances and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by the testator's widow under the will. *Foley* v. *Parry*, 2 Myl. & K. 138; Coop. *temp.* Brough. 219. Affirmed 5 Sim. 138.

8. A testatrix, after bequeathing property to her two sons, proceeded thus: "But I most earnestly wish that my said sons may give or settle their respective shares on their respective daughters, in preference to their sons." *Quære*, whether these words were imperative or merely precatory. *Young* v. *Martin*, 2 Y. & Coll. C. C. 582; 7 Jur. 1147.

A testator, after giving to his daughter an absolute power of appointment, by will, over certain property, recommended, though he did not absolutely enjoin, his said daughter to distribute the same at her decease amongst her daughters in equal shares:—Held, that these words were merely precatory. *Ib.*

9. A., after bequeathing leaseholds to his wife for the remainder of his interest therein, bequeathed all other his personal estate to his wife for her use and benefit, she maintaining the children, who were at his death under twenty-one, and paying his debts; and he declared it to be his will, that although he had given the whole of his property to his wife, yet it was his desire that if his children conducted themselves to her approbation, she should leave such property equally amongst all of them. Three of the children who survived the testator died in the lifetime of the widow, who by her will bequeathed her property to trustees, in trust to invest 200*l.* for one daughter; and as to the residue, in trust for the four surviving children:—Held, that the bequest by the testator to his widow was not absolute, but that the obligation amounted to a trust; and that the bequest by the widow in favour of the four surviving children was a good exercise of the discretion given to her. *Bonser* v. *Kinnear*, 2 Giff. 195; 6 Jur., N. S., 882.

10. A testator had a power to appoint the produce of a policy on his life amongst his children, by writing or will. By will he bequeathed all his personal estate to his daughter F. By a contemporaneous writing, unattested, and headed "memorandum," he gave directions to F. as to his property, and said: "The money from the Equitable Insurance Office I would have equally divided between my daughters F. G. and A.," and it also expressed his wish that his two sons should have certain interests out of his own property:—Held, that

the words "I would have" were imperative, and not mere instructions to F.:—Held, also, that F., who was not shown to have obtained the benefits under the will on the faith of any promise to distribute the testator's property according to the memorandum, was not bound to do so. *Proby* v. *Landor*, 28 Beav. 504; 30 L. J., Ch., 593.

1. A bequest of personalty to "A. and B., to be divided equally, with a request to A. that, should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B., provided they are prudent and well-conducted":—Held, that these words were not merely precatory, but sufficiently imperative to create a trust in favour of the sons of B. *Re O'Bierne*, 1 J. & L. 352; 7 Ir. Eq. R. 171.

2. A testator duly appointed a fund in favour of objects of the power absolutely, and he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power:—Held, that this did not raise a case for election; held, also, that the result would have been different, if there had been a different appointment of the subject of the power to strangers. *Blacket* v. *Lamb*, 14 Beav. 482; 21 L. J., N. S., Ch., 46; 16 Jur. 142.

3. A testator devised all his real estates to his son, in fee, and it was his earnest wish, and he particularly requested his son to keep the devised estates, and all other real estates to which he might become entitled, and not to sell, alien, or dispose of the same, except by way of exchange, or for re-investing the value in the purchase of other estates; and in case his son should die without leaving issue male, it was his (the testator's) anxious desire that he would so settle and devise the same that they might continue in the name of the testator:—Held, that this did not create a valid precatory trust, and that the son was absolute owner in fee simple of the estates. *Hood* v. *Oglander*, 13 W. R. 705; 12 L. T., N. S., 626; 11 Jur., N. S., 498; 34 L. J., Ch., 528; 34 Beav. 513; 6 N. R. 57.

4. Property was assigned to trustees, upon trust, after the death of the settlor, in the meantime, and until his eldest son should attain twenty-one, to pay the rents to the settlor's wife, to be applied by her for and towards the maintenance of herself and all the then present and future born children of the settlor; and the settlor declared, that if and when his eldest son should attain twenty-one, the trust property should be in trust for such eldest son, but so that the wish and desire of the settlor thereby declared, that the then present and future born children of the settlor and his wife should participate with him in the same should be particularly observed:—Held, that a valid trust was created in favour of the younger children to participate, and that it was not void for uncertainty. *Liddard* v. *Liddard*, 6 Jur., N. S., 439; 29 L. J., Ch., 619.

5. A testator having stated in his will that he had four shares in the National Bank, and an insurance policy, a bond and half an annuity, gave the bank shares to his sister S., as a trustee for his niece; and having disposed of the other property already mentioned, he bequeathed the "remainder of those effects (all my just debts being paid), if any remain," to his sister, adding, "and I beg she will apportion between the above-named [naming four of his legatees], and as my nephew John Corbett has a less secure position in life than his brothers, to him such portion or portions as she shall see fit. I would also wish that she should have power to give some small amounts for charity, especially to L.'s family," etc.:—Held, that his sister took the residue as a trustee for the persons named, and not beneficially. *Corbet* v. *Corbet*, 7 Ir. R., Eq., 456.

6. A clause in a will, appointing A. residuary legatee, with the desire that the residuary estate shall be afterwards left by her, in her own and the testator's name, to charitable purposes, does not raise a trust, but operates as an absolute gift. *M'Culloch* v. *M'Culloch*, 11 W. R. 504; 1 N. R. 535.

7. A. devised to his wife his house at G., and declared it to be "his earnest wish that his sister should reside at G., with his wife, during her life":—Held, that there was not any trust created in favour of the sister. *Graves* v. *Graves*, 13 Ir. Ch. R. 182.

See also 1 to 3 *supra*.

6. Words of Recommendation or Advice.

8. A recommendation by a testator to his son to continue his nephews in the occupation of their farms as heretofore, and so long as they continue to manage the same in a good and husbandman-like manner, and to duly pay their rents, is imperative. *Tibbits* v. *Tibbits*, Jac. 317; 19 Ves. 656.

A testator leaving to his son and heir his real estates, and the residue of his personalty, with a recommendation to continue his nephews as tenants on an estate settled on the son; the latter decreed to elect, either to continue them as tenants or to make them a compensation for the value of the tenancy out of the property given him by the testator. *Ib.*

9. Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malim* v. *Keighley*, 2 Ves. J. 529.

Testator showing his desire, creates a trust, unless plain words or necessary implication that there is to be a discretion to defeat it. *Id.* 335.

Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Id.* 333.

10. Bequest to A. for life, with power, on her marriage, to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death, and the determination of the preceding trusts, among the children of B. The recommendation being held an absolute trust, it is a vested interest in all the children, subject to be devested by appointment; and there being no appointment, children born after the death of the testator, and those who died in the life of A., are entitled with the rest. *Malim* v. *Barker*, 3 Ves. 150.

1. Words of expectation in a will, not amounting to recommendation, will not create a trust. *Lechmere* v. *Levie*, 2 Myl. & K. 197.

2. A., by will, devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, and, therefore, the testator added the following clause: "And I recommend to my executors, that all sugars, rum, and other plantation produce that is sent to the port of London be consigned to the house of C. E. & Co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignment may pass through his or their hands." C., a natural son of the testator's, set up the business of a sugar factor during the minority of the devisee, and accordingly got the consignments. Upon the devisee's coming of age, C. accounted with him, but insisted on being entitled to his commission, not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London:—Held, that the words of the above clause were not imperative, or amounted to words of bequest in favour of C., but were recommendatory only:—Held, also, that C. was entitled to a commission only upon what he had actually sold, and not upon what was only consigned, but not delivered to him. Decretal Order of Chancery confirmed. *Beckford* v. *Beckford*, 4 Bro. P. C 38.

3. Testatrix willed that, after payment of her legacies, the whole of her property should be given to her sister Mary, to be hers independently of any husband; and earnestly recommended her to take such measures as she might deem best for making it sure, that whatever she might inherit might go at her decease to her children:—Held, that the children, on their mother's death, were entitled to the property as joint tenants absolutely. *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590.

4. Words of recommendation in a will held not to amount to a trust. *Exp. Payne, Re Great Western Railway Act*, 2 Y. & Coll. 636; 7 L. J., N. S., Exch. Eq., 1; 1 Jur. 818.

5. C., having two sons, and being engaged in the sugar trade, devised his sugar houses, etc., to his eldest son; nevertheless, in case his eldest son should die without a son or sons of his body, then he recommended to him to give and devise the sugar houses, etc., to his brother, the testator's second son. The eldest son died without issue male, leaving a daughter, and without devising to his brother:—Held, not a trust for the brother, but a mere recommendation. *Cunliffe* v. *Cunliffe*, Ambl. 586.

6. A testator, after giving to his daughter an absolute power of appointment, by will, over certain property, recommended, though he did not absolutely enjoin, his said daughter to distribute the same at her decease amongst her daughters in equal shares:—Held, that these words were merely precatory. *Young* v. *Martin*, 2 Y. & Coll. C. C. 582; 7 Jur. 1147.

7. Testator gave to his wife all his personal estate, relying, that if she should marry again, she would secure whatever she should possess under his will, for her separate use; and he recommended her to give, by her will, what he should die possessed of under his will, to certain persons named:—Held, that wife's executor was trustee for whole property possessed by her under the will for those persons named. *Horwood* v. *West*, 1 Sim. & S. 387; 1 L. J., Ch., 201.

8. A testator bequeathed a legacy to his daughter A., and recommended her and her husband to settle that legacy, together with such a sum of money belonging to the husband as he should choose, for the benefit of the testator's daughter and her children. The testator's daughter died in his lifetime:—Held, that a trust was created as to the legacy for the benefit of the children, and that they were entitled to it in equal shares, and that the benefit to the children did not fail by the death of A. in the lifetime of the testator. *Ford* v. *Fowler*, 3 Beav. 146; 9 L. J., N. S., Ch, 352; 4 Jur. 958.

9. A devises K. lodge and other real estates to trustees, in trust in aid of his personal estate, and then to convey to B. in fee; and by a codicil recommended B., if he chooses to keep the house and demesne of M., that he should in twelve months make over K. lodge to plaintiff. A. died in 1797, and the trustees sold no part of the real estate, nor was it necessary to resort to it. B. entered on the real estate, and resided at M., and died seised in 1799, having devised K. lodge to the defendant, who entered and continued seised ever since. On a bill filed in 1828 it was held that the words of the codicil were mandatory, but that as they only raised an implied trust the plaintiff was barred by adverse possession since 1879. *Kingston (Lord)* v. *Lorton (Lord)*, 2 Hog. 166.

10. A testator by his will gave all his estate to his wife A., for her life; and after her death as to 2,000*l*., part thereof, he gave the same to be disposed of by her will in such manner as she should think proper; but recommended her to dispose of one half to her relations, and the other half to such of his relations as she should think proper. A., by will, disposed of the 2,000*l*. among various persons, some of whom did not belong to either of the classes mentioned in the will:—Held, that the word "recommended" did not create a binding trust, and that A. had the power of disposing of the fund in any way that she pleased. *Johnston* v. *Rowlands*, 2 De G. & Sm. 356; 17 L. J, N. S., Ch., 438; 12 Jur. 769.

11. Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate, in case of a deficiency, and, directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying, all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died

in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison* v. *Moore*, 2 Ves. J. 630.

1. The testator gave his wife 4,000*l.* "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her, for the purposes mentioned; at the same time recommending her not to diminish the principal, but to vest it in government or freehold securities": —Held, that this was a gift to the wife for life, to be employed, in such manner as she should think fit, for the benefit of herself and the children, she fairly and honestly exercising that discretion; and that, subject to such life estate, the children took an interest in the capital. *Hart* v. *Tribe*, 18 Beav. 215; 23 L. J., Ch., 462; 2 W. R 239

See also 1 to 3 *supra*

7. Precatory Words. When explained by the Context.

2. A husband bequeathed all his furniture, etc., and other property to his wife, and for her "to do justice to those relations on my side such as she thinks worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who" she "may please":—Held, that no precatory trust was created. *Re Bond, Cole* v. *Hawes*, 4 L. R., Ch. D., 238; 46 L. J., Ch., 488; 25 W. R. 95.

3. A testatrix, after directing legacies in certain events to fall into the residue, bequeathed specified articles "and other personal effects" to A. and B., in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct, and appointed A. and B. her executors. By a codicil, she directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the meantime "to form part of my residuary estate," and gave a legacy to "A., one of my executors and residuary legatees." By a second codicil, she gave a life interest to a legatee in a sum which, under the former dispositions, would have fallen into the residue, and stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the executors to postpone the payment of legacies, and giving other directions, the codicil concluded thus: "These wishes written by myself, and only concerning the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other":—Held, that, on the will alone, the executors would have taken the residue, subject to a trust for the next of kin; but that the word "confidence" in the will admitted of explanation, and was explained by the codicils not to amount to a binding trust. *Shepherd* v. *Nottidge*, 2 John. & H. 766.

4. After a devise to his daughter in fee, followed by a direction to keep the gardens, etc., in repair, a testator added, that in case his daughter married he strongly recommended her to execute a settlement, of which the will went on to prescribe the terms:—Held, upon unopposed petition, that the daughter, who was not married, could not convey the fee. *Exp. Payne, Re Great Western Railway*, 2 Y. & Coll. 636; 7 L. J., N. S., Exch., Eq., 1; 1 Jur. 818.

5. A father gave his real and personal estate to his son, appointing him his executor "in trust for the payment, execution, and discharging the intentions and devises thereinafter made, and to which my property, real and personal, so devised, is hereby made subject." The testator then made several bequests, and gave the residue of his real and personal estate to the son after payment of his debts, "requesting him that if he should not find an opportunity to dispose of my freehold estate at Winterborn Whitchurch greatly to his advantage and for the benefit of his family, that the said estate should belong after him to his eldest son":—Held, that no trust was created of this estate in favour of the son's family or his eldest son, but that the son took it absolutely. *House* v. *House*, 31 L. T., N. S., 427; 23 W. R. 22.

6. A testator gave all his property to his wife, trusting that she would use it for the spiritual and temporal good of herself and children, remembering always the church and poor:—Held, that the wife took absolutely. *Curtis* v. *Rippon*, 5 Madd. 431.

7. A testator, by his will, gave all his real and personal property to his wife, "to enjoy the same in the fullest and most unconstrained manner, subject, nevertheless, to the following provisions." These were legacies to relations of himself and of his wife; and he expressed his desire that his wife should make her will, and in such manner as that the whole property should be divided among her relations before mentioned, in such proportions as she might think they deserved. The testator then gave certain directions in case his wife should be unable to make a will, and then said, "But it is my express will that the precatory clause or power lastly provided for is not to do away with, or in any the least to deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself." The testator's widow made her will, giving legacies to her relations, but died intestate as to the residue of her estate:—Held, that the testator's property vested absolutely in his widow, and, so far as the same was undisposed of by her will, belonged to her next of kin. *Huskisson* v. *Bridge*, 20 L. J., N. S., Ch., 209; 15 Jur. 738; 4 De G. & Sm. 245.

8. A bequest "of all my property to my husband, hoping that he will leave it after his death to my son, if he is worthy of it," accompanied by the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and

that I cannot now feel any certainty what sort of a character he may become. I therefore leave it to my husband, in whose honour, justice, and parental affection I have the fullest confidence. If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles and clear judgment of right and wrong, and his sense of justice," does not create a trust. *Eaton* v. *Watts*, 4 L. R., Eq., 151; 16 L. T., N. S., 311.

1. Words of recommendation or desire in a will will not raise a trust, if such construction would conflict with other provisions of more definite and positive import in the same instrument; but the Court will give such effect to them as may not be inconsistent with those provisions. *Knott* v. *Cottee*, 2 Ph. 192

2. Testator, after giving his real and personal estates to his wife in fee, said, that he had so given the same to her unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference:—Held, that no trust was created. *Meredith* v. *Heneage*, 1 Sim. 542.

3. Testator bequeathed the whole of his property to his wife for her life, and directed that upon her death one-third should devolve upon his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry and have other children, her affection for their daughter will induce her to make the daughter her principal heir. The widow died unmarried:—Held, that she took an absolute interest in the two-thirds under the will. *Hoy* v. *Master*, 6 Sim. 568.

4. Testator gave to his wife all her jewels, trinkets, etc, which he added might be finally appropriated as she pleased, with the sum of 4,000*l.* in money, but which sum he recommended her to divide amongst certain persons in certain shares:—Held, by the Vice-Chancellor, that a trust was created in favour of those persons, to take effect after the wife's death; the Lord Chancellor, however, held the contrary, on appeal. *White* v. *Briggs*, 15 Sim. 33; 9 Jur. 1083. Reversed 2 Ph. 583; 15 Sim. 300; 16 L. J., N. S., Ch., 182.

5. A husband gave all his real and personal estate to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so":—Held, that she took absolutely. *Hutchinson* v. *Tenant*, 39 L. T., N. S., 86. S. C. *nom. Re Hutchinson and Tenant*, 8 L. R., Ch. D., 540; 26 W. R. 904.

6. A testator gave and devised all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, in "full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease":—Held, that under these words the widow took an absolute interest in the property, unfettered by any trust in favour of the children. *Lambe* v. *Eames* (6 L. R., Ch., 597), *Re Hutchinson and Tenant* (8 Ch. D. 540), *Curnick* v. *Tucker* (17 L. R., Eq., 320), and *Le Marchant* v. *Le Marchant* (18 L. R., Eq., 414) commented on. *Re Adams and Kensington Vestry, Re Adams* 24 L. R., Ch. D., 199; 52 L. J., Ch., 758; 48 L. T. 958; 32 W. R. 120.

8. Other Matters.

7. Where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of daughters to their separate use. *Willis* v. *Kymer*, 7 L. R., Ch. D., 181; 47 L. J., Ch, 90; 38 L. T., N. S., 207.

V. ABSOLUTE INTERESTS IN PERSONALTY WHERE ESTATE TAIL OR FEE-SIMPLE IN REALTY.

1. General Principles.

8. A limitation of personal property, after a disposition that would raise an entail express or implied in real estate, is void; and the person who would be tenant in tail takes the absolute interest. *Chandless* v. *Price*, 3 Ves. 99.

9. Words in a will which, in the case of a freehold estate, would have given to devisees either a fee tail or a fee simple, will, in the case of legatees of leaseholds, give to them an absolute interest. *Exp. Harrison, Re Commercial Railway Co.*, 3 Y. & Coll. 275; 8 L. J., N. S., Exch. Eq., 28; 2 Jur. 1038.

2. By Limitation to A. and his Heirs, Heirs Male, or to A. for Life, Remainder to his Heirs.

10. A testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter S. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of S., to "the right heirs" of S. "for ever." S. having married and died a widow, without

having had a child:—Held, that she took an absolute interest in the leaseholds. *Comfort* v. *Brown*, 10 L. R., Ch. D., 146; 48 L. J., Ch., 318; 27 W. R. 226.

1. A testator gives all his property to his daughter and her heirs, directing, at their decease, their debts, etc., to be paid; he then gives various legacies, and bequeaths the residue to his nephew:—Held, that the daughter takes the personal property absolutely, and an estate tail in the real property, and that the legacies were meant to be given only upon the failure of heirs of the body of that daughter. *Widdison* v. *Hodgkin*, 2 L. J., Ch., 9.

2. Devise of 100*l.*, and 50*l.* per annum to **A.** and his heirs, and if A. die without heirs then to a charity; A. dies without issue, living the testator: the will void as to the whole, and the charity cannot take. *Att.-Gen* v. *Gill*, 2 P. W. 369.

3. Bequest of 2,000*l.* to A., and in the event of her death without children to her heirs, the nearest relations of her great-aunt A.:—Held, that A. took an absolute interest. *Yearwood* v. *Yearwood*, 9 Beav. 276; 10 Jur. 151.

4. A testator, as to all his real and personal estate, directed that after his wife's death his son J. and daughter A. should "receive its income, and after their decease their heirs":—Held, that they took a joint estate in fee in the realty, and a joint interest for their lives in the personalty. *Herrick* v. *Franklin*, 37 L. J., Ch., 908; 6 L. R., Eq., 593.

5. Bequest to A., and his heirs male, equally to be divided among them, share and share alike, construed to A. for life, remainder to his children equally. *Wilson* v. *Vansittart*, Ambl. 562.

6. A testator gave leasehold estate to trustees, on trust for his son Benjamin, to take the rents until he should attain twenty-one, remainder on trust to support contingent remainders; and subject thereto on trust for such son for life, remainder for the heirs male of such son; remainder to the second and other sons of Benjamin, and the heirs male of their bodies; with remainder over of a like nature in favour of other children of the testator and their sons:—Held, that this would have been an estate tail in the son of Benjamin, and, being personalty, he would have taken an absolute estate. *Lewis* v. *Hoppins*, 3 Drew. 668. S. C. *nom. Lewis* v. *Hopkins*, 5 W. R. 17, 243. Affirmed *sub. nom. Williams* v. *Lewis*, 6 H. L. Ca. 1013; 5 Jur., N. S., 323; 28 L. J., Ch., 505; 7 W. R. 349; 3 L. T., N. S., 23.

To A. or his Heirs or Assigns.] 7. A testator devised and bequeathed real and personal estate to trustees, upon trust for his wife for life, and after her decease to sell and divide the proceeds among his five children (whom he named), or their heirs or assigns. One of the children died in the lifetime of the testator's widow, leaving her husband and a son and a daughter surviving. The husband took out letters of administration to her estate, and on the death of the testator's widow claimed one-fifth of the produce of part of the real estate, which had been paid into court:—Held, that the gift to the five children was absolute, and that the share of the deceased daughter belonged to her husband as her administrator. *Re Walton*, 2 Jur., N. S., 363; 25 L. J., Ch., 569; 8 De G. M. & G. 173; 4 W. R. 416.

8. A testator by his will devises all his real estate to his executors for the purposes hereinafter stated; and after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common; if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue:—Held, the daughter took an estate tail in the freeholds; that the real and personal estate being given over together, she took the personal estate absolutely; that the annuity of 150*l.* was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

3. By Limitation to A. and the Heirs of his Body.

9. Devise of personalty to B., and the lawful heirs of his body, if he should have any; but if he should die without lawful heirs, 1,000*l.* to S., and 500*l.* to C.; the contingencies are too remote. *Att.-Gen.* v. *Hird*, 1 Bro. C. C. 170.

10. On a bequest of a sum of money to each of four persons named, with a proviso, "should it so happen that the whole should die without heirs, the sum is ultimately to revert to the estate of the family, but should all or any of them die with heirs of their body, the sum of which they severally died possessed is to be continued to their heirs for ever, and not to revert to the estate":—Held, that the legatees took absolutely. *Brooks* v. *Lake* (*Lord*), 10 Jur. 485.

11. Devise of a personal estate to a trustee in trust for testator's only son, and the heirs of his body, and if his son die during his minority, and without issue, then to A., and makes his son executor, and B. executor in trust for his son during the son's minority. The son lives to eighteen, and then dies without issue; the personal estate shall go to the executor of the son, and not to A. *Whitmore* v. *Weld*, 1 Vern. 326; 2 Ch. Rep. 383; 3 Ch. Ca. 167.

12. Testator having devised residue of his real and personal estate to trustees, upon trust, within six months after his decease, to

raise 34,000*l.*, and having out of this sum made a provision for maintenance of his two daughters, E. and S., during their minorities, directed that a moiety of interest arising from it should be paid to each daughter on her attaining twenty-one, or marrying, for her separate use, during the term of ninety-nine years, if she so long lived; and in case either of them died, leaving no child or issue of a child, the whole of interest should be paid to survivor for her separate use, during remainder of term, if she so long lived; and subject to these and some contingent gifts, which never took effect, he bequeathed the 34,000*l.* to his trustees, upon trust, after decease of his daughters, for such person or persons as should, under subsequent limitations, be entitled to residue of his real and personal estate. In these subsequent limitations, trustees were directed, upon each of his daughters attaining twenty-one or marriage, to yield up to her a moiety of residue of his real and personal estates, to hold same to her and heirs of her body, with remainder to other daughter and heirs of her body, remainder to his own right heirs. In suit instituted on behalf of the infant daughters, for administration of testator's estate, a decree was made for raising 34,000*l.*, and personal estate proving insufficient, part of it was raised by sale of portions of real estate; afterwards S., with concurrence of the heir of surviving trustee, suffered a recovery of her moiety of lands to use of herself in fee, tenant to *præcipe* being made, and uses of recovery declared by bargain and sale, in which both S. and heir of surviving trustee were conveying parties, but which was not enrolled within due time. Subsequently E. suffered a recovery of her moiety of lands. S. died, leaving children, having received out of court moiety of principal of that part of charge which had been raised, but without having taken any steps to have remainder of it raised. *Semble*, that E. and S. did not take *quasi* estates tail in sum of 34,000*l.*:—Held, that if E. and S. took *quasi* estates tail in 34,000*l.* so as to be entitled to it absolutely, yet under circumstances of case, unraised portion of S.'s moiety of charge was extinguished, and unsold estates entirely exonerated; that an equitable recovery is valid, though tenant to *præcipe* is made by bargain and sale not enrolled within due time. Effect, as to extinguishment of a charge, of conduct of parties who are interested both in money and in lands out of which money is to be raised. *Smith* v. *Frederick*, 1 Russ. 174.

1. Devise and bequest to A. and the heirs of his body, with limitations over in case of no such heirs:—Held, an estate in tail in real estates, and an absolute interest in personal, the limitations over being void; but it expressed, if he leaves no such heirs, it would be good as confined to the time of the death, and not after an indefinite failure of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

2. A testator bequeathed the interest of his residuary personalty to William and the heirs of his body in equal proportions, subject to a life annuity in favour of Sarah; and in the event of William dying during the life of Sarah, without leaving heirs of his body, the testator desired that Sarah should receive the whole interest of such residue for her life, and at the decease of the aforesaid Sarah, William, and the heirs of his body, he desired that such residue might be allowed to accumulate until the interest thereof might be sufficient to support two persons for ever in a certain hospital —Held, that the testator's intention was to give the property successive, *i. e.*, not to give it to Sarah or the hospital so long as the heirs of the body of William should be unexhausted, and that, as a bequest in such terms was unlawful, the gift must be construed as a gift to William absolutely. *Re Barker's Trusts*, 52 L. J., Ch, 565; 48 L. T. 573.

4. By Limitation to A. for Life, Remainder to the Heir or Heirs of Body.

(*a*) *Where Corpus given*, 7957.
(*b*) *Where Interest given*, 7959.

(*a*) *Where Corpus given.*

3. Devise of real and personal estate in trust for A, for life, afterwards for B. for life, and afterwards for the heirs of his body, afterwards for the other sons of A., successively in tail, taking testator's name; then to the daughters in tail, for want of such issue to convey to C. in fee: B. is entitled to a conveyance in tail of the real, and to the absolute property of the personal; the intent being at least doubtful, the legal operation of the words cannot be taken away, and, as to the personal, it vested absolutely by such limitation, whether so intended or not. *Garth* v. *Baldwin*, 2 Ves. 646.

4. A. devises real and personal estate to B., for life, with remainder to the heirs of her body; this limitation over is void as to the personal estate, and B. shall take it absolutely. *Stratton* v. *Payne*, 3 Bro. P. C. 99.

5. Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, etc.; and in case both sons should die before twenty-one, over.—Held, an estate tail in the land, and absolute interest in personalty bequeathed with it. *Bennet* v. *Tankerville* (*Earl*), 19 Ves. 170.

6. A, by will, gives bank-stock, exchequer-orders, and other personal estate to B. for life, and after his death to B.'s heir, and, for want of issue, to C. for life, etc.; B. takes absolutely, and devise over to C. void. *Chatham* (*Earl*), v. *Tothill*, 7 Bro. P. C. 453.

Bequest of personalty to A. for life, and after A.'s death to heirs male of A.'s body for ever, and for want of such issue, to B. for life, etc.; A. takes absolute interest, and gift over to B. is void. *Semble*. S. C. *nom. Tothill* v. *Pitt*, 1 Madd. 488.

7. Real and personal estate was devised to a feme covert for life, for her independent use and benefit, with remainder to her husband for life, with "remainder to the heirs of her body in tail," with remainders over; and then followed a declaration in the will that "all the aforesaid limitations were intended by the testator to be in strict settlement":—

Held, in accordance with the certificate of the Court of C. P., that, subject to her husband's life estate, the wife took an estate tail in the realty and an absolute interest in the personalty. *Douglas* v. *Congreve*, 1 Beav. 59; 8 L. J., N. S., Ch., 53; 3 Jur. 120; 4 Bing., N. S., 1; 5 Scott 223; 7 L. J., N. S., C. P., 4. And see S. C. 1 Keen 410; 6 L. J., N. S., Ch., 51.

1. Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use; and from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house and the stock over:—Held, that the daughter took the property absolutely. *Verulam (Earl)* v. *Bathurst*, 13 Sim. 374; 12 L. J., N. S., Ch., 359; 7 Jur. 295.

2. A testator bequeathed to his granddaughter the interest arising out of 1,500*l.* consols during her life, and at her decease to descend to her heirs, male or female, by paying to her uncle 10*l.* per annum during his life, but the said 1,500*l.* stock to be by no means sold whatsoever, except on failure of issue, and then to descend to the testator's son and his heirs for ever:—Held, that this was an absolute bequest of the 1,500*l.* stock to the testator's granddaughter. *Ousby* v. *Harvey*, 17 L. J., N. S., Ch., 160.

3. Residuary trust by will to apply the rents and profits for A. during his life, and afterwards for the heirs of his body if any, and in default of such issue over, is an estate tail in the real estate, and the absolute interest in the personal. *Elton* v. *Eason*, 19 Ves. 73.

4. N. T. devised an annuity of 300*l.* per annum to his wife for life, then to accumulate, to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease, to the heirs male of his body, and in case of his having no issue, remainder to the next eldest son and his heir male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue. This is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise on the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it, as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C. 317; Ambl. 776.

5. A testator gave a leasehold estate to trustees during the term of thirty years, upon trust to receive the rents and profits and pay debts, and, subject thereto, "to lay out and continue the same at interest, upon the best security that they could get for the same, and shall accumulate the same yearly, by making the interest thereof principal, and to bear interest until the legacies hereinafter given and bequeathed, and hereby made chargeable thereon, shall be satisfied and paid; and immediately afterwards the legacies shall be satisfied and discharged, or immediately after a sufficient sum or sums of money shall be had and received for that purpose by and out of the rents and profits of the premises;" then he bequeathed the leasehold estate to the trustees and their heirs for the term in him vested, upon trust for his son B., until the son of his son B., if he had one, should attain twenty-one, and then to the trustees to preserve contingent remainders, but to permit such son to receive the rents and profits during his life; and after his decease, to the heirs male of such son; and for want of such issue, to the second and other sons of the body of B., lawfully to be begotten, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; and in default of such issue, a similar limitation in remainder to L.; "and then for default of such issue, upon trust to receive the rents and profits for the use and benefit of the son of the testator's daughter A. until he should attain twenty-one," with similar limitations as those in favour of B. B. and L. died without issue:—Held, that B.'s son took the term absolutely. *Williams* v. *Lewis*, 6 H. L. Ca. 1013; 5 Jur., N. S., 323; 28 L. J., Ch., 505; 7 W. R. 349; 3 L. T., N. S., 23. Affirming S. C. *nom. Lewis* v. *Hopkins*, 5 W. R. 17, 243. S. C. *nom. Lewis* v. *Hoppins*, 3 Drew. 688.

Held, also, that the trust for accumulation was not void for remoteness. *Ib.*

6. Devise of freehold and leasehold to A. for life, and after his death to the heirs of his body, their heirs, executors, etc.:—Held, this gives A. an estate tail in freehold, and absolute interest in the leasehold. *Kinch* v. *Ward*, 2 Sim. & S. 409; 4 L. J., N. S., Ch., 28.

7. Devise of all the rest, residue, and remainder of estate, both real and personal, unto A., to be placed at interest, until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her, to and for her use during natural life, and from and immediately after her decease unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such issue, or the death of A. before her age of twenty-one, or day of marriage, then unto her (the testatrix's) brother, is an estate for life in A. *Jacobs* v. *Amyatt*, 4 Bro. C. C. 542.

8. Devise to A. for life, remainder to trustees, to preserve contingent remainders, remainder to the heirs of his body, with remainder over for life and in tail male, declaring that the respective devises to A., etc., and their respective heirs male, are on condition of taking the testator's name; the residue of the personal property bequeathed to A., on attaining the age of twenty-four, to go over if he died under twenty-four, without leaving any child or children living at or born in due time after his death. Codicil giving an after purchased leasehold for years for such estate and estates, and in such manner and form as the real estates are devised by the will, and with, under, and subject to the like limitations, trusts, conditions, etc. A. takes an estate tail in the freehold, and the absolute interest in the leasehold estates. *Brouncker* v. *Bagot*, 19 Ves. 574; 1 Meriv. 271.

Remainder to Heir of Body.] 9. A house,

together with the furniture thereof, is limited to a feme, and such heir of her body as should be living at her death, and in default of such remainder over. The female has an estate tail in the house, and absolute property in the furniture. *Richards* v. *Bergavenny*, 2 Vern. 324.

Devise to A. for life, remainder to the heir of his body (though in the singular number), is an estate tail. *Ib.*

(*b*) *Where Interest given.*

1. Remote limitation: devise of 400*l.* to be put out on good security for T. B, that he may have the interest for his life, and for the heirs of his body; if he dies without issue, then over. The whole property vests in the first taker, and the limitation too remote. *Butterfield* v. *Butterfield*, 1 Ves. 133.

2. Interest of a sum given to A. for life, at his death to devolve to the heir of his body with remainder over, vests the principal sum absolutely in A. *Robinson* v. *Fitzherbert*, 2 Bro. C. C. 127.

3. Testator directs 20,000*l.* which he has in the Three per Cents. to be firmly fixed there, to remain during the life of his wife for her to receive the interest, and after her death to be in the same manner firmly fixed on the infant W. C., "to be so secured that he may only receive the interest during his life, and after his decease to the heir male of his body, and so on in succession to the heir-at-law, male or female;" with a direction that the principal sum is never to be broken into, but the interest only to be received; "his intent being that there should always be the interest to support the name of Cobb as a private gentleman." Though the intention be manifest to give only a life interest to W. C., yet, there being nothing to show that the word "heir male" was not used in a strictly technical sense:—Held that W. C. took an absolute interest, the words being such as would create an estate tail of freehold property; *secus*, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere *designatio personæ*:—Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which in the case of land would not prevent the creation of an estate tail. *Britton* v. *Twining*, 3 Meriv. 176.

5. By Limitation to A. for Life, Remainder to His Issue.

4. Construction of will, whether issue take by way of purchase or limitation. *Lyon* v. *Mitchell*, 1 Madd. 467.

A residue of personal estate was directed by will to be divided equally amongst the testator's sons (named), share and share alike, as tenants in common, and to the issue of their several and respective bodies lawfully begotten; but in case of the death of any or either of them without issue, lawfully begotten, living at the time of his or their respective deaths, then the part or share of him or them so dying to go to the survivors and survivor equally, share and share alike, and to the issue of their several and respective bodies lawfully begotten:—Held, that the bequests to the four sons passed absolute interests, but that on the death of one of such sons without issue, the shares survived to his brother. *Ib.*

5. Devise to devisor's wife of all his real and personal estates for her life, "after her" to A. and his male issue: "for want of male issue after him," to B. and his male issue; for want of male issue to two others and their male issue. An absolute interest in A. as to the personal estate. *Donn* v. *Penny*, 19 Ves. 545; 1 Meriv. 20.

Bequest of personal property to a man and his issue is an absolute interest, but a limitation over for want of issue living at his death is good. *Id.* 547.

6. A bequest to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's death, is an absolute gift to such children of A. as are living at the testator's death. *Butter* v. *Ommaney*, 4 Russ. 70; 6 L. J., Ch., 54.

7. A testator bequeathed the residue of his estate to his widow, in trust to apply the proceeds for her own use, and at her death he gave what should then be remaining of such residuary moneys equally among all the daughters of A. and their issue, with benefit of survivorship and accruer (which latter clause was not set forth in the bill):—Held, that a daughter of A., who died in the lifetime of the widow, took no share, and that two surviving daughters took the whole residue absolutely. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., N. S., Ch., 344.

8. A testator bequeathed ten Pelican shares to his son, and his heirs, executors, administrators, and assigns for ever, "he paying the profits of eight to the testator's daughters for life;" and after their decease the daughters' shares were to "return to his son and his issue;" and "in default of such issue" there was a gift over to the "daughters and their issue":— Held, that subject to the life interest of the daughters the son was absolutely entitled to the shares. *Hedges* v. *Harpur*, 9 Beav. 479; 10 Jur. 578.

9. A testator appointed his executors guardians of his children until they should attain the age of twenty-five, and he desired that all his estate (which consisted of personalty only) should be equally divided among his four children, share and share alike. He then gave certain powers to his executors, and at the end of the will came this passage: "And I hereby direct that all moneys inherited by my daughters under this will shall be placed in the hands of trustees appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue":—Held, upon the petition of a daughter who attained her age of twenty-five and was unmarried, that she was entitled to her share absolutely. *Samuel* v. *Samuel*, 14 L. J., N. S., Ch., 222; 9 Jur. 222.

10. A testator by his will gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S. during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive his daughter, then in trust for H., F., E., A., and W., his five sons, and their respective issue (if any), to be divided

among them in equal shares and proportions, such issue to take *per stirpes* and not *per capita;* he also gave the residue of his personal estate to his sons H, F, E., A., and W., "and their respective issue (if any), such issue to take *per stirpes* and not *per capita,* to be divided among them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one years, to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively attain such age":—Declared, that, S. dying in the lifetime of G., the sons of the testator living at such event would be absolutely entitled to the stock in equal shares, but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund which their parents would have been entitled to if living, such issue to take such shares equally among them, and adjudged, that the sons living at the death of the testator took an absolute interest in the residue. *Dictum,* that if any of the sons had died in the lifetime of the testator, his children, living at the death of the testator, would have taken, by substitution, the share of the parent. Whether grandchildren or more remote descendants would take as issue, and in what proportions, *quære. Pearson* v. *Stephen,* 5 Bli. N. S. 203; 2 Dow & Cl. 328.

1. Bequest of personalty to four daughters "and their issue":—Held, that they took absolutely. *Re Stanhope,* 27 Beav. 201.

2. A testator devised real and personal estate to A. for life, with a direction to the executors, after A.'s death, to divide it amongst all her children and their lawful issue, share and share alike. There was a gift over of the leaseholds to other persons, on a total failure of issue of the children:—Held, that the children took estates tail in the realty, and absolute interest in the personalty; and that cross remainders were not to be implied in regard to the leaseholds. *Beaver* v. *Nowell,* 25 Beav. 551.

3. A testator gave a share of his estate to L., subject to the condition that L. should receive for professional services 150*l.* in some one year, and the executors were to invest the principal, and pay L. the interest; "and in the event of his death, he being at the time unmarried, or not leaving legal issue, or not having fulfilled the above condition," then there was a gift over. L. never fulfilled the condition, but died leaving lawful issue:—Held, that his representatives took the share. *Law* v. *Thorp,* 1 Jur., N. S., 1082.

4. A testator gave the interest of all his money in the funds to his daughter, and he desired his outstanding money to be put into the funds. He then desired the interest of the moneys directed to be put into the funds to be paid to his daughter, "as and for her own and issue's proper moneys." But in the event of her dying without issue, he desired the whole of his funded property to be divided between his brothers and sisters and their children. The daughter died without issue:—Held, that she took the funds absolutely, and that the gift was inoperative. *Re Andrew,* 26 Beav. 608. S. C *nom Re Andrews,* 6 Jur., N. S., 114; 29 L. J., Ch., 291.

5. Devise of a freehold estate to the testator's illegitimate son W., "to have and to hold during the term of his natural life, and, in case he have issue, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will the testator devised and bequeathed the rest and residue of his effects real and personal, not thereinbefore disposed of, to his said son, "but in case my son W. dies without issue, then it is my will that the whole of my property be ascertained; and, after bequeathing certain legacies and annuities, the rest and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportions to A. and B.":—Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward* v. *Bevil,* 1 Y. & J. 512.

6. The testator gave the sum of 500*l.* stock to S. T., to receive the interest during life, and then to her issue; but in case of her death without issue, the said 500*l.* stock to be divided between her father's children by his second wife; and in default of any children by his second wife being living at the testator's death, over:—Held, that S. T. took an absolute interest in the sum of 500*l.* stock. *Att.-Gen.* v. *Bright,* 2 Keen, 57; 5 L. J., N. S., Ch., 325.

7. Gift of stock in the public funds upon trust to pay the dividends to the four brothers and two sisters of the testator in equal shares, for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the survivors or survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies, *ad infinitum,* for ever:—Held, that the bequests to the brothers and sisters of the testator were valid; that the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid; but that such eldest sons took absolute interests in their several shares of such stock; that, according to the language of the will, the issue of the nephews would take, if at all, as purchasers; but if the limitations to their issue male should be construed as words of limitation, the nephews would have taken a life estate only. *Harvey* v. *Towell,* 7 Hare 231; 17 L. J., N. S., Ch., 217; 12 Jur. 241.

8. Testator gives the accumulation of rents till A. should attain twenty-one, to be laid out, and to permit A. to receive the interest during life; after his death, he gives the said moneys to the issue male of A., and in default to the plaintiffs; A. died without issue: the issue would have taken as purchasers, and therefore the limitation to the plaintiffs takes place. *Knight* v. *Ellis,* 2 Bro. C. C. 570.

9. Devise of leaseholds on trust for A. for life, and afterwards to his issue male severally and respectively, according to their seniorities; and in default to his heirs, according to their

seniorities; and in default over:—Held, that A. took an absolute interest. *Jordan* v. *Lowe*, 6 Beav. 350.

1. The word "issue" is construed differently in limitations by will of real and personal property, because of the different order of succession to such property on the death of the owner intestate. *Re Wynch's Trusts*, 17 Jur. 588; 22 L. J., Ch., 750; 1 W. R. 426; 1 Eq. Rep. 521; 1 Sm. & G. 427 Affirmed 18 Jur. 659; 2 W. R. 570; 2 Eq. Rep. 1025; 23 L. J., Ch., 930; S. C. *nom. Exp. Wynch*, 5 De G. M. & G. 188.

J. W. bequeathed to A. M., the wife of R., "an annuity for her life and the issue from her body lawfully begotten; in failure of which, to revert to my heirs; and I request that K. and T. will act as trustees for the said A. M., so that the said annuity may be secured for her sole use and benefit".—Held, that the word "issue," in this gift, must be construed a word of purchase—that A. M. took an equitable interest only for her life, and that upon her death the children and other issue took the annuity as a class in equal shares as joint tenants. The authority of Lord Thurlow's decision in *Knight* v. *Ellis* (2 Bro. C. C. 570) upheld. *Ib.*

In construing bequests of personal estate it is not correct to apply rules which, with reference to real estate, have been derived from laws of tenure, such as that "issue" or "heirs of the body" shall be *primâ facie* words of limitation; but the intention must decide the construction. *Per* the Lord Chancellor and Sir G. J. Turner, L. J. *Ib.*

The authorities do not bear out the general proposition sometimes found in the report, namely, that the same words in a will which would create an estate tail in realty will give the absolute interest in personalty. *Per* Sir G. J. Turner, L. J. *Ib.*

A deed was executed in 1797, putting a particular construction upon the will. A. M., not being a party to the deed of 1797, executed a deed in 1808, previously to her marriage, which deed recited the former deed:—Held, by Knight-Bruce, L. J., that, as against the issue of the marriage, A. M. was bound by that recital, and could not put an opposite construction upon the will. *Ib.*

2. A testator gave certain leasehold houses to his wife for her life; and after her decease, to the niece A. for life for her separate use, and after her decease to the issue of the body of A. lawfully begotten; and if A. should die leaving no issue, then to B. A. died, leaving three children:—Held, in conformity with *Re Wynch's Trusts* (*supra*), that A. took only an estate for life. *Goldney* v. *Crabb*, 2 W. R. 579; 19 Beav. 338.

3. Devise of real and leasehold estates together to A. for life, and after his death to the male issue of the body of A., in equal shares and proportions, the leaseholds being the bulk of the property:—Held, that A. took an estate tail in the freeholds, and an estate for life only in the leaseholds. *Jackson* v. *Calvert*, 1 John. & H. 235.

4. A testatrix gave real and personal estate upon trust for all her children after they should attain twenty-one, share and share alike for their respective lives, and after the death of any of them before attaining twenty-one, upon trust as to the share of the child so dying for the issue of such child in equal shares and proportions, and their respective heirs, executors, administrators, and assigns, but if there should be but one such child who should attain the age of twenty-one (which event happened), upon trust as to the whole property for such child for life, with remainder in trust for the issue of such child, and their respective heirs, executors, administrators, and assigns as tenants in common:—Held, that the word issue was to be construed as a word of purchase, and that the testatrix's only child took an estate for life with remainder to her issue as tenants in common in fee as to the realty, and absolutely as to the personalty. *Bannister* v. *Lang*, 17 L. T., N. S., 137.

5. Bequest of chattel interest in houses to E. (who afterwards married, but died without issue) for life, and to his issue in case he shall marry:—Held, to give a life estate only to E. *Foster* v. *Wybrants*, 11 Ir. R., Eq., 40.

6. By Limitation to A. and his Children.

6. A testator left all his property to his "brother B. and his children in succession":—Held, that this gave to B. an estate tail in the realty, and an absolute interest in the personalty. *Tyrone* (*Earl*) v. *Waterford* (*Marquis*), 6 Jur., N. S., 567; 29 L. J., Ch., 486; 8 W. R. 454; 1 De G. F. & J. 613.

7. The mortgagee for a term of years, being in possession, devises the premises as an estate of inheritance to three several persons for life successively, with remainder to their first and other sons, remainders over; the remainders over are void as tending to a perpetuity. *Brett* v. *Sawbridge*, 3 Bro. P. C. 141.

8. Testator bequeathed two leasehold houses to his sisters A. and B. during their natural lives, they keeping them in good repair, and at their death to be disposed of as follows: One house to descend to his sister A.'s eldest son or daughter, and the next heirs male or female, until the expiration of the lease, and the other house in like manner to B.'s eldest son or daughter, etc.—Held, that A. and B. took an absolute interest in the leaseholds. *Quære*, whether, if it had been a devise of freehold, the words would have conferred a fee. *Exp. Harrison, Re Commercial Railway Act*, 3 Y. & Coll. 275; 8 L. J., N. S., Exch. Eq., 28; 2 Jur. 1038.

9. A testator gave all his real and personal estate to trustees in trust, as to one moiety for A. for life, remainder to her children, and as to the other moiety for B. and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children, and he left A. and B. jointly his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs; the number of their children nearly equalising the value of the two estates. In a subsequent codicil, he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children:—Held, that A. and B. were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate

absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington* v. *Sewell*, 1 Sim. 435.

Son, Child, etc., as a Word of Limitation in General.] See XVIII. *ante*.

7. By Limitation to A. and his Offspring.

1. A bequest of personalty to his offspring confers upon A. an absolute interest. *Young* v. *Davies*, 9 Jur., N. S., 309; 32 L. J., Ch., 372; 11 W. R. 452.

VI. ABSOLUTE OR CLEAR GIFTS NOT CUT DOWN BY DOUBTFUL EXPRESSIONS (REPUGNANCY).

2. It is a rule of the courts, in construing written instruments, that when an interest was given, or an estate conveyed in one clause of the instrument in clear decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate. *Thornhill* v. *Hall*, 2 Cl. & F. 22; 8 Bli. N. S. 88.

A testator recites, *seriatim*, in his will, the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit-rent of Blackacre during the term of the lease, which was for the lives of the testator, and of R and another, and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and, further, if any of the above legatees should die, or die unmarried," he left the property bequeathed to them to be divided equally among the survivors of them:—Held, that the devise to R. in Blackacre was for the whole term of the lives of the *cestuis que vient*, and was not, on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last-mentioned unmarried daughters only. *Ib.*

3. A testator gave the income of all the residue of his property, subject to two annuities, to his wife for life, and after her death to his son for life, and then bequeathed (a second time) the residue of his property to his son, excepting all money in the funds, which he gave to the children of his son:—Held, that after the death of the wife, the son took the income of all money in the funds for his life, as well as all the residuary property, since a preceding unambiguous gift cannot be cut down by subsequent implication. *Bell* v. *Bell*, 3 Jur. 554.

4. Where an absolute interest is given by a will, it will not be cut down except by distinct words. *Ashhead* v. *Willetts*, 9 W. R. 405; 29 Beav. 388.

5. An absolute gift in clear language, in a will, is not taken away unless by language equally clear. *Kiver* v. *Oldfield*, 4 De G. & J. 30.

Where, therefore, a testator having made a provision in his will for his eldest grandson by a bequest of leasehold property, directed that his residuary real and personal estate should be equally divided between his four other grandchildren in common, and declared that the share of each should remain vested in the trustees of the will, upon trust, to permit him and her to receive the income for life, and after the decease of each, his or her share to be in trust for his or her children; provided, that if the share of any one or more of the four grandchildren should not vest in any children or child of his or her body, or in case the term in the leasehold given to the eldest grandson should expire in his lifetime, then and in either of such cases the eldest grandson should be let into and take an equal share in the residuary estate intended for the other four grandchildren and their issue equally with such other grandchildren, or their respective issue:—Held, that on the death of one of the four younger grandchildren, without issue, the residue remained divided into four, and was not redistributable into five parts. *Ib.*

6. A clear gift by will to testator's son, on his attaining twenty-one, followed by limitations over, the construction of which was very doubtful:—Held, that the rule applied; that a clear gift cannot be cut down except by limitations equally clear. *Randfield* v. *Randfield*, 4 Drew. 147; 5 W. R. 768. But see S. C. on appeal, *infra*.

A., by will, dated in October 1837, but not executed until 1844, gave his real and personal estate to his son when he should have attained twenty-one, subject to an annuity to his widow. He then proceeded thus: "But should the hand of death fall on my widow and son, and my having no children, or my son any issue, my will is, that, should he leave a widow, she shall receive the annual sum of 50*l.*, during her widowhood, out of my real estates; the residue then to be equally divided, after paying such legacies as I may hereafter name, the division of property to be between my late brother's surviving children, and my sister C. D.'s children, my sister E. F.'s children, and my nieces, G. H. and I. J., they paying all my son's just debts, funeral expenses, and demands, or my wife's should she be the longest liver." At the date of the testator's will his son was an infant, but when it was executed he had attained the age of twenty-six:—Held (affirming 2 De G. & J. 57; 6 W. R. 98), that the gift over of the real estate took effect on the son dying without issue; but that in respect of the personalty the son was absolutely entitled. The proposition that where there is a clear gift in a will it is not to be cut down by anything subsequent, unless it is equally clear, not approved. The subsequent clause may have that effect, if it indicates, with reasonable certainty, the intention of the testator. S. C. on appeal 6 Jur., N. S., 901; 9 W. R. 1; 8 H. L. Ca. 225.

7. Bequest of residue after decease of testator's widow, to be divided equally amongst children, the son's shares to be paid immedi-

ately, and as to the daughters' to be invested for them for life, with remainder between all their children, to become vested at twenty-five, remainder over; in case of either of his daughters having no child attaining twenty-five, to the children of the others who should attain that age:—Held, that such gift over was too remote and void, and that the bequest to the daughters in the first instance being absolute, and the conditional limitation not being such as would legally take effect, the absolute interest remained according to the original gift. *Ring* v. *Hardwick*, 2 Beav. 352; 4 Jur. 2.

1. Express bequest or power not controlled by the reason assigned; which, though it may aid the construction if doubtful, cannot warrant the rejection of clear words. *Cole* v. *Wade*, 16 Ves. 46.

2. Testator directed trustees to invest 5,000*l.* on Government or real securities, and to pay the interest, etc., to his wife for life, and after her decease to divide the same, and pay one moiety to his son, W. W. C., and the other to be invested, and held, subject to the trusts declared concerning such share of his residuary estate as thereinafter bequeathed, for the use of his daughter, C. C. One part of the residuary estate the testator directed to be paid to his son, and the other he directed to be invested on Government or real securities, and the interest, etc., paid to the separate use of his daughter for life; "but in case either of them, W. W. C. or C. C., should be then dead, leaving lawful issue him or her surviving," the testator directed that his or her share "of or in the trust moneys and securities should be paid unto and amongst the issue of such deceased child or children in equal shares, etc. . . . Provided always, that in case either W. W. C. or C. C. should die in his lifetime, or in the lifetime of his wife, without leaving lawful issue," then the testator "directed that the share of him or her so dying of and in the trust moneys and securities respectively" should be paid to the survivor of his children absolutely. The testator died in 1850, leaving his wife, and his son and daughter, W. W. C. and C. C. (each of whom had issue one child). On claim as to whether W. W. C. took an absolute interest in the gift of the residue:—Held, that the direction, "in case W. W. C. should be then dead," meant his death in the lifetime of the testator; and that as W. W. C. survived the testator, he took an absolute interest in the gift of the residue. *Cooper* v. *Cooper*, 1 Jur., N. S., 105; 3 W. R. 80.

3. A testator gave a fund to M. for life, and if she should die without issue (which happened), then to C. and S. equally between them, or to the survivor, unless either of them should have departed this life leaving lawful issue, "in which case I give the share of him or her so dying unto his or her children, if more than one, in equal proportions." The testator died in 1813. C. died without issue in 1825; S. died, leaving issue, in 1851; and in 1855 M. died without issue:—Held, that words introducing the gift over were too ambiguous to cut down the preceding clear gift to C. and S., and that the children of S. took nothing. *Re Larkin*, 2 Jur., N. S., 229.

4. Testator gave his house, his stock in the public funds, and residuary personal estate to trustees upon trust, to let the house and convert the furniture and other effects into money, and pay the income, etc., to his wife for her life, and after her death upon trust to assign the house and pay and transfer the said stocks, funds, and premises to his nephew R. for his own use and benefit absolutely. An undated letter from the testator to R. was found amongst his papers after his death, by which the testator purported to explain the intentions of his will. This letter contained expressions of wish that R. should be considerate and liberal to his relations, should have some one of his nephews educated as a physician, and bequeath to such nephew the greater part of the property, the interest of which "I now bequeath to your dear aunt, and after her to yourself (R.)." This letter was admitted to probate:—Held, that the absolute gift to R. contained in the will was not cut down by the expressions in the letter, which were too ambiguous to create any trust capable of being enforced in equity. *Re Pinchard's Trust*, 27 L. J., Ch., 422; 1 L. T., N. S., 67: 4 Jur., N. S., 1041.

5. There is no foundation for the doctrine that if there is a limitation in a will which by itself gives a vested estate, and a condition is afterwards added, on a breach of which the estate is to go over, the limitation and the condition will be construed into a contingent devise. *Clavering* v. *Ellison*, 7 H. L. Ca. 707; 29 L. J., Ch., 762. Affirming 3 Drew. 451; 8 De G. M. & G. 662; 3 Jur., N. S., 276; 26 L. J., Ch., 335; 2 Jur., N. S., 201; 25 L. J., Ch., 274.

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning. *Ib.*

6. In construing a will, plain and distinct words are only to be controlled by words equally plain and distinct. *Goodwin* v. *Finlayson*, 25 Beav. 65. And see *Walmsley* v. *Foxall*, 1 De G. J. & S. 605.

7. When there is an express gift in a will, and there is a subsequent clause inconsistent with the first, but with only an implied revocation, the prior gift takes effect. *Kerr* v. *Clinton* (*Baroness*), 8 L. R., Eq., 462; 17 W. R. 980.

A testator having real estates subject to mortgages, for which he was not personally liable, devised his personal estate for payment of his debts, and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove insufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons:—Held, that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate. *Ib.*

Inconsistency and Repugnancy. In General.] See XIII. *ante.*

See also XIII. *ante*, and next Subdivision.

VII. ABSOLUTE INTERESTS. HOW FAR CUT DOWN QUÂ ENJOYMENT BY QUALIFYING TRUSTS.

8. Where in a will there is a general absolute devise of real and personal estate, and in a

subsequent clause the testator uses language plainly restrictive of the absolute gift in one species of property, but not in words confining it to that one, the restriction will be held applicable to both, in order to carry out the clear intention of the testator, unless there exists a clear necessity for excluding the other from its operation. *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84.

1. Where there was a bequest of personalty, in terms giving an absolute interest in the first instance to the legatees, followed by a direction to invest in trust for them for life, with a remainder to their children that was too remote, it was held, that the absolute gift was not cut down by the subsequent direction. *Ring* v. *Hardwick*, 2 Beav. 352; 4 Jur. 242.

2. Illustration of the distinction between a direction in a will which goes to cut down or qualify a prior absolute gift, and one which only goes to regulate the mode in which such gift shall be dealt with and enjoyed. *Gompertz* v. *Gompertz*, 2 Ph. 107; 16 L. J., N. S., Ch., 23; 10 Jur. 937.

3. If a testator leaves a legacy absolutely as regards his estate, but restrains the mode of enjoyment adapted to secure certain objects for the benefit of the legatee, on failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but modes of enjoyment are prescribed which fail, the legacy forms part of the testator's estate. *Quære*, the effect, on an absolute gift which is ambiguous, of pointing out the mode of enjoyment in every possible event to which the testator's mind was turned. *Lassence* v. *Tierney*, 1 Macn. & G. 551; 2 H. & Tw. 115; 14 Jur. 182.

4. Bequest to a daughter of 1,000*l.* stock, and 70*l.* a-year for life, which two sums were to be under the trust of the executors, and not to permit her to assign "her said annuities," and pay the interest from the 1,000*l.* to her for her life, and at her decease to divide it between her children:—Held, that the daughter took for life only, and not an absolute interest subject to be defeated by the interests given to her children. Distinction between an absolute bequest with a subsequent gift in derogation, and a limited bequest followed by a subsequent restricted gift over. In the former case, the absolute gift remains upon failure of the subsequent gift, but in the latter the limited bequest is not enlarged by such an event. *Scarisbrick* v. *Watson*, 10 Beav. 200; 16 L. J., N. S., Ch., 404; 11 Jur. 576.

5. Bequest to the children of A. B. for life; but in case of death before marriage, his share to go to the survivors. In the margin was written, "What is to become of the principal? The share of the parent to be divided amongst the children, if any. *Quære*, to be put in afterwards in a proper manner." The children of A. B. all died unmarried:—Held, that the gift was for life only, and not an absolute gift cut down merely to admit their children. *Kay* v. *Winder*, 12 Beav. 610.

6. Gift of residue to be equally divided between the testator's wife, sons, and daughters, subject, nevertheless, as to the shares of the daughters, which were to be placed in funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children:—Held, that their representatives were entitled to their shares. *Whittell* v. *Dudin*, 2 Jac. & Walk. 279.

7. An absolute gift of residue to the testator's widow:—Held, to be reduced to a life interest only, by subsequent directions as to the payment of interest on money lent, to be made to her "as long as she lives." *Flinn* v. *Jenkins*, 1 Colly. 365; 8 Jur. 661.

8. Where the bequest of residuary estate gave absolute interests to children in their respective shares, but afterwards, by a direction as to those of his daughters, that a moiety of their shares should be settled on them for life, with remainder to their children:—Held, that, on the death of a daughter unmarried, the purpose of such limitation in favour of her children failing, her representatives were entitled absolutely to her interest in the moiety directed to be so settled. *Winckworth* v. *Winckworth*, 8 Beav. 576; 9 Jur. 793.

9. Testator gave all his property to trustees, in trust, to invest it in securities at interest, for the use of his nephew, to be paid in such manner as the trustees should think fit; and when the nephew should attain twenty-one, that the trustees should pay him the amount of the interest or proceeds of the money come to their hands, as they might think most for his advantage, in weekly or quarterly payments for his life:—Held, that the nephew took an absolute interest in the property. *Billing* v. *Billing*, 5 Sim. 232.

10. A testator directed his trustees "to raise 5,000*l.* for his daughter," his said daughter's legacy to be invested, and the interest paid to her for her separate use for life, with remainder to her children absolutely, but with power to her to appoint a life interest to her husband. The daughter died unmarried:—Held, that she took an absolute interest in the legacy. *Mayor* v. *Townsend*, 3 Beav. 443; 10 L. J., N. S., Ch., 216; 5 Jur. 91.

11. Bequest of 1,000*l.* to a married woman for her own use, nevertheless, during her life, to pay the dividends, during her life, for her separate use, independent of any husband:—Held, an absolute interest. *Gurney* v. *Goggs*, 25 Beav. 334.

12. A bequest to M. E., testator's wife, of "the legal interest on bonds, debentures, and funded property, together with household furniture, etc., to be disposed of as she shall think proper:" and in case F. E. should survive the said M. E., that he should have "the interest of money, and whatever does belong to her, that she does not dispose of":—Held, that M. E. having survived F. E., the absolute gift to her was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty. *Phillips* v. *Eastwood*, Ll. & G. *temp.* Sugd. 270.

13. A testatrix bequeathed her residuary estate to trustees upon trust for her daughter for life, with remainder to the "younger children" of her said daughter, the shares of sons to be paid at twenty-one, and those of daughters at twenty-one or marriage; with a direction to invest the shares of daughters, and

pay them the income for their separate use from the time of marriage or upon their attaining twenty-one, so that the capital of each daughter's share should pass to the children of such daughters; with such trusts or remainders, in the event of there being no such issue, as the trustees should think proper:—Held, that the absolute interest given to daughters by the first part of the will was cut down only in the event of their having issue; and that an unmarried daughter, aged fifty-six, was entitled to receive her share upon entering into personal recognisances. *Lyddon* v. *Ellison*, 18 Jur. 1066; 19 Beav. 565.

1. Where the testator directed his trustees to apply the interest arising from his residuary estate for the maintenance of all his children, and the surplus to accumulate until the youngest should attain twenty-one, and then the capital to be divided into as many shares as there should be children then living, one to be allotted to each, and the issue of such as should be then dead to take their parents' shares, the shares of sons to be payable at twenty-one, and of daughters to remain in the hands of his trustees, upon trust to pay the interest for their lives for their separate use, and on the decease of such daughters leaving issue on the youngest attaining twenty-one:—Held, that a daughter living at the time when the youngest child attained twenty-one who died single, took an absolute interest in a share of the residue, the gift which was absolute in the first instance not being affected by the direction as to settling the shares of the daughters having issue. *Hulme* v. *Hulme*, 9 Sim. 644.

2. Testator set out a schedule of his property, calling it 5,000*l*. He then directed 1,000*l*. to be invested in each child's name, and 1,000*l*. in his wife's; interest to them for their life, and afterwards to their descendants, except his wife's, which was, at his death, to be sold and divided among them, except 200*l*. to M. L.'s child by him. Then followed in the same paper: "The above is increased, by the working up of stock, to 5,000*l*. I wish the same division and appropriation, except that, if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters:—Held, that by the will alone, the daughters would have taken absolute interests; but that by the will and codicil together, they took interests which, if absolute in the first instance, were defeasible. *Bird* v. *Webster*, 1 Drew. 338; 22 L. J., Ch., 483.

3. A testatrix gave her residuary personal estate to A. absolutely. She then gave legacies to several persons after the death of A.:—Held, that this did not cut down A.'s interest in the residue to a life interest. *Jennings* v. *Sparrow*, 1 W. R. 297; 17 Jur. 433.

4. A testator by will, dated in 1853, gave the residue of his property to his three brothers and nephew for their lives, as tenants in common; and after the decease of his brothers and nephew, then in trust for their heirs and assigns, as tenants in common; provided always, that in case any or either of their children should die under twenty-one, without leaving issue, the share of each child so dying should be in trust for the survivors or survivor; but in case any or either of such children should die leaving lawful issue, then the share of each such child to go to his or her child or children; and if there should be only one such child of his brothers or nephew who should attain twenty-one or be married, then in trust for such child, his or her heirs and assigns for ever. Upon a bill for the construction of the will:—Held, that it must be assumed that there was an omission of a gift to the children of the testator's brothers and nephew after the gift to them, and that the will must be read as giving the brothers a fee in the first clause of the devise, which was cut down to a life estate in the event of their having children, with a devise in fee to the children. *Spence* v. *Handford*, 4 Jur., N. S. 987; 27 L. J., Ch., 767; 1 L. T., N. S., 244.

5. Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, and after her death to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:—Held, that the wife was absolutely entitled. *Crozier* v. *Crozier*, 15 L. R., Eq., 282; 21 W. R. 398.

6. Testator gave 4000*l*. to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil, he directed that his granddaughter should have only the interest of 2,000*l*. for her maintenance, until she attained twenty-three, and that the interest of the other 2,000*l*. should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her, for her life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy:—Held, that the gift in the will was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. *Bell* v. *Jackson*, 1 Sim., N. S., 547.

7. A. directed his executors to raise a legacy "to or in trust for his son." It was to be invested in the names of trustees, and life annuities were given to the son and his wife out of the income, and interests were given to the children of the son and to their issue, with gifts over:—Held, that there was an absolute gift to the son cut down to the limited extent of the subsequent gifts. *Salmon* v. *Salmon*, 29 Beav. 27.

8. A testator bequeathed his residue to his nieces A. and B., and he then confined the gift to A. and B. and their children, without comprehending their husbands, unless his nieces should die without issue:—Held, that A. and B. took for their separate use for life, with remainder to their children; and that in default the nieces took absolutely. *Dawson* v. *Bourne*, 16 Beav. 29.

9. A testatrix directed her fortune to be divided between A. and R. K., appointing trustees for R. K. to pay him half-yearly his share. By codicil, reciting that A. was dead, she desired that her fortune should be divided between R. K. and T. K., for the use of their children, and when they came of age to be settled upon them, share and share alike.

R. K. survived the testatrix, and died without ever having had a child:—Held, that the gift to him by the will of a moiety was absolute, and that the modification introduced by the codicil affected it so far only as was necessary to give effect to the disposition in favour of his children, and that this disposition having failed, the absolute gift remained, so that his personal representatives were entitled to his moiety. *Norman* v. *Kynaston*, 3 De G. F. & J. 29; 7 Jur, N. S, 129; 9 W. R. 259; 3 L. T, N. S., 826. Affirming 30 L. J., Ch., 189; 29 Beav. 96; 9 W. R. 50.

1. A testator gave all his property, real and personal, to trustees, and directed that they should sell his freehold estate, and make up an account of his estate, so that they might be able to make a division among his nine children, to whom he left the same in equal shares. After other directions, he declared that he left the shares of his daughters to them, for their lives, free from the control of their husbands, with power to appoint among their children, notwithstanding coverture. In a subsequent clause he directed that the shares of his sons who should have attained twenty-one at the time of his death should forthwith vest in them, and that the shares of the other sons should vest as they should afterwards attain twenty-one, and the shares of daughters on marriage; and that the shares of sons who should die under twenty-one, and of daughters who should die unmarried, should go amongst the survivors as therein mentioned. A., one of the daughters, married, and died without having exercised her power of appointment, leaving one child:—Held, that A. took an absolute interest in her share of the fund. *M'Tear* v. *M'Dowell*, 11 Ir. Ch. R. 338.

2. Bequest of residue to be divided equally between A., B., C., and D., with benefit of survivorship between them in case of the death of any or either of them without issue:—Held, that the gift was absolute, and the clause of survivorship void. *Wells* v. *Maling*, 3 Jur. 36.

3. A grandfather, by his will, after reference to the provision thereinafter made for his granddaughter, directed that, as to certain shares, until his granddaughter attained the age of twenty-one, or should be married with consent, his executors should hold them upon trust to pay the dividends to his daughter, but when his granddaughter should attain the age of twenty-one, or before upon marriage with consent, upon trust to pay the dividends to his daughter during her life, apart from her husband; and in case of her marriage with consent then upon such marriage he gave to his executors such a sum of money as would, with the value of the shares, make up 2,500*l.*, upon trust to settle the same for the benefit and provision of his daughter for her separate use, with power in such settlement for her to dispose of the same among her issue, or if no issue, a general power of disposition; and the will contained a gift over in the event of her dying under twenty-one and unmarried. She attained twenty-one, but was still unmarried:—Held, that she was not entitled absolutely, but took an interest for life, subject to any question that might arise on marriage. *Savage* v. *Tyers*, 41 L. J., Ch., 815; 7 L. R., Ch., 356; 20 W. R. 317.

4. By will, dated in 1829, a testator gave to A. 800*l.*, "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees may think fit," and if not, then the interest was to be paid to A. for life, with remainder to his son, if he should have any. A. died intestate and unmarried. No part of the legacy was ever paid to A. or applied for his benefit:—Held, that the first gift to A was never taken away, except in the event of his leaving a son as above mentioned; and that, he having died without a son, his administrator was entitled to the legacy. *Lord* v. *Lord*, 3 Jur., N. S., 485.

Semble, that the legacy did not belong to A. absolutely until his decease without a son. *Ib*

5. A testator bequeathed one-third of his residue to his daughter, her executors, etc., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve and be settled by deed upon her, as a feme sole, and that the income should not be anticipated, and that until her marriage she should only be entitled to receive the dividends, and retain the power to bequeath the capital by will. The daughter being unmarried:—Held, that she took absolutely, and was entitled to payment of the fund out of court on attaining twenty-one. *Re Young's Settlement*, 18 Beav. 199.

6. An appointment of a person as residuary legatee, with a desire that the testator's residuary estate be afterwards left in the residuary legatee's and his own name to charitable purposes, is not sufficient to create a charitable trust, and to cut down the beneficial interest of the legatee. *McCulloch* v. *McCulloch*, 1 N. R. 535; 11 W. R. 504.

7. A husband bequeathed property to his wife for life, with remainder to his sons and daughters, the share of the daughters "to be vested in the bank in their own names, and the interest for life to be received by them to remain as a jointure for their use in case of their marrying, untouchable by their husbands, but to descend to their legal or nearest-of-kin":—Held, that a daughter, whether marrying or not, took only a life interest, with remainder to her next-of-kin. *Harris* v. *Newton*, 36 L. T., N. S., 173; 25 W. R. 228; 46 L. J., Ch., 268.

8. If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. *Kellett* v. *Kellett*, 3 L. R., H. L. 160.

A testator directed his trustees holding his real estate to levy and raise for his five daughters, naming them, 1,000*l.* each:—Held, that this was in itself an absolute provision for each. *Ib.*

The will directed that the sum of 1,000*l.* each should be raised "subject to the provisoes thereinafter expressed:" *i.e.*, the trustees were to permit each daughter to take the interest for life—in case she should marry, her husband was to take the interest for life—and after the decease of any daughter unmarried or without issue, the principal was to be applied amongst all or any of his other children, in such shares

as the daughter dying should appoint, and, in default of appointment, amongst the surviving children or their issue in equal shares. By a codicil he revoked his will "so far as the said sum to each of my daughters is given absolutely, and I declare that in the event of any of my daughters remaining unmarried, she shall only be entitled to an interest for her natural life," and he then confirmed the gift, "subject to the restriction aforesaid":—Held, that these provisions did not qualify the gift, except so far as the restriction as to remaining unmarried was concerned. *Ib.*

Held, also, that, notwithstanding the revocation, by the codicil, of the absolute gift, the Court had properly declared the survivor entitled for her life to a distributive share of her deceased sisters' interests in the sums given to them. *Ib.*

A testator resided in a house at W. By his will he recited that he had made a lease of this house and certain lands adjoining, and he directed his trustees to hold the house and lands for the lives of his five daughters and their survivors, subject to the yearly rent of 2*l.* 10*s.* per annum, his object being to provide them with a residence. By a codicil he declared that his (then surviving) daughters should have "the house at W., and the lands as laid out, furniture, and plate at their disposal":—Held, that reading the will and codicil together, the surviving daughter was entitled to have the house and land free from any rent, and to have the plate and furniture absolutely. *Ib.*

1. When an absolute gift or an appointment in a will is attempted to be cut down by a subsequent inoperative modification or restriction, the original gift remains unaffected by the intended restriction. *Churchill* v. *Churchill*, 16 W. R. 182; 5 L. R., Eq., 44.

2. Under a gift of a sum of money "to my daughter J. H., to be employed for her use in the following manner," accompanied by a direction that the fund should be invested, and the interest only paid to the daughter during her life, and, in case she should marry and have children, then the principal to be divided amongst such children:—Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund. *Campbell* v. *Brownrigg*, 1 Ph. 301; 13 L. J., N. S., Ch., 7.

3. When either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, and any daughter who dies without issue takes her share absolutely. *Re Sidway Hall Estate*, 37 L. T., N. S., 457.

4. A testatrix bequeathed personalty in trust for A. B. for life, and after his decease for his issue, and on failure of his issue to F. H. S. and R. S., share and share alike, "and after the decease of the said F. H. S. and R. S. to their children share and share alike, and to their heirs for ever." F. H. S. died without having had issue, R. S. survived him and died leaving children, and A. B., who survived them both, died without issue. Upon a petition by the children of R. S. for payment out of a portion of the trust fund which was in court:—Held, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of F. H. S. and R. S. to their respective children, and that there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F. H. S. and the children of R. S. *Re Hutchinson's Trusts*, 21 L. R., Ch. D., 811; 51 L. J., Ch., 924; 47 L. T. 573.

See also preceding Subdivision.

Effect of Clauses Obnoxious to the Rule against Perpetuities.] See PERPETUITY.

VIII. INTERESTS. WHETHER FOR LIFE OR ABSOLUTE IN OTHER CASES.

5. A legacy was, after certain limitations, "to revert to the possessor of the estate":—Held, that the tenant for life of the estate took it absolutely. *Mangin* v. *Mangin*, 16 Beav. 300.

6. A testator, by his will, gave a legacy to his daughter for life, for her separate use with remainder to her children. By a codicil, headed as "instructions to his solicitor," to add to his will, he gave another legacy "to his daughter and children, for their sole use and benefit, etc., etc.," and one-third of the residue "to his daughter and children for their sole use and benefit":—Held, that the daughter took a life interest in the gifts by the codicil. *Cator* v. *Cator*, 14 Beav. 463.

7. Testator by an ungrammatical will before the Wills Act 1837, after giving his widow the rents of all the tenements and lands belonging to him during widowhood, to be afterwards divided into three equal parts according to value between his three sons, enumerated the particulars of his real estate, and proceeded: "My stock in trade, money, book debts, and what other effects not included in the above statement, to be equally divided between my two sons T. and W., and to pay all my lawful debts":—Held, that the words "according to value" did not amount to a direction to sell, and that the three sons in the first gift took for life only. *Milsome* v. *Long*, 3 Jur., N. S., 1073.

8. Testator bequeaths certain leasehold hereditaments to A. for life, remainder to B., remainder to C.:—Held, that B. takes a life interest only in the leaseholds. *Lonsdale (Earl)* v. *Berchtoldt (Countess)*, 1 Kay 640; 23 L. J., Ch., 816; 18 Jur. 811.

9. Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body, share and share alike. The sister had five children living at the testator's death:—Held, from the context of the will, that she took for life, with remainder to her children as tenants in common. *Symers* v. *Jobson*, 16 Sim. 267.

10. A testator bequeathed to his wife absolutely 100*l.*, his household furniture, etc., and then bequeathed to her the interest of moneys invested by him in certain loan societies, and all his other property, during her life. He afterwards bequeathed all moneys belonging

to him in a friendly society, and in all other societies, to his wife absolutely:—Held, that the expression "all other societies" meant societies *ejusdem generis* with that which had been just mentioned, and that as to the moneys payable by the loan societies the widow took a life interest only in them. *Marks* v. *Solomons*, 2 H. & Tw. 323; 19 L. J., N. S., Ch., 555.

1. A testator gave the interest of his residuary estate to his widow for her life, and directed that in case it should not be sufficient she should be at liberty to go to the principal. The widow claimed the whole fund, but stated that 60*l.* a year was the least she required for her maintenance. She died before her claim was disposed of. Upon a petition by her administrator:—Held, that she was entitled to have 60*l.* a year made up to her out of the principal, and that if in her ordinary expenditure she left any debts they must also be satisfied. *Re Pedrotti*, 6 Jur., N. S., 187; 29 L. J., Ch., 92; 27 Beav. 583.

2. A. gives by a codicil to B., during her natural life, his house in G., with all the household goods found therein at the time of his decease. The word "with" so conjoins the house and goods that the devisee can have no larger interest in the one than in the other. *Leeke* v. *Bennett*, 1 Atk. 470.

3. A testator gave his estate to four children in equal proportions, but his wife was to have "her proportionate part" for life, and it was given afterwards to the four children. And as to "the part of his estates" thereinbefore given to his daughter, she was to have it for life, with remainder to her children:—Held, that the "part" of the daughter included her share in the part given to the wife for life, and that therefore she was only entitled to a life interest in it. *Watson* v. *Pryce*, 34 Beav. 71.

4. Residuary devise and bequest, after the death of testator's brother and sister, J. C. and S. C., to his sister M. K., to be held by her, and in the event of her decease, by her trustee or trustees for the benefit of her daughter A. K., and in the event of the death of A. K. to go among her brothers and sisters:—Held, to give the absolute interest to A. K. *Kerr* v. *Cusac*, 1 Jur. 792.

5. Upon a bequest of money to be placed in each child's name, the interest to them for life, and after to their descendants, with the superadded words, "as any share falls in":—Held, the intention was to give a life interest. *Bird* v. *Webster*, 1 W. R. 121; 1 Drew. 338; 22 L. J., Ch., 483.

6. A testatrix bequeathed the "interest of a sum of money to her eldest child for life," and afterwards to devolve in succession on her (the testatrix's) remaining children:—Held, on the death of the eldest, that the others were entitled for life in succession, according to their priority of age. *Young* v. *Shepherd*, 10 Beav. 207; 16 L. J., N. S., Ch., 247.

7. A testatrix, after bequeathing certain property to her two daughters and to her three sons, T., G., and J., gave the residue of her property to her sons T. and G. if both living at her decease, and, if either should be then dead, leaving no issue, the whole to the survivor; and, if both should be then dead, leaving no issue, then the whole to J.; and, if he should be then dead leaving no issue, then to and amongst her daughters equally, or the survivor of them, or to an only surviving one; but directing, if either of her sons or her daughters should die, leaving issue, that such should take the parent's respective share of the provision already made for the sons and daughters respectively, unless otherwise appointed by the parent:—Held, that the word "provisions" meant only the residue so disposed of, that the sons T. and G., having survived the testatrix, were entitled absolutely to the residue. *Young* v. *Martin*, 2 Y. & Coll. C. C. 582; 7 Jur. 1147.

8. A father gave all his personal estate upon trust for his two sons "to be disposed of" as follows: Income to accumulate until sons respectively attained twenty-five, when each was to take to take half of the accumulations, or the survivor the whole; between twenty-five and thirty the sons or their widows were to receive the income. Sons on attaining thirty, and having children, the whole to be paid to "them"; if either or both should be without children, then they should only be entitled to the income. One son died unmarried in the testator's lifetime; the other son attained the age of thirty and had a child:—Held, that he was only entitled to a life interest. *Allen* v. *Allen*, 21 W. R. 747.

9. Bequest of a legacy to A. to be paid at twenty-five or between twenty-one and twenty-five, if the executors should think proper; and maintenance in the meantime, with a limitation over, in case A. should not receive or dispose of it by will or otherwise, in his lifetime: the limitation over held void. *Ross* v. *Ross*, 1 Jac. & Walk. 154.

10. A testator by his will desired that his wife might reside during her widowhood in the freehold house in which he dwelt. After directing his business to be carried on by his executrix (who was his wife) and his executors, so long as they thought expedient, he gave the house, stock-in-trade, and the residue of his property to his executrix and executors, upon trust to pay the wife an annuity of 20*l.* so long as the business should be carried on, and when his youngest child attained twenty-one, to sell the business, stock, and effects, together with the house, and out of the proceeds to pay the wife during her widowhood an annuity of 54*l.* 10*s.* instead of one of 20*l.*, and, subject thereto, trusts were declared for the benefit of the children:—Held, that the widow's right to reside in the house ceased upon the sale. *Chapman* v. *Gilbert*, 4 De G. M. & G. 366.

11. A testator gave to his wife, F. H., the interest of all his property in the public funds during her life, the principal being placed in the names of the undermentioned trustees for that purpose, and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary. On the death of his wife he gave to his daughter, J. H., 200*l.* stock 3 per cent. reduced annuities, and to two other persons 50*l.* 3 per cent. reduced annuities, respectively, and to his son the residue of his property, after paying those legacies. And he appointed two persons his executors and trustees. At the date of his will the testator had 700*l.* 3 per cent. reduced

annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage:—Held, that the gift to F. H. of the interest of the testator's property in the funds was specific, and consequently adeemed by the sale of the stock, but that the other legacies were general, and that F. H. took only a life interest in the testator's residuary estate. *Hayes* v. *Hayes*, 1 Keen, 97; 5 L. J., N. S., Ch., 243.

1. Where testator bequeathed to his wife all his household goods, furniture, plate, linen, and china in his house at E., or to the said house belonging, and also the said house, gardens, field, and land thereto belonging, so long as she continued his widow and no longer; and he likewise gave her his jewels, etc.:—Held, that the household goods, furniture, plate, linen, and china were put under the same restriction as the house itself; but that the jewels were the wife's absolute property. *Richards* v. *Baker*, 2 Atk. 321; 9 Mod. 325.

The putting limiting words in the first or last part of a sentence makes no difference as to the construction. *Ib.*

A testator may give one thing to a person for life, together with an absolute property in another, unless the latter should be appurtenant to the thing before given. *Ib.*

2. A wife appointed 5,000*l.* to her daughter, but if she had a fortune of 25,000*l.* (over which the husband had a power of appointment), then she desired the 5,000*l.* to be divided between her son and daughter, desiring that her husband should have a life interest therein:—Held, that the husband took a life estate, at all events. *Darby* v. *Darby*, 18 Beav. 412.

3. G. left the residue of his property to trustees in trust (after the death of his wife) for his children who being sons should attain the age of twenty-one or leave issue, or being daughters should attain twenty-one or marry; and if only one child then for him or her absolutely. The will went on to provide that the children of the testator's children should stand in the place of their respective parents, which provision was followed by clauses of survivorship, accruer, maintenance, and accumulation. In the accumulation clause reference was made to "the parties entitled for life":—Held, that the testator's children took life interests only in the residue. *Re Green*, 17 W. R. 1081.

4. Bequest to A., his executors, administrators, and assigns, but in case he shall die leaving lawful issue, then in trust for his children:—Held, that the subsequent gift cut down the former to a life estate. *Johnston* v. *Antrobus*, 21 Beav. 556.

5. Testatrix by her will devised all her fee-simple, freehold, and leasehold estate to R. E. for life, remainder to J. E. for life, with remainder, save a certain rent-charge, to the Commissioners of Charitable Donations, in trust to pay the head-rents and to apply the annual profits to certain charities:—Held, that R. E. and J. E. took beneficial interests for their lives. *Charitable Donations (Commissioners of)* v. *Espinasse*, Fl. & K. 164; 3 Ir. E. R. 324.

6. A testator gave and devised to trustees all his freehold, leasehold, and personal property, upon trust to sell, and the money arising from such sale was to be invested for the benefit of his three daughters; the interest thereof to be paid to each of them for their lives, and on the decease of each of them one half of the fund or share to be paid to the children of each daughter so dying at the age of twenty-one, and the other half to such grandchildren for life only, and afterwards to their children at twenty-one:—Held, that the gift to the children of grandchildren was void for remoteness, that the daughters did not take an absolute interest, and that the undisposed-of portion of the real property went to the testator's heir. *Whitehead* v. *Bennett*, 22 L. J., Ch., 1020; 18 Jur. 140; 1 W. R. 406; 1 Eq. Rep. 561.

XLVI. Secret Trusts and Parol Promises made to Testators.

I. SECRET OR PAROL TRUSTS AFFECTING DEVISES AND BEQUESTS.

7. Devise of 1,500*l.* to A. and B. for such uses as testator had declared to them, and by them not to be disclosed, A., in the life of B., writes a letter disclosing the trust. This is a good declaration of the trust. *Crooke* v. *Brooking*, 2 Vern. 106.

8. A. having made his will, and his wife executrix, and the son prevails with the mother to get his father to make a new will, and that he might be made an executor, and promises to be a trustee for his mother: trust decreed. *Thynn* v. *Thynn*, 1 Vern. 296.

9. Parol admitted of declaration of devisee to prove she was only trustee. *Strode* v. *Winchester*, Dick. 397.

10. Though there can be no parol declaration of a trust since 29 Car. 2, yet parol evidence is proper in avoidance of fraud. *Hutchins* v. *Lee*, 1 Atk. 448.

11. Circumstances under which a parol trust of real estate will be enforced. *Donohoe* v. *Conahy*, 2 J. & L. 688; 8 Ir. Eq. R. 679.

12. A., by will, gave lands to S., and having afterwards purchased other lands, he on his death-bed desired B., his heir-at-law, not to hinder S. from enjoying the new purchased lands, though he had not by any writing declared the trust for S. B. suffered S. to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will. Decreed, that this was out of the Statute of Frauds, and that B. letting S. enjoy it so long was an execution of the trust, and though no express fraud was proved against B. (as in *Lester* v. *Foxcroft*, Colles's P. C. 108), yet the possession for eleven years was a strong presumption that he suffered it in execution of the testator's declaration. *Harris* v. *Horwell*, Gilb. Eq. Rep. 11.

1. A certain estate was devised by will to one for life, remainder in tail male. By an unattested codicil, some annuities were directed to be paid by whoever inherited such estate. A general demurrer to a bill, which prayed payment of an annuity and arrears, was allowed. *Middlebrook* v. *Bromley*, 2 N. R. 224; 9 Jur., N. S., 614; 11 W. R. 712.

2. If A. devise all her personal estate to B., to be disposed of as B. shall think fit, and add by parol, "you may if you please give 100*l.* to my niece;" B., on a bill, in the answer to which the parol declaration is admitted, shall be decreed to pay the 100*l.* to the niece. *Nab* v. *Nab*, 10 Mod. 404.

3. If a legatee promises a testator, that in consideration of a disposition in her favour she will do an act in favour of a third person, she who undertook to do the act must perform it. *Drakeford* v. *Wilks*, 3 Atk. 539.

4. Testator gave his real and personal estate to his wife absolutely, "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposition of my property after her decease." After the death of the wife intestate, a bill was filed by two natural children of the testator against his heir and next of kin, and also against his wife's heir and administrator, alleging that testator, at time of making will, desired his wife to give the whole of his property after her death to the plaintiffs, and that she promised and undertook so to do:—Held, that if the plaintiffs had proved that allegation, a trust would have been created as to the whole of the property in favour of the plaintiffs. *Podmore* v. *Gunning*, 7 Sim. 644; 5 L. J., N. S., Ch., 266.

5. A testator bequeaths to A and B. in trust for certain purposes which the will states to have been fully explained to them; on the same day a paper writing is signed by A. and B., in which they declare that the bequest is upon trust for six persons, whose names are stated, and after their signature some lines are added in the handwriting of the testator, by which a seventh person (an unborn child) is admitted to a share of the legacy; upon a bill filed by one of the six persons named in the body of the paper writing, the Court recognised the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper. *Smith* v. *Attersoll*, 1 Russ. 266.

6. A testator having declared, by parol, to his residuary legatee, certain trusts, to which he wished 2,000*l.* to be applied, afterwards made a codicil, stating that he had instructed the residuary legatee as to the disposition of his property:—Held, that the parol trusts could be enforced against the personal representative of the residuary legatee. *Att.-Gen.* v. *Dillon*, 13 Ir. Ch. R. 127.

7. John B. and others file a bill alleging that E. B. was, at the date of his will and death, possessed of considerable property in places named and elsewhere, and was the great-uncle of the plaintiffs, and being so possessed made his will duly executed, and thereby devised all his real and his residuary personal estate on certain trusts in favour of James B. a son of his brother B. B., and his children or some of them; or upon trusts under which James B. and his children, or some of them, became entitled to the testator's real and residuary personal estate. That E. B. died at an advanced age, but the plaintiff could not discover the time or place, and naming certain persons, with the defendant R. S., as present. That a box containing the will and title deeds had been found by these parties and concealed ever since; and that they were in receipt of the rents, for which they had given false receipts under fictitious titles. That James B. died in 1846, without having discovered the fraud, and that the plaintiff was his heir at law, and that the plaintiffs were unable to proceed at law by reason of the defendants' possession of the will and title deeds. And the bill prayed the production and deposit and delivery up of the will and title deeds; that the trusts might be carried out under the direction of the Court; for all necessary conveyances and transfer; and for an injunction and receiver. Upon a general demurrer to this bill for want of equity—Demurrer allowed with costs, upon the ground that the plaintiffs did not allege any title to the property in question. *Bothomley* v. *Squire*, 4 W. R. 338; 3 Drew. 517; 2 Jur., N. S., 153.

8. A devise of land to A. upon the face of the will for his own benefit, but really upon a secret trust assented to by him for a charity, vests the legal estate in A., subject only to a resulting trust for the testator's real representative. *Sweeting* v. *Sweeting*, 10 Jur., N. S., 31; 33 L. J., Ch., 211; 9 L. T., N. S., 783; 12 W. R. 239; 3 N. R. 240.

Therefore, where a testator devised his residuary real estate to trustees upon a secret agreed trust for a charity, and his heir-at-law was not known:—Held, as between the Crown and persons claiming under the surviving trustee, that the legal estate was well devised, and that the former could therefore establish no claim by escheat. *Ib.*

The Court considered itself bound by the 25 & 26 Vict. c., 42 to decide the question as to the legal effect of the devise, and accordingly made a declaration as to the legal right, dismissed the attorney-general from the suit, and directed inquiries as to the heir. *Ib.*

9. Where on the face of a will there is nothing to show that any trust or purpose was intended by the testator other than a gift of the whole beneficial interest to the legatee, the plaintiffs, in order to succeed in setting the bequest aside, must prove by evidence a trust expressed, or such engagement, by words or by silence, as will authorise the Court to say that the legatee undertook to do that which the law prevented the testator from imposing upon her—an express trust to devote the residue to an illegal charitable purpose. *Lomax* v. *Ripley*, 1 Jur., N. S., 272; 24 L. J., Ch., 254; 3 Sm. & Giff. 48.

Where the evidence, parol and documentary, merely proves the wishes and intentions of the testator, and that he refrained by instruction and premeditation from declaring any trust, or imposing any obligation, or exacting any promise for their fulfilment from the legatee, and also that the legatee was, from the impulses of her own mind and disposition, bent on fulfilling the testator's wishes and intentions if she had the power, it falls short of what is required to establish the existence of any secret or honorary trust, the

performance of which could be compelled on the footing of the breach of a promise or engagement which would have been binding on the conscience. *Ib.*

Where a gift is in terms absolute, but accompanied with an expression of wishes in favour of another object, and a confidence in the honour and justice of the legatee, unless the language is so express as to be in terms imperative, and to exclude all option or discretion, they cannot bind the legatee or create a trust. *Ib.*

1. A testator gave a policy of assurance to two trustees, "to hold the same upon uses appointed by letter signed by them and myself." No such letter existed at the date of the will, but the testator had previously asked the trustees, who had consented, to accept the bequest for the benefit of persons and objects then named by the testator. Long after the date of his will, the testator wrote a letter, addressed to his executors, stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim by one of the persons beneficially interested under the memorandum, against the executors and trustees:—Held, that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will; and that the letter would not operate as a gift *inter vivos*, and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. *Johnson* v. *Ball*, 5 De G. & Sm. 85; 16 Jur. 538; 21 L. J., Ch., 210.

2. A person gave his real and personal estate to trustees, on trust to sell the same, and after payment of his debts, to pay the same, and he gave and bequeathed the same to I. (to whom he was engaged to be married) "absolutely, trusting she would carry out his wishes with regard to the same, with which she was fully acquainted." Shortly before the date of his will the testator had verbally expressed to I. his wish that she should make certain gifts out of the property to be bequeathed to her, and she had afterwards written down his wishes for her own use, but not in the testator's presence:—Held, that I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself. *Irvine* v. *Sullivan*, 38 L. J., Ch., 635; 8 L. R., Eq., 673; 17 W. R. 1083.

3. A testator, by will, gave the residue of his personal estate to trustees, upon trust to his wife for life; and after her death, for his nephew R. absolutely. After his death, a letter in his own handwriting, but without date, was found among his papers, addressed to R., and he therein, after requesting that it might be accepted in explanation of his will, lest there should be anything not fully explanatory of his intention in the terms of such will, expressed a wish that his property, after the death of his wife, "should be R.'s." He also expressed a wish that R. should educate some one nephew as a physician, and bequeath to such nephew all, or the greater part, of the property bequeathed to R. by the testator, adding that he wished finally to benefit such nephew as R. might select as his successor. This letter was admitted to probate. The testator died, leaving his wife and R. surviving. R., by will, gave the property bequeathed to him by the testator to his (R.'s) brothers and sisters:—Held, that although the letter addressed to R. was a distinct testamentary instrument, it was recommendatory only to, and not obligatory on R., and that it was not sufficiently definite to destroy the effect of the absolute gift to R. contained in the will. *Re Pinckard's Trusts*, 4 Jur., N. S., 1041; 27 L. J., Ch., 422.

4. A testatrix having executed a will and three codicils, made a fourth codicil as follows:—"I do hereby bequeath to J. B. (to whom I have willed my landed property) also all my personalty, such as cash, furniture, etc., to be applied as I have requested him to do." The wishes of the testatrix as communicated to J. B. appeared fully from his affidavit in the action, and in part from a memorandum drawn up by him (but not signed by the testatrix) immediately before the execution of the codicil, and it also appeared thereby that the testatrix did not intend to alter her previous dispositions, except for the purpose of giving effect to her wishes as stated to J. B.:—Held, that the Court would give effect to the trust intended to be reposed by the testatrix in J. B., and that he held as trustee for the objects specified in the will and three codicils, subject to the alterations contained in the new dispositions shown by his affidavit. Held, also, that the words, "cash, furniture, etc.," were not sufficient to cut down the general expression "all my personalty;" and that, therefore, the fourth codicil extended to and comprised the whole personal estate of the testatrix. Held, further, that, assuming that effect could not have been given to the trust reposed in J. B., the will and three codicils would nevertheless have remained in operation, since the fourth codicil would in that case have been executed for the purpose of creating new interests which failed. Held, also, that one of the witnesses to the codicil being interested under the parol trust, such interest failed. *Re Fleetwood, Sidgreaves* v. *Brewer*, 15 L. R., Ch. D., 594; 49 L. J., Ch., 514; 29 W. R. 45.

5. A will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognizant, and as contained in a memorandum which the testator should leave with him. It was proved by parol evidence that, before the execution of the will, the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had consented to accept the legacy for this purpose, and had promised the testator to carry out his wishes respecting it. The residuary legatees of the testator having claimed the benefit of the legacy:—Held, that a valid trust for the person named by the testator had attached to the bequest. *Riordan* v. *Banon*, 10 Ir. R., Eq., 469.

Parol evidence is admissible to prove that a

legacy has been bequeathed upon a secret trust, entirely or partially undisclosed upon the face of the will, when, at, or before the execution of the will, the trust has been communicated by the testator to the legatee and has been accepted by the latter. *Ib.*

1. W., shortly before his death, informed the wife of F. that he had conferred great benefits upon them by his will, and begged the wife to make a provision of 300*l.* per annum for N., which she promised to do:—Held, that the property which the wife took under the will, and of which F., *jure mariti*, was in the possession and enjoyment, was fixed with a secret trust in favour of N. *Norris* v. *Frazer*, 21 W. R. 434; 15 L. R., Eq., 318.

2. A testator gave certain legacies to A. M. by his will, and by a codicil bequeathed to him a stud of horses and 10,000*l.*, in terms importing an absolute gift, which the testator declared to be "in addition to all the benefits given to him by my will." But by a letter addressed to, and duly received and answered by, A. M., the testator stated that he had left a letter with his solicitor expressing a wish that the 10,000*l.*, which he described as left for that purpose, should be settled on H. M. and F. M. for their joint use in the event of their intermarrying. No such letter was left with his solicitor or any one else:—Held, that parol evidence as to the intentions of the testator was not admissible. *Baillie* v. *Wallace*, 17 W. R. 221.

Held, also, that the sum of 10,000*l.* was bequeathed upon trust, and that A. M. could not in any event take it beneficially. *Ib.*

3. Where a testatrix left the residue of her property, including large real estate, to joint tenants, and the evidence showed that the joint devisees, though not legally trustees, considered themselves under a moral obligation to apply the property to charitable purposes according to the wish of the testatrix:—Held, that the joint devisees were trustees for the heir at law and next of kin of the testatrix. *Jones* v. *Bradley* or *Badley*, 15 W. R. 297; 15 L. T., N. S., 497; 3 L. R., Eq., 635; 3 L. R., Ch., 362; 16 W. R. 713; 19 L. T., N. S., 106.

4. A., on his death-bed, sent for B., and told him that he had made his will, leaving all to B.; and that the will would be found in his desk, and a letter with it. The will and letter were found in the place indicated, and by the will the testator's property was left absolutely to B. The letter, which was addressed to B., commenced in the following terms:—"Seeing so much litigation and quarrelling arise in consequence of property being left in many hands, to prevent same in my own case I have thought it best to invest the whole of mine in your hands, as you will see by the enclosed will; and, well knowing you will carry out my intentions to the best of your ability, I now state them." The letter then contained a number of pecuniary gifts, including a gift of an annuity of 10*l.* per annum to X., and continued: "After arranging for the due payment of the foregoing in whatever manner you may think best, I wish the remainder of my property to go to yourself and to my brothers in equal proportions, and to be sold or not as you may consider best for the benefit of all parties. I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would, if living, and as the parties are deserving; and, as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." To the letter was annexed a postscript, in which A. stated that he felt that he "might not be justified in making more bequests, lest the property should not turn out so as to leave a sufficient surplus after paying them." And the postscript concluded in these words: "Having written the foregoing in a hasty manner, and perhaps in such a way as you may not clearly understand it, I leave it to yourself to carry out the intentions as you may think best; and should the property not yield sufficient at first to pay the annuities and leave a good surplus, you can defer as many of them as you find least deserving, and can best afford to wait until the outer park becomes more productive":—Held, that the letter did not contain a trust in favour of X. that could be enforced in a court of equity. *M'Cormick* v. *Grogan*, 1 Ir. R., Eq., 313; 17 W. R. 961; 4 L. R., H. L., 82.

Transactions inter vivos.] 5. The plaintiff, apprehensive of being indicted for bigamy (which it turned out he was not liable to be), conveyed real property to the defendant, on a parol agreement to retransfer when the difficulty had passed. On a bill for a retransfer, the defendant denied the agreement and insisted on the Statute of Frauds, the trusts not being in writing:—Held, that this was a case of fraud, and that the statute did not apply. *Davies* v. *Otty*, 35 Beav. 208; 34 L. J., Ch., 252; 13 W. R. 484; 12 L. T., N. S., 789; 5 N. R. 391.

6. The sole proprietor of a recipe for making a medicine, assigned it on the marriage of his daughter to trustees in trust for her and her husband for their lives, and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated the contents to the eldest son for the benefit of the other children. Upon bill by some of younger children against him, he was declared to hold the secret upon the trust of the settlement, and was decreed to account for the profits made by the sale of the medicine after his mother's death: and as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green* v. *Folyham*, 1 Sim. & S. 398. S. C. *nom. Green* v. *Church*, 1 L. J., Ch., 203.

7. More than fifteen years before his death, a testator purchased two Southampton Pier Bonds for 500*l.* each, having, before the purchase, told the plaintiff that he had left her by his will more than her sisters, to enable her to subscribe to some charities, and, very soon after the purchase, that he had invested the 1,000*l.* on the pier bond in her and his own name, but did not mention any trust or purpose. He privately applied the interest in subscribing to certain charities; and, fourteen years after the purchase, mentioned in several letters the charities to which he wished her to apply the interest, but said he did not intend to bind her by any legal document:—Held, that no valid trust was created, and no resulting trust, but that the sister was entitled to

the fund. *Wheeler* v *Smith*, 1 Giff 300; 6 Jur., N. S., 62; 29 L. J., Ch., 194; 9 W. R. 173.

A voluntary grant of property *inter vivos*, with the expression of a wish as to the way in which the grantee would apply it, but with a declaration that no legal obligation was imposed, does not make the grantee a trustee; and the expression of the wish without imposing an obligation is enough to rebut the resulting trust for want of any consideration moving from the grantee. *Ib.*

Gift of property *inter vivos*, accompanied by expression of a mere wish by the grantor as to the mode of employing the property, and his direction that no legal obligation as to that mode of employment is intended to be imposed. In such a case no trust results to the grantor for want of valuable consideration. *Ib.*

II DEVISES OR BEQUESTS PREVENTED BY PROMISES MADE TO TESTATOR.

1. Where a son promised to pay his father's legacies, if he would forbear to alter his will, such promise shall be enforced. *Chamberlaine* v. *Chamberlaine*, 2 Freem. 34.

Semble, it is said to be the constant course of the Court to make decrees upon promises of this nature. *Ib.*

2. Provision by will increased, upon evidence of the testator's request to the executor and residuary legatee, and his promise, upon which the testor refused to make a new will, and said he would leave it to the generosity of the executor. *Barrow* v. *Greenough*, 3 Ves. 152.

3. Devise to L., in consideration of her promise to give, etc, is a trust. *Clifton* v. *Lambe*, Ambl. 519.

4. Under certain circumstances verbal promises will bind men in equity to the performance of them; as where a son promised his father to pay his sisters' portions, if he would not by will direct timber to be felled to raise them. *Dutton* v. *Poole*, 1 Vent. 318.

5. Relief granted on fraud, in not performing a promise, relying on which, the testator forbore to bequeath. *Chamberlain* v. *Agar*, 2 Ves. & B. 262.

6. Discovery compelled where devise was obtained, or prevented by undertaking of devisee or heir, to do certain acts in favour of individuals, and relief upon the ground of fraud. *Stickland* v. *Aldridge*, 9 Ves. 519.

7. Executor promised his testator to pay plaintiff 100*l.* legacy, and said he need not put it in his will; after the testator's death, he said he would not pay it. Decree for payment out of assets. *Reech* v. *Kennigate*, Ambl. 67. S. C. *nom. Reech* v. *Kennegal*, 1 Ves. J. 123; 1 Wils. 227.

8. A copyholder by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, the wife persuades him to nominate her to the whole, and that she would give the godson the part designed for him; decreed against the wife notwithstanding the Statute of Frauds and Perjuries. *Devenish* v. *Baines*, Pre. Ch. 4.

9. A. devises land to his brother, and makes him executor, and wills, that out of the personal estate, and half a year's rent of his personal estate, he should pay his legacies, and give an annuity to his nephew to maintain him at college. It being proved that the brother promised the testator to pay the annuity, otherwise he would have charged his real estate therewith, decreed the real estate to be charged with the annuity. *Oldham* v. *Litchfield*, 2 Vern. 506; 2 Freem. 284.

10 A sister, in a writing addressed to her brother, after stating, "As you have kindly promised, if I do not make a will, my wishes shall be fulfilled," expressed her wish that A. and others should have the same therein specified She died intestate, and the brother inherited her property. There was some evidence of the brother's having seen the writing in her life, and of his having afterwards expressed an intention to carry his sister's wishes into effect, but he died without having done so:—Held, that there was not sufficient evidence of a contract on the part of the brother to enable the Court to enforce the performance of the sister's wishes. *Chester* v. *Urwick*, 23 Beav. 407.

11. Whether, where A., a residuary legatee, by artful and fraudulent misrepresentations to the testator of the character of B., induces the testator to revoke a legacy given to B., the benefit of which revocation results to A., this Court has jurisdiction to affix a trust on A. in favour of B. to the extent of the fruit of the fraud possessed by A., or whether the matter belongs exclusively to the Ecclesiastical Court; and, secondly, whether such trust can be declared after a sentence of the Ecclesiastical Court, in which the question of undue influence was in issue, *quære*:—Held, in the affirmative by the Master of the Rolls, and in the negative by the Lord Chancellor. The parties thereupon appealed to the House of Lords. *Allen* v. *M'Pherson*, 1 Ph. 133; 13 L. J, N. S., Ch., 97; 7 Jur. 49. Reversing 5 Beav. 469; 11 L. J., N. S, Ch., 59. The judgment of the Lord Chancellor was affirmed. S. C. 1 H. L. Ca 191; 11 Jur. 785.

12. A., by a voluntary deed, assigned all the personal estate which he was then, or might at any time afterwards, be possessed of or entitled to, upon trust to pay the interest, etc., to himself for life, and after his decease to such persons as he should appoint by will, for their lives, and subject thereto, to pay the principal to his next of kin who would be living at his decease, his, her, or their executors, etc. Soon afterwards the testator, by his will, gave some legacies, and gave the residue to the persons by name who were his next of kin at the execution of the deed, and at his death; upon whose bill, claiming under the deed, an account of the trust estate received by the trustees, and of the personal estate, etc., and to set aside the legacies, it was held that the power was not executed by the will; but one of the plaintiffs being clearly affected with notice, and acquiescence in the plan of giving the legacies, instead of executing the power, the cause was ordered to stand over, with liberty to file a bill to establish the legacies; the Court inclining, in case the other plaintiff could be affected with notice, at all events to apply the interest of the personal estate, during the life of the legatees, in payment of the legacies; they were afterwards paid under a compromise. *Griffin* v. *Nanson*, 4 Ves. 343.

XLVII. Gifts over of Undisposed of Interests in Personal Estate.

I. LIFE INTEREST IN THE FIRST LEGATEE.

1. One devises that such part of his personal estate as his wife should leave of her subsistence shall go to his sister; devise over good. *Upwell* v. *Halsey*, 1 P. W. 651; 10 Mod. 441. But see 2 Ves. 532; 1 Ll. & G. 298.

2. Testator gave his whole property to his wife, making no express provision for his daughter; "but in case of death happening to his wife, desired his executors to take care of the whole for his daughter.' The wife shall have the whole for life only, with remainder absolutely to his daughter. *Wall* v. *Bushby*, 1 Bro. C. C. 489.

3. A testator directed his debts and funeral expenses to be paid, and gave to his wife all his estate, effects, goods, chattels, houses, lands, moneys, securities for money, due or growing due, every matter and thing whatsoever and wheresoever the same might be at the time of his decease, for her sole separate use and benefit; and he further directed that at her decease whatever remained of his estate and effects should go to and be equally divided, share and share alike, among certain specified persons, or such of them as should be then living:—Held, that there was a substantial gift after the widow's death. *Constable* v. *Bull*, 3 De G. & Sm. 411; 13 Jur., N. S., 619; 18 L. J., N. S., Ch., 302.

Held, that the widow was entitled to an estate for life only in the residuary personal estate of the testator after payment of his debts and funeral and testamentary expenses. S. C. 22 L. J., Ch., 182.

4. Gift, by will to A., and in the event of her death, over. By codicil the testator left all he possessed to A., as stated in his will, wishing her to pay certain legacies; "and at A.'s death I wish all remaining to be for the benefit of B. and her children":—Held, that A. took a life interest only, with remainder to B. and her children, as joint tenants. *Re Adam*, 11 Jur., N. S., 961; 14 W. R. 18; 13 L. T., N. S., 347.

5. F W. by will gave certain freehold and leasehold estates to trustees in trust for his wife for her life, and after her death he gave the same unto, amongst, and between a class of persons, naming them, share and share alike; and after their decease, to three children, share and share alike. The will contained a residuary gift. After the death of the testator and his wife one of the class died without issue:—Held, that he was not entitled absolutely to the share given to him, but that on his death without children, as the will contained no express words to show that an absolute interest was intended, the share fell into the residue. *Waters* v. *Waters*, 3 Jur., N. S., 654; 29 L. T. 310; 26 L. J., Ch., 624.

6. E. and A., sisters, were tenants in common of freehold and leasehold property. E. by her will gave all her estates and effects, both real and personal, to A. absolutely, and by a codicil which she directed to be taken as part of her will she gave, after the death of A., "all property of mine which may then be remaining" (except a house and furniture) "to my brother W. B" and three other persons in certain proportions, "my brother W. B. to have one-half of the property for his whole and sole disposal." A., who survived E. a year and eight months, remained in possession of the whole of the property, and by her will gave a portion of it to W. B. for life only, and after his death to other persons. On bill filed by W. B., for administration of both estates:—Held, that the intention of E. was, construing the two instruments together, that A. should have a life interest only in her property. *Bibbens* v. *Potter*, 10 L. R., Ch. D., 733; 27 W. R. 304.

7. A testator possessed of personal property gave a beneficial and apparently absolute interest in it to his wife, whom he made his sole executrix, but with a direction that, in case his property should be more than she wanted to live on for her lifetime, she was to give weekly the remainder to the testator's two daughters, so long as she lived; and he directed the whole of his property to be sold, and the money to be put into the Bank of England in trust as might be thought best for her and those in trust:—Held, for [illegible] wife took beneficially an interest [illegible]rs was invalid; that the gift to the daughter [illegible]tacy as to the and that there was an intes[illegible]ital after the beneficial interest in the cap[illegible]ant, 1 Colly. widow's death. *Hudson* v. *Bry*[illegible] 681.

8. Bequest of residuary personal [illegible] estate after decease of testator's widow, or her [illegible]arriage in his daughter's lifetime, to his "dau[illegible]ghter, the same to be always considered as vest[illegible]ed in her upon her attaining her age of tw[illegible]enty-one years, and to be subject to her di[illegible]sposition thereof;" and in case his daughte[illegible]r should die "without attaining twenty-one, or [illegible]," then over:—Held, upon the context, th[illegible]at the daughter took for life, with a testam[illegible]entary power of disposition. *Borton* v. *Bort*[illegible]. 10 Sim. 552; 18 L. J., N. S., Ch., 219; 13 Jur. 247.

9. A testator bequeathed the residue of his personal estate to his widow in trust, to apply the interest and proceeds for her own use, and after her decease he gave what should be remaining of such residuary moneys unto and equally amongst all the daughters of T. D. and their issue, with benefit of survivorship and accruer. T. D. had three daughters living at the testator's death. One of them died without issue in the lifetime of the testator's widow. The two others survived the widow, and had issue living at her death:—Held,

that the two surviving daughters were entitled to the whole of the residue absolutely. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., N. S., Ch., 344.

1. A. by his will gave all his real and personal estate to his wife with full power to sell his landed property in her lifetime, or to retain the same during her lifetime, and to dispose of one moiety of such real and personal estate as she might be possessed of at her decease by her will; and he gave the other moiety of such realty and personalty, as might remain in his wife's possession at her death, to C. (but not until after his wife's decease). C. predeceased the testator's widow, who sold the whole real estate and died; but the purchaser only paid half the purchase money, on the doubt whether one moiety was not undisposed of. On bill filed by C.'s representative:—Held, he was entitled to one moiety of the purchase money with 4 per cent. interest from the widow's death. Costs of the plaintiff out of the moiety of the purchase money, the purchaser and widow's executor paying their own costs. *Phillips* v. *Powell*, 3 W. R. 2.

2. Testator, reciting his intention to dispose of all his property, and that his daughter was likely to die (of a violent distemper), left his wife, if she died, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower, giving the residue and dividends to that daughter; if she died without children, testator gave his brother "all that should be left:" the daughter survived the testator, but died of the same illness without issue:—Held, that the mother was still entitled for life, and that the words "what should be left" constituted a good residuary bequest to the brother. *Duhamel* v. *Ardovin*, 2 Ves. 162.

II. ABSOLUTE INTEREST IN THE FIRST LEGATEE.

3. Wife, having a power to dispose, by will signed and sealed by her, of 300*l.* in the hands of trustees, having made a will, agreeably to the power, afterwards makes a testamentary paper, by which she gives it to her husband, but so much as shall be remaining at his death, etc., to her brother and sisters. This paper is not sealed, found annexed to the will by a wafer, and is on a stamp:—Held, that it vested absolutely in her husband, and it was decreed to be paid to him, the property not being sufficiently certain to raise a trust. *Sprange* v. *Barnard*, 2 Bro. C. C. 585.

4. Gift by will to A., to be paid to him at twenty-one, with a bequest over, in the event of dying under that age, or afterwards without heirs, and intestate:—Held, an absolute interest in A., on his attaining twenty-one. *Cuthbert* v. *Purrier*, Jac. 415.

5. J. gives the residue of his estate to his daughter C., to dispose of as she shall think fit; but if she should die unmarried, or intestate, then what was left to her should go to his brother's children. C. possessed this residue, and disposed of it in making purchases, and taking securities in her own name. She afterwards died intestate and unmarried:—Held, that all her personal estate belonged to her next of kin; and that no part of it could be considered as the specific personal estate of her father, or go to his brother's children. *Lightburne* v. *Gill*, 3 Bro. P. C. 250.

6. A testator bequeathed his residuary estate to his wife, "her executors, administrators, and assigns;" but if she died intestate, then his will was that it should be bequeathed to A. and B. The wife predeceased the testator:—Held, independently of that circumstance, that the gift over, after an absolute interest, was void. *Hughes* v. *Ellis*, 20 Beav. 193; 1 Jur., N. S., 316; 24 L. J., Ch., 351; 3 W. R. 310.

7. A testator gave real and personal estate upon trust for the benefit of his son to vest in him on his attaining twenty-one. He then directed that in case his son should die under twenty-one, or, having attained twenty-one, should not have made a will, then the property should go over. The son attained twenty-one, and died intestate:—Held, that the real and personal estate vested in him absolutely at twenty-one, and that, therefore, the devise over was repugnant and void. *Holmes* v. *Godson*, 20 Beav. 193; 25 L. J., Ch., 317; 4 W. R. 415; 2 Jur., N. S., 383.

8. A. devised real estate to his second son in fee if he attained twenty-one, charged with a legacy to a daughter, and if the second son died under twenty-one, then to the eldest son when he attained twenty-one, charged with the legacy; and in case it should happen that all the testator's three children should die without issue, and without appointing the disposal of the estate, then over:—Held, that the devise over was repugnant and void. *Gulliver* v. *Vaux*, 8 De G. M. & G. 167.

9. A testator gave all his property, consisting of realty and personalty, to his three children, A., B., and C., share and share alike, the share of A. to be for her during her life, and then to be divided among her children at twenty-one; and if she leave no children, or all her children die under twenty-one, then the one-third share to be divided between B. and C.; but in case B. and C., or either of them, should die intestate, his or their share or shares was or were to be divided between their children respectively, share and share alike:—Held, that the gift over in case B. and C., or either of them, should die intestate, was void, as being annexed to a condition repugnant. *Barton* v. *Barton*, 3 Kay & J. 512; 8 Jur., N. S., 808.

The rule that such a condition is repugnant when annexed to an absolute interest previously given in the same will is the same whether the subject-matter be real or personal estate. *Ib.*

10. A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills:—Held, that they took absolute vested interests, and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy. *Weale* v. *Ollive*, 32 Beav. 421.

1. A testator bequeaths to his wife the residue of his estate, requesting that she would at her death leave three legacies of 200*l.* each to three persons, whom he describes, and that she would leave the remainder of her property to his two nephews, in such proportions as she thought proper:—Held, that, subject to the three legacies, the widow was entitled to the residue absolutely, and that no trust as to any portion of it was raised in favour of the nephews. *Eade* v. *Eade*, 4 L. J., N. S., Ch, 44.

2. The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother":—Held, that the son took an absolute interest in the house. *Green* v. *Harvey*, 1 Hare 428; 11 L. J., N. S., Ch., 290; 6 Jur. 704.

3. A gift of the yearly interest, dividends, proceeds, and profits, to arise from the shares of the testator in a pottery, ship-building yard, shipping, trust moneys, effects, and premises, to his wife for her life, for the maintenance, education, and support of herself and his children, and subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally; and the testator particularly recommended, desired, and directed his wife, at his decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children, in equal shares:—Held, that the attempted disposition of the savings of the widow was in the nature of a precatory gift; but, the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift, and no trust created of the savings in favour of the children; and that the same, therefore, belonged to the estate of the widow. *Cowman* v. *Harrison*, 10 Hare 234; 17 Jur. 313; 22 L. J., Ch., 993.

4. A testator devised to his four sons, in trust, to pay an annuity to his widow, and on her death, or second marriage, to divide equally between his said sons and his two daughters; and on the decease of either of his sons or daughters, or the children of his sons or daughters, then to their children; and in case any person becoming entitled to his property should attempt to sell it, then he should forfeit his share:—Held, that the first takers, the children of the testator, each took his share absolutely, subject to the annuity. *Bartlett* v. *Bartlett*, 11 L. J., N. S., Ch., 11.

5. A testator bequeathed his residuary personal estate (after a life interest) to his grandson to and for his own use; but if he should die under twenty-one without leaving lawful issue, or if he should attain twenty-one and die without leaving lawful issue, and without having disposed of the same by his will or otherwise, then over:—Held, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest. *Re Tulden*, 1 De G. M. & G. 53.

6. Bequest of a legacy to A. to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper, and maintenance in the meantime, with a limitation over, in case A. should not receive or dispose of it by will or otherwise in his lifetime. The limitation over held void. *Ross* v. *Ross*, 1 Jac. & Walk. 154.

7. Where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person. *Watkins* v. *Williams*, *Harverd* v. *Church*, 3 Macn. & G. 622, 16 Jur. 181; 21 L. J., Ch., 601.

W. D devised certain estates to R. D, with a power to sell and dispose of the premises, or to raise any sum or sums of money by way of mortgage or otherwise, as he should think proper, with a proviso that such portion of all and every sum and sums of money so raised, "either by sale or mortgage, as shall be unexpended at my decease," etc., should be charged by him on certain property of his own, in favour of other parties:—Held, establishing the validity of mortgages executed by R. D., that this proviso did not operate as a condition precedent, but was a limitation over of so much of the money to be raised by R. D. as should be unexpended. *Ib.*

8. A testator gave to his wife the residue of his personal property, with a proviso that, if not disposed of by her in her life or by her will, it should go over. It passed as part of her property by her will, although not specifically noticed. *Bourn* v. *Gibbs*, 1 Russ. & M. 614; Taml. 414; 8 L. J., Ch., 151.

9. Bequest of personal property in trust for A. (a married woman) for her separate use; with a power of disposing by will (except to particular persons); "and in case she dies without a will, I give all that may remain at her decease to B," followed by a gift of "all the rest and residue" to A., who is appointed executrix: A. takes the absolute interest in the property, not a power of disposing merely; and the gift to B. of "all that may remain at her decease" is void for uncertainty. *Bull* v. *Kingston*, 1 Meriv. 314.

10. A bequest to M. E., testator's wife, of "the legal interest on bonds, debentures, and funded property, together with household furniture, etc., to be disposed of as he shall think proper;" and in case F. E. should survive the said M. E., that he should have "the interest of money, and whatever does belong to her that she does not dispose of":—Held, that M. E. having survived F. E., the absolute gift to her was not cut down by the subsequent bequest over, and that that bequest was void for uncertainty. *Phillips* v. *Eastwood*, Ll. & G. *temp.* Sudg. 270.

11. Bequest of residue to A. for life, "and whatever she can transfer to go to her daughters," B. and C.:—Held, that the gift to B. and C. was void for uncertainty. *Flint* v. *Hughes*, 6 Beav. 342; 7 Jur. 523.

12. Bequest of a residue to the testator's father, "to spend both principal and interest, or any part of it, during his lifetime;" should he "not spend the property," then in trust for the testatrix's sisters:—Held, that the bequest to the father was absolute, and that the gift over was inconsistent with it, and inoperative.

Henderson v. *Cross*, 29 Beav. 216; 7 Jur., N. S., 177; 9 W. R. 263.

1. A testator, by his will, bequeathed unto his wife all his leasehold property wheresoever situate, for her sole use and benefit, except a house therein described; and in a subsequent part of his will he directed that as soon after the decease of his wife as might be practicable, all his leasehold property not already disposed of by her (save and except the house) should be sold, and the produce thereof distributed by his executors (of whom the wife was named one) among certain persons, in the proportions therein stated:—Held, that, upon the death of the testator, his widow became absolutely entitled under his will to the leasehold property bequeathed to her by such will, and that the direction to sell contained in such will and the expressed disposition of the proceeds of sale were repugnant to the preceding absolute gift to the wife, and void. *Bowes* v. *Goslett*, 4 Jur., N. S., 17; 27 L. J., Ch., 249; 6 W. R. 8.

2. A father directed the residue of his property to be divided into equal portions, and to be paid to as many of his children as should be living at the time of his death, to be for ever at their disposal, with the following reservation only: the equal share or portion which should fall to his eldest daughter should remain in certain investments, and the proceeds or interest of such her equal portion should be applied for her support and maintenance during her life, and at her death the property thus bequeathed to her should be divided into equal portions among as many of his other children as might be living at the time of her decease. She survived all the other children of the testator:—Held, that she took an absolute interest in her equal portion of the residue. *Bishop* v. *Wise*, 26 L. T., N. S., 530.

3. R., by will, gave all the remainder of her property to H., his heirs and assigns, for ever, as she had full confidence that, if he should die without issue, he would, after providing for his widow during her life, leave the bulk of her residuary estate to four parties named. H.'s wife being dead, he left all his property to trustees, to convert and hold the same, after payment of debts and legacies, in trust for the objects named in R.'s will, and six others. On the question whether H. took the property clothed with a precatory trust:—Held, that he did not, but took the absolute interest, the word "bulk" applying to a portion only, and not being a certain fixed subject. *Palmer* v. *Simmonds*, 2 W. R. 313; 2 Drew. 221.

4. A devise of lands for ever conveys an estate in fee, and is not affected by subsequent words requesting the devisee, "in case of failure of issue of his said body," to give the estate to another. *Bland* v. *Bland*, 9 Mod. 478.

5. Testator devised a copyhold estate to his wife upon trust to sell and invest the money in the funds; and gave and bequeathed the interest and dividends to her use. He also gave and bequeathed to her all his effects whatsoever and wheresoever for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects part of their shares. The widow's executrix held entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson* v. *Major*, 11 Ves. 205.

6. A husband gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money (if any) that should be remaining, after payment of his wife's just debts, he gave to legatees named as tenants in common equally. The widow died shortly after the testator intestate:—Held, that she took an absolute interest in the residuary personal estate, and that it belonged to her next of kin. *Perry* v. *Merritt*, 18 L. R., Eq., 152; 43 L. J., Ch., 608; 22 W. R. 600.

7. A fund was settled in trust for W., the illegitimate daughter of the settlor, for life, and in the event, which happened, of her not at her death being under coverture, for her absolutely; with a proviso that if any estate, interest, or benefit should, under the powers and provisions of the settlement, be undisposed of, or in the events which should happen, would but for the proviso be held in trust for the Crown or belong beneficially to the Crown, then and in every such case the estate, interest, or benefit should belong to and be held in trust for her father for life, and after his death for her mother. W. having died intestate, the Crown claimed the fund:—Held, that the fund vested absolutely in W. at her death, and that the gift over was repugnant and void; and consequently that the Crown was entitled to the fund. *Re Wilcocks*, 1 L. R., Ch. D., 229.

III. GIFT OVER AFTER A LIFE INTEREST WITH POWER OF DISPOSITION.

8. Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter, A., out of the same, as long as she, his wife, should live, and, at her decease, to dispose of what shall be left among his children, in such manner as she shall judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman* v. *Filliter*, 3 Ves. 7.

9. Bequest to A. and B. of a fund, upon trust to invest on security, and to apply the interest on the principal for the benefit of C., in such way as A. and B. should think fit, during the life of C., and so that A. and B. should have entire power over the fund, to dispose of the principal and interest or any part thereof, or to withhold the same as they should think fit, without being accountable to C. or any other person; and on the death of C., in case the said sum or any part thereof should be undisposed of, to stand possessed thereof on the trust therein mentioned. A. and B. paid the income to C. during their lives, and died, leaving C. surviving:—Held, that C. was

absolutely entitled to the capital *Gude* v. *Worthington*, 18 L. J., N. S., Ch., 303; 13 Jur. 847.

1. A devise of all the testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marriage, to settle the whole, or such part as they should think fit, upon her and her children, if she should have any, with remainder, in default of children, to her mother absolutely. The niece attained twenty-one, but before any settlement was made under the power she died without having been married.—Held, that the power could not then be exercised, and that her heir was entitled to the whole of the real estate. *Lancashire* v. *Lancashire*, 2 Ph. 657; 17 L. J., N. S., Ch., 270; 12 Jur. 368.

2. Bequest of household goods, etc., after payment of debts, etc., to testator's wife for life or widowhood, with power to her to sell same as she should think fit for her own benefit and the maintenance of testator's nephew, etc., during their minority, with a bequest over on death or second marriage of wife of the same, or so much as should then remain, to such nephew, etc.:—Held, that widow was entitled to residue for her life or widowhood, with power to apply any part of the capital for her own benefit, proper maintenance of nephew, etc., during minorities, and that, on death or marriage of widow, remainder of capital unapplied was well limited over. *Surman* v. *Surman*, 5 Madd. 123.

3. A bequest of residue to trustees, upon trust to permit the testator's wife to receive the annual produce for her life, with power to apply to her own use such parts of the capital as she should think proper; and after her decease, upon trust, as to such portions as should remain after such application of any part thereof by his wife, for such persons as she should by will appoint; and in default of and subject to any such appointment, in trust for certain persons named:—Held, that the widow took a life interest only in the residue, with power of disposition of the capital, and of appointment by will. *Scott* v. *Josselyn*, 26 Beav. 174; 5 Jur., N. S., 560; 28 L. J., Ch., 297.

4. A wife by will appointed real estate to her husband upon trust for his own use for life, "with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit." After his death "subject as aforesaid" over to other persons. The husband died without exercising the power:—Held, that he had only a life estate, and that the property went to the persons to whom it was given in remainder after his death. *Pennock* v. *Pennock*, 41 L. J., Ch., 141; 13 L. R., Eq., 144; 25 L. T. 691.

5. A testator gave his personal estate "for the use of his wife, not doubting but she would exercise due discretion and economy in expending the same, the whole to be under the care of his wife and the other executor, who were likewise requested to pay out of the same all just debts; and after the decease of his wife, he gave the residue to be equally divided in five shares":—Held, that the word "residue" meant "residue after payment of debts" and that the wife took a life interest followed by a gift over. *Re Brooks*, 2 Dr. & Sm. 362; 34 L. J., Ch., 616; 13 W. R. 573; 12 L. T., N. S., 172.

6. A testator left to M., E., and R. the entirety of his property during their joint and several lives, subject to legacies and annuities, and added, "In leaving my property to my three nieces, as co-heirs, it is my wish that if my grand-nephew, J. W. C., conducts himself to their satisfaction, that the (*sic*) should leave him the property I now leave to them." J. W. C. died in the lifetime of M., E., and R. There was no evidence that J. W. C. did not conduct himself to their satisfaction. E. having died:—Held, that M. and R. were entitled to the testator's real estate for their lives only. *Moore* v. *ffolliott*, 11 L. R., Ir., 206.

7. A testator by his will gave all his property to his widow "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—Held, that the widow had no power to dispose of the property by will, and that on her death it went to the ulterior takers named in the husband's will. *Re Thomson's Estate, Herring* v. *Barrow*, 14 L. R., Ch. D., 263; 49 L. J., Ch., 622; 43 L. T. 35; 28 W. R. 802. Affirming in part 13 L. R., Ch. D., 141; 49 L. J., Ch., 16.

Whether she took anything more than a life estate with a right to enjoy the property in specie, *quære*. *Ib.*

8. A testator gave and devised to his brother all his real and personal estate and effects whatsoever and wheresoever, with full power to dispose thereof by deed or will, and then provided that if his brother should not dispose thereof the real estate should go to H. for life, with numerous limitations over. He then bequeathed his furniture, etc., to executors, as heirlooms, and gave all the residue of his estate and effects to the executors upon trust, after the decease of the survivor of his brother and himself, to sell and dispose thereof, and invest in other real estates to be settled to the same uses as he had declared concerning the real estates devised by his will, with powers of investment in the meantime. The brother died before the testator. On the death of the testator in 1803 H. entered into possession, and held the estates till his death in 1869. On the death of H. the persons entitled under his will took possession of the property, which was then claimed by the persons entitled under the limitations in the will of the original testator:—Held, that though the first clause in the will amounted to an absolute gift, the whole will showed a clear intention to give the testator's brother an estate for life only with a power of appointment, and that as that power of appointment had not been exercised, the limitations over took effect. *Re Stringer, Shaw* v. *Ford*, 46 L. J., Ch., 633; 6 L. R., Ch. D., 1; 37 L. T., N. S., 233; 25 W. R. 815.

Semble, that if no such intention had appeared on the will, the limitations over would have taken effect, as the brother died in the lifetime of the testator. *Ib.*

See also POWER, I. III.

XLVIII. Gifts Conferring an Option or Right of Pre-emption or Election.

I. RIGHT OF SELECTION.

1. If a testator, dying solvent, bequeaths to A. a given number of articles, forming part of a stock of articles of the same description, as, for instance, if he has twenty horses in his stable, and bequeaths to A. six of them, A. has the right of selection. *Jacques* v. *Chambers*, 15 L. J., N. S., Ch., 225; 16 L. J., N. S., Ch., 243; 2 Colly. 435; 11 Jur. 295.

A testator was possessed of fifty original shares, and seventy other after-purchased shares. He gave thirty whole shares to trustees, upon trust, for a married woman for her separate use for life, and thirty whole shares to another party. He declared that the legacies should not be deemed specific, so as to be capable of ademption. On the seventy shares all the calls had not been paid, but on the fifty the whole had been paid. The railway company raised new shares, and offered the same ratably to the registered proprietors. The executors accepted sixty, and paid the deposit on them in respect of the thirty shares first bequeathed:—Held, that the bequests were specific, and that the income of the shares from the testator's death belonged to the legatees; that the legatees were entitled to the new shares in respect of the shares bequeathed to them, subject to the payment of the future calls; that the legatees were entitled to select, and the executors not entitled to appropriate the shares to be taken by the legatees; that the original and purchased shares must, with respect to the liability of the testator and his estate to pay the calls thereon, be considered identical; and that, therefore, his estate was liable to pay the calls on both sets of shares. *Ib.*

2. A testatrix bequeathed the shares in a company as follows:—fifteen to J., and six to B., E., and A. respectively. The remaining shares she left to M. She possessed seventy-four shares in the company, viz., thirty-seven shares fully paid up, and thirty-seven new shares not fully paid up, and she was in the habit of speaking of the whole as thirty-seven shares only. The new shares had been allotted, by way of bonus, in respect of the old ones, but they were distinguished in the company's books by separate and distinct numbers, and were transferable separately from the old shares:—Held, that the four specific legatees took only single shares, and not a new share with each old one, but that they had a right to select the fully paid up shares as the best. M., therefore, was entitled to the residue of the old shares and all the new ones. *Millard* v. *Bailey*, 1 L. R., Eq., 378; 14 W. R. 385; 35 L. J., Ch., 312; 13 L. T., N. S., 751.

3. A widow devised an acre of land, which was "to be selected by" the devisee, to a clergyman absolutely, and devised all her other real estate to the trustees of her will to convert it into money. By a letter to the clergyman, dated the day her will was executed, but not intended to be, and not, in fact, delivered to him until after her death, she said that it would be gratifying to her memory if he of his own free will would dedicate the acre of land as a site for a church. He did select an acre for that purpose, but subsequently entered into an arrangement with the trustees of her will, whereby the trustees sold the acre so selected, and granted him permission to select another acre in lieu. The clergyman died without having selected another acre:—Held, that the permission to make a second selection was *ultra vires*, and that the purchase money produced by the acre originally selected belonged to the personal representatives of the clergyman absolutely. *Littledale* v. *Bickersteth*, 24 W. R. 507.

4. Testator gave all his household furniture, wearing apparel, books, plate, wines, pictures, statues, china, horses, carriages, in short everything in his house and elsewhere, together with all his other property, to trustees in trust to sell all his household property as aforesaid, except such articles whatsoever they might be as his wife might desire to retain for her own use, which he thereby empowered her to appropriate for her own use:—Held, an absolute gift to the wife of the whole or any of the articles enumerated, whether articles of use or ornament, which she might select. *Kennedy* v. *Kennedy*, 1 W. R. 177; 10 Hare 438.

5. Gift by a testator of his plate to trustees upon trust to permit his widow "to have and appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—Held, that the widow was entitled to the whole of the plate. *Arthur* v. *Mackinnon*, 11 L. R., Ch. D., 385; 48 L. J., Ch., 534; 27 W. R. 704.

6. A testator devised to each of his four daughters a house and garden at G., to be built at the expense of his executors. A daughter, M., requiring the house, one was built with a garden by D., the executor, who was also residuary legatee and devisee:—Held, after the death of D., that the gift was not void, and that M. was entitled to the house and garden. *Edwards* v. *Jones*, 35 Beav. 474, 14 W. R. 815.

7. Testator, who was possessed of three leasehold houses in K. Street, bequeathed "two houses in K. Street" in trust for P. for life, and then to form part of his residuary gift. The will contained no other references to the testator's houses in K. Street:—Held, that two of the houses passed under the gift, and that P. was entitled to elect which he would take. *Tapley* v. *Eagleton*, 12 L. R., Ch. D., 683; 28 W. R. 239.

II. ELECTION BETWEEN ALTERNATIVE GIFTS.

8. Bequest of 500*l.*, or an annuity of 25*l.* for life:—Held, not to give the option to the legatee, but to the parties interested in the

property subject to the annuity. *Wilson* v. *Wilson*, 1 De G. & Sm. 152; 11 Jur. 793.

1. Legacy in lieu of things expressed, shall not put the party to his election as to another benefit, though it may be contrary to an intent that he should take both. *East* v. *Cooke*, 2 Ves. 30.

2. A testator, being entitled to two leasehold houses situate at P. and at R., directed his trustees to allow his wife to occupy his house at P. or at R., as she should elect, for her life, without payment of any rent:—Held, first, that the widow must elect between the two houses, and could not enjoy both. *Harby* v. *Moore*, 6 Jur., N. S., 883.

Held, secondly, that she was entitled to be indemnified out of the testator's estate against the rent and covenants to which the house she might select was liable. *Ib.*

III. ELECTION WHERE GIFT CUM ONERE.

3. The legatee of a house, held by the testator on a lease at a reserved rent, higher than it could be let for after his death, cannot reject the gift of the lease, and retain an annuity under the will, but must take the benefit *cum onere*. *Talbot* v. *Radnor* (*Earl*), 3 Myl. & K. 252.

4. Where it is necessary for a lunatic to elect under a will as in this case, giving first a personal legacy, and afterwards in same will a real estate, with a charge upon it, the Court has power to elect for him; and if the Court chooses the real estate, it will continue the charge paid off as a lien on it for the lunatic's next of kin. *Re Marriott*, 2 Moll. 516.

5. Where a testator makes several bequests to a devisee, one of which is clogged with a burden created by the testator, it is a question of the intention of the testator, to be gathered from the will, whether the devisee must elect to take all or none of the gifts in the will, or whether he may accept the beneficial gifts, and repudiate that which is burdensome. *Warren* v. *Rudall, Exp. Godfrey, Hall* v. *Warren*, 1 John. & H. 1; 6 Jur., N. S., 641; 29 L. J., Ch., 543; 6 Jur., N. S., 395; 8 W. R. 331.

A testator bequeathed a legacy to A., and devised freeholds to A. and his wife for their lives, with remainder over, and after several intervening gifts bequeathed leasehold premises to A.:—Held, that A. might take the legacy and the freeholds, and repudiate the bequest of the leasehold. *Ib.*

There is no rule that a person to whom a testator has made two distinct gifts, one of which is subject to a burthen created by the testator, is bound to accept both or neither of these gifts. In such circumstances the question is one of intention, to be gathered from the will. *Ib.*

6. K. devised estates to his son D., charged with a legacy of 1,000*l.* to his daughter M.; and by a codicil he bequeathed all his shares in a company unto all his sons and daughters equally, and directed that all calls and payments to be made and become due after his decease should be borne and paid by them in equal shares. M. and her husband gave notice to the executors that they declined to accept the legacy of the shares, and they refused to take a transfer of them. Subsequently calls were made upon the executors, and D. paid them; and he refused to pay the legacy without deducting the calls thereupon, and without the husband of M. taking a transfer of the shares, and giving an undertaking to pay all future calls. On a bill by M. by her next friend:—Held, that she was entitled to the legacy without deduction, and that she had a right to disclaim the legacy of the shares. *Long* v. *Kent*, 11 Jur., N. S., 724; 12 L. T., N. S., 794; 13 W. R. 961; 6 N. R. 354.

7. Shares in a company were given, together with other property, and were onerous:—Held, that the legatees might repudiate the shares, and take the rest of the gift. *Aston* v. *Wood*, 43 L. J., Ch., 715; 31 L. T., N. S., 293.

8. Bequest of six leasehold villas to one for life, and by a subsequent codicil reciting his death, bequest of the same to another, together with any other house testator might build on an adjoining space of ground, "together with the ornamental park I am now forming opposite that cottage and villas," for his life:—Held, that the legatee could not take the villas without the park, of which the tenure was onerous. *Green* v. *Britten*, 42 L. J., Ch., 187; 27 L. T., N. S., 811.

9. When by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy and to take the other. If, however, onerous property and beneficial property are included in the same gift, *primâ facie* the legatee cannot disclaim the onerous and accept the beneficial; he must take the whole gift or none of it. But this *primâ facie* rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary. *Green* v. *Britten* (42 L. J., Ch., 187) followed. *Guthrie* v. *Walrond*, 22 L. R., Ch. D., 573; 52 L. J., Ch., 165; 47 L. T. 614; 31 W. R. 285.

IV. ELECTION OR CHOICE IN OTHER CASES.

10. Testator gave to his son, in case he should live to attain twenty-one, such part of his real estate as his son should choose, but not exceeding the yearly value of 350*l.*, and to his daughter such part of his real estate as should remain after his son should have made his choice; or of the whole of his real estate in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.*:—Held, that the son was entitled to priority of choice, on attaining twenty-one, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* *Weigall* v. *Brome*, 6 Sim. 99.

11. A testator bequeathed manuscripts to trustees "for my grandson, that they may provide for the books being published to the best advantage for the interests of the child, so as to contribute towards raising a fund to assist him when he goes to college," and bequeathed 1,000*l.* towards the printing:—Held, that the grandson was entitled to elect to take the 1,000*l.*, it appearing to be impossible to publish the book at a profit. *Re Skinner*, 1 John. & H. 102; 8 W. R. 605.

12. A testator authorised his executors, in

case A. and B. should elect to carry on his business, to permit them to do so, without any payment for goodwill, upon their giving their security for their stock in trade, or such part as they should require. Shortly after his death, A. and B. gave the executors notice that they elected to take to the business:—Held, that there was a specific bequest of the business to A. and B.; that upon payment of the value of the stock in trade, and making provision for the testator's debts, they were entitled to the goodwill and stock in trade of the business from the time of their election. *Fryer* v. *Ward*, 31 Beav. 602; 9 Jur., N. S., 164; 32 L. J., Ch., 433; 11 W. R. 104.

1. D., being seised in fee of two freehold closes of land in R., by his will devised to his son John one freehold close of land in R., and to his son George one freehold close of land in R. John was the testator's heir-at-law. After the death of the testator, John and George tossed up for choice, and George won:—Held, that the devise to John was not void for uncertainty, and that the case was one for election. *Duckmanton* v. *Duckmanton*, 5 H. & N. 219; 29 L. J., Exch., 133.

Held, also, that party first named in the will being also the heir-at-law was the person who had the right to elect. *Ib.*

2. W. P. by will directed his trustees as soon as conveniently might be after his death to divide his residuary real estate into lots, or set a value upon such lots, and give a copy of such particulars of division and valuation to the testator's son: and if, within six months after delivery of such copy, the son should give notice in writing under his hand of his desire to relinquish all or any part of such real estate, his estate in the part relinquished was to cease and become vested in the trustees upon certain trusts; the effect of which was, out of the relinquished estates, and by a charge on the other, to put all the testator's children on an equality. Provided that if the son shall neglect to give "such notice," or "by some notice or other writing," to consent to hold all on the terms thereinbefore mentioned within the time thereinbefore mentioned, then, and so soon as such neglect or refusal should have happened, the estate of the son in all was to shift to the trustees as before, the testator's wish being to give to each of his children or their representatives one-fifth share of his property, and subject to these provisions the testator devised the said estates to his trustees for 500 years, remainder to his son in fee. No allotment or valuation was ever made by the trustees, nor any notice given by the son; but he entered into possession of the estates, and accounted for the rents to the trustees of the father's estate until his death 5½ years after his father:—Held, that the son had waived his right to have the estate first valued; and had elected to take the whole subject to the charge for the benefit of the other children. *Godwin* v. *Coulson*, 1 W. R. 485; 17 Jur. 795.

3. A testator having three sons, A., B., and C., devised certain property to A., and other leasehold property, together with all the stock in trade which should be in the premises to B. and C. as tenants in common, and in case his said sons or either of them should die without leaving lawful issue him surviving, he directed that the share of such son so dying, in the premises and in the stock in trade which should be therein at the time of such decease, should go and be divided, share and share alike, between such of his said sons as should be then living as tenants in common. B. and C. carried on the trade after the testator's death; and B. died without issue leaving A. and C. surviving:—Held, that no case of election arose, there being no condition attached to the bequest, that the stock on the premises, at the death of either of the sons, should be subject to the bequest. A., therefore, was only entitled to a moiety of the stock in trade at the testator's death. *Thornton* v. *Thornton*, 11 Ir. Ch. R. 474.

V. OPTIONS AND PRE-EMPTIONS.

1. In General.

4. A. wills that B. shall sell his land to C.; C. shall compel B., by subpœna. *Anon.*, Cary 14.

5. A testator, by his will, directed that his son H. should have the option of purchasing the goodwill, etc., of his business, the purchase-money to form part of the residuary estate. The testator died in 1835, and H., who, from 1820, had managed the business, and resided solely on the premises as apparent owner, claimed it as an advancement, and alleged a parol agreement between him and the testator in 1825, and, as proof thereof, gave in evidence declarations of the testator, about that time, to his neighbours, that he had set up H. in business, and had asked their custom for him:—Held, that as there was no direct transfer or proof of change of possession, the parol declarations of the testator could not countervail his solemn declaration expressed by his will. *Sharpe* v. *Sharpe*, 10 L. J., N. S., Exch. Eq., 3.

6. A right of pre-emption given by will, whether at a price expressed, or to be fixed by the trustees, will be executed; the construction in the latter case being a reasonable price to be ascertained by reference to the Master. But to pass such right to the heir or devisee, the intention to accept the offer must appear by some act, or at least by will. *Radnor (Earl)* v. *Shafto*, 11 Ves. 448.

7. A testatrix, who carried on the business of a brewer, gave to M. a right of pre-emption of "all her brewery, etc.," at one-fourth less than its value. The testatrix held a number of public-houses in connection with the brewery, the tenants of which were bound to take their beer from the testatrix:—Held, that the right of pre-emption extended to these public-houses. *Waite* v. *Morland*, 12 Jur., N. S., 763; 14 W. R. 746; 44 L. T., N. S., 649. Reversing 13 W. R. 963; 13 L. T., N. S., 91.

8. A testator, by his will, gave all his real and personal estate to be enjoyed by his widow for life, and after her death, to be sold, and the proceeds to be divided among his ten children equally. He directed that one of his

sons should have a right of pre-emption, for 450*l.*, of a particular parcel of garden land, part of the real estate. After the death of the testator, and before that of the widow, the parcel of garden land was purchased by a railway company, under their compulsory powers; the compensation money paid therefore, when freed from incumbrance, being represented, at the death of his widow, by the sum of 882*l.* 18*s.* 2*d.*, standing in court.—Held, that the testator's son, to whom the right of pre-emption was given, was entitled to the compensation money, subject to the deduction of the price fixed by the testator. *Re Cant*, 5 Jur., N. S., 829; 28 L. J., Ch., 641; 4 De G. & J. 503.

1. Option to purchase at a valuation; valuation must not only be made according to the letter of the will, but must be fair and adequate. Option must be declared before valuation. Goodwill an element in the value of a reversionary interest in a public-house. *Edwards* v. *Edwards*, 1 Jur. 654.

2. A., by will, directed that his sons should have the option of purchasing certain premises at a given sum. They agreed to do so, and signified their intention by a note in writing to the trustees, and they were let into possession of the premises. No conveyance had, however, been made of the premises to the sons, but a draft conveyance had been prepared, in which they were treated as tenants in common. They both subsequently executed marriage settlements, in which the shares which they took under the will were treated as separate shares. They both died. After the death of the sons their representatives received the rents and profits of the premises in moieties:—Held, that the sons took as tenants in common *Harrison* v. *Barton*, 1 John. & H. 287; 7 Jur., N. S., 19; 30 L. J., Ch., 213; 3 L. T., N. S., 614; 9 W. R. 177.

3. A testator gave to each of his sons an option to purchase an estate, and required a formal agreement to be executed within two months from receiving the offer to purchase. A. accepted by letter within the two months, and offered to execute a formal agreement:—Held, that the letter was such a contract as would be enforced in equity even if the formal agreement was not executed in time. *Austin* v. *Tawney*, 15 W. R. 1. And see S. C. *nom. Austin* v. *Tawney*, p. 7983, pl. (2) *infra*.

4. A testator bequeathed four leasehold houses to A. B. and C. D., in trust for his wife for life, and after her death he bequeathed the same to A. B., subject and on condition that he should grant an under-lease to C. D. for all the term wanting eleven days, at 5*l.* a year rent, of two of the houses, containing covenants similar to those contained in the original lease. The original rent of each of these two houses was 18*l.* 7*s.* 6*d.* C. D. died in the lifetime of the widow, and on her death his executor claimed an under-lease:—Held, that the gift was not personal to C. D., and was not lost by his death in the lifetime of the widow; and that his executor was entitled to an under-lease according to the requisitions of the will. *Taylor* v. *Cooper*, 10 Jur. 1078.

5. A testatrix devised real estate to trustees, in trust for her husband for life; and she authorised and directed them to sell the property absolutely to her husband for a certain sum, to be applied for the purposes of her will, provided her husband declared his acceptance of the proposal within a year after her death. *Semble*, the right of pre-emption to the husband was a gift, and therefore the trustees were not bound to make out, nor were they entitled to the costs of making out, title to the husband out of the assets of the testatrix, to the prejudice of the persons entitled to the residue. *Re Davison & Torrens*, 17 Ir. Ch. R. 7.

2. Time for Exercise.

6. A., having five daughters, devises lands in trust to convey to eldest, in case she should pay 6,000*l.* among her four sisters, and if not he gives the like pre-emption to each of his daughters. Equity will not enlarge the time. *Master* v. *Willoughby*, 2 Bro. P. C. 244.

7. Devise of lands to trustees in fee, in trust to pay debts and legacies, and after these paid, then to sell, and if any of the testator's name would buy it, such person to have it for 200*l.* less than the value. One of the testator's name brings a bill for this pre-emption, but delays bringing it until twenty-five years after testator's death. Bill dismissed. *Huckstep* v. *Mathews*, 1 Vern. 362.

8. A., seised in fee, devised lands to his daughter and her heirs; and his mind was, that if his son paid to her 50*l.*, then his son should have the land; the money was not paid at the day, and the daughter sold the land, but decreed against the vendee on the son's paying the money; but the Court took it to be but in the nature of a security. *Bland* v. *Middleton*, 2 Ch. Ca. 1.

9. Testator devised a house to trustees, upon trust to permit his son, at any time within three months after his decease, to become the purchaser thereof, at a certain price, and to convey the same accordingly; but should the son not complete the purchase within three months, then the trustees were to sell the same by auction within twelve months from the testator's death. The son, who was himself a trustee, within two months declared verbally to his co-trustees his intention to purchase, but the trustees did not deliver the title-deeds to the solicitor who was to prepare the conveyance until the last day of the three months, and no conveyance was made, nor was any part of the purchase money paid within the three months;—Held, that the right of pre-emption was gone. *Dawson* v. *Dawson*, 8 Sim. 346.

10. A person having under a will a right of pre-emption of an estate for a given sum, provided he signified to the trustees, within one month of the testator's death, his option to purchase, and paid the purchase money afterwards within two months, duly signified his option to the trustees, and applied to their solicitor for an abstract of title. The solicitor acknowledged this application, and promised to take an opportunity of seeing his clients thereon. But no abstract was furnished; and hearing nothing further, the donee of the right of pre-emption allowed the two months to expire without paying his purchase money, or taking any further step in the matter:—Held, that the trustees were not under any obligation to furnish an abstract, and the

purchase money not having been paid within the two months, the right of pre-emption was lost, the rule being that such a right must be strictly complied with. *Brooke* v. *Garrod*, 3 Kay & J. 608. Affirmed 2 De G. & J. 62; 27 L. J., Ch., 226; 6 W. R. 194

1. A testator directed his trustees to give to A. the option of purchasing his Lancashire estates at the price mentioned in his conveyance, but the offer was to be considered declined unless accepted within a month from the offer being made:—Held, that no valid offer was made until the price had been stated to A. *Lilford (Lord)* v. *Keck*, 30 Beav. 295.

2. A testator devised real estates to trustees for sale, and directed that his eldest son should have an option of purchase at a price to be fixed by arbitration, and that the time allowed for such option should be two months, within which time he should enter into such an agreement for the completion of the purchase as the arbitrators should direct or approve of. The arbitrators made their award on the 5th May, and delivered it to the family solicitor, who acted for all parties. On the 7th May the solicitor sent by post, to the eldest son, a letter containing an extract from the award. On the 16th June the son wrote to the solicitor, accepting the terms, but the formal agreement for purchase was not signed until the 6th July:—Held, that the time began to run when the award was communicated to the son, and not when the award was made, and the agreement, therefore, had been entered into within the time allowed by the will. *Austin* v. *Tawney*, 36 L. J., Ch., 339; 2 L. R., Ch., 143; 15 W. R. 463.

3. A testatrix appointed lands to the use of her husband for life, with remainder to trustees in fee, with a power to her son to purchase, upon his giving notice to the trustees, within twelve months after the death of the tenant for life. The testatrix having survived her husband more than twelve months:—Held, that the true construction of the condition was, that the notice should be given within the stated period after the estate became vested in the trustees, and that the right of pre-emption was subsisting. *Evans* v. *Stratford*, 2 Hem. & M. 142; 10 Jur., N. S., 861; 10 L. T., N. S., 713.

XLIX. Gifts by Reference and Incidents of Cumulative or Substituted Legacies.

I. EFFECT OF CERTAIN REFERENTIAL EXPRESSIONS.

4. Testator having directed transfer of 3 per cent. consols, three months after his decease, gave several other legacies of stock "as aforesaid." Those words upon construction referred to description of stock, not to the time of the transfer. *Sibley* v. *Perry*, 7 Ves. 522.

5. Testator bequeathed certain houses in trust for his granddaughter Martha for her separate use for her life, and on her decease in trust to apply the rents for the maintenance of her children then living, and when they should all attain twenty-one, in trust to sell and divide the produce among them equally; and in case Martha should die without leaving issue, to divide the produce amongst such of the testator's grandchildren thereinafter named as should be living at her decease; and the testator, by three separate and subsequent clauses, bequeathed other houses in trust for his granddaughters Charlotte, Sarah, and Harriett, for their separate use for their lives, and repeated after each clause, "and after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my granddaughter Martha." In a subsequent part of his will he declared that, if all his said granddaughters should die without leaving issue, all the houses mentioned in his will should fall into the residue of his estate. Charlotte died leaving issue; Harriett died without issue:—Held, that the houses bequeathed in trust for her went over to Martha and Sarah, as being the only grandchildren of the testator living at her death. *Doughty* v. *Saltwell*, 15 Sim. 640.

6. Trust by will as to a moiety of the share of the testator's married daughter, A., for her separate use, to the end and that it may not be subject to the control, etc., of B., her present husband, or any other husband, remainder to her husband B. for life, remainder for all the children of A., and in case there shall not be any children of A., or all shall die before twenty-one, for the survivor of B. and A., his wife, his or her executors, etc, and, as to a moiety of each of the shares of each of his unmarried daughters, upon the like trusts, and under the like restrictions, as described concerning the share of A., so, and in such manner as, that the same may be secured for the benefit of his said daughters and their children, and not to be subject or liable to the control of any husband they may happen to marry; one of the then unmarried daughters having married and died without issue, her husband surviving is not entitled to any interest in the moiety of the subject of the trust created by the will. *Judd* v. *Wyatt*, 11 Ves. 483.

7. Testator bequeathed one moiety of personal estate to his daughter for life, remainder to her children, and their children by way of substitution, absolutely; the other moiety he gave to his son for life, remainder to his son's children, and if he died without issue living at

his death, then to the children of the daughter "in such shares and proportions and in such manner as was directed for the payment and division of their shares in the other moiety": the son died without issue:—Held, that the daughter took a life interest in the second moiety by implication. *Davies* v. *Hopkins*, 2 Beav. 276.

1. A testator had a son and two daughters (A. and C.) living, another daughter (B.) was dead, having left five daughters. He bequeathed 15,000*l.*, as to 5,000*l.* for A. for life, with remainder to her children. He then gave the residue "equally amongst his son, his daughter A., the five daughters of B., and his daughter C., to be settled as he had directed the three sums of 5,000*l.* upon them and their issue":—Held, that the five daughters of B. took *per capita*, so that each was entitled to one-eighth of the residue. *Tyndale* v. *Wilkinson*, 23 Beav. 74.

2. Residuary bequest to the testator's nephew and nieces *per stirpes* equally for their lives, and after the death of either that share of the principal to be paid equally to and among the children of such of the said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares; but upon the death of the last survivor without a child, his shares both original and accrued are undisposed of, notwithstanding another has left a child. *Milsom* v. *Awdry*, 5 Ves. 465.

3. A. bequeathed leasehold estates, after the failure of previous limitations in favour of A. and his issue, "in trust for such persons as at the time of such failure of issue should be his (the testator's) next of kin according to the Statute of Distributions, and as if the testator had survived A., and in the like shares as they would be entitled to the same under the statute." He afterwards bequeathed a legacy in trust for M. for life, and, after her decease without issue, in trust for his own "next of kin in manner aforesaid":—Held, that the persons entitled to the legacy would be the persons who would be next of kin of the testator living at the death of M., and not the next of kin at his own death. *Bessant* v. *Noble*, 26 L. J., Ch., 236.

4. Testator gave certain leasehold houses in trust for A., absolutely for her separate use, and other leasehold houses in trust for B. for her separate use, for her life, and after her decease for her children; if none, to fall into the residue; and he gave the residue in trust for A. and B., to be divided between them, share and share alike, and to be paid and applied in like manner, for their use and benefit, as the rents and profits of the leasehold premises hereinbefore settled upon them, and their receipts to be a sufficient discharge: the reference in the residuary clause is not to the interests of A. and B. in the houses, but to the provision that they shall take for their separate use; therefore they take the residue absolutely. *Shanley* v. *Baker*, 4 Ves. 732.

5. The testator bequeathed 5,000*l.* to his wife for life, and after her decease to his nephew absolutely; but if the nephew should die in the lifetime of his wife, then he directed his executors to divide the same amongst the children of the nephew; and in case the nephew should die without leaving lawful issue, then to pay the same unto and equally between his two nieces, Louisa and Georgiana, for their separate use; and in case one or both of the nieces should die in the lifetime of the wife, then to pay and divide the share of the niece so dying unto and equally between her children as tenants in common; and the testator bequeathed all moneys in the public funds of which he should die possessed upon trust for his wife for her life, and after her death for the benefit of his nieces Louisa and Georgiana, in manner thereinbefore directed of and concerning the sum of 5,000*l.*, and he gave all the residue, except moneys in funds, to his wife absolutely. One of the nieces died in the lifetime of the wife, leaving children:—Held, that the gift of the 5,000*l.* to the children of the nieces could not be regarded as a part or modification of the gift to the mother, but was in fact a substitutionary gift, to arise on a distinct event; that the reference to the bequest of the 5,000*l.* in the residuary gift of the moneys in the funds by the words "in manner hereinbefore directed" might refer to the manner of taking as tenants in common or for their separate use; that the children of the niece did not, therefore, by virtue of the reference, take any interest in the residue of the moneys in the funds; and that, as to such moneys, so far as related to the share of the deceased niece, there was an intestacy. *Lumley* v. *Robbins*, 10 Hare 621; 17 Jur. 410; 22 L. J., Ch., 869; 1 W. R. 285; 1 Eq. Rep. 129.

6. A testator bequeathed his personal estate to his wife absolutely, and he devised two real estates to her for life, and after her death in trust for sale and division amongst other parties. Having sold one of the estates, he made a codicil changing his trustee, and authorising the sale of the remaining estate at any time, and he gave the produce thereof to his wife for life, and then "upon the trusts and for the intents and purposes in his will expressed and declared as concerning all his real and personal estate;" and in all other respects he confirmed his will:—Held, that the produce of the estate was not divisible amongst all the devisees and legatees ratably, but was subject to the trusts declared by the will. *Baker* v. *Richards*, 27 Beav. 320; 5 Jur., N. S., 697.

7. By will the testatrix gave a share of her property to A., a married woman, for her separate use during her life, with a general power of appointment on her decease; and another share to B., also a feme covert, for her separate use during her life, with remainder to the children of B. By a codicil, revoking this disposition, the testatrix declared that B. should have her share, "the same as A., to be at her own disposal, independent of her children, so that no part of it should be put under trust, as mentioned in the will, but to be entirely at her (B.'s) own disposal, to give to any of her children (the B.'s) who may be kind and dutiful to her":—Held, that B. took an estate for her separate use during her life. *Ker* v. *Ruxton*, 16 Jur. 491.

8. By articles of agreement, it was provided that the interest of a fund which was vested in trustees should be paid to Lady C. for her

life, and after her death the principal to go amongst the then unmarried children of herself and husband, as the husband should by deed or will appoint, and in default of appointment equally among the children who should be living at the death of the husband. The fund having been invested in lands pursuant to a trust in the articles, the husband, by his will, appointed the lands among his sons as follows: Ballygriffin to John, Gurtaneelig to George, Knuttery to Henry, and Gneeve to Nelson, to go to them immediately from and after the decease of Lady C., with a clause of survivorship among the brothers, if any of them should die before they became respectively entitled thereto. The testator, by two subsequent deeds of appointment, irrevocably appointed Ballygriffin to John, and Knuttery (which he had by his will given to Henry) to George, and by a codicil (in which these two deeds were recited) he revoked the appointment of Knuttery to his son Henry in the will contained, and instead thereof appointed to him Gurtaneelig. Henry died after the testator, but before the death of Lady C.:—Held, that the devise of the lands of Gurtaneelig by the codicil was to be considered in the light of an absolute appointment, and that same was not subject to the clause of survivorship contained in the will. *Charitable Donations and Bequests (Commissioners of)* v. *Cotter*, 2 Dr. & Wal. 615; 2 Ir. Eq. R. 196; 1 Dr. & War. 498.

1. A testator gave all his real estate to trustees, to pay the income thereof to his mother for her life, and then to sell, and divide the proceeds into two moieties, the one moiety to the children of his sister S., and the other moiety to his sister M. or her children, if she were then dead. He then gave all his personal estate, after payment of debts, etc., to his wife A. for life or widowhood; and from her decease or second marriage to transfer the whole to such persons and in such manner as he had declared concerning his real estate, "payable on the decease of his mother." The widow married during the life of the mother:—Held, that the construction to be put on this was, that on the death or marriage of his widow the personal estate was to be distributed in the same manner as the real estate was to be distributed on the death of the mother. *Mountain* v. *Young*, 18 Jur. 769.

2. A testatrix gave certain estates on trust, as to a moiety, for E. for life, with remainder, if the trustees should think proper, in trust for E.'s husband for life; and as to the other moiety, on similar trusts for H. and her husband, and in certain events, which happened, upon the same trusts, in favour of E. and her issue, as were thereinbefore expressed concerning the other moiety. The trustees, after the death of E., declared that E.'s husband should have the income of both moieties for life:—Held, that he was entitled to the income of the moiety given to H. for life. *Ashburnham* v. *Ashburnham*, 13 Jur. 1111.

3. Legacy to A. for life, then to her children for maintenance, and to be equally divided among them on their arriving at twenty-one, followed by a legacy to B., "on the same conditions on his attaining the age of twenty-one." The legacy to B. construed in the same manner as the other, viz., for life only, etc. *Longdon* v. *Simson*, 12 Ves. 295.

4. A testator by his will gives 3,000*l.* to his brother for life, with remainders to his wife and children, and 6,000*l.* to his sister B. for life, with remainders to her husband and children, and then, after two small bequests, the residue of his personal estate and effects to his sister C. absolutely. Afterwards, by a codicil, entitled by him a codicil to his will, he leaves to his brother an equal share of his effects with his sisters, subject to similar limitations with those of the 3,000*l.*, and then adds, "my sister B. to have an equal share with my sister C." He makes a second codicil, repeating the two small bequests above mentioned in the same terms in which they were given by his will, and appointing a third executor to act with the two others named in the will:—Held, that the effect of the codicils was only to equalise the shares of his brother and sisters, and that the substitutional share of B. remained subject to the same limitations for the benefit of her children, which were declared concerning the 6,000*l.* given her by the will. *Cookson* v. *Hancock*, 1 Keen 817; 5 L. J., N. S., Ch., 245. Affirmed 2 Myl. & C. 611; 6 L. J., N. S., Ch., 56.

5. A testatrix, having by her will directed her trustees to stand possessed of a fifth of her residuary estate upon trust for a woman for life, and after her death for her children, directed them to stand possessed of three other fifth parts upon such trusts for three other women respectively as should correspond with the trusts thereinbefore declared concerning the fifth part or share of the first-mentioned woman:—Held, that the three women took only life interests, with remainder to their respective children, in the same manner as the first-mentioned woman and her children took. *Smith* v. *Greenhill*, 14 W. R. 912.

6. A testatrix directed trustees to make an investment, and out of the dividends to pay annuities of 100*l.* each to his two nieces and his nephew for life, and the capital to their children respectively, and to apply 100*l.* a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one, when he gave them the capital fund producing this annuity. He bequeathed his residue to his two nieces and nephew and the children of Daniel, "in equal shares, in like manner as was thereinbefore mentioned with respect to the annual sums of 100*l.* bequeathed to them respectively":—Held, that the children of Daniel took one-fourth only of the residue. *Eames* v. *Anster*, 33 Beav. 264.

7. A testator gave an estate to his daughter E. for life, and after her death upon trusts to her children, and made similar dispositions of other estates in favour of his daughter A. and his sons J. and W. respectively, and their respective children, and gave his residuary estate to E. and A. equally. By a codicil he gave the residue to his wife for life, and after her death between E., A., J., and W. equally, "precisely in the same way as the shares before given to them in my will":—Held, that the shares of the residue were not given absolutely by the codicil, but were subject to the limitations contained in the will as to the estates specifically devised. *Re Colshead*, 2 De G. & J. 690.

Held, also, that E. and W. having died with

out issue, their shares in the residue went to the personal representatives of E. and A., the absolute gift to E. and A. in the will remaining to that extent unaltered. *Ib.*

1. A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly. *Giles* v. *Melsom*, 6 L. R., H. L., 21; 42 L. J., C. P., 122; 21 W. R. 417; 28 L. T., N. S., 789.

A father devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others "in the same manner as the estates devised were limited to them respectively," subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises "so specifically devised" to her husband:—Held, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations. *Ib.*

2. A bequest of leaseholds by reference to the uses declared respecting freeholds make the leaseholds subject to other limitations and restrictions declared concerning the freeholds. *Heasman* v. *Pearse*, 11 L. R., Eq., 522; 40 L. J., Ch., 258; 24 L. T. 864; 19 W. R. 673.

3. A testator by his will gave his residuary estate to trustees upon trust to divide it equally between his children, and by a codicil directed them to hold the sum of 2,000*l.*, part of the share of his daughter E., in trust for her for life, and after her death for her children, with an ultimate trust for the survivors or survivor of the testator's children, and the issue of such of them as should be then dead leaving issue; and the testator directed his trustees to hold the sum of 2,000*l.*, part of the share of his daughter C., in trust for her for life, and after her death "upon such and the like trusts as are hereinbefore declared of the sum of 2,000*l.* secured for the benefit of my daughter E., as fully and effectually as if such trusts were here fully repeated," and the testator directed his trustees to hold the sum of 2,000*l.*, part of the share of his daughter L., "upon such and the like trusts as are hereinbefore declared of the two several sums of 2,000*l.*, and 2,000*l.* secured for the separate use and benefit of my daughters E. and C., as fully and effectually as if such trusts were here fully repeated." E. died leaving issue, and C. without having had any issue:—Held, that the 2,000*l.* forming part of the share of C. did not pass after her death upon the same trusts as E.'s 2,000*l.*, *i.e.*, to the issue of E., but upon trusts corresponding to these, but having C.'s name substituted for E.'s, so that, in the events which had happened, it passed to the survivors of the testator's children, and the issue of such of them as were dead leaving issue. *Re Smith, Bashford* v. *Chaplin*, 45 L. T. 246.

4. A testator bequeathed 20,000*l.* consols upon trust to pay the dividends to his wife for life, and after her death to B. (the wife of A.) for life, for her separate use, and after the death of B. upon trust for the benefit of B.'s children. The testator's wife, who was his residuary legatee, survived him only two days, and by her will, after giving several legacies of 100*l.* each, bequeathed to A. and B. "the same amount and on the same trusts and conditions" as were "named" in her late husband's will. She directed her residuary estate to be divided into two moieties, whereof she gave one to A. and B. and their children, "on the same trusts as before alluded to." There was no other part of the testator's will to which the bequest in the testatrix's could be referred, except that above stated:—Held, that a legacy of 20,000*l.* consols passed by the wife's will on the same trusts as those above mentioned of the husband's will. *Stephens* v. *Powys*, 1 De G. & J. 24.

5. A father gave to his sons H. and J. 16,000*l.* upon special trust and confidence to invest and to pay the income of 8,000*l.*, part thereof, to his daughter A. for life for her separate use, and after her death to divide the 8,000*l.* amongst her children at twenty-one. He then directed that his sons should pay the income of the remaining 8,000*l.* to his daughter S. for life in the same manner in every respect and subject to the same control as he had directed as to his daughter A., it being his intention that his daughters' fortunes should not be subject to the debts of their husbands. He then gave to H. and J. 6,000*l.*, to invest and pay the income to his son S., and to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance and education of the daughters' and sons' children. The daughter S. died, leaving four children who had attained the age of twenty-one. The sum representing the 8,000*l.* had been paid into court:—Held, that by implication the four children were entitled to the fund. *Sweeting* v. *Prideaux*, 2 L. R., Ch. D., 413; 45 L. J., Ch., 378; 24 W. R. 776; 34 L. T., N. S., 240.

6. A testator gave his real and personal estate to trustees as to one-fourth to A. for life, and, after her decease, for her children, and, in default of children, for B., C., and D., and their issue, in the same manner as hereinafter directed respecting their original shares; as to one other fourth to B. for life, and, after his decease, for his children, and, in default of children, for A., C., and D., and their issue, in the same manner as directed respecting their original shares; as to one other fourth part for C. and her children by reference to the share of A., using the same referential expressions as are next given concerning the remaining share; and the fourth share he bequeathed for the benefit of D. and his children upon the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar and in all respects corresponding with the trusts, powers, and authorities expressed and declared concerning the one-fourth share bequeathed in trust for B. and his children, as effectually as if the same trusts were there repeated. D. died unmarried:—Held, that the fourth share went over, upon the death of D. without issue, to the other three legatees, A., B., and C. *Surtees* v. *Hopkinson*, 4 L. R., Eq., 98; 36 L. J., Ch., 305; 15 W. R. 395; 16 L. T., N. S. 8.

7. By a marriage settlement a fund was settled by the husband in favour of the husband and wife during their respective lives,

and after the decease of the survivor for the children. Another fund was settled by the husband's mother for herself for life, and after her decease upon such of the trusts thereinbefore declared concerning the first fund in favour of the children as should be then subsisting or capable of taking effect:—Held, that the trust of the second fund in favour of the children arose at once upon the death of the tenant for life in the lifetime of the husband and wife. *Hare* v. *Hare*, 24 W. R. 575.

A general reference in a gift to the terms of a former disposition does not determine the time when the gift is to take effect. *Ib.*

1. A testator bequeathed "a sum" of consols to trustees for his daughter L. for life, with remainder to her children. By a codicil he directed "that the sum of 200*l.* per annum be added to the sum" by his will, "granted to his daughter L. during her life, and invested in the same manner and trusts" as governed the will:—Held, that the words, "during her life," were words of reference, and not of limitation, and that the gift by the codicil was of a sum sufficient to produce 200*l.* a year, which was to be held for the daughter for life, with remainder for her children. *Auldjo* v. *Wallace*, 31 Beav. 193.

2. A testator devised his real and personal estate to trustees, upon trust to sell and put out one-ninth of the produce in Government or real securities, and to pay the interest to A. for life, and afterwards to her children. By a codicil he bequeathed a leasehold to the trustees, to hold upon the same trusts, in all respects, and for the same persons and subject to the same powers, provisoes, condition, and limitations as the above one-ninth:—Held, that A. was not entitled to enjoy the leasehold in specie, but that it must be sold and invested for the benefit of the parties entitled in succession. *Murton* v. *Markby*, 18 Beav. 196.

3. A testator gave 1,000*l.* to his sister Sarah for life, with remainder to her children; he then said, "To each of my sisters, M., A., C., and B., I bequeath 500*l.*; and in case of death of either, their portions to go to the surviving sisters above mentioned." C. died in the lifetime of the testator:—Held, that her 500*l.* survived to M., A., and B., and that Sarah was not included in the words, "the surviving sisters above mentioned." *White* v. *Wakley*, 26 Beav. 23; 28 L. J., Ch., 79.

4. Testatrix gave pecuniary legacies to A., B., and C. respectively, and appointed A. and B. her executors, and bequeathed her residuary property to her executors A. and B. By a codicil she declared that C. should be also executor, and that her will should take effect as if his name had been originally inserted therein as third executor; and she requested C. to accept a legacy of 50*l.* as some slight acknowledgment for the trouble he would have, etc., to be independent of and in addition to the benefit he derived under her will; and she declared that her trust estate and property should vest in C. jointly with A. and B., and confirmed her will in all other respects:—Held, that C. was not entitled to one-third of the residue. *Hillersdon* v. *Grove*, 21 Beav. 518.

5. Gift to the sons and daughters of T., viz., A., B., F., and M., 100*l.* each, F. excepted, "as the interest of such share shall be paid to M. for life, then the said 100*l.* shall be given to F.'s children;" then gift of residue "to A. F. for life, and after her decease I give to the sons and daughters of T. (except and excepted as aforesaid) all my remaining effects":—Held, that the children of F. took no part of the residue. *West* v. *Laking*, 12 Jur. 129.

6. Testator bequeathed to G. two sums of stock, and, in case of his death in the testator's lifetime without issue, the two sums were to be equally divided amongst the testator's nieces thereinafter named, under the same conditions and restrictions as were thereinafter mentioned, respecting the several bequests thereinafter to them respectively given. The testator then gave 12,000*l.* stock to trustees, upon trusts to pay the dividends (in thirds) to the testator's three nieces, A., B., and C., for their lives, and after their respective deaths to transfer the capital (in thirds) to the children of the nieces, with limitations over in the nature of cross-remainders, in the event of any of the nieces dying without leaving children, with an ultimate limitation, in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G. died, without issue, in the testator's lifetime. The nieces had children:—Held, that the children took the same interest in the stock given to G. as they did in the 12,000*l.* consols. *Ross* v. *Ross*, 2 Colly. 269; 9 Jur. 795.

7. By a settlement trustees were to raise 2,000*l.* for A. for life, with remainder to her children, with powers for maintenance, advancement, "or otherwise," and in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the 2,000*l.* given to A. and her children, "and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated:—Held, that this included the gift over to C., and that on the death of B. without children C. was entitled to the second 2,000*l.* *Re Shirley*, 32 Beav 394.

8. A testator gave his residue to his grandchildren, the children of his son and daughter (A. and B.), living at his decease, with a gift over to his brothers and sisters, in case any died before attaining a vested interest. By a codicil he gave 4,000*l.*, the interest to be paid in equal moieties to A. and B. during their lives, and at their decease the 4,000*l.* to be for the benefit of his grandchildren, agreeably to the instructions contained in his will. A. died, living B.:—Held, that a moiety of the 4,000*l.* became, upon the death of A., divisible amongst his children. *Archer* v. *Legg*, 31 Beav. 187; 10 W. R. 703.

9. A testatrix, by her will, after reciting that being joint heiress with her two sisters, she was possessed of a third part of the rectorial tithes of B., gave to her sisters the said third part or share to be equally divided between them, and to be held by and subject to the same conditions by which they, her two sisters, held the other two parts or shares. At the date of the will both of the sisters were married, and on the occasion of the marriage of each her shares of the tithes had been put into settlement:—Held, that the sisters became entitled respectively to a moiety of the third

upon the trusts declared by their respective marriage settlements of the shares originally vested in them in their own right. *Ord* v. *Ord*, 2 L. R., Eq., 393, 15 L. T., N. S., 51.

1. By will a testator gave a legacy "equally between my brothers and sisters now living;" and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors By a codicil of the same date he bequeathed another legacy, "between my brothers and sisters, in like manner as I have directed by my will":—Held, that the class mentioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class was to take, and not to the class itself; and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy. *Re Wilder*, 27 Beav. 418.

2. Bequest to the children of a deceased niece who should be living at the testator's death, followed by a bequest to a nephew for life, and after his decease upon the like "trusts," for the benefit of his issue, and subject to the same powers, "limitations," etc., in respect of his issue, as those expressed as to the niece's children. The nephew had no child living at the testator's death, but he afterwards had one child born:—Held, that such was entitled to the second legacy. *Yardley* v. *Yardley*, 26 Beav. 38.

3. A. devised property to the children of B., in like manner as they were entitled under the will of B., deceased:—Held, that A. referred to the will and codicils together of B. *Pigott* v. *Wilder*, 26 Beav. 90.

A father, having eight children, devised his estate to six of them equally. Afterwards the wife's father devised another property unto her children, to be vested at the like times, with like benefit of survivorship, and provision for maintenance, and in like manner in all other respects, so far as the nature of the property and the difference of tenure would permit, as the children were entitled to the estate of their father, under the dispositions and limitations contained in his will:—Held, that the eight children participated in the second devise. *Ib.*

4. A testator gave property, including 2,700*l.* stock, to his wife for life, and after her decease as to 800*l.*, part of the stock, for his daughter Y. as therein mentioned, and after the decease of Y. for her children living at the time of her decease, equally. The testator subsequently gave 1,200*l.*, further part of the stock, for his daughter S., in similar terms to those used with respect to the gift of the 800*l.* stock to his daughter Y.; and, after the decease of his daughter S., to transfer the 1,200*l.* stock to all and every the children of his said last-mentioned daughter, at the same time and in the same manner as was thereinbefore mentioned with respect to the 800*l.* for the benefit of his daughter Y.:—Held, that a child of S., who predeceased her mother, took no share in the fund. *Swift* v. *Swift*, 32 L. J., Ch., 479; 11 W. R. 334; 1 N. R. 353.

5. By a marriage settlement, reciting only the intended marriage, and that it had been agreed that the lady's property should be settled and assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses and upon such trusts as the wife should appoint, and in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds:—Held, that the power of appointment was general, and could not be restricted to a power to appoint to issue. *Minton* v. *Kirwood*, 3 L. R., Ch., 614; 37 L. J., Ch., 606.

Held, also, that the covenant to surrender the copyholds to the same uses as the freeholds made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant. *Ib.*

6. A testator gave his estate to four children in equal proportions, but his wife was to have "her proportionate part" for life, and it was given afterwards to the four children. And as to "the part of his estates" thereinbefore given to his daughter, she was to have it for life, with remainder to her children:—Held, that the "part" of the daughter included her share in the part given to the wife for life, and that therefore she was only entitled to a life interest in it. *Watson* v. *Pryce*, 34 Beav. 71.

7. A testator gave his freehold estate "and property, whether real or personal," to A. for life; and after her decease, he gave "all his said freehold estate and property" to B. and wife for life; and after their decease, he gave "all his said freehold property" to their children, "for an estate of inheritance in fee-simple," and in default he gave "his freehold estate and property" to C., "his heirs and assigns, in fee-simple." He charged his personal estate with some legacies, and he gave the residue of which he should die possessed, etc., to A.:—Held, that B. and his children took no interest in the personal estate, which belonged to A *Hollingsworth* v. *Shakeshaft*, 14 Beav 492; 21 L. J, Ch, 722.

8. A testator, having bequeathed a sum of money to his executors, in trust for his four grandchildren, Joseph, James, Lydia, and Mary, and the residue of his estate and effects, upon the happening of certain contingencies, unto his four grandchildren, devised his real estate, subject to a life interest, unto his grandson Joseph, charged and chargeable nevertheless with the payment thereout of 1,500*l.* apiece, unto each of the three brothers and sisters of Joseph, that was to say, James, Lydia, and Mary. And the testator proceeded as follows: "And I direct that if any of the children of my late son Joseph, being a son or sons, shall die under twenty-one, or if any of the children of my son Joseph, being a daughter or daughters, shall die under that age without being or having been married, then as well the original share or shares of the children so dying as the share or shares which by virtue of this proviso shall have survived or accrued to him, her, or them of and in the said sums of 1,500*l.* apiece, and of and in the rest and residue of my personal estate and effects, shall go, remain, and be to the other and others of the said children, and if more than one, in equal shares as tenants in common." The two grandchildren, Lydia and Mary, both died under twenty-one and unmarried:—Held, that

the words "said children" referred to the four grandchildren, and that James was entitled to one moiety only of the two sums of 1,500*l.* given to the granddaughters. *Dickason* v. *Foster*, 4 L. T., N. S., 628.

1. The word "said" applies to the immediate antecedent. *Re Willomier*, 16 Ir. Ch. R. 389.

A testator directed his household furniture, etc., to be sold, and the produce, with other moneys, to be laid out in stock, the interest to be paid to his wife for her life, and after her death the stock to be sold, and the half of the produce to be paid to C., eldest son of his niece E., and the other half to be divided equally between the children of E. Secondly, he left all stock, etc., of which he should die possessed, to his wife during her life, and after her death he directed the same to be sold, and 3,000*l.* of the produce to be paid to C., and the remainder to be divided equally between all the other children of his niece E., and he appointed executors. Thirdly, he devised his lands in France to his wife for life, and after her death the one half to go to C., and the other half to be divided equally between all the other children of his niece E., and he appointed an executor of his property in France; and he directed that his executors should not be liable for any loss which might happen in placing out his property according to the direction of his will, except for wilful neglect; and in case C. should die before he attained twenty-one, he directed that the said property and effects should go to his (the testator's) nearest heirs on his mother's side equally. E., the testator's niece, was his nearest heir both on his father's and mother's side, and his next of kin. C. died under age:—Held, that "my said property and effects" in the third clause did not mean all the property of the testator, but was confined to the portion of it bequeathed and devised to C. *Ib.*

Held, secondly, that it applied to all the property which C. would have taken, and was not confined to the third clause. *Ib.*

II. REDUPLICATION OF CHARGES.

2. Where trusts of a fund are declared by way of reference to the trusts of a prior fund, such limitations ought not to be so construed as to multiply the charges which had been made on such prior fund. *Boyd* v. *Boyd*, 9 L. T., N. S., 166; 2 N. R. 486.

Where, therefore, A. bequeathed to trustees a considerable sum of money for B. during his life, after his decease in trust to raise portions of 5,000*l.* each for the younger children of B. as therein named, with gifts over, subject to these charges, and he also bequeathed one-fifth of his residuary personal estate upon the trusts before declared concerning the capital of which the dividends were given to B. for life, the residuary personal estate being of very considerable amount:—Held, that the children of B. were not entitled to double portions of 5,000*l.* each. *Ib.*

3. A trust created by reference to other trusts ought not, generally speaking, to be so read as to create a duplication of charges. *Hindle* v. *Taylor*, 5 De G. M. & G. 577. And see *Samborne* v. *Barry*, 11 Ir. R. Eq. 140.

4. By the will of E. B. an undivided moiety of freeholds and leaseholds is vested in trustees upon trust to sell and pay annuities and legacies, and after decease of S. L. (her sister) and of A. B., to divide the residue among certain parties. S. L. survived, and devised the other undivided moiety of the premises to the trustees of her sister's will, to hold them upon the same trusts, or such as should after her decease be subsisting, for the benefit of the same persons and for the same purposes as were declared by her sister's will of and concerning the moiety of her sister in the premises:—Held, that the intention of S. L. was to add the produce of her moiety to her sister's personal estate, and that it was applicable in aid of payment of the annuities and legacies of E. B.'s will, and subject thereto belonged to E. B.'s residuary legatees. *Baskett* v. *Lodge*, 23 Beav. 138.

5. When an estate is devised by reference to the like limitations as are expressed in another instrument concerning another estate, the Court will consider that the testator's intention was to make the second estate a supplemental provision to the first, and not to multiply charges or powers of charging. *Leigh* v. *Leigh*, 18 W. R. 991; 22 L. T., N. S., 837.

This construction is rendered more certain if the second estate is insufficient alone to bear an independent set of charges; or, if the will devising the second estate contains more than one devise, by reference to the same limitations. *Ib.*

6. A father by his will made a series of specific devises upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; and he then gave his residuary real and personal estate upon and for the trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised:—Held, that each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically-devised estate and the child's share of residue. *Cooper* v. *Macdonald*, 16 L. R., Eq., 258; 42 L. J., Ch., 533; 28 L. T. 693.

Secus, if the power had been to appoint an annuity of or not exceeding a fixed amount. *Ib.*

7. The gift of property subject to charges, to which it is already liable, does not create a new charge. It may be a recognition or confirmation of the charge already existing, but does not create a charge more extensive than what before existed, or was supposed to exist. *Doolan* v. *Smith*, 3 J. & L. 547; 9 Ir. Eq. R. 426.

By a marriage settlement, the lands of X. and Y. were, in case the wife survived her husband, charged with an "annuity or yearly rent-charge" of 50*l.*, for the benefit of the wife during her life, provided the leases of the lands should so long continue; and it was provided, that if the husband should, at any time during his life, purchase or become seised of 20*l.* per annum, to be settled "as a jointure" on his wife, in addition to her above-mentioned rent-charge or sum of 50*l.* per annum, the

trustees should pay him a certain sum out of the trust moneys. The mother of the husband, having power to appoint the lands of Z. amongst such of her sons as she should think fit, granted, with his consent, an annuity or yearly rent-charge of 20*l.* charged on said lands, to his wife for her life; and thereupon the trustees paid the trust money to the husband. The husband afterwards acquired the lands of Z., subject to the annuity of 20*l.*; and the lease of X. having expired, and that of Z. (which was vested in a third person) being about to expire, he made his will, whereby he devised all his real, freehold, and personal property to his son, "subject to my wife's jointure," and to a further sum of 70*l.* during her life, which he thereby charged on his entire property:—Held, that the 50*l.* per annum was not impliedly charged upon Z. by the will; and that whether the word "jointure" in the will referred to the 50*l.* per annum, or the 20*l.* per annum, the gift of his property, subject to his wife's jointure, did not create a charge upon it, but left it as it was, subject to the charges created by the prior instruments. *Ib.*

III. GIFT TO PERSONS BEFORE NAMED.

1. Real and personal estate given to trustees, upon trust to pay the income to the testator's wife for her life, and, within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time; and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named (with exceptions), ratably and in proportion to the amount of their respective legacies. The wife survived the testator:—Held, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies," such legacies as remained to be satisfied at the expiration of the ten years; that annuitants for life, not having other legacies, were legatees of shares in the residue; that the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies; that annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies; that a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named;" that the widow of the testator did not take under the residuary gift; that the annuities which ceased at the expiration of the ten years were not legacies in respect of which the annuitants took any share in the residue. *Bromley* v. *Wright*, 7 Hare 334.

2. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees "specially named," except one of the classes described:—Held, that this showed that by the words "specially named" the testator meant described or mentioned; and that all the legatees, whether named or only described, took shares. *Re Holmes' Trusts*, 1 Drew. 321; 22 L. J., Ch., 393.

IV. INCIDENTS OF CUMULATIVE OR SUBSTITUTED LEGACIES.

3. Testator gave an annuity of 300*l.* free from all taxes and stamp duties to T. and H. during their joint lives, and to the survivor during her life, and after the death of the survivor to G. for her life. By a codicil he revoked the annuity of 300*l.* given to T. and H., and gave them an annuity of 100*l.* each, with benefit of survivorship. The annuities of 100*l.* are subject to the legacy duty. *Burrows* v. *Cottrell*, 3 Sim. 375.

4. Testator, by his will, directed that the legacies therein given should be paid free of legacy duty. By a codicil, which he directed might be considered and taken as part of his will, he gave other legacies:—Held, that the legacies given by the codicil were not given free of legacy duty. *Early* v. *Benbow*, 2 Colly. 354; 10 Jur. 280.

5. On mere substitution of legacy it is attended with the same incidents *primâ facie*, and where subsequent addition is made to prior legacy, addition will have same qualities. *Chatteris* v. *Young*, 6 Madd. 31.

A testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and as to the remaining 30,000*l.* she was to receive the interest to her separate use, during her life; and after her death the principal was to be paid to such person or persons as she might, by her will, appoint; and after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees, free of the legacy duty; the daughter having died in his lifetime, he afterwards by a codicil, "instead of the legacies given to her by will, which are now lapsed, bequeathed to her husband 20,000*l.*":—Held, that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty. S. C. 2 Russ. 183. Affirming 6 Madd. 31.

6. Testator gave 4,000*l.* to trustees, upon trust, for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue; by codicil, reciting this bequest, and that he is desirous of increasing the same to 5,000*l.*, he revoked the gift of 4,000*l.*, and gives 5,000*l.* upon the same trust, etc. By a second codicil, reciting the former, and that he is desirous of further increasing to 6,000*l.*, he revokes the gift of 5,000*l.*, and gives in lieu thereof 6,000*l.*, upon the same trusts. This is not a revocation, but substitution in each instance, and the 6,000*l.* is therefore exempt from the legacy duty. *Cooper* v. *Day*, 3 Meriv. 154.

7. A testatrix bequeathed a legacy of 6,000*l.*

She afterwards, in a separate sentence, said, "I also bequeath the several legacies hereinafter mentioned" [specifying them], "all which legacies I direct to be free from legacy duty." She then proceeded, "I also give E. R. 200*l.*, T. C. 4,500*l.*," "all which said legacies I direct shall be paid free of legacy duty":—Held, that the legacy of 6,000*l.* was not included in the legacies given free of duty. *Fisher* v. *Brierley*, 30 Beav. 265.

By a will some legacies were given free of duty, and their amounts were varied by a codicil:—Held, that they were still exempt from duty. S. C. 30 Beav. 267.

1. Testator by his will gave an annuity to his grandson, and directed his executors to pay the legacy duty on all the legacies and annuities given by his will. By a codicil he gave an annuity to his grandson in lieu of the annuity given by his will:—Held, that the annuity given by the codicil was free from legacy duty. *Shaftesbury* (*Earl*) v. *Marlborough* (*Duke*), 7 Sim. 237.

2. Where a legacy is given subject to specified conditions, and another legacy is given by a subsequent codicil to the same object *simpliciter*, without any intimation of an intention to import the conditions of the first legacy:—Held, to be cumulative and payable out of the same funds, and upon the same conditions, including exemption from legacy duty. *Johnstone* v. *Harrowby* (*Earl*), 1 De G. F. & J. 183; 6 Jur.. N. S., 153; 29 L. J., Ch., 145. Varying Johns. 425. And see *Re Boddington*, *Boddington* v. *Curiat*, 22 L. R., Ch. D., 597; 52 L. J., Ch., 239; 48 L. T. 110; 31 W. R. 449. Affirmed 25 L. R., Ch. D., 685; 53 L. J., Ch., 475; 50 L. T. 761; 32 W. R. 448.

3. A testator, by a codicil to a will, made in 1853, made the following bequest: "I bequeath, out of my ready money in my bankers' hands, money invested in the public funds, and other my personal estate, not consisting of an estate, interest, charge, or incumbrance upon lands or hereditaments, within the 9 Geo. 2, c. 36, 500*l.* to the Literary Association of the Friends of Poland, the sum to form part of the ordinary funds of the society, and to be applied accordingly, at the discretion of the council thereof." By a second codicil in 1854, the testator bequeathed as follows: "I give and bequeath to the Literary Association of the Friends of Poland in London 1,000*l.*":—Held, that the legacy given by the second codicil was cumulative, and also that it was payable out of the same fund, and in addition to the first legacy, and was subject, therefore, to the same restrictions and conditions. *Ib.*

Held, also, that the second legacy was payable free of duty. *Ib.*

4. A bequest by a codicil of 1,000*l.*, instead of 1,500*l.* given by the will, is subject to the same limitations and restrictions which affected the 1,500*l.* *Prescott* v. *Edmunds*, 4 L. J., Ch., 111.

5. Where testator by will devised residue to daughters as tenants in common, and afterwards made a codicil for an express purpose, but re-devised the residue to daughters, omitting words of severance, the codicil was construed by will, and they take as tenants in common. *Mathews* v. *Bowman*, 3 Anstr. 727.

6. A bequest by will of an annuity to a married woman for life, for her separate use. By codicil, a legacy of 300*l.*, "in addition" to that in the will. By a second codicil, a bequest of furniture and money in the house to the same legatee, "for her own use and purposes":—Held, that the 300*l.* must follow the trusts of the annuity; but not so the legacy in the second codicil. *Warwick* v. *Hawkins*, 16 Jur. 902; 21 L. J., Ch., 796.

7. A testatrix directs that her trustees (who were also her executors) should, within a year after her decease, pay to the several persons named in a schedule to her will the sums set opposite to their respective names, as vested and transmissible interests; in a subsequent clause she gives 3,000*l.* to the trustees, upon trust to invest the same, and pay it to A. on her attaining twenty-one, with a proviso that it should fall into the residue if A. died under twenty-one. By the schedule to her will she gives to her executors 600*l.* in trust for A., in addition to the 3,000*l.* given by the will:—Held, that the legacy of 600*l.* was not affected by the contingency to which the 3,000*l.* was subject, but vested immediately. *Tilbury* v. *Wakeford*, 5 L. J., Ch., 73.

8. Testator gave a real estate and a sum of stock to A. for her life, and after her death to his brother absolutely, and he gave legacies, which he directed to be paid as soon as convenient after his death, to his nephews and nieces, and the residue of his property to his brother absolutely. The brother having died, the testator, by a codicil reciting that fact, and that thereby the devises and bequests to his brother had lapsed, gave an annuity to his brother's widow, and directed his trustees to pay the income of the residue of his personal estate to A. for life, and gave to her all his real estates for life, and after her death to his trustees in trust to sell, and the proceeds to fall into his personal estate; he then gave 10,000*l.* to each of his nieces, in addition to the legacies given to them by the will, and directed that that sum for each of them should be held by his trustees for their separate use, and he gave all the clear residue of his estate (after providing for the before-mentioned legacies, and also those given by his will) to his nephews:—Held, that the legacies given to the nieces by the codicil were not payable till after A.'s death. *Overend* v. *Gurney*, 7 Sim. 128.

9. A testator appointed 10,000*l.* each to his younger children, and all the residue to his eldest son. And he directed the income of the whole, until the youngest should attain twenty-one, to be applied in the maintenance of the minors. In the event of a younger child dying under twenty-one, he appointed his share to the eldest son, "in addition to the residue":—Held, that the share of a younger child who died under twenty-one was not payable to the eldest until the youngest child attained twenty-one. *Duffield* v. *Currie*, 29 Beav. 284.

10. A testator bequeathed to A. B. an annuity of 150*l.*, half yearly, for her separate use; afterwards, on hearing that she was married (as she was at the time of the original bequest), he wrote on the margin of the will opposite the above passage, "now Mrs. C. D., one hundred guineas per annum, in quarterly payments," which he signed. The two handwritings were proved separately:—Held, nevertheless, that the annuity of one hundred guineas was in substitution for the other, and that this was

given to her separate use. *Martin* v. *Drinkwater*, 2 Beav. 215; 9 L. J., N. S, Ch., 247.

1. A testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, and gave a legacy of half the amount only, but without referring to the particular fund:—Held, that the latter was a mere substitution for the former; and the particular fund failing, that the legatee was not entitled to be paid out of the general assets. *Bristow* v. *Bristow*, 5 Beav. 289.

2. Testator gives 24,000*l.* upon trust, as to 6,000*l.* to pay the interest to S. B. (his niece), during her life, and after her decease the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6,000*l.* (making the remainder of the 24,000*l.*) for his three other nieces and their children. Proviso, that in case any of his said nieces should marry without such consent as therein prescribed, each, etc., so marrying should forfeit the interest of her 6,000*l.*, and all other sums to which she may be entitled under his will, and the respective sums of 6,000*l*, and all such other sums, etc., should fall into his residue; and he gives the residue in trust for his two nephews and their children; in case of the death of either, without issue, his moiety to go over to, and be divided among, his said nieces. Afterwards, by codicil, he gives to each of his nieces 2,000*l.* in addition, "subject to the same powers, provisoes, directions, and limitations, as are contained in the will respecting the sums of 6,000*l.*" S. B., who was of age at the date of the will, marries without the consent required:—Held, a forfeiture, extending not only to the future interest of her 6,000*l.*, but to the capital, and also to the 2,000*l.* given by the codicil, and to a fund set apart to answer an annuity to which S. B. would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to the testator's niece, *quære*. *Lloyd* v. *Branton*, 3 Meriv. 108.

3. A testator gave to his executors beneficially, in equal proportions, all his property which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words: "In a codicil to my will I gave to the Corporation of Gloucester 14,000*l.* In this I wish my executors would give 60,000*l.* more to them for the same purpose as I have before named. I would also give my friends (several were named with large legacies), and I confirm all other bequests, and give the rest of my property to the executors for their own interest." No other codicil was produced:—Held (affirming a decree of the Court of Chancery on a bill filed by the Corporation of Gloucester claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose. *Gloucester (Corporation)* v. *Osborn*, 1 H. L. Ca. 272. Affirming S. C. *nom. Gloucester (Corporation)* v. *Wood*, 2 Hare 131; 13 L. J., N. S., Ch., 54; 7 Jur. 1125.

4. After a legacy in stock in 4 per cent. consols Bank annuities, a legacy to same persons of an additional sum of 200*l.* was to be paid out of the 4 per cents., and was held pecuniary. *Deane* v. *Test*, 9 Ves. 146; 1 Smith 112.

5. A legacy substituted for another shall be raised out of the same fund, and subject to the same conditions. *Crowder* v. *Clowes*, 2 Ves. J. 449.

Testator created a term for debts and legacies, and gave 1,000*l.* to his niece, to be paid immediately after his decease if she should be then married; if not, the interest of the said legacy to be paid her for life, to be calculated and paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate: and by codicil he gave her 200*l.* in addition to what he had given her by the will:—Held, that the additional legacy is to be raised out of the same fund, and subject to the same conditions; and the legatee having married after the testator's death, is entitled. *Ib.*

6. Where testator by his will gave annuities to his sister A. and other females, which he declared by a general clause were for their separate use, and by a codicil gave "to each of his sisters 100*l.* a year in addition to the legacies given by the will":—Held, in the case of A., that the annuity given to her by the codicil was also for her separate use. *Day* v. *Croft*, 4 Beav. 561.

7. A testator gave an annuity to a married woman, and directed that all annuities given by his will to married women should be for their separate use. By a codicil, the testator directed his executors to pay to the married woman a legacy of 300*l.* "in addition to the legacy mentioned in his will":—Held, that the legacy was subjected to the restriction to the separate use of the married woman. *Warwick* v. *Hawkins*, 5 De G. & Sm. 481; 16 Jur. 902; 21 L. J., Ch., 796.

8. Where legacies were given to children "subject to the same limitations" as certain portions they were entitled to:—Held, that the expressions put them on the same footing as to interest. *Bredin* v. *Bredin*, 1 Dr. & War. 494.

9. A testator by his will gave two-thirds of his residue estate to his eldest son, with a gift over in case he died under twenty-five and unmarried, and he gave the remaining one-third to his second son upon similar terms. By a codicil he revoked so much of his will as related to the distribution of his residue, and gave to his second son 20,000*l.* sterling in lieu of his one-third of the residue, and he appointed his eldest son residuary legatee:—Held, that the gift of the 20,000*l.* was absolute, and not subject to the same liabilities as the one-third of the residue. *Alexander* v. *Alexander*, 5 Beav. 518; And see *Donnellan* v. *O'Neill*, 5 Ir. R., Eq., 523.

10. Where testator by his will gave his residue among certain legatees in proportion to the amount of their legacies thereinbefore given, and afterwards by codicil gave other legacies to some of the same legatees, "in addition to what he had given them by his will":—Held, that the shares which the latter took in the residue should be proportioned to their legacies under the will only. *Hall* v. *Severne*, 9 Sim. 515.

11. The testator gave the residue to his relations named in the will. He made a

codicil which he directed to be taken as part of his will, and a second by which he gave legacies, but gave no such direction in this codicil; there were legacies given to two of his relations: they shall take shares of the residue. *Sherer* v. *Bishop*, 4 Bro. C. C. 55.

1. A testator by his will gave a legacy to his daughter for life, for her separate use, with remainder to her children. By a codicil, headed as "instructions to his solicitor," to add to his will, he gave another legacy "to his daughter and children for their sole use and benefit, etc., etc.," and one-third of the residue "to his daughter and children for their sole use and benefit"—Held, that the daughter took a life interest in the gifts by the codicil. *Cator* v. *Cator*, 14 Beav. 463.

2. A testator gave a legacy of 500*l.* 3*l.* per cent. consols, or other stock into which the same might be converted, or in case he should not be possessed of such stock that he gave a legacy of as much sterling money as that amount of stock would have been worth at his death, and by a subsequent clause the testator gave another legacy of like stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate:—Held, that the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general. *Mullins* v. *Smith*, 1 Dr. & Sm. 204; 8 W. R. 739.

3. A testator by his will directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property, in trust for the survivor, upon the trusts of her original bequest:—Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore that the daughter who had attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue, and without having attained twenty-five. *Thompson* v. *Teulon*, 22 L. J., Ch., 243.

4. Testatrix by her will gave 15,000*l.* reduced annuities, "part of a larger sum standing in my name," to S. J., and 3,500*l.* like annuities, "being further part of such annuities standing in my name," to J. L. By her second codicil, after reciting that by her will she had bequeathed 15,000*l.* reduced annuities standing in her name to S. J., and that she was desirous of making a further provision for J. W., another legatee, she revoked the bequest to S. J., so far as related to the sum of 6,000*l.*, "part of the said sum of 15,000*l.* reduced annuities," and directed her executors, as soon as conveniently might be after her death, to transfer to J. W. "the said sum of 6,000*l.* reduced annuities," and after further reciting that by her will she had bequeathed 3,500*l.* "like reduced annuities" to J. L., and that she was desirous of increasing such bequest, she thereby revoked the last-mentioned bequest, and in lieu of it gave 4,500*l.* "like reduced annuities" to J. L. By her third codicil she, in order that J. W. might have the full benefit of the bequest of 6,000*l.* reduced annuities given to him by her second codicil, directed that such legacy should not be subject to any deduction for legacy duty or other charges, and that the same should be transferred to him before and in preference to any other legacies and bequests given by her out of or as part of her reduced annuities. The testatrix had 21,300*l.* reduced annuities standing in her name at the date of the will. At the date of her second codicil that sum was reduced to 18,000*l.* like annuities. At the date of her third codicil it was reduced to 16,000*l.* like annuities:—Held, that the legacy of 4,500*l.* "like reduced annuities," given by the second codicil to L. J., was not a specific but a general legacy, and that J. W. was entitled to have 6,000*l.* reduced annuities transferred to him out of the 16,000*l.* like annuities, without any deduction or abatement whatsoever. *Johnson* v. *Johnson*, 14 Sim. 313; 8 Jur. 1038.

5 A testator bequeathed to his nieces 500*l.* owing to him from A., and he directed that if his estate should not be sufficient to pay his legacies in full, they should (exclusive of that to his nieces) abate proportionally, and if it should be more than sufficient they should be increased proportionally. The testator received the debt, and by a subsequent codicil, "in the place of the intended legacy," gave his nieces 500*l.*, to be paid out of his general personal estate:—Held, that the second legacies were substitutionary and subject to the same incidents, and that the nieces were not entitled to have them increased proportionally out of the undisposed-of estate. *Duncan* v. *Duncan*, 27 Beav. 392.

6. A testatrix, by her will, dated in 1832, directed the trustees of a fund over which she had a power of appointment to hold 1,000*l.*, part thereof, on trust for her daughter E. for her separate use for life, with remainder to her husband, with remainder to her children, and, in default of children, as therein mentioned, among the other children of the testatrix. She then gave other similar portions (1,000*l.* each) of the same fund on similar trusts for her two other married daughters, H. and F., and their husbands and families. Afterwards, H. and her husband becoming involved, the testatrix advanced them 1,000*l.* out of her own moneys, taking their joint receipt for the same, and that it was in discharge of the above legacy. Afterwards, by a codicil referring to the will, and to this payment and acknowledgment, the testatrix desired the acknowledgment to be cancelled; and then expressing a fear of a deficiency of the trust fund, directed 1,000*l.* to be paid to F. and 1,000*l.* to E., without any express directions as to the settlement of these sums:—Held, that the sums given to E. and F. in the codicil must be taken to have been given with the like restrictions, etc., as the similar amounts given to E. and F. in the will. *Fenton* v. *Farington*, 2 Jur., N. S., 1120.

7. A testator gave by will 3,000*l.* upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had

by his will given the 3,000*l.* to A. for life, with remainder to her children; and afterwards to B. for life, with remainder to his children; and revoked the will as to 2,000*l.*, part of the 3,000*l.*, from and after the devise to A. and her children, and instead of giving the 2,000*l.* to B. and his children, bequeathed the same to C.:—Held, that the erroneous recital in the codicil, that the 3,000*l.* was given to B. for life, did not amount to a gift estate in the 1,000*l.*, which remained unrevoked. *Re Smith*, 2 John. & H. 594.

By the will the testator had also given 2,000*l.* to B. for life, with a gift over on insolvency:—Held, that if the codicil had been read as an implied gift of 1,000*l.* to B. for life, the gift over on insolvency would have attached to the 1,000*l.* as well as to the 2,000*l.* *Ib.*

1. By his will, a testator devised and bequeathed his real and personal estate to trustees, upon trust to invest 2,000*l.*, and stand possessed of 1,000*l.* upon trust for his daughter Mary and her family, and upon trust to pay the interest of the other 1,000*l.* to his son John for his life or solvency; and after his death, insolvency, or bankruptcy, in trust for his wife for life, and afterwards to divide the capital among her children and issue: and in default, as therein mentioned. The testator then directed, that, subject to the 2,000*l.*, the trustees should stand possessed of the residue of his estate and effects, in trust for all and every his child and children, in equal shares, and the several heirs of their respective bodies ("except as to John and his children and their issue, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than the share of any other of my children"); and in case there should be a failure of issue of any of such children, then, as to the share or shares of him, her, or them whose issue should so fail, to the use of the other or others of them, as tenants in common, and the several heirs of their respective bodies; and in case there should be a failure of issue of all such children, then to the use of such one child, and the heirs of his or her body. The testator left Mary and John his only children, and died seised and possessed of both freehold and leasehold estates:—Held, that the exception in the parenthesis did not alter the gift of the share of the residue to John, so as to make it liable to the same trusts as of the 1,000*l.* *Green* v. *Green*, 3 De G. & S. M. 480; 18 L. J., N. S., Ch., 465; 14 Jur. 74.

2. Gift of a share "in addition":—Held, under the circumstances, not liable to the same contingency as the original share. *King* v. *Tootel*, 25 Beav. 23.

A testator devised an estate to A. and B. successively for life, and, after their deaths, to sell and divide the produce between his grandchildren who should be living at the decease of the survivor of A. and B., except his grandsons E. and J., neither of whom was to receive anything; and he directed that the shares which would be otherwise payable to them should be paid to his granddaughter S., "in addition to her own share." E. and J. survived the tenants for life, but S. predeceased them:—Held, that the two shares passed to the representatives of S. *Ib.*

4. An additional legacy is subject to all the conditions attached to the previous legacy, unless there are express words to the contrary. *May* v. *May*, 19 W. R. 432.

A testator gave his wife an annuity during her widowhood. Eleven years afterwards he made a codicil, and thereby, after reciting that he had made too small a provision for his wife, he gave her, in addition to all other provisions, an annuity of 80*l.* for her life, for her sole and separate use. After his death, the widow married again:—Held, that the gift in the codicil was not subject to the condition of widowhood, and that, therefore, she was not deprived of it by her second marriage. *Ib.*

5. By his will a testator directed his property to be divided into eight equal shares, one to each of his seven children then living, naming them, of whom R., a daughter, was one, and the other share to the children of a deceased son. The share of each daughter was to be invested, and the interest was to be paid to her as it became due, and after her decease to her children. By a codicil the testator directed his executors to transfer 300*l.* consols as a legacy to R., "my daughter named in my will, in trust as otherwise therein stipulated, anything therein to the contrary notwithstanding":—Held, that the 300*l.* consols was additional to the gift to R. in the will, and that she took the same absolutely, subject, nevertheless, to have it secured. *Ledger* v. *Hooker*, 18 Jur. 481.

6. A father bequeathed to his daughter an annuity, and also, in case she did not marry before the age of twenty-eight, a legacy of 1,000*l.* By a codicil on the same paper, he gave her "furthermore 5,000*l.* upon the terms hereinbefore mentioned." A suitor of the daughter wrote to the testator after the date of his will, and before she attained twenty-eight, proposing to marry her; in answer to which the testator stated what provision he meant to make for her in his lifetime, but did not mention the above-intended testamentary dispositions. He added, that the marriage had his qualified consent, but that he must hear from his daughter before he made it absolute. The daughter wrote to the testator, expressing her consent, to which, being very ill, he replied that he could not appoint a time to attend to business. He shortly afterwards died, without making any further communication on the subject, and subsequently the marriage took place before the daughter attained twenty-eight:—Held, that the 5,000*l.* was subject to the same condition as the 1,000*l.* *Yonge* v. *Furse*, 8 De G. M. & G. 756; 3 Jur., N. S., 603; 26 L. J., Ch., 352. Reversing 2 Jur., N. S., 894; 25 L. J., Ch., 117.

7. A testator by his will bequeathed a legacy of 70,000*l.* to trustees upon certain trusts in favour of one of his adopted daughters therein named, and a legacy of 80,000*l.* upon similar trusts in favour of another adopted daughter, also named; and, after declaring that the term, "the said residuary legatees," thereinafter used should be considered to designate all persons thereinbefore named as pecuniary legatees, he bequeathed his residuary estate in trust for, and to be divided among, "the said residuary legatees" *pro rata* in proportion to the amounts of the legacies thereinbefore

bequeathed to "the said residuary legatees" respectively. By a codicil the testator revoked the legacy of 70,000*l.* given by the will, and, "in substitution for and not in addition to" the same, gave to his trustees the sum of 80,000*l.* upon the same trusts as those declared in the will concerning the revoked legacy of 70,000*l.*, and "in the same manner as if they were there repeated;" and in terms substantially identical the testator revoked the legacy of 80 000*l.* given by the will, and gave a legacy of 140,000*l.* "in substitution for and not in addition to" the revoked legacy of 80,000*l.* A question arose as to whether, in the division of the residuary estate, any and what share of it should be allotted in respect of the two increased legacies, or in respect of the two for which they were substituted:—Held, that, in the absence of authority, the fullest meaning must be given to the words, "in substitution for and not in addition to," and, reading the will and codicil together, the effect was as if the testator had directed that the increased legacies should be read as if they were inserted in the will for all purposes; and that the residue must be divided amongst the legatees as if their original legacies had been the amounts mentioned in the codicil, and not in the will. *Re Cortauld, Cortauld* v. *Carston*, 47 L. T. 647.

1. A testatrix by her will duly appointed some settled property to her husband, upon trust, that so soon as certain proceedings in law and equity (pending with respect to the property) should be terminated, and the same should come into his possession, then he should pay, assign, transfer, and set over the stock, which, by four several indentures, had been assigned or appointed by the testatrix, to the persons in the several indentures mentioned; and, secondly, that he should pay to each of her brothers and sister 2,000*l.*:—Held, that the termination of the legal proceedings applied equally to the stock and the legacies of 2,000*l.* *Luff* v. *Lord*, 11 L. T., N. S., 656.

2. A testator by his will gave 3,000*l.* to his brother B. for his life, with remainder to his wife for her life, remainder to his children; and he gave 6,000*l.* to his sister S. for her life, with remainder to her husband for his life, remainder to her children; and, after giving 10*l.* a year to each of his said servants, for their lives, he gave his real estate, and the residue of his personal estate and effects, to his sister H. By a codicil, described as a codicil to his will, he left his brother B. an equal share of his effects with his sisters, to have the interest for his life, with limitations after his decease, for the benefit of his wife and children; and his sister S. was to have an equal share with his sister H. By a second codicil he left to his two maid-servants 10*l.* a year each for their lives. The testator's sister S. survived her husband, and died, leaving two children.—Held, that S. was entitled, under the first codicil, to one-third share of the testator's personal estate, subject to the limitations declared by the testator with respect to the legacy of 6,000*l.* which had been given by the will. *Cookson* v. *Hancock*, 2 Myl. & C. 606; 6 L. J., N. S., Ch., 56. Affirming 1 Keen 817; 5 L. J., N. S., Ch., 245.

3. A testatrix gave 4,000*l.* to trustees, in trust, to pay two annuities of 60*l.* and 30*l.*, and to pay the residue and remainder of the said interest and dividends to her nieces, M. A. P. and H. P., with gifts over in favour of the children of those nieces; but if either niece died without issue before both the annuitants were dead, then the whole 4,000*l.* was, on the decease of the last surviving annuitant, to be paid and transferred to the survivor of the two nieces; and the testatrix declared that the respective legacies, by her will, given to the two nieces, should not lapse in the event of either of them dying without issue in the lifetime of the annuitant:—Held, first, that, on the decease of one of the annuitants, her annuity accrued for the benefit of the two nieces, and not for the general residuary legatee; secondly, that, under the circumstances, one niece having died without issue in the lifetime of one of the annuitants, the surviving niece took the share of the niece so dying absolutely, and not for life only, with limitations over for the benefit of her children, like the limitations declared of her own original share, on the ground that there was a new gift to the surviving niece; and that in general a new unqualified gift will not be made subject to the restrictions imposed on a prior gift in the will. *Boodle* v. *Partington*, 16 Jur. 606.

4. A testator bequeathed a legacy to trustees for his son for life, with remainder to his children. Subsequently, by a codicil, reciting that he had given a legacy for the benefit of his son and his family, he revoked the legacy, and in lieu thereof made his son one of his residuary legatees:—Held, that the son was entitled to the share of the residue absolutely. *Hargreaves* v. *Pennington*, 34 L. J., Ch., 180; 10 Jur., N. S., 834; 12 W. R. 1047.

5. Bequest of 1,000*l.* to A., the interest of 2,000*l.* to B., and at his death to his children, the sum of 1,000*l.* to D., the sum of 1,000*l.* to B., in addition to 1,000*l* before mentioned:—Held, that the former legacy to B. was of pounds sterling, and that the gift to his children was of an absolute interest in capital:—Held, also, that the reference to the former legacy in the latter gift to B. did not diminish the previous legacy, and that the latter legacy was given to B. absolutely, and not to him for life, and then to his children. *Mann* v. *Fuller*, 1 Kay 624; 23 L. J., Ch., 543; 2 Eq. Rep. 1085; 2 W. R. 510.

Legacies given "in addition to" previous gifts to the same person only partake of the same incidents, where the former gifts are absolute or defeasible; but the doctrine has never been extended so far as to alter an absolute gift of the latter legacy into a gift to the legatee for life, and after his death to other persons. *Ib.*

6. By a will property was given to trustees, to apply the rents, interest, and proceeds for the maintenance of the testator's son Edward for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another

codicil the testator gave 600*l.* stock to Edward, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—Held, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest That, although in one codicil the words, "in the event of the death of Edward," meant upon the death of Edward, it did not follow that the words in another codicil, "in the event of both their deaths," meant upon both their deaths; for one expression was applied to a life interest and the other to a capital sum. That the period of survivorship must be referred to the period of distribution, namely, the death of the testator. That, therefore, Edward, having survived the testator, took the legacy of stock absolutely. *Re More's Trust*, 10 Hare 171.

The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given, *quære*. *Ib.*

1. By his will a testator gave 20,000*l.* to his daughter for life, with remainder to her children, to be vested at twenty-one or death under that age, leaving issue. By a codicil, "instead of the 20,000*l.*," he gave 15,000*l.* to his daughter for life, with remainder to her children, "or the survivors":—Held, that the gift by the codicil was not substitutional so as to make the limitations of it similar to those in the will, and therefore that children who died after attaining twenty-one in the life of the daughter were excluded as against the surviving children. *Haley* v. *Bannister*, 23 Beav. 336.

2. When a life interest in a legacy is given by will with limitations over, and by codicil another legacy is given to the same legatee, in addition to the former legacy, the legacy given by the codicil is not *primâ facie* subject to the same limitations as the legacy given by the will. *Hill* v. *Jones*, 37 L. J., Ch., 465.

Legacies by a Codicil. When Charged on the same Property as the Legacies by the Will.] See VI. XIV. *ante.*

Operation of Wills and Codicils inter se. In General.] See VI. *ante.*

L. Implication.

I. GENERAL PRINCIPLES.

3. Necessary implication imports, not natural necessity, but so strong probability, that an intention to the contrary cannot be supposed. *Wilkinson* v. *Adam*, 1 Ves. & B. 466.

4. An estate by implication cannot be against the plain intent of the party expressed in his will. *Smith* v. *Clever*, 2 Vern 60.

5. No estate raised by implication in a will can destroy an express estate. *Bamfield* v. *Popham*, 1 P. W. 54; Salk. 236; 2 Vern. 427; 2 Eq. Ca. Abr. 308. pl. 12.

6. Implication may arise from an elliptical form of expression, which necessarily involves and implies something else, or from a form of gift which cannot be rendered effectual, or a direction to do something, which direction cannot be obeyed without implying something else. *Parker* v. *Tootal*, 11 H. L. Ca. 143; 11 Jur., N. S., 185.

II. OF DISINHERISON OF HEIR-AT-LAW.

7. An heir-at-law may be disinherited by words of necessary implication. *Gurly* v. *Gurly*, 8 Cl. & F. 763. Affirming 2 Dr. & Wal. 463.

8. An heir-at-law is not to be disinherited unless by express words; and unless it be distinctly pointed out to whom the estate is to go it devolves upon him. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668.

1. An heir is not to be disinherited by ambiguous expressions. *Johnson* v. *Telford*, 1 Russ. & M. 244; 8 L. J., Ch., 94.

2. Heir not to be disinherited in equity but by express words or necessary implication. *Kellet* v. *Kellet*, 1 Ball & B. 541. Affirmed 3 Dow P. C. 248.

3. Plain words of gift or necessary implication are required to disinherit heir-at-law. *Berry* v. *Usher*, 11 Ves. 92.

4. It is a rule in equity to give the turn of the scale in favour of an heir, and the Court always inclines in his favour, and will allow artificial reasoning to prevent his being disinherited. *Crabtree* v. *Bramble*, 3 Atk. 689. *Parsons* v. *Freeman*, *id.* 747.

5. An heir is not to be disinherited, unless by express words or necessary implication, and the same rule holds with respect to an heir of customary lands. *Gascoigne* v. *Barker*, 3 Atk. 8. *London* (*City*) v. *Garway*, 2 Vern. 571.

6. A clear implication is necessary to disinherit heir-at-law. *Boutell* v. *Mohun*, Pre. Ch. 381.

7. It is a rule of law that the heir-at-law is not to be disinherited unless by express words or necessary implication. *Hall* v. *Warren*, 7 Jur, N. S., 1089; 10 W. R. 66; 5 L. T., N. S., 190.

Where there is uncertainty in a will whether property has been devised or bequeathed from the heir-at-law or next of kin, the proper course is to allow the property to go as the law directs in cases of intestacy. *Ib.*

It is not enough to show that a testator did not intend to die intestate; it must be shown distinctly that some person has been substituted for the heir. *Ib.*

III. FROM GIFT TO A. AFTER DEATH OF B. (REAL ESTATE).

8. A., a copyholder, devised his lands to S. (a stranger) for twenty years after the death of his wife to raise portions for his younger children. *Per* Lord Chancellor, where such a devise is made to the heir, there an estate shall arise to the wife by implication; but where it is devised to a stranger (as in this case) there in the meantime it shall descend to the heir. *Fawlkner* v. *Fawlkner*, 1 Vern. 22. A stranger is but *fidei commissarius*, *quoad* the profits of that part of the real estate which are devised from him. Gilb. Eq. Rep. 270.

9. A devise of lands to the heir after the death of the wife, by necessary implication, gives an estate for life to the wife. Otherwise, where the devise is to a stranger. *London* (*City*) v. *Garway*, 2 Vern. 571.

10. Devise after the death of the devisor's wife. If the devisee is heir, the wife takes for life by implication; otherwise, not. *Upton* v. *Ferrers* (*Lord*), 5 Ves. 806.

11. Devise to B. after the death of A. B. being the heir-at-law, a necessary implication for A. for life. *Dashwood* v. *Peyton*, 18 Ves. 40.

12. One, having a wife and four daughters, devises lands to one of his daughters after the death of his wife; this is a devise to the wife for life by implication, though the daughter was only one of the co-heirs. *Hutton* v. *Simpson*, 2 Vern. 723; Pre. Ch. 439. S. C. *nom. Simpson* v. *Hornby*, Gilb. Eq. Rep. 115, 120

13. A testator, after making certain dispositions in favour of his wife and others, directed that from and after the decease of his wife without leaving issue of his marriage, his trustee should stand possessed of all the undisposed-of residue of his real and personal estate in trust for his natural daughter for the term of her natural life, with further provision in case of her death or marriage. It appeared that there was no issue of the marriage, that the testator's widow was still living, and that the natural daughter was still unmarried:—Held, from an examination of the whole will, that, according to the intention therein appearing, the vesting in possession of the natural daughter's estate was not postponed till after the death of the widow. *Rhodes* v. *Rhodes*, 7 L. R., App. Cas., 192; 51 L. J., P. C., 53; 46 L. T. 463; 30 W. R. 709.

"From and after the decease of my said wife" must be construed as referring only to property in which the widow took an interest terminable at her death. *Ib.*

Quære, if the case arose, whether they might be construed as referring also to property in which the widow's interest failed during her life. *Ib.*

14. Estate for life in lands by implication, rebutted by the party having a bequest for life in a particular part of them, and by the testator desiring she should not be turned out. *Boon* v. *Cornforth*, 2 Ves. 277.

15. Devise of land to the testator's second son for life, he or his heirs paying rent thereout to the eldest son for his life; and after the death of the second son and his wife, remainder to the first, etc., son of the second son. The wife of the second son had an estate for life by implication, by the opinion of Lord Chancellor Parker. *Willis* v. *Lucas*, 1 P. W. 472; 10 Mod. 416.

16. Construction of a will, devising specific parts of the estate to certain persons for their lives, the residue, after the death of those persons, to others, some of whom were heirs-at-law; that the words "after the death," etc., meant only subject to the life estates, repelling the implication of an estate for life in the residue, if it could arise; and whether it could, where some of the devisees were not heirs, *quære*. *Dyer* v. *Dyer*, 19 Ves. 612; 1 Meriv. 414.

17. Estate for life by implication in real and personal estate. *Cockshott* v. *Cockshott*, 2 Colly. 432; 15 L. J., N. S., Ch., 131; 10 Jur. 141.

18. Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Read* v. *Snell*, 2 Atk. 646.

19. Devise of moiety to A. for life, and of other moiety to B.; and after A.'s death, fee to be conveyed to B. If B. dies before A., A. is not entitled to B.'s moiety by implication. *Aspinal* v. *Petrin*, 1 Sim. & S. 544; 2 L. J., Ch., 121.

1. A testator gave a house and furniture to A. and B., and after their death to C., together with his estate at N.:—Held, that the estate at N. did not vest in C. till after the death of A. and B., but descended in the meantime to the testator's heir-at-law. *Attwater* v. *Attwater*, 2 W. R. 81; 18 Jur. 50; 18 Beav. 330; 23 L. J., Ch, 692.

2. A testator gave his real and personal estate to his daughter for life, with remainder to his other children; but he directed that no division of the property should be made until the decease of his daughter and her husband, and of the survivor of them:—Held, that the husband took no interest by implication. *Barnet* v. *Barnet*, 29 Beav. 239.

3. Devise of real estate to W. R. W. and his heirs, upon trust to receive the rents and profits, and apply same in discharge of the testator's debts and legacies, and after payment thereof to convey a portion of said real estate to testator's brother R. W. for his life, and the residue thereof, and the part so devised to R. W., after his decease to such of the sons of W. R. W., the trustee, as should at his decease be his second son, for life, with remainder to the first and other sons of such second son in tail male; with remainder to the third, fourth, and other sons of W. R. W., successively, in strict settlement. Testator appointed W. R. W. his residuary legatee. The debts and legacies were all paid, and R. W. died in the lifetime of W. R. W.:—Held, that the heir-at-law of the testator was entitled to the rents and profits of the real estate until the death of W. R. W., as undisposed-of realty. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

4. Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L, gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters M. and C. He then gave to his wife for her life the possession of his house, together with the use of his plate, furniture, etc., and the interest of his stock in the funds during her life, "save and except the clauses in favour of my daughters as already mentioned: at her decease, it is my will and pleasure that M. and C. shall divide equally between them, as residuary legatees, whatever I my die possessed of, except what is already mentioned in favour of others".—Held, that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee commencing on the widow's decease, in the estates in H. and L., and that the widow did not take a life interest by implication in those estates, and that the heir took them by descent during her life. *Davenport* v. *Coltman*, 12 Sim. 588; 11 L. J., N. S., Ch., 262; 6 Jur. 381. And see S. C. at law, 9 M. & W. 481; 11 L. J., N. S., Exch., 114.

5. Children, by implication from will and codicil, the latter saying, that in case tenant for life had no children, gift over:—Held, entitled to legacy. *Exp. Rogers*, 2 Madd. 449.

6. As to the effect of a devise to the heir and another person, or to the heir and other persons on the death of A., where there is no explanatory context, *quære*. *Blackwell* v. *Bull*, 1 Keen 176; 5 L. J., N. S., Ch., 251.

The word "family" admits of a variety of applications, and the construction to be put upon it, in a particular will, must depend upon the intention to be collected from the whole context of the will. Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust, that, at his wife's decease, the whole of it, as well freehold as personal, should be equally divided among his children, it was held that the testator in the words "my family" intended to comprise his wife, and as to the testator's property devised after his wife's decease to his children, it was held upon the whole will, and what appeared to be the evident intention of the testator, that the wife took a life interest by implication as well in the real as in the personal estate. *Ib.*

7. A testator, who died in June 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. W., "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of 700*l.* to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren:—Held (affirming 5 L. R., Ch. D, 984; 46 L. J., Ch, 530; 37 L. T. 112; 25 W. R. 530), that the widow did not take a life estate by implication. *Ralph* v. *Carrick*, 11 L. R., Ch. D., 873; 48 L. J., Ch., 801; 40 L. T. 505.

A life estate in A. B. will not be implied from a gift on the death of A. B. to the testator's heir-at-law or next of kin along with other persons. *Ib.*

IV. FROM GIFT TO A. AFTER DEATH OF B. (PERSONAL ESTATE).

8. A testator, having brothers and sisters, and several nephews and nieces, and having given a legacy to one of his brothers, directed

his residuary estate to be invested in Government security, the interest to be paid for the maintenance of M. as long as she lived single and without a child; and, at her death, the money to come to his brothers' and sisters' children: M., although married, and having a child, is entitled to the interest for life, not to the principal. *Bird* v. *Hunsdon*, 2 Swan 342; 1 Wils. 456.

1. Testator bequeathed one moiety of personal estate to his daughter for life, remainder to her children, and their children by way of substitution, absolutely; her other moiety he gave to his son for life, remainder to his son's children, and if he died without issue living at his death, then to the children of the daughter "in such shares and proportions and in such manner as was directed for the payment and division of their shares in the other moiety:" the son died without issue:—Held, that the daughter took a life interest in the second moiety by implication. *Davies* v. *Hopkins*, 2 Beav. 276.

2. Estate for life in real estates and in personalty by implication. *Ramsden* v. *Hassard*, 3 Bro. C. C. 236. And see *Blackwell* v. *Bull*, 1 Keen 176; 5 L. J., N. S., Ch., 251.

3. Bequest, after the death of A., of 2,500*l.* as A. should appoint, with a gift over "of the same" in default, and to be paid with interest from A.'s death; A. appointed a part to B., and 1,630*l.* to other persons, and directed the said sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease:—Held, that the interest on the 1,630*l.*, accruing between the deaths of A. and B., neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment. *Henderson* v. *Constable*, 5 Beav. 297; 11 L. J., N. S., Ch., 332.

4. A testator willed that certain property should be vested in a manner most secure, and least liable to fluctuation or risk, and that 3,000*l.* should be at the will of his wife at her death; but the residue he willed his wife should distribute to his relations. He made his wife residuary legatee:—Held, that the distribution to the relations was not to take place until the wife's death, and the Court inclined to the opinion that the wife took a life estate by implication; but held that, at all events, she was entitled for life under the residuary gift to her. *Hudleston* v. *Gouldsbury*, 10 Beav. 547; 11 Jur. 464.

5. A will containing a devise of realty in trust for A. for life, remainder to B., his wife, for life, and after the death of the survivor, to sell and divide the proceeds equally among the children, whose shares were to be vested at twenty-one for sons, and twenty-one or marriage for daughters, with a proviso postponing payment in the event of any shares vesting in the lifetime of either tenant for life. The will also contained a bequest of stock, in trust to pay the dividends to A. for life, and on his death to divide the principal among his children equally, the shares to vest at the same time as were before provided as to the proceeds of the realty; and there was a proviso that in the event of there being no child of A. and B., or all the children dying before twenty-one, or, if daughters, before that age or marriage, the proceeds of the realty and the sum of stock should be divided equally among the members of a defined class of persons who should be living at the death of the survivor of A. and B., or A.'s children or child, as according to the trusts thereinbefore declared the case might require:—Held, that the last of these clauses must be read distributively, and that it did not give to B. by implication a life interest in the stock. *Drew* v. *Killick*, 1 De G. & Sm. 266; 11 Jur 900.

6. A testator made a minutely specific provision for his wife for life; and directed that all his property at her death should be sold and divided between his children, "or such of them as shall be living at my decease, and the issue of such of my wife":—Held, that in a fund not described part of the estate, the widow did not take a life estate by implication. *Stevens* v. *Hale*, 2 Dr. & Sm. 22; 10 W. R. 418; 6 L. T., N. S., 453.

7. A gift of personal estate to several children "after the death of A.," their mother, no estate being given during the life of A., raises an implied gift of a life estate in favour of A. *Cock* v. *Cock*, 28 L. T., N. S., 627; 21 W. R. 807.

8. After gifts to A., B., and C. there was a gift "after their decease" of that property, together with the residue:—Held, that "after their decease" meant "subject to the interests of A., B., and C.," and that these words did not postpone the immediate enjoyment of the general residue. *Lill* v. *Lill*, 23 Beav. 446; 5 W. R. 300. S. P. *Key* v. *Key*, 4 De G. M. & G. 73; 17 Jur. 769; 22 L. J., Ch., 641; 1 Eq. Rep. 82.

9. A bequest by a testator of the remainder of his personal property, after his wife's death to be equally divided among a class which could only then be ascertained by implication, entitles the wife to receive the interest of the property during her life. *Humphreys* v. *Humphreys*, 15 W. R. 391; 14 L. T., N. S., 557.

A testator, after giving an annuity and legacies to his wife, and an annuity to his father for his life and that of his (testator's) mother, left several legacies which he wished to be paid duty free after the death of his father and mother; after his wife's death he directed the remainder of his property to be equally divided among his brothers and sisters, if living; if dead, among his nephews and nieces:—Held, that the widow took a life estate by implication in the residue. S. C. 4 L. R., Eq., 475.

10. Gift of residue to trustees to invest and pay the income to daughter T. "during the joint lives of herself and my two sons-in-law for her sole and separate use and benefit, and after the death of my sons-in-law or either of them I direct that their or his widow or widows shall be entitled to share and participate equally with my daughter T. in the income, so that the same shall be received and enjoyed by my daughters and the survivors or survivor of them during their or her lives or life for her sole and separate use and benefit." Upon the death of the last survivor, the capital to be divided amongst the grandchildren. T. died before the sons-in-law:—Held, that there was an intestacy of the income until the widowhood of the daughters.

Isaacson v. *Van Goor*, 21 W. R. 156; 42 L. J., Ch., 193; 27 L. T., N. S., 752.

1. A testator gave a sum of stock in trust to pay the income to a married woman for life, and after her decease if she should have children, in trust to pay the income to her husband for life, and after his decease in trust for the children equally; but if there should be no child (which was the case) then, after the decease of the husband and wife, in trust for other persons absolutely. The husband survived his wife:—Held, that he took a life interest by implication. *Re Blake*, 36 L. J., Ch., 747; 16 L. T., N. S., 279; 3 L. R., Eq., 799.

2. By a marriage settlement certain trust funds stood limited in trust for the wife for life, and after her death, in default of children, for such persons as A. (the wife) should by will appoint, and, in default of appointment, to her next of kin. The husband took no interest under the settlement. By her will A., after reciting the settlement, directed and appointed all such property so subject to her disposition as aforesaid, and from and after the decease of her said husband (but not to affect the income thereof during his life), in equal fifth parts unto and between her brother and four sisters therein named. At the date of the will the said brother and sisters were five out of six people who would have been entitled as the next of kin of A. if she had then died:—Held, that the husband of A. did not take any life estate by implication. *Woodhouse* v. *Spurgeon*, 52 L. J., Ch., 825; 49 L. T. 97; 32 W. R. 225.

3. A testator bequeathed life annuities payable from his death, and he directed a fund to be set apart to secure them. He also gave one half of the residue of his personal estate to his widow absolutely, and the other half to parties for life, with remainders over. By a codicil he postponed the payment of the annuities until the death of the wife:—Held, first, that she did not by implication take the intermediate dividends of the fund set apart to answer the annuities. *Cranley* v. *Dixon*, 23 Beav. 512; 3 Jur., N. S., 531; 26 L. J., Ch., 529.

Held, secondly, that such dividends, as between the tenants for life and those in remainder, constituted income, and not corpus. *Ib.*

4. A testator, who died in June 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. W., "equally among them, the descendants (if any) of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of 700*l.* to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren:—Held (affirming 5 L. R., Ch. D., 984; 46 L. J., Ch., 530; 37 L. T., N. S., 112; 25 W. R. 530), that the widow did not take a life estate by implication. *Ralph* v. *Carrick*, 11 L. R., Ch. D., 873; 48 L. J., Ch., 801; 40 L. T. 505.

A life estate in A. B. will not be implied from a gift on the death of A. B. to the testator's heir-at-law or next of kin along with other persons. *Ib.*

5. A testator gave a legacy to the mayor of Dublin for such objects as he should deem most deserving, and gave the residue of his property to his trustees for such objects as they should consider most deserving:—Held, that the legacies were not charitable, and not given to the mayor or the trustees for their own benefit, and therefore void. *Harris* v. *Du Pasquier*, 26 L. T. 689; 20 W. R. 668.

These gifts were to take effect after the death or marriage of the testator's wife:—Held, no life estate by implication to the widow. *Ib.*

6. A testator devised to A. all his real estate, including chattels real, in trust for B. and her heirs, for her sole and separate use. Provided, that if B. should die under the age of twenty-one, and unmarried, he bequeathed all the property he should be possessed of or entitled to at his decease to A., his heirs, etc., for ever, subject to a life annuity; and he bequeathed a legacy of 500*l.* to A., whom he appointed his executor:—Held, that there was no gift by implication of the personal estate to B. *James* v. *Shannon*, 2 Ir. R., Eq., 118.

V. OF ABSOLUTE INTEREST FROM GIFT TO A. TILL TWENTY-ONE, OR LIMITATION OVER ON DEATH UNDER TWENTY-ONE.

7. Bequest of stock to executors for the use of E. and A., or the longer liver, the dividends to be paid to their order during the lives of either of them, and then to the issue of A., if any; if not, the stock to be transferred in trust for J. till he comes of age. J. attained twenty-one, and died; then E., and lastly A., without issue. The representative of J. held entitled to the fund, and that the trust during the minority was only a mode of convenience. *Atkinson* v. *Paice*, 1 Bro. C. C. 92.

8. Legacy to trustees to be put out upon security, the interests to be paid to A., and in case she marry or die the interests to be paid to B., in trust for her till she come to the age

of twenty-one years:—Held, that B. was absolutely entitled to the legacy. *Hale* v. *Beck*, 2 Eden 229.

1. A testatrix having by will directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces, to be paid to them half-yearly, and at their decease "the half-yearly dividends to be continued to their children till they came to the age of twenty-one." She then "constituted and appointed" the executors (*nominatim*) trustees for the nieces and their children. All the children of a deceased niece had attained twenty-one:—Held, that they were entitled absolutely to the moiety given to her for life. *Wilks* v. *Williams*, 2 John. & H. 125; 10 W. R. 55; 5 L. T., N. S., 445.

2. Devise of the residue of real and personal estate to executors for A., till he attain twenty-one, and then the trust to cease, passes the whole beneficial estate to A. *Peat* v. *Powell*, Ambl. 387; 1 Eden 479.

3. J. S., after the devise of several parts of his real and personal estates to several persons, devises the interest and produce of the surplus of his real and personal estate to his grandchildren, until their age of twenty-one. This will pass the absolute right and property of the real and personal estate to the grandchildren after that age. *Newland* v. *Shephard*, 2 P. W. 194.

4. Resulting trust for the heir; the only express devise being to convey to the devisor's son, from and after his age of thirty, which he did not attain; and no devise by implication, from a declaration, that he shall have no power over the estate until his age of thirty. *Nash* v. *Smith*, 17 Ves. 29.

5. A testator gave his residue to his wife for her and her son's support, clothing, and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his bank stock to his wife for life; after her death, he gave all his property to his daughter:—Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. *Fitzhenry* v. *Bonner*, 2 Drew. 36; 2 W. R. 30; 2 Eq. Rep. 454.

6. Legacy to be paid on marriage with consent; and given over in case of death before twenty-five "or" such marriage with consent:—Held, that the legacy was only intended to go over in the event of death before twenty-five "and" such marriage with consent. *Malcolm* v. *O'Callaghan*, Coop. *temp.* Brough. 73; 2 Madd. 349.

7. Leaseholds were bequeathed to executors in trust for A. and B., "for their use and benefit until A. is twenty-five years old, and in case A. and B. should die before A. attains twenty-five, then the leaseholds shall be equally divided between C., D., and E." A. attained twenty-five:—Held, that A. and B. became absolutely entitled in moieties to the leaseholds. *Gardiner* v. *Stevens*, 9 W. R. 138; 30 L. J., Ch., 199; 7 Jur., N. S., 307.

8. Devise to A. until he attained twenty-one, with devise to B. for life if A. died under twenty-one. The will then proceeded with a gift of the produce of the estate to a class of persons, such gift commencing with the word "likewise" with a capital letter. The will contained no stops. A. attained twenty-one. On the construction of the will:—Held, that the son having attained twenty-one, the gift to the nephews failed. *Paylor* v. *Pegg*, 24 Beav. 105.

9. A testator, after directing payment of his debts, funeral and testamentary expenses, gave to his daughter by a first marriage 500*l.*; he then gave to trustees all the residue of his estate and effects except articles specified, upon trust to permit his wife to receive the rents and profits for life, for the maintenance of herself and such children as he might have by her living at the time of his decease till twenty-one. He then gave to each of such children 500*l.*, to be paid to them as they respectively attained twenty-one; but in case of his wife's decease before they attained that age, the trustees to apply the interest of his estate and effects for their maintenance and education until they arrive at that age equally; but in case any of them died under twenty-one, that share to go equally among the survivors or survivor. There was then a specific gift to the wife, with a proviso that if she should marry again all the testator's estates and effects should be equally divided amongst his children by her in equal proportions as they should attain twenty-one, subject to maintenance in the meantime. The widow did not marry again, and on the questions what interest she and the children took under the will:—Held, that the gift to the daughter by the first marriage was intended to be all her provision, and that there was an absolute gift of the corpus of the residue to the children of the second marriage equally in any event, subject to the provision for the wife. *Tunaley* v. *Roch*, 5 W. R. 515.

10. A grandfather by his will, after reference to the provision thereinafter made for his granddaughter, directed that, as to certain shares, until his granddaughter attained the age of twenty-one, or should be married with consent, his executors should hold them upon trust to pay the dividends to his daughter; but when his granddaughter should attain the age of twenty-one, or before upon marriage with consent, upon trust to pay the dividends to his daughter during her life, apart from her husband; and in case of her marriage with consent, then upon such marriage he gave to his executors such a sum of money as would, with the value of the shares, make up 2,500*l.*, upon trust to settle the same for the benefit and provision of his daughter for her separate use, with power in such settlement for her to dispose of the same among her issue, or if no issue, a general power of disposition; and the will contained a gift over in the event of her dying under twenty-one and unmarried. She attained twenty-one, but was still unmarried:—Held, that she was not entitled absolutely, but took an interest for life, subject to any question that might arise on marriage. *Savage* v. *Tyers*, 41 L. J., Ch., 815; 7 L. R., Ch., 356; 20 W. R. 817.

VI. FROM GIFT TO A., AND IF HE DIES WITHOUT ISSUE OR CHILDREN, OVER. INTEREST OF ISSUE OR CHILDREN.

11. Children, by implication from will and

codicil, the latter saying, that in case tenant for life had no children, gift over:—Held, entitled to legacy. *Exp. Rogers*, 2 Madd. 449.

1. Bequest of an annuity to A. and B., and to the survivor for life; and if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to A. and his heirs for ever:—Held, that the children of A. took absolute interests in a perpetual annuity. *Robinson* v. *Hunt*, 4 Beav. 450.

2. Pecuniary legacies were given severally to A., B., C., and D., "during their natural lives," and in case of the demise of any of them "without legitimate issue," his proportion was to be divided among the survivors. A. died leaving children:—Held, that they did not take by implication, but that on A.'s death his legacy fell into the residue. *Ranelagh* v. *Ranelagh*, 12 Beav. 200; 19 L. J., N. S., Ch., 39.

3. A testator bequeathed a sum of money to his wife's nephew for life, and if he should die in the testator's lifetime without issue, then he gave the same to other parties. The nephew died in the lifetime of the testator, leaving issue:—Held, that such issue was not entitled by implication to the legacy. *Cooper* v. *Pitcher*, 16 L. J., N. S., Ch., 24; 4 Hare 485; 9 Jur. 202.

4. Devise and bequest of residuary real and personal estate to the testator's son, and the heirs of his body for ever; and in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike. The son takes an estate tail in the freehold part of the property. *Abram* v. *Ward*, 6 Hare 165; 16 L. J., N. S., Ch., 293; 11 Jur 867.

5. Where there is an indefinite bequest to a parent, and if he dies without having or leaving children over, the children do not take by implication. *Kinsella* v. *Caffrey*, 11 Ir. Ch. R. 154.

Where there is a bequest to the parent for life, and if he die without having or leaving children over, the children are not entitled by implication. *Ib.*

Where there is a bequest to a parent for life, and if he die without having or leaving children over, and there are matters in the will to raise an inference in favour of the children, the Court is at liberty to take them in connection with the bequest, in the event of the parent dying without having or leaving issue, and to hold that the children are entitled by implication. *Ib.*

A. bequeathed to each of his grandnephews, A. and B., an annuity for their lives; and in case of the death of either of them leaving issue, he directed that the annuity of him so dying should go to such issue if more than one, share and share alike, the share or shares of such child or children as should die under twenty-one or marriage to go to and be equally divided amongst the survivor and survivors of such issue during their respective natural lives; and if but one, the whole of annuity to go to such only child for life; and in case of the death of either A. or B. without lawful issue living at his death, that the annuity of him so dying should go to the survivor for his life; and in case of the death of both A. and B. without having issue or leaving such, and that such issue should die before the age of twenty-one, then, after the death of the survivor of such issue of A. and B., he directed that the said two annuities should sink into his residuary personal estate. A. died without issue:—Held, that there was a bequest by implication of A.'s annuity to the children. *Ib.*

6. Devise in trust for A. for life, and after the decease of A., in trust to permit such one child of A., and the heirs of his or her body, to receive the rents as A. should appoint by deed or will, and in default of appointment to go to his eldest son and the heirs of his body; and in case there should be no son, to and amongst his daughters, and to the heirs of their bodies, share and share alike; and in default of such issue, in trust for B., C., and D. successively for their lives, with similar remainders respectively to them as to A.'s sons and daughters, with remainder over in fee, and a residuary devise to A. A. by will appointed to his eldest son, who died without issue in his lifetime:—Held, first, that A. took an estate tail in remainder, after the estate devised to his eldest son in default of appointment. *Bell* v. *Bell*, 15 Ir. Ch. R. 517.

Held, secondly, that the words "in case there shall be no son" did not give an estate by implication to the other sons of A. *Ib.*

7. A. by will gave 2,000*l.* on trust for E. for life, with remainder as E. should appoint, and in default of such appointment for such persons as should be living at the death of E and next of kindred of A.; and in case E. should die without issue living to attain twenty-one, then over. E. never executed the power of appointment, and died leaving one only child, who attained twenty-one:—Held, that there was no estate by implication in the issue of E. *Re Hayton*, 10 L. T., N. S., 336; 1 N. R. 55

Held, also, that the gift to the next of kindred of A. took effect, and that "next of kindred" meant the nearest relatives of A. living at the time specified. *Ib.*

8. Bequest of residue of personal estate to trustees, upon trust for A.; but if he should die in the testatrix's lifetime, "without leaving any child or children him surviving," then in trust for B. absolutely:—Held, not to create a trust by implication for the children of A. on his death in the testatrix's lifetime; and *semble*, that it was a case of intestacy. *Lee* v. *Bush*, 2 De G. M. & G. 810; 16 Jur. 1057; 22 L. J., Ch., 97.

9. A bequest to A. for life, with a gift over, if he die without leaving issue, gives no interest by implication to the issue. *Neighbour* v. *Thurlow*, 28 Beav. 33.

A. gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, and if any die without leaving issue, in that case to return again for the benefit of his grandchildren":—Held, that the three children took during their joint lives and the life of survivors and survivor; and, secondly, that their children took no interest by implication, so that if the three children all died leaving issue there would be an intestacy after the death of the survivor. *Ib.*

10. A testator gave legacies to his children absolutely, and then gave the income of his

residuary estate to his wife for her life, and directed that after her death the income should be divided equally among his said children during their respective lives, and after the death of all his children he directed the capital to be divided equally among all his grandchildren; provided, nevertheless, that in case of the death of any of his said children, leaving lawful issue, "the respective legacy, share, and interest" of the child or children so dying should immediately thereupon become vested in such his, her, or their issue respectively:—Held, that upon the death of a child leaving issue before the period of distribution, the income of that share of the residue of which the child had been tenant for life was payable until the period of distribution to the issue as joint tenants, and not to the surviving children of the testator. *Walmsley* v. *Foxhall*, 1 De G. J. & S. 605.

1. Bequest to W. of an annuity during his natural life, and in case W. should die without child or children, and from and after his death, then over:—Held, that W.'s children took no interest in this annuity. *Sparks* v. *Restal* 24 Beav. 218.

2. B., after directing the payment of his general expenses, gave all his funded property in the Bank of England and certain other personal and real estate to his daughter S., she paying and receiving all his debts. The will proceeded as follows: "The said S shall in no way dispose of any of the said funded property, but to hold the same for her natural life, and if she should die without issue the said landed property shall go to J. B for his natural life. I will and direct that all the funded property shall go to my granddaughter W. and her heirs for ever; and I also will and direct that after the death of the said J. B. all the said landed property shall go to W. and her heirs for ever." On the question what interest S. took in the testator's funded property:—Held, *semble*, that the issue of S. took no gift by implication from the terms of the gift over, but W. took the funded property absolutely on the death of S. *Exp. Horill, Re Banks' Trust*, 2 Kay & J. 387.

3. Where a testator directed the annual interest of his residue to be divided into as many shares as there were living children of T. and L., share and share alike, as they should come of age; and in case any one should die without children, his share to devolve on survivors successively, till the whole interest came into the hands of the grandchildren and great-grandchildren of T. and L.:—Held, that the children of T. living at his death were entitled to the income only, but that there was a gift by implication to these children absolutely, with a gift over of the share of any grandchild who had died without having had issue; not absolutely, but according to the gift of the original share. *Wetherell* v. *Wetherell*, 4 Giff. 51.

4. Bequest of residue to John L., but if he should die in the lifetime of the testatrix, without leaving children, then to Charles L.:—Held, that the children of John L. took nothing by implication. *Addison* v. *Bush*, 14 Beav. 459.

In such a case the same words receive the same construction in the case of a residue, as in that of a mere legacy. *Ib.*

5. A testator directed that the interest of his estate should be divided half-yearly between four of his sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children:—Held, that the four sons take estates for life only, and that on the death of any one of them, leaving children, such children take the corpus of one-fourth part by implication. *Dowling* v. *Dowling*, 11 Jur., N. S., 1033; 14 W. R. 47; 1 L. R., Eq., 442. S. C. on appeal, 1 L. R., Ch., 612; 12 Jur., N. S., 720; 14 W. R. 1003; 15 L. T., N. S., 152.

6. Devise of lands of gavelkind tenure to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. M. and the heirs male of his body, and in default of issue of the body of the said T. G. M. for every other son of T. M. successively, for the like estates and interests; and on failure of all such issue of the body of T. M., upon trust for him his heirs and assigns, for ever; provided that if P. M., or T. M., or any of their issue, should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises, upon trust for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead. T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates upon trust for his wife for her life, and from and after her decease upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate:—Held, that P. M. took an estate for her life only; that T. G. M. took an estate for life in remainder after the life estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his becoming entitled to the Jodrell estate; that the eldest son of T. G. M. took a contingent remainder in tail, after the determination of the life estate of his father. *Moneypenny* v. *Dering*, 7 Hare 568; 14 Jur. 1083.

VII. OF DEVISE TO SURVIVORS.

7. A testatrix gave 50*l.* long annuities to her sister M. P., and her said sister's husband, for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities. *Townley* v. *Bolton*, 1 Myl. & K. 148; 2 L. J., N. S., Ch., 25.

8. A bequest of the interest of the residue to the use of "A. and his wife for their lives," with remainder over:—Held, that the wife, who survived her husband, was entitled during their joint lives and the life of the survivor. *Moffatt* v. *Burnie*, 18 Beav. 211; 18 Jur. 32; 23 L. J., Ch., 591; 2 W. R. 83.

9. A testatrix gave unto A. and B. a sum in

the long annuities, to be equally divided during their lives, after which she gave the said sum to C.:—Held, that the survivor of A. and B. took for life. *M'Dermott* v. *Wallace*, 5 Beav. 142; 6 Jur. 547.

1. A testatrix bequeathed to two servants, husband and wife, an annuity of 200*l.* a year each, for their lives, and the life of the survivor:—Held, that this was a gift of two annuities; and that on the death of one of the annuitants his annuity continued for the life of the survivor, and that his personal representative was the party entitled to receive it. *Eales* v. *Cardigan (Lord)*, 9 Sim. 384; 8 L. J., N. S., Ch., 11.

2. A testator gave a fund to trustees upon trust to pay the interest thereof unto and between B. and C. during their respective lives in equal shares; and after the decease of B. and C. upon trust to pay, assign, and transfer the fund unto and between the children of B. and C. And if there should be no child or children of B. and C. living at the time of the death of C., then upon trust for other parties. B. died, leaving children:—Held, that C. took during his life the whole of the produce of the trust fund, and that at his death the principal was distributable among the children of B. and C. who should survive C. *Pearce* v. *Edmeades*, 3 Y. & Coll. 246; 8 L. J., N. S., Exch. Eq., 61; 3 Jur. 245.

3. Legacies are given to A., B., and C., to be paid at their respective marriages, and if any of them die her legacy to go to the survivors. One of them dies unmarried. The survivors shall not receive her legacy before their respective marriages. *Moore* v. *Godfrey*, 2 Vern. 620.

4. Bequest "to A. and B. of the sum of 25*l.* per annum each, for and during the term of their natural lives or the life of the longest liver of them, for their or her own absolute use and benefit":—Held, that on the death of A. her annuity survived to B. for her life. *Hatton* v. *Finch*, 4 Beav. 186; 5 Jur. 548.

5. Bequest of an annuity to the child or children of B. equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them, or longer liver of them:—Held, that the children took as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, and that the shares of those dying within that period went to their personal representatives. *Bryan* v. *Twigg*, 3 L. R., Ch., 183; 37 L. J., Ch., 219; 16 W. R. 298. Affirming 3 L. R., Eq., 133; 15 W. R. 37; 36 L. J., Ch., 45.

6. A testator directed an annuity to be purchased for the life of his two sisters, to be equally divided between them:—Held, that the annuity was only to continue during the joint lives of the two sisters. *Grant* v. *Winbolt*, 23 L. J., Ch., 282; 2 W. R. 151.

7. The testator gave an annuity to A. for life, and the income of the residue to B. and C. "during their lives as tenants in common." The gift over to their respective children was only after the deaths of A., B., and C.; and there was a provision for intermediate maintenance; it was only on a contingent event, which never happened. B. died:—Held, that C. was not, by implication or otherwise, entitled to more than half of the income for life. *Re Drakeley's Estate*, 19 Beav. 395; 2 W. R. 613.

8. Devise and bequest to A., and after her decease, leaving any child or children her surviving who should attain twenty-one, to pay her share "to her eldest child, his executors, administrators, and assigns," with a gift over in default of such child:—Held, that A.'s eldest child, who died in A.'s life, did not take, but that the second child, who survived her mother, was entitled. *Stevens* v. *Pyle*, 30 Beav. 284.

9. A gift of income to persons by name, though accompanied by words of severance, followed by a gift over after the death of the same persons, naming them, is clear evidence of intention that the subject of the gift should pass as a whole. *Draycott* v. *Wood*, 8 L. T., N. S., 304. S. C. *nom. Wood* v. *Draycott*, 2 N. R. 55.

Where it is impossible to ascertain the donees *nominatim*, the same rule holds as to a gift to persons as a class. *Ib.*

Therefore, in construing such a gift, the Court will prefer to imply a clause of accruer, rather than to hold it as in joint tenancy, the latter being liable to severance, and therefore less proper to carry out the intention. *Ib.*

10. The words "during their joint and natural lives" in a settlement held to mean "during their lives and the life of each of them." *Smith* v. *Oakes*, 14 Sim. 122.

11. Testator gave a residue to trustees to pay the interest to four persons for life, and after decease of the survivor then to divide the principal among their children; two died: the interest shall be paid to the other two. Though the words "share and share alike" in a will generally create a tenancy in common, they cannot do so where there is an express joint tenancy. *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215. But see *Jones* v. *Randall*, 1 Jac & Walk. 100.

12. Devise of 100*l.* to A. and B., viz., 50*l.* to A. and 50*l.* to B, payable at such a time, and if either die before the time then the 100*l.* to the survivor. The whole 100*l.* decreed to the survivor, notwithstanding the severing clause, which holds only in case both live to the time of payment. *Scoolding* v. *Green*, Pre. Ch. 37.

13. Bequest of the interest of the residuary personalty to the testator's wife for life, and from and after her death to B. D. for life, and from and after the death of the survivor of them the capital to W. absolutely, subject to the payment to A., B., and C. of 1,000*l.* each, which the testator gave to them, to be paid to each of them at the end of twelve months next after the decease of the survivor of his said wife and B. D.; provided that if either of the said A., B., and C. should die "in the lifetime of my said wife and my said brother B. D.":—Held, that A.'s personal representative was entitled to her legacy, and that the gift over had not taken effect. *Day* v. *Day*, Kay 703; 18 Jur. 1013.

14. Bequest of personal estate, after the death of the tenant for life, in trust to pay equally between A. and B.; but if "neither" should be then living, to C. A. died in the lifetime of the testatrix. B. survived the tenant for life, and claimed the whole, either as surviving joint tenant, or under a gift to her by implication. The Court rejected such claim, and:—Held, that the moiety intended

for A. had lapsed, and belonged to the next of kin of the testatrix. *Baxter* v. *Losh*, 14 Beav. 612; 21 L. J., N. S., Ch., 55.

1. Bequest of personalty to trustees, in trust to pay the income to A. and B. for their lives, with provisions for the maintenance of their children, if any, and against alienation; and after the decease and failure of issue of A. and B., the trustees were to continue the payments to any husband A. and B. might respectively have, during the life of such husband; and after the decease of the respective husbands of the said A. and B., then the testatrix gave the whole of the said funds over to C. A. died without leaving a husband or issue:—Held, that B. did not take the whole for her life, but that C. took A.'s share immediately on her decease. *Evington* v. *Fenn*, 16 Jur. 398.

2. A testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow; but if she should marry again to pay one-half of the dividends, and after her death to pay the whole to his brother and sister during their joint lives, equally to be divided, and after the decease of either of them the brother and sister to pay the same wholly to the survivor for life, and after the decease of "every of them," his wife, brother, and sister. he declared that the trust fund and the dividends were to be held in trust for the children of the brother:—Held, that a moiety of the income accruing due after the second marriage of the widow, and between the death of the survivor of the brother and sister, and that of the widow (who survived them), neither belonged to the widow nor was undisposed of, but belonged to the brother's only child. *Brown* v. *Jarvis*, 2 De G. F. & J. 168; 6 Jur., N. S., 789; 29 L. J., Ch., 595; 8 W. R. 644. And see *Swan* v. *Holmes*, 19 Beav. 471. *Sarel* v. *Sarel*, 23 Beav. 87.

3. A testator gives an annuity of 200*l.* to S. A. H. for life, and at her death 100*l.* of the same to be continued to such of her daughters as remained single during their lives; at the termination of which the same should revert to his children, their executors, administrators, and assigns. The annuity is paid to S. A. H., and on her death 100*l.* continued to her three unmarried daughters. One dies; and on the question whether the annuity of 100*l.* survived:—Held, that it did. *Smyth* v. *Smyth*, 3 W. R. 189.

4. J., referring to the fact that he possessed certain stock, requested payment to his brother of a net annual annuity, the residue to his sister, also the net interest or other stock to E. J.; each of the above three annuities to be enjoyed for their lives, with benefit of survivorship; and at the dissolution of those three persons, over absolutely. The testator then directed an accumulation to make up 100*l.* to pay the following annuities: To E. O. 20*l.* per annum, to C. T. 20*l.* per annum, to M. E. 20*l.* per annum, to T. T. 20*l.* per annum; the benefit of survivorship in these four annuities to devolve to E. O.; but in case of her not surviving, the benefit of survivorship to be derived by the three first-named legatees; and on the demise of all the annuitants, over as before. E. O. survived T. T. and died, and on the question whether her representative was entitled to the two annuities to her and T. T.:—Held, that they were not, and that the annuities, being undisposed of, went to the next of kin. *Jernegan* v. *Baxter*, 2 W. R. 481.

5. Gift of the income of property to A., B., and C. for their lives and the lives of the survivors and survivor of them during their and her lives or life; and from and after the death of the survivor of them, then in trust for their children:—Held, that A., B., and C. took as joint tenants. *Pearson* v. *Cranswick*, *Cranswick* v. *Pearson*, 31 Beav. 624; 9 Jur., N. S., 397; 11 W. R. 229; 9 L. T., N. S., 215. Affirmed 9 L. T., N. S., 295.

6. A testator devises his property to be invested in the funds; and gives 100*l.* a year out of the interest to be paid yearly to the order of A., and the remainder of the interest to B. and C., during their lives, share and share alike; at the death of either, her share to go to A.; and then orders, that at the death of both B. and C. the property shall be drawn out of the funds, and remitted to a corporation to be applied to charitable purposes; the testator dies; then B. dies; and then A.:—Held, that A.'s representative was entitled to the 100*l.* a year, and B.'s moiety of the residue of the interest during the life of C. *Booth* v. *Garraway*, 2 L. J., Ch., 183.

7. B. bequeathed to his five daughters, naming them, 12,500*l.*, chargeable on his real and personal estate, the interest to be paid to them in equal shares during their lives, the principal to be invested for them or the survivors or survivor of them for their maintenance, to be free from the debts and control of their husbands, "the principal, after their deaths, in equal parts, to their surviving children, as they arrive at the age of twenty-one;" and he gave to his trustees the residue of his property. Two of the daughters died, one leaving two children:—Held, that the principal was to remain in its integrity until the death of the survivor of the five daughters, and on the death of such survivor the fund to be divided amongst the persons described as "surviving children," but that the time had not arrived to decide who were meant by those words. *Minton* v. *Minton*, 9 W. R. 586; 4 L. T., N. S., 696.

8. A. gave his residue to his three children "for their natural lives, viz., they to have the interest during their natural lives, and if any die without leaving issue, in that case to return again for the benefit of his grandchildren":—Held, that the three children took during their joint lives and the life of the survivors and survivor. *Neighbour* v. *Thurlow*, 28 Beav. 33.

9. J. by his will gave to his daughters N. and S. the interest of 2,000*l.* consols, to be paid to them in equal shares for and during the term of their natural lives. By a codicil thereto the testator declared it to be his will, that after the decease of his daughters N. or S. the property for which they were to receive during their lives the interest, which was thereby to be for their sole and separate use, independent of any connections they might form, the stock should become the joint property of the lawful heirs of his four children in equal shares:—Held, that each of the daughters N. and S., took the income of a

moiety of 2,000*l.* for her life, and that on the death of one, her moiety went over at once to the heirs of the children of the testator. *Hensley* v. *Wills*, 14 W. R. 422; 14 L. T., N. S., 162.

The share of the heirs of the surviving daughter was carried to a separate account for such person as should be her heir at her death. *Ib.*

1. A testator gave to Mrs. R. and M. P. "each a moiety of the interest" of certain invested moneys, and also gave to Mrs. R. and M. P. "each a moiety of the rents" of his freehold estate, "and at the death of the last survivor" of them, directed the investments and property to be sold, and the proceeds to be equally divided between his surviving nephews and nieces:—Held, that on the death of M. P. there was an intestacy as to one moiety of the interest and rents during the life of Mrs. R. *Round* v. *Pickett*, 47 L. J., Ch., 631; 26 W. R. 493.

2. A. bequeathed one half of the interest of a sum to A. and B., and the other half to C. and D. during their natural lives, and after the death of A., B., C., and D. he bequeathed the principal to E., and he appointed residuary legatees. A. died, and then B., leaving C. and D. surviving:—Held, that no part of the principal or interest went to E. during the life of C. and D. *Gray* v. *Robinson*, 11 Ir. Ch. R. 295.

Held, also, that the executors of B., and not the residuary legatees, were entitled to the interest of one-half during the lives of C. and D. *Ib.*

3. A testator gives 1,340*l.* upon trust to invest the same, and pay the interest to his wife for life or during widowhood, and then to pay the interest unto his two sons T. and F., and W. B. C., for their natural lives, in equal shares; and from and after the decease of his said two sons and W. B. C., he gave and bequeathed one-third part of the principal unto the children of each of them his two sons and the said W. B. C. in equal shares and proportions, to be paid when they should respectively attain twenty-one, the interest to be paid to the several children until they should severally attain twenty-one, with a gift over to T., F., and W. B. C. equally. T. died without issue, F. died leaving children, and W. B. C. was living, having one child:—Held, that there was a joint tenancy for life in T., F., and W. B. C., with a gift over of the whole fund in thirds to the children of each *per stirpes* at the death of the survivor of the three, T.'s share falling into the residue. *Bigley* v. *Cook*, 5 W. R. 66; 3 Drew. 662.

4. A testator gives to his wife all his household goods, etc., absolutely, and the dividends of a sum of stock to be paid half-yearly, subject to a defeasance in case of her marrying in a particular manner, in which event the capital was to sink into the residuary estate. Then followed specific gifts of further portions of his stock to his daughter A., to be paid at twenty-one, for her separate use; and in case she died under twenty-one leaving children, to such children equally at twenty-one; but in case she died under twenty-one without children, such sum to sink into the residue. Then followed specific gifts of other portions of his stock to his daughter A. and his other children for life, and after to their children equally at twenty-one, with power to make advances for maintenance to his daughters for their separate use, and in default of children to sink into the residue, with a provision that, as to such of his children as should be under age at his death, the dividends should be applied for their maintenance; and whereas he gave the capital to his daughters, he gave the dividends only to his two sons, and there was a proviso for forfeiture in case of any attempt at assignment, charge, or anticipation, and no deduction to be made from the gifts to his wife in case of a deficiency. There was then a gift to trustees of leaseholds and personalty in trust to sell, and pay debts, and funeral and testamentary expenses, and to invest the residue, after paying debts and legacies, and to pay the dividends to his wife for life, or until her second marriage as aforesaid; and after her decease or second marriage, to pay the dividends of all the residuary estates unto and among his seven children (by name) during their several and respective lives, to be divided in the proportion which the dividends and stock specifically bequeathed bore to each other; and on the decease of his said children, upon trust to pay the principal or capital among the children of his aforesaid seven children share and share alike at twenty-one; but in case any of his said grandchildren should happen to die without children surviving, or, being such, all should die under twenty-one without issue, the share of his said grandchildren so dying to go to the others, share and share alike, with trusts for maintenance, with a gift over in the event of the death of all his children and grandchildren without issue. There was then a proviso that this last gift to his wife and children should be subject to the aforesaid proviso for forfeiture, and the shares so forfeited to go to the others of the children. The testator made two codicils, by which he revoked the specific legacies to his two sons, and gave them smaller sums in the same terms as by the will directed, as also to his daughter E. The testator left his widow and children surviving, and, on the death of his two sons, one having two sons, questions arose as to the effect of the will, and on bill filed for the purpose of putting a construction upon it:—Held, that there was a gift to the seven children as tenants in common in unequal shares during their respective lives, the word "deceases" showing that intention, and that as each died a certain portion should become subject to distribution, and be let loose to go to all the grandchildren who had then attained twenty-one, and so on as each child died. That the codicils only affected the share of the sons, and not of their children, to whom with the other grandchildren all the undisposed-of residue would go, and there was no intestacy as to corpus or dividends. *Alt* v. *Gregory*, 3 W. R. 630.

Held, on appeal, that on the true construction of the will the surviving children of the testator for the time being were entitled to the whole income of the residue till the death of the last surviving child. S. C., 2 Jur., N. S., 577; 4 W. R. 436; 8 De G. M. & G. 221.

See also XLIV. XI. *ante.*

Legacies to Executors.] See EXECUTOR AND ADMINISTRATOR, VIII. III.

VIII. OF GIFT BY RECITAL OR ASSUMPTION OF FACT.

1. If a testator recites that he has, in the first part of his will, given such an estate to A., that is a sufficient devise. *Yates* v. *Thomson*, 3 Cl. & F. 572.

2. No devise by implication from the mere recital of an erroneous conception of right. *Dashwood* v. *Peyton*, 18 Ves. 27.

Devise to the heir, after death of devisor's wife, a necessary implication that the wife should take for life; but no implication for her upon such a devise of another man's estate through the medium of election. *Id.* 48.

3. Devise of lands, "which he has before given to A.," over to B. on a given event, is a devise by implication to A. *Bibin* v. *Walker*, Ambl. 661.

4. A. by will, taking notice that his natural son J. had disobliged him, declared thus: "I do hereby resolve not to give him more than 20*l.* per annum for life." And he gave his estate to his legitimate son. *Per cur.*, the words do not amount to a devise, and the bastard shall take nothing. *Holder* v. *Holder*, Vid. tit. Devise. (D. B.) pl. 8.

5. By a codicil a testator gave to A. B. "500*l.* in addition to 1,500*l.* which he had before bequeathed to him" The testator had previously bequeathed two legacies only of 500*l.* and 500*l.* each:—Held, that by implication the legatee was entitled to 2,000*l.* *Jordan* v. *Fortescue*, 10 Beav. 259; 16 L. J., N. S., Ch, 332; 11 Jur. 549.

6. A testator devised all his real estate, whatsoever and wheresoever, to trustees upon certain trusts. He then recited that he left nothing to his nephews and nieces, because they would become entitled to property, held by him under their grandfather's will, upon his (the testator's) death without issue. He then bequeathed all his residuary personal estate. The testator was mistaken in supposing that the property referred to by him would devolve upon his nephews and nieces upon his death, it having descended upon the testator himself as the heir-at-law of his father:—Held, that under the circumstances he died intestate in respect to it. *Circuitt* v. *Perry*, 2 Jur., N. S., 1157; 23 Beav. 275.

7. A testator gives all the residue of his property to his executors on trust for the sole use and benefit of his daughter L. until she shall attain twenty-five; and if she marries before that age, for the sole and separate use of L. and her husband; but if she remains single or is a widow at twenty-five, she shall have power of disposing of the whole property by will. Should she die before twenty-five unmarried, or after that age intestate, then over. By a codicil the testator takes notice that he has left in trust all his property for the sole use and benefit of his daughter, and substitutes other parties for the executors before appointed. The testator left L. surviving, who had attained twenty-five and was unmarried. On the question what estate L. took:—Held, that she took absolutely. *Grover* v. *Raper*, 5 W. R. 134.

8. A testator gave by will 3,000*l.* upon trust for A. and her children, and after the decease of A. without issue for the children of B. By a codicil of later date he recited that he had by his will given the 3,000*l.* to A. for life, with remainder to her children; and afterwards to B. for life, with remainder to his children; and revoked the will as to 2,000*l.*, part of the 3,000*l.*, from and after the devise to A. and her children, and instead of giving the 2,000*l.* to B. and his children, bequeathed the same to C:—Held, that the erroneous recital in the codicil, that the 3,000*l.* was given to B. for life, did not amount to a gift of an estate in the 1,000*l.* which remained unrevoked. *Re Smith*, 2 John. & H. 594.

By the will the testator had also given 2,000*l.* to B. for life, with a gift over on insolvency:—Held, that if the codicil had been read as an implied gift of 1,000*l.* to B. for life, the gift over on insolvency would have attached to the 1,000*l.* as well as to the 2,000*l.* *Ib.*

9. A testator having devised his "fee-simple and other freehold property," in default of issue of his own, to N. for life, remainder to the sons of N. successively in tail, made a codicil as follows: "Having left in my will my fee estate and personal property to S. M. Nugent in case I had no family, I do not now revoke my bequests to him; but as I have no children, and have lived very happily with my devoted wife, I will and bequeath to her an annuity of 200*l.* over and above her legal jointure, to be paid her by S. M. N. off my estate as long as she lives":—Held, that the personal estate was undisposed of. *Nugent* v. *Nugent*, 8 Ir. R., Ch., 78.

10. The testator devised and bequeathed real and personal estate, after payment of debts on trusts (subject to the dower and thirds at common law of his wife), to receive and apply the rents, issues, and profits thereof, or the overplus thereof after deducting the dower and thirds of his said wife and the interest of moneys charged on his said real estate, for the maintenance of his children, and then on trust to sell and divide the moneys among his children:—Held, that this was not by implication a gift of an interest in the estate to the wife. *Adams* v. *Adams*, 1 Hare 537; 11 L. J., N. S., Ch., 305; 6 Jur. 681.

11. A mere erroneous recital in a codicil of what the testator has given by his will, does not operate to create a new gift, or to vary the disposition made by the will. *Adams* v. *Adams* (1 Hare 537) explained. *Mackenzie* v. *Bradbury*, 6 N. R. 283.

Bequest by will of 1,000*l.* to the children of A., of whom W. was one. Recital in a codicil of a bequest of 1,000*l.* to W., with directions as to the time of payment and mode of application:—Held, first, not to create a new legacy. S. C. 11 Jur., N. S., 650; 34 L. J., Ch., 627; 33 Beav. 617.

Held, secondly, not to enlarge the interest of W. in the original legacy. *Ib.*

12. A testator in his will ratifies a settlement, and recites that an annuity of 200*l.* is thereby secured to his wife, which was not the fact. He then bequeaths her another annuity of 400*l.*, "in addition to the said annuity of 200*l.* secured to her by the settlement":—Held, that this was merely a mistake in the recital, and did not constitute a bequest, in addition to the annuity of 400*l.*, of so much as would make up the settled property 200*l.* a year. *Ralph* v. *Watson*, 9 L. J., N. S., Ch., 328.

13. Plate excepted by bequest of personal

estate to wife, after her decease over, and recited to be hereinafter given to daughter, but not farther noticed · undisposed of. *Frederick* v. *Hall*, 1 Ves. J. 396.

1. An erroneous recital in a will, that the lands of Blackacre (of which the testator was seised in fee farm) were settled on A. at the death of H., does not operate to give a life estate by implication to H. But it is sufficient to take those lands out of a general residuary devise, so that they descend upon the testator's heir-at-law. *Harris* v. *Harris*, 17 W. R. 790; 3 Ir. Eq. R. 610.

A testator, after bequeathing a farm to his eldest son, added, "I observe by my marriage settlement that the lands of K. and G. M'G. are settled upon him" (the testator's eldest son) "at my wife's death. I, therefore, consider these ample provision for him, and I do, therefore, bar him from any further participation in my property, save only the use or enjoyment of such part or parcel as my wife may in her judgment think fit to allow him during her life, but at her death I do strictly limit him as hereinbefore mentioned." After other devises and bequests, the testator, by the residuary clause, gave all the residue of his property to his wife, with power to apportion it. The lands of G. M'G. were not in fact settled on the testator's eldest son by his marriage settlement, or at all:—Held, that the son took those lands as heir-at-law of the testator, and that the wife did not take in them an estate for life by implication. *Ib.*

2. A testator, being entitled to a policy of assurance for 500*l* on the joint lives of himself and his wife, bequeathed all his personal estate, "save and except the sum of 500*l*. payable at my death under a policy of insurance to my wife, and to which she is absolutely entitled under the said policy," to trustees, upon trust for his wife for life, and for his children after her death —Held, that the sum of 500*l*. payable under the policy was given by implication to the widow absolutely by the will. *Hall* v. *Lietch*, 9 L. R., Eq, 376; 18 W. R. 423; 23 L. T., N. S., 298.

3. Gift by recital. See *Wilson* v. *Piggott*, 2 Ves. J. 351.

4. A devise for life contained in a will cannot be enlarged by a recital in a codicil that such devise was in tail. *Re Arnold*, 33 Beav. 163; 9 Jur., N. S., 1186; 12 W. R. 4; 9 L. T., N. S., 530.

5. Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that by its non-execution A. (a legatee) will divide the fund equally with B. *Langslow* v. *Langslow*, 21 Beav. 552; 2 Jur., N. S., 1057; 28 L. J., Ch., 610.

6. An erroneous recital in a will as to the effect of a settlement does not put the devisees to their election, whether they will take under the will or the settlement. *Box* v. *Barrett*, 15 W. R. 217.

Under a settlement the four daughters of a testator took equal shares, subject to his life interest. The testator by his will, recited that under the settlement his two daughters, A. and B. would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done; he then devised to A. and B. certain estates, and to his two other daughters, C. and D., other estates, of much greater value The will did not purport to affect the settled property:—Held, that as the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, C. and D. were not put to their election. S. C, 3 L. R., Eq., 244.

7. A widow of a freeman of London who left children and died intestate was entitled to four-ninths of his personal estate, and having by deed, assigned over her four-ninths for her separate use, in case of marriage, and to such persons as she should appoint, and for want of such appointment then to her children; the widow intending to marry a second husband, by another deed, to which the husband was a party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigns it over to trustees, in trust for the intended husband, during their joint lives, subject to her control and disposal by writing; after which she dies without disposing of it. Decreed, the second husband is as a purchaser, and the recital that he would be entitled to it if the wife should not dispose of it was a gift *Poulson* v. *Wellington*, 2 P. W. 533.

8. A testator gave the interest of 2,000*l*. to G., and the residue of his estate to P., and then said, "and failing G. and P. without children, one or other of them, the property hereby conveyed to them shall devolve on S.":—Held, that the words "property conveyed to them" did not confer by implication a life estate upon G. in the residue given to P. *Pursell* v. *Elder*, 13 L. T., N. S., 203.

9. A testatrix gave the residue of her property to A, and by a codicil reciting that gift, and that as life was uncertain A. might be removed before her, she in such case appointed B. and C. her residuary legatees. The testator made a second codicil as follows: "As the death of Mrs. W. (the mother of B. and C.) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l*. she was to have I give to Mrs. H.":—Held, that A. was entitled to the residue. *Vaughan* v. *Foakes*, 1 Keen 58.

10. A father bequeathod a legacy of 1,000*l*. to each of his sons. By a codicil he gave to his eldest son a sum of "300*l*. instead of a sum of 500*l*. which I have bequeathed to my other children." The will contained no such bequest to his other children:—Held, that the codicil was insensible, inoperative, and void for uncertainty. *Armit* v. *Hipkins*, 21 W. R. 475; 28 L. T., N. S., 222.

11. A testator gave to each of his three brothers and six sisters a legacy of 500*l*., and other legacies to other relations of his, which, with the preceding legacies to his brothers and sisters, amounted to 6,100*l*. He then gave "the remainder of his property to his wife absolutely, except 4,100*l*., of which she was only to have the use during her life, and which he wished to be divided among his relations to whom he had left legacies in the fore part of his will, in proportion to the legacies left above, which would just make

their legacies double the first bequest":—Held, that although there had been a mistake by the testator in computing the amount of the legacies given by him in the former part of his will, there was no such evidence of a clear intention on his part to double the amount of the preceding legacies as would justify the Court in holding that the words "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." *Thompson* v. *Whitelock*, 5 Jur., N. S., 991; 28 L. J., Ch., 793; 7 W. R. 625.

1. The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the will; but an erroneous recital of a will, coupled with or followed by a clear indication of the testator's intention to make some modified or different disposition, inconsistent with the dispositions of the will, is operative to modify or alter the earlier gifts. *Re Margitson, Haggard* v. *Haggard*, 46 L. T. 807; 30 W. R. 920. Affirmed 48 L. T., 172; 31 W. R., 257.

A testator by his will gave to his daughter (in events which happened) an estate tail in his real property, and an absolute estate in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property, with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to any husband who should survive her, and that if she should have more than one son, and her eldest son should inherit property from other sources of a certain value, then her second son should succeed to the property given by the will, with certain gifts over:—Held, that the estates given by the will were modified by the codicil, and that the daughter was entitled to a life estate only in the real and personal property of the testator, with remainder by implication to her eldest son absolutely, subject to the appointment by her of a life estate in favour of a husband, and to a shifting use in favour of a second son. *Ib.*

2. Mistake in the computation of a legacy rectified according to the intention, though contrary to the words. *Milner* v. *Milner*, 1 Ves. 106.

3. A testator gives to his wife an annuity of 100*l.* and the sum of 1,000*l.*, which he considers will, with the property which she is entitled to after his death, make up an income of 2,500*l.* a year; in fact, those gifts make up her income only to 1,800*l.* a year. She is entitled to have the deficiency supplied out of his residuary estate. *Trevor* v. *Trevor*, 5 Russ. 24; 6 L. J., Ch., 182.

4. A testatrix gave to A. an annuity of 40*l.*, contingent on a certain event. She then gave A. a legacy of 30*l.* By a codicil she said, "And I increase the immediate annuity of 30*l.*, left by my will to" A., "to an annuity of 50*l.*":—Held, that he took an annuity of 50*l.* in addition to the contingent annuity of 10*l.* *Ives* v. *Dodgson*, 9 L. R., Eq., 401; 39 L. J., Ch., 693; 23 L. T., N. S., 215.

5. A father directed his debts to be paid, "including a debt of 300*l.* owing from me to my daughter." He owed his daughter 150*l.* only:—Held, that she was not entitled to receive more than the 150*l.* *Wilson* v. *Morley*, 5 L. R., Ch. D., 776; 46 L. J., Ch., 790; 25 W. R. 690.

6. A will contained a bequest of 1,000*l.* on trusts, and of 5,000*l.* on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no actual blank was left. In another part of the will there was power to invest the said sum of 5,000*l.*, and the said two sums of 1,000*l.*:—Held, that the latter clause was evidence that the testator intended a bequest of 1,000*l.* in the bequest in which no sum was named. *Edmunds* v. *Waugh*, 4 Drew. 275.

7. A testator, after reciting inaccurately that his wife was entitled for life to 39,000*l.* settled on his marriage, which he stated would, at 4 per cent., yield 1,560*l.*, directed his trustees to add an annuity of 440*l.* to raise his wife's jointure to 2,000*l.*:—Held, that the widow was entitled to have her annuity made up to 2,000. at all events. *Ouseley* v. *Anstruther*, 10 Beav. 459.

8. Bequest of 1,000*l.* to A., the interest of 2,000*l.* to B., and at his death to his children; the sum of 1,000*l.* to D., the sum of 1,000*l.* to B., in addition to 1,000*l.* before mentioned:—Held, that the former legacy to B. was of pounds sterling, and that the gift to his children was of an absolute interest in capital. *Mann* v. *Fuller*, 1 Kay 624; 23 L. J., Ch., 543; 2 Eq. Rep. 1085; 2 W R. 510.

9. On construction of will:—Held, that the capital of the residue passed by implication, though the interest and dividends only were expressly given. *Phillips* v. *Chamberlaine*, 4 Ves. 51.

10. A sum of 20,000*l.* was bequeathed by a testator to A., his wife, who was also his residuary legatee, and after her death to B., wife of C., for life, for her sole and separate use, and after her death upon certain trusts for the benefit of their children (no interest being given to C.). A. by her will, after three legacies of 100*l.* each absolutely, gave to C. and his wife "the same amount and on the same trusts and conditions as are named in my late husband's will to C." One moiety of her residuary personal estate was also directed to be given to B. and C. and their children, "on the same trusts as before alluded to":—Held, that the words "same amount" did not refer to the preceding gifts of 100*l.*, and that notwithstanding the mistaken reference to the testator's will as containing any gift to C., the 20,000*l.* passed by A.'s will on the same trusts as were contained in the testator's will. *Stephens* v. *Powys*, 1 De G. & J. 24.

12. Legacies out of a specific fund, given over in case of lapse or death of the legatees, before the fund shall be realised, not extended by a subsequent recital of the fund as "willed to" those legatees over. The surplus therefore passed under the residuary clause. *Smith* v. *Fitzgerald*, 3 Ves. & B. 2.

Revocation by Erroneous Recital or Assumption of Fact.] See VI. VIII. and IX. *ante.*

IX. EQUITABLE ESTATE. WHETHER CO-EXTENSIVE WITH LEGAL ESTATE.

13. Devise to trustees and their heirs, "upon trust for the use and benefit of" A., B., and C.

(without words of limitation):—Held, that A., B., and C. took in fee. Devise to trustees in fee, upon trust for the use and benefit of A., B., and C., the rents to be paid for their maintenance and education, "or to the survivors or survivor of them, share and share alike":—Held, that they took equitable estates in fee as joint tenants. *Moore* v. *Cleghorn*, 10 Beav. 423; 16 L. J., N. S., Ch., 469; 11 Jur. 958. Affirmed 17 L. J., N. S, Ch, 400; 2 Jur. 591.

1. A testatrix devised to trustees and their heirs her copyhold dwelling-house, garden, and ground, together with the furniture and effects therein; and also the ten cottages and two new cottages built by her, with their appurtenances, at L., upon trust to pay the rents of the said hereditaments to her niece S. S., the wife of G. S., or to permit and suffer her to use and occupy the said hereditaments during her life, to the intent that the same hereditaments and the rents, issues, and profits thereof might be for her separate use; and after her decease to G. S. for his life, and after his decease to stand possessed of the same hereditaments in trust for such of the testatrix's nephews and nieces, or grandnephews and grandnieces, as S. S. should appoint; and in default of appointment upon trust to sell and dispose of the said hereditaments and premises, the produce of such sale to constitute part of her residuary personal estate:—Held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees. *Stubbs* v. *Sargon*, 2 Keen 255; 6 L. J., N. S., Ch., 254. Affirmed 3 Myl. & C. 507; 7 L. J., N. S., Ch., 95; 2 Jur. 150.

2. A. by his will devised all his real and personal estate upon trust as to the real estate, to repair and let the same, etc, and upon further trust, notwithstanding any limitation of uses or trusts thereinbefore mentioned, at their discretion to sell and convey the same; and as to the money to arise upon such sales, upon trust to add the same to his personal estate, to constitute a part thereof, and directed his trustees, when J. C. should arrive at the age of twenty-four years, to convey, assign, etc., to J. C. all the legal estate and interest in all his freehold, copyhold, and leasehold messuages, lands, etc, and all other his real and personal estate and effects not thereinbefore devised and bequeathed, etc.:—Held, that J. C. took the produce of the mixed fund of the real and personal estate of testator, and that rents of real estates till J. C. attained twenty-four did not result to heir-at-law of testator as undisposed of, but passed to J. C. as part of fund given in trust. *Ackers* v. *Phipps*, 9 Bli., N. S., 430; 3 Cl. & F. 655. Reversing on this point *Phipps* v. *Williams*, 5 Sim. 44; 1 L. J., N. S., Ch., 96.

3. A testator gave real and personal estate to his daughter A. and to two other persons, upon trust to permit A. to receive the rents and interest for life for her separate use, and after her decease in trust to convey to her heirs, executors, etc.; but in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children:—Held, that A. took an absolute equitable estate, with an executory gift over to D. and his children; and D. having died in the lifetime of A., leaving no children:—Held, that A. was absolutely entitled to the property. *Jackson* v. *Noble*, 2 Keen 590; 7 L. J., N. S., Ch., 133; 2 Jur. 251.

4. Conveyance of real estate to a trustee in fee in trust for one for life, and afterwards to her children equally. There being no limitation to their heirs.—Held, that the children took for life. *Holliday* v. *Overton*, 14 Beav. 467; 21 L. J., N. S., Ch., 769; 16 Jur. 346.

5. A testator gave all his real and personal estate in trust to divide the income, rents, interest, and profits equally amongst his children by name, or such other as he might have at his death, or *en ventre sa mère*, providing as to the payment to daughters half-yearly, and to their separate use, and the issue of any dying in his lifetime leaving issue, if not their shares to the survivors; and in case any of his children and their issues should die "in the lifetime of any husband or wife, with whom his children" should have intermarried, he gave their shares to his then surviving children, and the issue of such as should be then dead, it being his will that none of his sons' wives or daughters' husbands "should become heirs to their children's property," and that none of his children should sell any part of his estates. Some of the testator's children having died without issue in his lifetime:—Held, that each of the surviving children took the share of his real property, not for life only, but in fee, and of his personalty absolutely. *Hodson* v. *Ball*, 14 Sim. 558; 9 Jur. 407.

6. Real estates were limited in remainder, in trust for the next of kin of a married woman, as if she had not been married:—Held, that the next of kin took life estates only. *Lucas* v. *Brandreth*, 6 Jur., N. S, 945.

7. A testator, by will in 1826, gave real and personal estate to trustees in fee, in trust for his four nieces, M., B., S., and J., for their respective lives, as tenants in common; and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died; and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and to be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died a spinster. S. was a spinster and over sixty:—Held, first, that the equitable fee was given to the children of the nieces. *Maden* v. *Taylor*, 45 L. J., Ch., 569.

Held, secondly, that seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Ib.*

8. A testator devised freehold property to trustees, their executors and assigns, in trust as to three freehold houses for the sole benefit of his two daughters E. and S., either to live in or let for their joint benefit; and should either of his daughters die and leave no children or child, then either one of the houses, at the option of the survivor, to be sold, and the produce divided between the survivor and such of the testator's sons as should be living; but if either of his daughters should marry and have a child or children, then such child or children to have the

mother's share of the rents and profits of the three houses after the mother's decease. On the death of one daughter without children one of the houses was sold, according to the direction in the will. The other daughter then died without children:—Held, that the gift for the sole benefit of the two daughters of the testator gave them an estate commensurate with the estate in fee given to the trustees, and made them joint tenants in fee subject to executory gifts over in the event of their dying leaving issue; and that, this event not having happened, the joint tenancy in fee was unaffected, and the devisee of the survivor was entitled to the two unsold houses. *Yarrow* v. *Knightly*, 8 L. R., Ch. D., 736; 47 L. J., Ch., 874; 39 L. T., N. S., 238; 26 W. R. 704. Affirming 25 W. R. 687; 36 L. T., N. S., 907.

1. A testator being seised of lands under leases for lives renewable for ever, in 1824 devised all his freehold leases and interest whatsoever to trustees, and the heirs of the survivor of them, in trust, after payment of the head rents, to apply the clear yearly rents to and amongst his three daughters during their respective lives, in equal shares and proportions, for their sole and separate use; and in case any or either of his daughters should happen to die leaving lawful issue, then in trust, as to the share and proportion of such daughter so dying, to and for the use of such issue, as she should by deed or will appoint, and in default of such appointment to the use of such issue equally, share and share alike; and if any of his daughters died without issue, he directed that her share of the rents should go to and be paid to the survivors or survivor of them for the increase of her and their respective shares, to their separate use, and to go to their lawful issue, subject to the like power of appointment among such issue; and in case of the death of all his daughters without leaving lawful issue, then in trust to pay the rents to his nephew during his life; and after the death of his nephew, in case he should happen to die leaving lawful issue, in trust, as to one-half of his freehold and leasehold interests, to the use of the children of his sister, in equal shares, and to their lawful issue; and in case his nephew should happen to die without issue, then, as to the whole of his freehold and leasehold interests, to the use of the said children of his sister, in equal shares, and to their lawful issue; and in case they should be then dead, then, as to the whole, in trust for the issue of his nephew; and in case of the deaths of his nephew and the children of his sister without issue, in trust to assign over the freehold and leasehold interests to his own right heirs; and a power was given to the trustees to lease from time to time as they should remain seised and possessed by virtue of the trusts in the will contained, with the consent of the person or persons then entitled:—Held, first, that the legal estate was devised to the trustees during the existence of the entire series of limitations. *Sherwin* v. *Kenny*, 16 Ir. Ch. R. 138.

Held, secondly, that the daughters of the testator took equitable estates in quasi tail in their respective shares. *Ib.*

2. A. devised his real and personal estate to trustees and their heirs, to sell, if expedient, and invest in consols, and permit his wife, *durante viduitate*, to receive the rents and dividends; and from and after her death or second marriage to divide the residue of his estate and effects between his children [without words of inheritance]:—Held, that (subject to the wife's interest) the children took the real estate absolutely. *Tatham* v. *Vernon*, 29 Beav. 604; 9 W. R. 822; 4 L. T., N. S., 531; 7 Jur., N. S., 815.

3. A devise of lands under the law prior to 1838 to trustees in fee, to the use of A. for life, with remainder to the use of the children of A. indefinitely; but if A. "should die without leaving such issue," to the use of B. for life, with remainder to the use of the children of B. indefinitely; but if B "should die without leaving such issue," to the use of C. D. and E. in fee as tenants in common. A. and B. both left children living at their deaths:—Held, that the gift to the children of A. was a devise for life, and that the ulterior devises had failed, and that, subject to the successive life estates of A. and his children, the land descended to the heir of the testatrix. *Re Pollard*, 2 N. R. 404; 32 L. J., Ch., 657; 11 W. R. 1083; 8 L. T., N. S., 710; 3 De G. J. & S. 541.

X. OTHER CASES.

4. A direction in a will that the testator's brother should be his executor, to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter. *Davis* v. *Davis*, 1 Russ. & M. 645; 1 L. J., N. S., Ch., 155.

5. Estate for life in real estates and in personalty by implication. *Ramsden* v. *Hassard*, 3 Bro. C. C. 236.

6. On construction of a will the enjoyment of bequests, given in terms indicating a future period, accelerated by implication. *Parrott* v. *Worsfold*, 1 Jac. & Walk. 594.

7. A testator willed that certain property should be vested in a manner most secure, and least liable to fluctation or risk, and that 3,000*l.* should be at the will of his wife at her death; but the residue he willed his wife should distribute to his relations. He made his wife residuary legatee:—Held, that the distribution to the relations was not to take place until the wife's death, and the Court inclined to the opinion that the wife took a life estate by implication; but held that, at all events, she was entitled for life under the residuary gift to her. *Hudleston* v. *Goulsbury*, 10 Beav. 547; 11 Jur. 464.

8. A testator gave 3,000*l.* to his executors for the benefit of M. during her life, and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of M.:—Held, that the children of M. who were living at the time of her death were entitled to the fund in equal shares as tenants in common. *Re Phene*, 5 L. R., Eq., 346.

9. Devise to A. until B. shall attain forty years. B. dies before forty; A.'s estate ceases. *Secus*, if the devise to A. be made a

fund to pay debts or portions, which cannot be raised until B. shall have attained his age of forty, in which case the word "shall" is taken for "should." *Lomax* v. *Holmeden*, 3 P. W. 176.

1. Devise of 50*l.* per annum to the wife of A. during the life of B., for her separate use. The wife of A. dies; the 50*l.* per annum shall be paid to the executor of the wife of A. during the life of B. *Rawlinson* v. *Montague*, 2 Vern. 667.

2. Testator bequeathed a leasehold estate, after an estate for life, to his nephew A., and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew B, as A. shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving and that will make the best use of it; or to the children of his nephew C., if any such there are or shall be. A. dying in the testator's life the bequest of the latter estate was established in favour of all the children; *quære*, as to the former. *Brown* v. *Higgs*, 4 Ves. 708. Affirmed 5 Ves. 495.

3. A testator bequeathed leaseholds to trustees to pay the rents to his wife till his son attained twenty-one, and then to assign them to his son. The wife died during the minority of the son:—Held, that the legal personal representative was entitled to the rents until the son attained twenty-one. *Laxton* v. *Eedle*, 19 Beav. 321.

4. After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words. *Emanuel College, Cambridge* v. *Norwich (Bishop)*, 4 Bio. C. C. 481.

5. A testator gave the interest of his residuary estate to his mother for life, and afterwards one-half of the interest to his brother and one-half to his sister. Upon the death of the sister the capital was to go to her children if any, and if not to his brother. Upon the death of his brother the capital was to go to his children. The sister died without children:—Held, that the children of the brother took no interest in her moiety. *Tatnall* v. *Tatnall*, 10 Beav. 509.

6. A man, having daughters by his first marriage, died, leaving his second wife *enceinte*, having first devised part of a trust estate to his wife for life; and if the child *en ventre* proved a daughter, then the trustees to convey to his daughters, and to pay them the profits in the meantime. The child proved a daughter. What estate shall the wife take by the devise, *quære*. *Ball* v. *Smith*, 2 Vern. 633.

7. A testator gave to B. a moiety of the beneficial interest to arise by virtue of the policy he had effected on the life of his son in the P. office, and to C. the other moiety. And after giving various legacies, he directed his trustees to invest 500*l.* in consols, and out of the rents and income of his property, and the dividends of the consols, pay the annual premiums on the policy he had effected in the P. office, and also the premiums on a policy he had effected on his own life and the life of M. in the E. office, and when the continuance of the payment of the premiums should become unnecessary by the decease of his son and M., or otherwise, to apply the interest and dividends for the benefit of his son's wife and children until the youngest should attain twenty-one, and then to divide the principal equally between them. Also, to receive the money he should be entitled to upon the policy effected in the P. office for the joint benefit of B. and C.; and in case of the death of either without lawful issue, then to the survivor; and in case of both their deaths without lawful issue, then over. B. died an infant shortly after the testator's decease:—Held, that C. was absolutely entitled to the whole of the money secured by the policy in the P. office, and the son's wife and children to that effected in the E. office. *Noy* v. *Roworth*, 10 W. R. 510; 6 L. T., N. S., 676.

LI. Gifts to Survivors.

See also VESTED, CONTINGENT, AND FUTURE INTERESTS, VIII.

I. "SURVIVE," "SURVIVOR." MEANING OF.

8. The meaning of the word "survive" in a limitation of property is, that the person to survive shall be living at the death of the person whom, or at the time of the event which, he is to survive; it does not mean living at any time whatever after the event referred to; consequently a gift over, if there should be no child, or remoter issue of A. who should survive the testator and A., and should live to attain twenty-one, is not void for remoteness. *Gee* v. *Liddell*, 35 Beav. 631, 658; 2 L. R., Eq., 341; 12 Jur., N. S., 541; 35 L. J., Ch., 640; 14 W. R. 853.

9. A gift of residuary estate among surviving children not extended to deceased children by reason of ambiguities in the will, showing merely a tendency to treat all the children with equality. *Re Crosse*, 9 Jur., N. S., 429; 32 L. J., Ch., 344; 11 W. R. 396; 8 L. T., N. S., 299; 1 N. R. 419.

An intention of equally benefiting all the children is to be assumed in a settlement, but not in a will. *Ib.*

10. A gift by will to C. for life, and after her death to all and every the children of C. who shall survive me, includes children of C. born after the death of the testator. *Re Clark*, 3 De G. J. & S. 111

A testator gave the proceeds of the sale of real and personal estate to trustees for C. for life, and after his decease as to one moiety for the reputed daughter of C. for life for her separate use, and after her decease to divide the same equally among all her children who

should survive the testator, with benefit of survivorship, and if there should be no child who should survive the testator, then over. C.'s reputed daughter was twelve years old at the death of the testator. She afterwards married and died, leaving several children; the legatees in remainder were also dead:—Held, that the children born after the testator's death were entitled to their mother's moiety on her decease. S. C. 13 W. R. 115.

1. A husband gave his residuary estate to his wife for life, and afterwards to his cousin for her sole use; and should she have any legal issue by marriage, to be divided amongst them equally at twenty-one. "Should my cousin not survive my wife, and die without the said legal issue by marriage," he gave his residuary estate to M. The cousin survived the wife, but had no children:—Held, that the words "not survive" must be construed as equivalent to "die in the lifetime of," and that the gift over could only take effect on the death of the cousin, without children, in the lifetime of the testator's widow, which event not having happened, it failed. *Reed* v. *Braithwaite*, 11 L. R., Eq., 514; 40 L. J., Ch., 355; 24 L. T., N. S., 351; 19 W. R. 697.

2. When a gift is given to a class and the survivors, the obvious and natural meaning of the word "survivor" is not the person surviving any particular event, but the longest liver of the class. *Taaffe* v. *Conmee*, 8 Jur., N. S., 919; 6 L. T., N. S., 666; 10 H. L. Ca. 64.

3. Devise to trustees and their heirs, in trust for A. and his wife for their lives, and after the death of the survivor to the testator's four granddaughters, as tenants in common during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder to the testator in fee:—Held, that the survivorship had reference to the extent of the estate and not to the persons who were to take, and that the granddaughters took for life as tenants in common, with survivorship to the survivors and survivor of them; and that after the death of the last survivor their issue took several inheritances in tail. *Haddelsey* v. *Adams*, 22 Beav. 266; 2 Jur., N. S., 724; 25 L. J., Ch., 826.

4. *Semble*, that, to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Winterton* v. *Cranfurd*, 1 Russ. & M. 407; 8 L. J., Ch., 134.

5. D. by will gave all his real and personal property to his wife for life, and, after certain gifts not material to the question argued, he gave to his five first cousins, naming them, or the survivors of them, the sum of 1,050*l.* stock, to be equally divided between them, share and share alike; the whole to be paid as soon as possible after his wife's death. D.'s wife survived him. Three of the cousins died in the lifetime of D., and only one survived D.'s widow:—Held, that the word "survivors" must include the case of one legatee alone surviving. *Hearn* v. *Baker*, 2 Kay & J. 383.

6. A testator gave 5,000*l.* to each of his four daughters for their separate use, and if they had any children the principal to be divided between them after her death, if they should attain twenty-one; if not, it was to be divided among "her surviving sisters." A. B., one daughter, died, leaving two children, both of whom died infants, but one of them left a child surviving. Another daughter died before her sister A. B.'s children, leaving three children. The testator had a fifth daughter, for whom he had separately provided:—Held, that the separate provision was no reason for excluding her from taking under the words "her surviving sisters." *Carver* v. *Burgess*, 24 L. J., Ch., 401; 7 De G. M. & G. 96; 3 W. R. 308; 3 Eq. Rep. 421; 18 Beav. 541; 2 W. R. 125.

Maintenance having been allowed by an order of this Court out of the income of the legacy, and the surplus having been invested, it was held that such surplus passed to the legal personal representatives of the infants. *Ib.*

II. WHEN CONSTRUED "OTHERS."

1. When Construed Strictly, not as Importing "Others."

7. The word "survivors" construed strictly. *Davidson* v. *Dallas*, 14 Ves. 576. And see *Milsom* v. *Audrey*, 5 Ves. 465.

8. The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will. *Re Keep*, 32 Beav. 122.

9. Testatrix, before the statute 1 Vict., c. 20, bequeathed the residue of her personal estate to her son A. and her daughter B., to be divided equally between them, in case they were both living at the time of her decease; but if either of them should happen to die before her, or at any time after, without issue, then she bequeathed the share of him or her so dying, and without issue, to the survivor of them. A. and B. survived the testatrix. A. died unmarried in the lifetime of B.:—Held, that the moiety of the residue given to A. devolved to B. *Turner* v. *Frampton*, 2 Colly. 331; 10 Jur. 24.

10. Where there were different bequests to different classes of children, followed by a general clause that the shares of all such legatees as died under twenty-three should go over to the survivor and survivors, such clause was construed distributively as to each class, and the word "survivor" was taken in its usual sense. *Cromek* v. *Lumb*, 3 Y. & Coll. 565.

A testator gave a fund between the children of H., and provided that the legacies should vest at twenty-three, and that if any should die under twenty-three without issue, their legacies should go to the survivors; there were five children of H., of whom one, who attained twenty-three, died between the deaths of two of his brothers, who died under that age:—Held, that he took an original fifth, and a part

of the share of the one who died before him, but no part of the share of the one who died after him. *Ib.*

1. Legacies to the children (by name) of the testator's late niece, M., to be assigned them when and as soon as they should respectively attain twenty-five: provided that if any should die under twenty-five leaving issue, the issue to take the parent's legacy; but if any should die under twenty-five without having issue then living, the legacy of the child so dying to go and be paid to the "survivors and survivor, and others and other" of the same children in equal shares. At the death of the testator all the children of M. were under twenty-five; all afterwards attained twenty-five except A., who died under that age without issue, having survived two of the children, B. and C. The share of A. devolved to the representatives of B. and C., together with the children who survive A. *Slade* v. *Parr*, 1 Y. & Coll. C. C. 565; 7 Jur. 102.

Upon the construction of a will:—Held, that the surplus dividends of a legacy after payments for maintenance during the minority of the legatee go with the *corpus*. *Ib.*

2. Gift of a residue of real and personal estate to trustees to sell, get in, and pay and divide the money arising therefrom unto, and equally among, the testator's children so soon as the youngest should attain twenty-one; the daughter's shares to be invested and secured, and the interest paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child the share to be divided amongst the survivors of the testator's children equally; and in case of the death of any of his children leaving lawful issue, the testator gave to such issue the share the parent would have been entitled to have. *Semble*, that the word "survivors" in the residuary clause must be construed in its natural sense, and not as importing "others," and that this construction of the word in one part of the will must govern the construction of the same word in the other parts. *Leeming* v. *Sherratt*, 2 Hare 14; 11 L. J., N. S., Ch., 423; 6 Jur. 663.

3. Bequest to one for life, and then to be divided among four legatees equally, as tenants in common; if either died in the life of the tenant for life, his share to be divided among his children; if either died during that period without leaving issue, then his share to go to the survivors or survivor of them. One died leaving nine children, and then another died without issue, and then the tenant for life died:—Held, that the children of the legatee who died first took no interest in the share of the one who died afterwards without issue. *Moate* v. *Moate*, 16 Jur. 1010.

4. Where testator, after giving legacies to daughters for their respective lives, with remainder to their respective issue, and in default of issue the share of the daughter so dying to go to the survivors, directed that if any daughter should die before vesting of legacy, leaving issue, the legacy should descend to such issue:—Held, that the word "survivor" must be strictly taken, but that under the clause of substitution a survivor's share of a deceased daughter's legacy passed to the children of a daughter predeceasing testator, leaving issue surviving him. *Willetts* v. *Willetts*, 7 Hare 39; 17 L. J., N. S., Ch., 457; 12 Jur. 670.

5. Gift of a certain sum to each of the children of A. and B. who should attain twenty-one, but in case any of them should die under that age his share to go to his surviving brothers and sisters, the word "surviving" in such a limitation cannot be read "other," so as to entitle a child to the share of a brother who died before he was born. *Mann* v. *Thompson*, Kay 638; 2 W. R. 582. S. C. *nom. Perkin* v. *Mann*, 18 Jur. 826.

6. The rule as settled by modern authorities is, that the word "survivor" is to be construed strictly, and is not to be read "other," unless the rest of the will should render the more liberal and less literal construction essential, for the purpose of carrying into execution the objects expressed by the will. *Hodge* v. *Foot*, 34 Beav. 349.

7. The words "survivor or survivors" in a will must be taken in their proper and usual sense, unless the context plainly shows that the testator employed such words in some other signification. *Re Ustieke*, 14 W. R. 447.

The words "survivors and survivor" of parents construed strictly, although the children of some of them took an interest in remainder. S. C. 35 Beav. 338.

8. A testator devised all his estate to trustees (subject to an annuity to his wife), to pay the rents to his six daughters, share and share alike, as they should respectively attain twenty-one, or be married, and to continue during their respective lives; and in case any of his children should die without having any child or children, then as to the share or shares of her or them so dying in trust to pay the same to the survivors or survivor of them, to be equally divided between them, if more than one; and if but one, to pay the whole to her; provided that such shares should be paid to his daughters for their separate use; and in case any of his daughters should have any child or children living at their respective deaths, it should be lawful for such of his daughters to dispose of their property, thereby devised to them, to and amongst her child or children as she might appoint, and for want of appointment to and among such child or children equally; and in case all his daughters should die without having any child or children, as aforesaid, then for his wife; and he devised all the residue of his property to his six daughters:—Held, that "survivors or survivor" were to be construed in their ordinary sense of "longest liver," and that a surviving daughter took for her life the share of one who died without children, to the exclusion of the children of another deceased daughter. *Browne* v. *Rainsford*, 1 Ir. R., Eq., 384; 16 W. R. 198.

9. A father devised real estate to trustees upon trust to receive the rent, and to pay one-fourth part of such rent unto each of his four daughters for her separate use during her life, and after the death of either or any of his daughters, he gave and devised one equal undivided fourth part or share of and in the premises unto the child or children of each of his daughters so dying and leaving lawful issue, and the heirs and assigns of such children for ever, and as tenants in common if more than one child, and in case any or either

of his daughters should happen to die without leaving any lawful issue surviving her, then the testator gave and devised the share or shares of any such daughter so dying unto the survivors or survivor of his daughters, and their or her heirs and assigns for ever; and in case all his daughters should die without leaving lawful issue, then he gave and devised the premises unto his two sons:—Held, that the words "survivors or survivor" must be taken in their natural and primary sense, and that on the death of a daughter without leaving a child, the children of a daughter who predeceased her took no interest in her share. *Twist* v. *Herbert*, 28 L. T., N. S., 489.

1. Where legacies were given to each of four persons for life, interest at 5 per cent., to be paid till heir attained twenty-one, and "in case of the demise of any of them without legitimate issue, then his or her proportions to be divided equally among the survivors," and one of the legatees died without having been married:—Held, that the survivors were absolutely entitled to the legacy. *Ranelagh* v. *Ranelagh*, 4 Beav. 419.

2. A testator gave stock to trustees to be divided, after the death of the two persons who had life interest in it, among A, B, C., D., and E., in equal shares; and he directed, that if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to, and be equally divided among, the survivor and survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund. B. died, leaving a son, who died without issue, before the period of distribution. Shortly afterwards, and also before the period of distribution, C. died without issue:—Held, that B.'s personal representative was not entitled to any portion of the fund; that the one-third of B.'s share, which, on the failure of her issue, survives to C, did not, on C.'s death, survive to the other legatees, but was transmitted to her personal representative; and that the words "survivor or survivors" were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the share of B. and C. went over to A.'s personal representative. *Crowder* v. *Stone*, 3 Russ. 217; 7 L. J., Ch., 93.

3. A. devised freeholds to two or their heirs as tenants in common, and in case either should die without leaving lawful issue surviving her, then he devised her part unto the survivor:—Held, that "survivor" was to be read in its ordinary sense, and not in the sense of "other." *Greenwood* v. *Percy*, 26 Beav. 572.

4. Testator being possessed of a mill, etc., which had been granted to him and heirs for three lives, devised his property to trustees and their heirs upon trust to let and to pay one-fifth of the profits to his wife for life, and the other four parts he directed to be applied for the maintenance, education, and bringing up of his four children until they severally attain twenty-five, at which time, as they should severally attain that age, he gave, devised, and bequeathed unto such of his children as should attain that age, one-fifth of the property, to hold to them and their heirs. The testator then provided that, if any of his children should die under twenty-five and leave no lawful issue, then he gave, etc., the part of him, her, or them so dying unto the survivors or survivor of his said children, to be equally divided amongst them, their heirs, etc, with a like proviso if any of such children should happen to die under twenty-one; and after the death of his wife he gave the other fifth part to his children subject to the same trusts, provisoes, and conditions. The testator left all his four children, E., M., J., and Joseph, him surviving. E. attained twenty-five and married S.; M. married P. and died under twenty-five; J. attained twenty-five, married G., and had one child who died an infant, and afterwards J. died. Joseph died under twenty-five unmarried. On bill filed by E. and her husband against the children of M. and G., the husband of J, in order to ascertain the rights of the parties to the mill:—Held, that the children of the testator did not take vested interests until they severally attained twenty-five. That the words "survivors or survivor" could not be read "others or other;" that the husband of J. was not entitled to the share of J. during his life as tenant by the curtesy. *Stead* v. *Platt*, 18 Beav. 50.

5. Testator bequeathed the residue of his estate equally between his two sons and his daughter with a direction that in case either of his sons should die under twenty-one, or in case his daughter should die unmarried, the share of the son or daughter so dying should go to his, the testator's, two then surviving children; and that in case both sons should die under twenty-one, or one son die under that age, and the daughter die unmarried, the share of the second child so dying should go to the only surviving child; and, further, that in case both the sons should die under twenty-one, and the daughter die unmarried, the residue should go over; the two sons attained twenty-one; daughter survived them and died unmarried:—Held, that there was an intestacy as to the daughter's share. *Cooper* v. *Palmer*, 1 Colly. 665.

6. On a gift to a class and their issue, and in case of the death of one without leaving issue, to the survivors or survivor and their issue:—Held, that the word "survivors" could not be read "others" merely on the ground of the improbability of the testator intending the interests of the issue to depend on the period of their parents' death. *Re Corbett*, Johns. 591; 6 Jur., N. S., 339; 29 L. J., Ch., 458; 8 W. R. 257.

A sum bequeathed to trustees, in trust for A., and to pay the income to her, with limitations over to her issue, and to the survivors of A., B., and C., and their issue:—Held, upon failure of the subsequent limitations, that A. was absolutely entitled to the bequest. *Ib.*

7. Under a devise of real and personal estate to the widow for life, and afterwards to the testator's four children, "or" their children, share and share alike; and if any of such children should die without leaving a child, his share was to be divided between "the survivor or survivors" of them "or" their children:—Held, that "or" could not be read as "and," nor "survivors" as "others," and that the effect of the gift was to substitute

children for their parents who had died in the life of the tenant for life. One child died in the life of the tenant for life, without issue; and at the death of the latter, the three other children and several grandchildren were living; also, that the three children took exclusively as tenants in common. *Blundell* v. *Chapman*, 33 Beav. 648. And see *Parsons* v. *Cole*, 4 Drew. 296.

1. The word "survivor" cannot be construed as "others," where the gift over is partly to persons whose interests are not given over. *De Garagnol* v. *Liardet*, 32 Beav. 608; 2 N. R. 296.

A testator gave legacies to each of his four daughters for life, with remainder to their children; and he provided, that if either of the daughters should die without children, her share should go over to the survivors of his sons and daughters:—Held, that "survivors" could not be read "others," in consequence of the gift over being to a different class from those whose shares were to go over. *Ib.*

2. A testator gave stock to the four children of his daughter (a son and three daughters), the shares of the granddaughters to be held in trust for their separate use for their lives; and he directed, that in case of any of his granddaughters dying without issue, their shares should accrue and survive to the "survivors" of all the children of his daughter, including the son, the accruing shares of the granddaughters to be subject to the same conditions as their original shares:—Held, that upon the death of the last surviving granddaughter without issue, her share, both original and accrued, was undisposed of, and fell into the residue. *Nevill* v. *Boddam*, 6 Jur., N. S., 573; 29 L. J., Ch., 738; 8 W. R. 490; 28 Beav. 554.

3. H. in 1823 bequeathed the interest of a fund in trust for her niece S. for life, and after the death of S. to her three daughters H., M., and I., in equal shares and proportions. She declared, that in case any of them should die without leaving any lawful issue, the share or shares of her or them so dying should go to the survivors of them in equal shares; and if but one, then to such one only; but if any or either of them should leave any child or children, then she gave the share or shares of her or them so dying unto her or their child or children respectively in equal shares; provided that if H., M., and I. should all die without lawful issue, in the lifetime of their mother, S., then the fund should go to S. absolutely. H. and I. died in the lifetime of S., leaving children, and M. survived S., and was unmarried:—Held, that the share of M., in the event of her dying without issue, was at her absolute disposal, and did not pass to the children of her sisters H. and I. *Re Hays*, 9 Jur., N. S., 1068; 9 L. T., N. S., 197.

4. A father directed his trustees to pay and divide the residuary moneys arising from the sale and conversion of his real and personal estate among all such of his five daughters as should be living at his death in equal shares, and he directed his trustees to invest every share given to a daughter of his living at his death, and during the life of each such daughter to pay the income of her share to her for her separate use, and after her death to hold the same in trust for her children as therein mentioned, and declared that if there should be no child of such his daughter, who should attain a vested interest, then, subject to a power of appointment given to her over a portion of her share, as well the original share of such daughter, as any share or shares which might accrue to her under that provision, or otherwise, should accrue to his other daughters or other daughter surviving in equal shares, if more than one, each accruing share to be held upon the same trusts as the original. The will contained no gift over in the event of all the daughters dying without issue. All the five daughters survived the testator. Then one of them died leaving a child, then another died without issue:—Held, that the words "other daughter or other surviving daughters" referred to survivorship at the death of the daughter whose share was to be distributed, and that the child of the daughter who died first took no interest in the share of the daughter who died next. *Beckwith* v. *Beckwith*, 46 L. J., Ch., 97; 36 L. T. 128; 25 W. R. 282. Reversing 25 W. R. 6.

5. A testatrix bequeathed two sums of money upon trust respectively for her nieces M. and E. The legacy given to E. was bequeathed upon trust for E. for life for her separate use, and after her decease for her children, if any, living at her death, as she should appoint; and in default of appointment equally amongst them; or if but one child, the whole to be in trust for such only child. The legacy to M. was bequeathed upon similar trusts; and the testatrix directed that in case her said nieces, or either of them, should die without leaving issue, the legacy of the niece so dying should be equally divided between the children of whichever of the testatrix's nieces should happen to survive, and the children of C. (a nephew of the testatrix), in equal shares, on attaining twenty-one years or day of marriage; and if only one such child then living, the whole should go to such only child. There was no gift over of the whole fund, in the event of there being no children to take it. M. died in 1877, E. died in 1881 without issue, and at the time of her death there were living children of M. and children of C.:—Held, that the children of C. were entitled to the whole of the legacy so bequeathed to E., to the exclusion of M.'s children, and that the words "whichever should survived" should receive their literal meaning, and could not be construed as equivalent to "the other." *Re Dunlevy's Trusts*, 7 L. R., Ir., 525. Affirmed 9 L. R., Ir., 349.

6. Testator gave, by will made in 1834, the residue of his estate to trustees to pay the income, after the death of his wife, unto such of his four named children as should be living at the decease of his wife, during their lives; and after the decease of any one or more of such children who should leave children, he gave the share, whether original or accruing, of the one so dying in trust for his or her children; and in the event of any one of his children dying without leaving children who should attain twenty-one years, then he gave the share, whether original or accruing, of such of them so dying in trust for the survivor or survivors of his said children during their lives, and after their deaths for their respective children, and their heirs, executors, and administrators. There was no

gift over. The four children of the testator survived the widow. One child died leaving two children who attained the age of twenty-one years, and the other three children died without issue:—Held, that the words "survivor or survivors" must be so read, and not as "other or others." *Re Horner's Estate, Pomfret* v. *Graham*, 19 L. R., Ch. D., 186; 51 L. J., Ch., 43; 45 L. T. 670.

1. A testator, by will in 1826, gave real and personal estate to trustees in fee, in trust for his four nieces, M., B., S., and J., for their respective lives, as tenants in common, and on the death of any of them, then in trust as to the share of her so dying, to stand possessed of and interested in such share for the child or children of such of them as should have died, and if any of them should die without issue, then he directed the share or shares of her or them so dying to go to the survivor or survivors of them and their heirs, and be conveyed to them and their heirs accordingly. B. and J. died leaving children. M. died a spinster. S. was a spinster and over sixty:—Held, first, that the equitable fee was given to the children of the nieces. *Maden* v. *Taylor*, 45 L. J., Ch., 569.

Held, secondly, that seeing that S. was past the age of child-bearing, she was entitled to her own one-fourth share in fee, under the gift over to the survivor of the nieces. *Ib.*

By codicil of same date, the testator devised freehold estate on trust for M., B., S., and J., for their respective lives, as tenants in common, and on death of all or any of them, then as to the part of her or them so dying, in trust for all and every the child and children of them respectively, and the heirs of their bodies; and if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies; and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for his heirs. B. died, having had four children, three of whom died infants, and unmarried. J. died, having had three children, one of whom died an infant and unmarried. Then M. died a spinster. S. was a spinster, and over sixty:—Held, first, that cross-remainders in tail were to be implied between the children of the tenants for life. *Ib.*

Held, secondly, that "survivor" was not to be read "other," but that S. took M.'s share. *Ib.*

Held, thirdly, that S. being past the age of child-bearing, was entitled to her own one-fourth share in tail under the gift over to the survivors and survivor of them. *Ib.*

2. A testator bequeathed the dividends of a sum of 10,000*l.* consols unto and equally between his four daughters, and from and immediately after their several and respective deceases he bequeathed the 10,000*l.* to their children respectively, viz., one-fourth part thereof unto and equally between the children of each daughter. And, in case any one or more of the daughters should die without leaving issue her or them surviving, he bequeathed the share or shares of the stock as bequeathed to and intended for the issue (had there been such) "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth was the longest liver, and was a spinster of the age of fifty-four:—Held, that on her death without leaving issue she would be entitled to her own one-fourth share of the 10,000*l.* absolutely; that it might be assumed that she would never have any children; and that the share might be transferred to her at once. *Maden* v. *Taylor* (45 L. J., Ch., 569) approved and followed. *Davidson* v. *Kempton*, 18 L. R., Ch. D., 213; 45 L. T. 132; 29 W. R. 912.

2. When Construed "Others."

3. The word "survivors" construed "others." *Barlow* v. *Salter*, 17 Ves. 482.

4. An estate was settled by deed upon A., B., and C., for life, as tenants in common, remainder to their first and other sons respectively in tail male, remainder to their daughters respectively as tenants in common in tail, remainder, "in case one or two of the said A., B., and C., should die without issue of her or their bodies, then as to the share of such one or two dying without issue, to the use of all and every the daughters of such survivors, as tenants in common in tail:—Held, that the limitation to the daughters of the survivor was a good contingent remainder, and not void for remoteness, and that the word "survivors" must be construed "others." *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed 2 H. L. Ca. 186; 12 Jur. 927.

5. Bequest to three children in thirds respectively, with a direction that they should not be put in possession till their respective attainment of particular ages, and in case of the death of either of the above-named children before the ages mentioned, the third to be equally divided between the two surviving children; and in the event of the death of two surviving children, and in the event of the death of two before the respective ages above mentioned, then the whole to devolve to the surviving child; but should all the children die before they should attain their said respective ages, then the whole of his estate was given over. One died, having attained the age mentioned; afterwards another died under that age; the share of the latter a vested interest in the child who died first, and the survivor attaining the age specified. *Wilmot* v. *Wilmot*, 8 Ves. 10.

6. J. having three unmarried daughters, A., L., and C., bequeathed to A. and L. 2,000*l.* each, and to C. 2,500*l.*, to be invested for their benefit, and there to remain until their day of marriage; and in case one or more of his daughters should die before her marriage, then the portion or portions of her so dying should go to and be divided between his surviving daughters, share and share alike; and if only one should survive, then to that daughter. And if all his said daughters should die before their marriage, then their portions should be divided between all his sons. The testator had also three married daughters. C. married, and died in the life of A., who died unmarried, leaving L. surviving:—Held

that C.'s personal representative was entitled to a moiety of A.'s share. *Re Jackson*, 14 Ir. Ch. R. 472.

1. Testator bequeathed a sum of stock to A. and B. for their lives, and on their deaths to their children then living who should attain twenty-one, with a gift over to the survivor of A. and B., in case the children of either of them should die under twenty-one. A. died, leaving a child who had attained twenty-one. B. afterwards died without having had a child:—Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. *Aiton* v. *Brooks*, 7 Sim. 204.

2 Testator by will directed his executors to place out upon government securities such a sum of money out of the interest thereof as should be sufficient to produce an annuity of 50*l.*, which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Colly. 108; 13 L. J., N. S., Ch., 240; 8 Jur. 265.

3. A gift over to "surviving daughters," on the decease of daughters without issue, is a gift over to "other" daughters. *Crowther* v. *Evans*, 11 Jur., N. S., 902; 13 L. T., N. S., 271.

4. A testator bequeathed all his property to his four daughters, share and share alike, the share of each to be given to each on their days of marriage, with consent; and if his daughters should happen to die unmarried, then the share of the child to go, share and share alike, among his surviving daughters, or daughter so surviving:—Held, that surviving daughters meant other daughters, and therefore that the children of a deceased daughter were entitled to a share of the legacy of a daughter who died unmarried. *Re Connellan*, 16 Ir. Ch. R. 524.

5. Where a testator manifests a clear intention to give a benefit to certain objects in an event which happens, the legatees shall not be deprived of it, although a circumstance inadvertently coupled with it in the language used does not literally take place. Therefore, under a bequest of equal sums for the benefit of each of two granddaughters, A. and B., for life, and their children respectively; but if either died without issue, her share to go to the children of the surviving granddaughter; A. marries and dies leaving children in the lifetime of B. Then B. dies unmarried:—Held, that A.'s children took each of their shares, though their mother did not actually survive B. *Harman* v. *Dickenson*, 1 Bro. C. C. 91.

6. A. bequeathed to four nieces, C., D., E., and F.; and on death of any, the whole bequest should go to survivor or survivors; but if any died leaving a child, then her share should go to such child; if all died without issue, then to B. C. married, and had issue G. and H., who died in life of their mother, H. having issue L. and M.; C., D., E., and F. die in succession, F. being last surviving:—Held, that L. and M. were entitled to the whole bequest. *Pitt* v. *Harbin*, Lofft. 19.

7. A testator bequeathed 10,000*l.* equally between his four daughters for life, with remainder to their issue; and directed that the share of every of them dying without issue should devolve to the survivors and survivor of them. There was a gift over, if they should all die without issue:—Held, that "survivors and survivor" were to be read "others and other," and that the issue of one daughter, who died, was entitled to participate in the share of another daughter, who subsequently died without issue. *Lowe* v. *Land*, 6 L. J., N. S., Ch., 234; 1 Jur. 377.

8. Testator, by a will made since the stat. 1 Vict., c. 26, after directing payment of his debts, and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds, some of which were held for years, and others for years determinable on lives, should be kept in hand and let to the best advantage, and the produce be divided every half-year among the above-named L., M., N., O., and P., or to their lawful heirs; and in case of there being no heirs, the share or shares to be divided in equal parts among the surviving legatees. The testator at his death left L. his heiress-at-law and sole next of kin; M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other; M. died unmarried in the testator's lifetime:—Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin; secondly, that M.'s share of the freehold property did not lapse, but went to the surviving devisees, the words "heir and lawful heirs" referring to heirs of the body, and "or" being construed "and"; thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other." *Harris* v. *Davis*, 1 Colly. 416; 9 Jur. 269.

9. Where a testator has directed his trustees to convey one-third of his real and leasehold property to each of his three daughters for life, with a power to each daughter to appoint her third share among her children, and in default of appointment to go to her children equally as tenants in common in fee-simple, but in default of issue of any one or more of his daughters, then the share or shares of such one or more dying without issue to be limited, so as to go to her surviving sisters and to their issue in like manner as their original third parts were directed to be conveyed to each of them, with a gift over in case all three daughters should die without issue in the lifetime of their mother; and the testator directed, in such conveyance,

to be made to his daughters, that all necessary trustees and trusts should be inserted therein for the purpose of protecting the entail and succession designed by him to be effected upon his three daughters and the issue of them:—Held, that this was a case for reading "surviving" as "others." *Hurry* v. *Morgan*, 15 W. R. 87; 36 L. J., Ch., 105; 3 L. R., Eq., 152.

1. The word "surviving" interpreted to mean "other" upon a consideration of the whole scope of the will. *Holland* v. *Allsop*, 7 Jur., N. S., 856; 9 W. R. 683.

In a gift over, upon the death of any of a class without leaving issue, to the survivors, the word "survivors" was construed "others." in consequence of the ultimate gift over being only to take effect on the death of all the class without issue. S. C. 29 Beav. 498.

2. The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will. *Re Keep*, 32 Beav. 122.

The word "survivors" of nieces construed "others," in consequence of the gift over and of the subsequent part of the will referring to the issue of a deceased niece participating in an accrued share. *Ib*

3. T. devised real estate to her three nephews, A., B., and C., for their lives, share and share alike, with remainder, as to the share of each nephew, to his first and other sons in tail male, with remainder to his daughters as tenants in common in tail, and in case of the death of any or either of the nephews without lawful issue, male or female, then to such of her nephews as should survive, and to their and his issue in the manner thereinbefore mentioned, and in case of the death of all the nephews and their issue, then to the right heirs of the testatrix. A. died, leaving a son; then B. died without issue; then C. died leaving a son:—Held, that the words of the will "such as shall survive" of the nephews must be construed as meaning "the others or other" of them, and consequently that A.'s son was entitled to one moiety of B.'s share. *Re Tharp*, 33 L. J., Ch., 59; 11 W. R. 763; 8 L. T., N. S., 558; 1 De G. J. & Sm. 453; 2 N. R. 253.

4. A testator gave one-third of his real and personal estate to each of his three daughters for life, and after their respective deaths to their respective children. But in case any or either of the daughters should die without leaving any child, or if all should die under twenty-one, then the share of the daughter so dying should be for the separate use of surviving daughter, or daughters and their children, *per stirpes*:—Held, that "surviving" ought to be construed "other." Consequently, one having died leaving children in 1803, and a second in 1837 leaving a child, and the third in 1864 leaving no child:—Held, that the share of the last was divisible *per stirpes* amongst the children of the two former. *Hodge* v. *Foot*, 34 Beav. 349.

5. A father gave a sum of money in sixths, and directed his trustees to hold one-sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes* and not *per capita*, in the same manner as the original shares:—Held, that on the death of a daughter without leaving a child who attained twenty-one or married, the children of other daughters who had predeceased her took shares in her one-sixth. *Waite* v. *Littlewood*, 8 L. R., Ch., 70; 42 L. J., Ch., 216; 28 L. T., N. S., 123; 21 W. R. 131.

6. A testatrix devised and bequeathed all her real and personal estate upon trust to sell and convert, and directed her trustees to stand possessed of her residuary personalty upon trust to invest, and as to one-fourth to pay the income to her daughter A. for life, and after A.'s death to assign, transfer, and make over the same to and amongst A.'s child and children, to be assigned, transferred, and paid at twenty-three. Any child attaining twenty-three in the lifetime of A. was to acquire a vested interest. In case of the death of A. without leaving any such child or children as aforesaid, she directed the trustees to pay, apply, and dispose of the income of the fourth to and amongst her (testatrix's) surviving daughters, such benefit of survivorship to extend to the surviving as well as to the original shares; and directed that the principal should go and belong to, and be divisible amongst, the several child or children of such daughter or daughters. As to the remaining three-fourths, she directed the trustees to stand possessed of the income on similar trusts for the benefit of her other three daughters, B., C., and D., for their lives; and of the principal for their respective children, in such manner and form as before directed. In case of the death of all her four daughters without leaving such children as aforesaid, or leaving such, and they should all die under twenty-three, the trustees were to hold the fund in trust for the testatrix's next of kin. Upon the death of a daughter without leaving children:—Held, that the children of a deceased daughter were entitled to participate in the share of the daughter so dying; in other words, that "surviving" must be read as meaning "other." *Badger* v. *Gregory*, 8 L. R., Eq., 78; 17 W. R. 1090; 21 L. T., N. S., 107.

7. A testator devised freeholds in moieties to the use of A. and B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, and in default of issue of either A. or B., then to the same uses in favour of the "survivor of them" and her issue as thereinbefore declared concerning their original shares; remainders over. A. died, leaving a child, who thereupon became tenant in tail of A.'s moiety. Subsequently B. died without issue:—Held, that A.'s child then became tenant in tail of B.'s moiety, "survivor" being read "other." *Re Row*, 43 L. J., Ch., 347; 17 L. R., Eq., 300; 29 L. T. 824.

8. A testator devised real estate upon trust for his three granddaughters for their lives respectively, share and share alike; and after the death of each of them, he gave one-third of his said estate to the children of each of them who should attain twenty-one, or die

under twenty-one leaving issue. And in case any one of such three granddaughters should die without leaving such issue, the testator gave his said estate during the lives of his two surviving granddaughters upon trust for them in equal shares; and after the death of each of two such surviving granddaughters, he gave one moiety of his said estate to their children who should attain twenty-one, or die under twenty-one leaving issue. And in case either of such two surviving granddaughters should die without leaving such issue, he gave his said estate during the life of the last survivor of such granddaughters upon trust for her, and after her death to her children who should attain twenty-one, or die under twenty-one leaving issue:—Held, that, according to the true construction of the will, "survivors" and "surviving" must be construed "others." *Re Beck*, 37 L. J., Ch., 233; 16 W. R. 189.

1. A testator gave property upon trust for his four children as tenants in common during their lives, and after the decease of his children respectively in trust for the children of his children respectively *per stirpes;* and in case of a failure of such issue of either of his children then in trust for his other surviving children or child. One of the testator's children predeceased him, leaving an infant daughter. Another of the testator's children survived him, and afterwards died without issue:—Held, that the infant grandchild took one-third of the lapsed share concurrently with the two surviving children of the testator. *Re Arnold*, 39 L. J., Ch., 875; 10 L. R., Eq, 252; 18 W. R. 912; 23 L. T., N. S., 337.

2. A father directed the income of the residue of his estate to be divided between all his sons as tenants in common, with benefit of survivorship between them, in case any or either of them should die without issue, and in case any child or children who should be entitled under the trusts of his will to any principal money, or income, should die leaving issue, the principal money or share, from which the interest of such child or children should be derived, should go to and be divided amongst such issue as tenants in common. The testator left five sons, two of whom died leaving issue, and three died without issue, the last survivor of the five dying without issue:—Held, that on the death of the last surviving son the principal set free accrued to the children of the sons who had died leaving issue. *Cross* v. *Maltby*, 20 L. R., Eq., 378; 23 W. R. 863; 33 L. T., N. S., 300.

3. After a bequest to testator's children for life, with remainder to their respective children, a clause of accruer of the shares of any of the testator's children dying without leaving issue in favour of his surviving children was held to carry an accruing share to the then living children of the testator and children of those then dead, although the will contained no gift over on the death and failure of issue of all the testator's children. *Re Walker's Estate, Church* v. *Tyacke*, 12 L. R., Ch. D., 205; 48 L. J., Ch., 590.

4. A father gave the residue of his property to trustees, on trust to pay and divide the income equally among his three children, during their respective lives, and after the death of each child the share of the fund to the income of which the deceased child was entitled for life was to be in trust for his or her issue. And in case, and so often as, any of the three children should die without leaving issue, the share to which such child should become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children, during their, his, or her respective life or lives, and in equal shares if more than one. And, after the decease of each such survivor, the surviving or accruing share, to which such survivor for the time being should become entitled for his or her life, was to be in trust for his or her issue. And, in case all the children should die without leaving issue, the fund was to be in trust for the representatives of the survivor. After the death of the testator one of his children died without issue, then another child died leaving issue, and, lastly, the third child died without issue:—Held, that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund. *Wake* v. *Varah*, 2 L. R., Ch. D., 348; 45 L. J., Ch., 533; 24 W. R. 621; 34 L. T., N. S, 437. Affirming 2 L. R., Ch., 350; 24 W. R. 21.

5. A testator directed his trustees to pay one seventh part of his residuary estate, after conversion, to each of his two sons upon their attaining twenty-one, and to pay the income of one other seventh part to his daughter E. for her life, and after her death to divide the capital thereof among such children of E. as should attain twenty-one, and as to the other four sevenths upon like trusts for the benefit of his daughters A., B., C., and D., and their children. And the testator directed that in case any of his daughters should die without leaving issue surviving them, then the shares, as well original as accruing, of such daughters should be divided among his surviving sons and daughters, the shares of any daughters to be held upon the trusts therein declared concerning the other shares as accretions thereto:—Held, that "surviving" was to be read as equivalent to "other." *Jackson* v. *Sparks*, 38 L. J., Ch, 75.

6. A father gave his residuary estate to his six children in equal shares, and directed the shares of his sons who conducted themselves with propriety to be paid to them at twenty-five, and the shares of his sons who did not so conduct themselves to remain vested in his trustees upon trust for such sons for life, and afterwards for their children. The testator also directed the shares of his daughters to remain vested in his trustees upon trust for his daughters for life, and afterwards for their issue; and in case of the death of his daughters or his sons without having received their shares and without lawful issue, then he directed such shares to be divided equally between his "surviving children" in the same manner as the original shares. All the six children of the testator survived him. His three sons attained twenty-five, and their shares were all paid to them. His three daughters all married; one died in 1876 without leaving issue. At that time one son only was living. Two daughters died leaving issue; one son died leaving issue, and one without leaving issue. The question before the Court was the distribution of the share of the daughter who died without leaving issue:—

Held, that "surviving children" must be construed "other children," and that the share must be divided into fifths amongst the representatives of all the brothers and sisters. *Lucena* v. *Lucena*, 47 L. J., Ch., 203; 26 W. R. 254; 7 L. R., Ch. D., 255; 37 L. T., N. S., 420. Varying 36 L. T., N. S, 87.

1. Upon a bequest of all testator's real and personal estate to trustees upon trust to pay certain annuities and weekly payments to his two sons and daughter, and the surplus to accumulate for the benefit of his grandchildren, and, from and after the decease of the surviving annuitant, unto and among all his grandchildren that might be living at the testator's decease, their issue to take the shares of their parents who should die before they became payable, but, in case of the death of any grandchild without leaving issue before the share should be payable, the share of such deceased grandchild to go equally among the surviving grandchildren, to be paid at the same time as the original share would be payable:—Held, that upon the death of any one of the grandchildren, their children were to stand in the place of the parent, both as to the original and accruing shares: the term "surviving" was not be construed to mean "living at the time of the accruer taking place," affirming the judgment below. *Eyre* v. *Marsden*, 4 Myl. & C. 231; 3 Jur. 350 Affirming 2 Keen 564; 7 L. J., N. S, Ch., 220; 2 Jur. 583.

2. Testator bequeathed a leasehold estate to his son Charles, and directed that, if his son should die without issue, the leasehold estate should be considered as part of his residuary estate, and be divided amongst the children of his three daughters, Isabella, Matilda, and Mary, as thereinafter mentioned. And he gave the residue of his estate to trustees, in trust for his son and three daughters, or such of them as should be living at the death of his wife, equally during their lives; and he directed that after their deaths the whole of the residue should be divided amongst all the children of his said son and daughters, in equal parts, shares, and proportions; and in case any of his said son and daughters should die without leaving issue, that the share of him, her, or them so dying should be divided amongst the survivor or survivors of his said children and their issue in the like equal parts, shares, and proportions. Isabella died in the lifetime of the testator's widow, leaving children. Mary died after the widow, leaving children. Then Charles died without issue. Matilda was still living, and had children:—Held, that Isabella's children were entitled to one-fourth of the residue, notwithstanding their mother died before the widow; that Mary's children were entitled to another fourth; and that Matilda was entitled to another fourth for her life, with remainder to her children; and that, as Charles had died without issue, the remaining fourth was divisible into three parts, and one of those parts belonged to Isabella's children, another to Mary's children, and the remaining part to Matilda for life, with remainder to her children. *Hawkins* v. *Hamerton*, 16 Sim. 410; 13 Jur. 2.

3. Where there is in a will a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other." *Smith* v. *Osborne*, 6 H. L. Ca. 375; 3 Jur., N. S., 1181.

O., in anticipation of marriage, executed a settlement, which recited, that "whereas O. is entitled to a contingent remainder on failure of the issue of G. C., party hereto in the town and lands of S., and in certain tenements in W., subject only to such powers over the same as shall appear to be vested in G. C., under and by virtue of the last will of T. C.;" and it went on to covenant, that when and as soon as "the said remainder" should become vested in O. in possession, he would then convey the property to the uses of the settlement. By the will of T. C., both these properties were devised to G. C. for life, remainder to his first and other sons in tail, remainder to the testator's daughters Elizabeth and Frances, as tenants in common in tail, and if either daughter should die without issue, then "to the use of my surviving daughter and the heirs of her body lawfully issuing, and in default of such issue to my own right heirs." G. C. died unmarried, and the lands of S. and W. descended to the two daughters (one of whom was O.'s mother), as tenants in common. The two sisters executed disentailing deeds as to S., but not as to W., and soon afterwards O.'s mother died intestate, and her property descended to O., her son, the covenantor. The other sister by will gave all her property to O., her nephew, subject to annuities and legacies:—Held, that as to the lands at S., the entail of which had been barred, and which had not descended to O., under the will of T. C., this covenant did not take effect, but it did take effect as to the lands at W., for the word "surviving" in the will of T. C. must be construed to mean "other," and the words "such issue" include the issue of both daughters, and therefore O. succeeded to both moieties of that estate as tenant in tail under the will. *Ib.*

4. A testator devised to J. certain hereditaments, to E certain other hereditaments, to M. certain other hereditaments, to A. certain other hereditaments; J., E., M., and A. were children of M., and the estates given to them were in tail general. By a subsequent clause in his will he devised as follows:—"In case if either or all the within-named children of M. shall happen to die leaving no lawful issue, or if they leave lawful issue if such issue die leaving no lawful issue, in any of such cases the property of him, her, or them so dying shall be equally transferred to the use and uses of the surviving child or children of M. that are herein named" in tail general. E. died leaving an only son. A. died leaving a daughter, and after the deaths of E. and A., J. died without having been married, and M. survived E., A., and J.:—Held, that the word "surviving" must be read as the word "other," and E.'s only son was entitled to recover from M. one undivided third part of the hereditaments devised to J. *Williams* v. *James*, 20 W. R. 1010.

3. Where word "Others" Associated with word "Survivors."

5. Legacies to the children (by name) of the testator's late niece M., to be assigned to

them when and as soon as they should respectively attain twenty-five. Provided that if any should die under twenty-five, leaving issue, the issue to take the parent's legacy; but if any should die under twenty-five without having issue then living, the legacy of the child so dying to go and be paid to the "survivors and survivor and others and other" of the same children, in equal shares. At the death of the testator, all the children of M. are under twenty-five. All afterwards attain twenty-five except A., who dies under that age, without issue, having survived two of the children, B. and C. The share of A. devolves to the representatives of B. and C., together with the children who survive A. *Slade* v. *Parr*, 1 Y. & Coll. C. C. 565; 7 Jur. 102.

1. *Semble*, that to effect the expressed intention of the testator, the word "survivor" may receive a different sense in different parts of a will. *Winterton* v. *Cranfurd*, 1 Russ. & M. 407; 8 L. J., Ch., 134.

2. A father directed his trustees to pay and divide the residuary moneys arising from the sale and conversion of his real and personal estate among all such of his five daughters as should be living at his death in equal shares, and he directed his trustees to invest every share given to a daughter of his living at his death, and during the life of each such daughter to pay the income of her share to her for her separate use, and after her death to hold the same in trust for her children as therein mentioned, and declared that if there should be no child of such his daughter, who should attain a vested interest, then, subject to a power of appointment given to her over a portion of her share, as well the original share of such daughter as any share or shares which might accrue to her under that provision, or otherwise, should accrue to his other daughters or daughter surviving in equal shares, if more than one, each accruing share to be held upon the same trusts as the original. The will contained no gift over in the event of all the daughters dying without issue. All the five daughters survived the testator. Then one of them died leaving a child, then another died without issue:—Held, that the words "other daughter or other surviving daughters" referred to survivorship at the death of the daughter whose share was to be distributed, and that the child of the daughter who died first took no interest in the share of the daughter who died next. *Beckwith* v. *Beckwith*, 46 L. J., Ch., 97; 36 L. T., N. S., 128; 25 W. R. 282. Reversing 25 W. R. 6.

3. A testator gave property upon trust for his four children as tenants in common during their lives, and after the decease of his children respectively in trust for the children of his children respectively *per stirpes;* and in case of a failure of such issue of either of his children then in trust for his other surviving children or child. One of the testator's children predeceased him, leaving an infant daughter. Another of the testator's children survived him, and afterwards died without issue:—Held, that the infant grandchild took one-third of the lapsed share concurrently with the two surviving children of the testator. *Re Arnold's Trusts*, 10 L. R., Eq., 252; 39 L. J., Ch., 875; 23 L. T. 337; 18 W. R. 912.

4. "Others." When Construed "Survivors."

4. A mother, having two daughters, A. and B., and three sons, C., D., and E., bequeathed a fund upon trust for A. for life, and after her death for her children, with a gift over in default of children "to the others or other of them, B., C., D., and E., equally to be divided between or amongst them, if more than one." The will contained a like bequest in favour of B. and her children, with a like gift over "to the others or other of my children, that is to say, A., C., D., and E., equally to be divided." A. died a spinster, C. and D. predeceased her:—Held, that the words "others or other" could not be read as equivalent to "survivors or survivor at the death of A.," and that upon her death the fund bequeathed upon trust for her life became divisible in fourths. *Re Hagen*, 46 L. J., Ch., 665.

5. A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—Held, that "others" meant children other than those who had died without leaving issue:—Held, also, that the gift over applied to accrued as well as original shares. *Re Chaston, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

III. ACCRUING SHARES AND CLAUSE OF ACCRUER.

1. General Rule. No Survivorship.

6. A survived share shall not survive again without express words. *Exp. West*, 1 Bro. C. C. 575; 1 P. W. 275.

7. A. devises to his granchildren, B., C., and D., 1,000*l.* each, the interest to their use, and if any dies to the survivors or survivor, share and share alike, the interest to be paid to their father, to their use. B. dies an infant; then C. dies. The share which C. took by the death of B. shall not survive to D., but go to the father, administrator of C. *Rudge* v. *Barker*, Forrest. 124.

8. A testator gave his residuary personal estate to trustees, upon trust to pay the income to his wife until his youngest child should attain twenty-one years, she thereout maintaining the children during their respective minorities; and on the youngest child attaining twenty-one years, upon trust to divide the trust fund among the testator's wife and chil-

dren as tenants in common, with benefit of survivorship:—Held, that the shares of children dying before the youngest child attained twenty-one went to the survivors. But whether the accrued shares survived as well as the original shares, *quære*. *Vorley* v. *Richardson*, 4 W. R. 397; 2 Jur., N. S., 362; 25 L. J., Ch., 335; 8 De G. M. & G. 126.

2. Effect of words "Share," "Portion," "His Share."

1. T. by will appointed the interest that should be made of his personal estate to be paid to his father for life, then to his mother for life; and he gave the residue of his personal estate to his brother and sisters, and to A. and B., sisters of his late wife, share and share alike; and then said, "in case of the death of any of them before me, or the survivor of my father and mother, then the share of the deceased to go among the survivors." The brother died in testator's lifetime; but after the will was made the sisters (in the lifetime of testator's mother, who survived her husband, and then died) and A. and B. claimed the residue of the personal estate:—Held, that they were entitled, as the only surviving legatees, not only to their own original shares, but to all accumulations. *Pain* v. *Benson*, 3 Atk. 78

A. gave 1,000*l.* among four persons, as tenants in common, and directed, if one of them die before twenty-one or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share was a new legacy, and there is no survivorship. *Id.* 80.

2. One devises several parcels of land to his several children in tail, and if any of them die before twenty-one or unmarried, such child's part to go to the surviving children; if any of the children die unmarried, though above the age of twenty-one, his share shall go to the surviving child, but such survivor shall have such share for life only; what goes over on one child's death shall not go over again a second time. *Woodworth* v. *Glassbrook*, 2 Vern. 388.

3. Testator gave a sum to the four children of A., to be divided into equal shares, and paid to them at twenty-one, and the interest of their shares to be paid to their parents in the meantime; and in case of any dying under twenty-one, his, her, or their shares to be divided among the survivors. Two of the children died under twenty-one, in the testator's lifetime:—Held, that the original share of each had accrued to the then survivors, but that the accruing share of the one who died last lapsed. *Rickett* v. *Guillemard*, 12 Sim. 88; 5 Jur. 818.

4. A testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money, and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the Bank of England, or that of the United States of America, to his reputed children, Anthony, James, and Richard, and their heirs, share and share alike, as soon as they should have attained twenty-one, it being his will that if one of them should die before he attained that age, his share should vest in and belong to the survivors. James died under twenty-one, leaving Anthony and Richard surviving:—Held, that the share of the testator's property, which James would have been entitled to if he had attained twenty-one, vested in Anthony and Richard as joint tenants. *Jones* v. *Hall*, 16 Sim. 500.

5. A testator gave stock to trustees, to be divided after the death of the two persons who had life interest in it among A., B., C., D., and E., in equal shares; and he directed that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue should go to and be equally divided among the survivor and survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund; then B. died, leaving a son, who died without issue before the period of distribution; shortly afterwards, and also before the period of distribution, C. died without issue:—Held, that B.'s personal representatives were not entitled to any portion of the fund; that the one-third of B.'s share, which on the failure of her issue survived to C., did not, on C.'s death, survive to her other legatees, but was transmitted to her personal representative; that the words "survivor and survivors" were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of B. and C. went over to A.'s personal representatives. *Crowder* v. *Stone*, 3 Russ. 217; 7 L. J., Ch., 93.

6. One devises portions to his children, A., B., and C., and if any die before twenty-one or marriage the portion of the child so dying to go to the survivor; one of the children dies in the lifetime of the testator. This is not a lapsed legacy, but shall go over to the surviving children. *Perkins* v. *Micklethwaite*, 1 P. W. 274.

7. A married woman, by a testamentary instrument, made in execution of a power contained in her marriage settlement, gave 2,000*l.*, subject to the life interest of her husband, to trustees, upon trust for the benefit of her child or children, to be equally divided between them, share and share alike; but, in case the 2,000*l.* should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; and, in case any of the children should happen to die before their portions should become payable, then they should go and belong to the survivors or survivor of them. The testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son and afterwards a daughter died in the lifetime of their father:—Held, that on the death of the father the surviving daughter was entitled to the 2,000*l.* by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which

belonged to the representative of the deceased daughter. *Bright* v. *Rowe*, 3 Myl. & K. 316.

1. A gave his leasehold and general residuary estate to trustees, in trust, "as to the clear annual residue of his estate," to divide the same between his three daughters, N., P., and M., for their separate use; but in case any or either of his daughters should die, leaving lawful issue surviving, to pay such "shares or share" to the children of such one or more of them; and if one of his daughters died without issue surviving, upon trust to pay her annual share unto the survivors equally; and in case there should be only one surviving daughter during the continuance of the trusts, then the whole of his estate and effects was to be paid to such surviving daughter, for her own absolute use. All three daughters were married, and died without ever having had children. The husband, as the representative of the survivor, P., who died in 1857, claimed the whole of the estate, but the representatives of M., who died in 1839, submitted that there was an intestacy:—Held, upon the whole language of the will, that the plaintiff, as the representative of the survivor, was entitled to the estate and effects absolutely. *Pulbrook* v. *Bratt*, 5 Jur., N. S., 330.

2. Gift to A. for life, and afterwards to seven named persons, equally, "the share of each who shall happen to die to be equally divided amongst the survivors, unless A. (one of them) should die, leaving children; in that case, I mean that her children should inherit the share of the parent." The seven all died before the tenant for life, A. being the survivor of them:—Held, first, that the seven took equally; secondly, that the children of A. took no more than one-seventh; and, thirdly, that the share of one of the seven, who predeceased the testatrix, was undisposed of. *Cambridge* v. *Rous*, 25 Beav. 409.

3. Accruing share held to go over with the original share, by force of the words "part share and interest." *Douglas* v. *Andrews*, 14 Beav. 347.

A testator gave his estate to one for life, with remainder to her children equally, with a gift over (in case of the death of any child in the life of the tenant for life) of the "part and parts, share and shares, and interest" of such child to his issue:—Held, that the gift over comprised the accrued as well as the original share. *Ib.*

4. The word "share" alone, when there is no gift over of the whole fund, in case of the failure of all the members of the class, is not sufficient to carry over an accrued share. *Evans* v. *Evans*, 25 Beav. 81.

5. Bequest to four equally, "and as each dies, his or her part shall be equally divided amongst the others that's living":—Held, that the accrued shares did not go over. *Goodwin* v. *Finlayson*, 25 Beav. 65.

6. A testator gave certain securities to trustees upon trust that a moiety should be set apart for his two sons, T. and C., share and share alike, to pay the interest to them respectively until T. succeeded to the F. estates, when the whole of the moiety should be transferred to C., until he attained twenty-seven, then to be paid to him for his absolute use. And in case either of his sons died unmarried his share should go to the survivor; and if both died unmarried under twenty-seven, then over. T. succeeded to the estates, and C. died unmarried, under twenty-seven:—Held, that the whole of the moiety belonged to T. *Edmonstone* v. *Farley*, 18 L. T., N. S., 847.

7. A testator in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—Held, that the gift over applied to accrued as well as original shares. *Re Chaston*, *Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

3. Accrued Shares Directed to go in Same Manner as Original Shares.

8. Residuary bequest to the testator's nephews and nieces, *per stirpes*, equally for their lives, and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares; but upon the death of the last survivor without a child, his shares both original and accrued are undisposed of, notwithstanding another has left a child. *Milsom* v. *Awdry*, 5 Ves. 465.

9. A gift between grandchildren living at the testator's death, to be divided between them on the death of the survivor of three persons, with a gift over to the survivors, in case of the death of any before he should be entitled to receive his share, and to be paid at the same time, and in the same manner, as before mentioned touching the original share. The gift over held to apply to the accruing as well as to the original share. *Eyre* v. *Marsden*, 2 Keen 564; 7 L. J., N. S., Ch., 220; 2 Jur. 583. Affirmed 4 Myl. & C. 231; 3 Jur. 450.

10. After a bequest for the benefit of children and their issue, it was declared that, if any should die without issue, his share should go among the survivors in the manner directed concerning the original shares:—Held, that the gift over comprised an accrued share. *Goodman* v. *Goodman*, 1 De G. & Sm. 695; 17 L. J., N. S., Ch., 103; 12 Jur. 258.

11. Devise of estates to testator's son and four daughters, "and their lawful issue respectively in tail general, with benefit of survivorship, to and amongst their issue respectively as tenants in common; but such issue, being sons, not to have vested interests until twenty-one, or daughters until twenty-one or marriage, with powers to trustees to advance, etc., to the extent of one-half the presumptive share of each child; and in case his son or daughters, or either of them, should die without leaving lawful issue, or with lawful issue, and

such issue being a son should not attain twenty-one, or a daughter not attain twenty-one nor be married, then the share of the party so dying to be for the benefit of the survivors and their issue, in same manner as their original shares":—Held (confirming the certificate of the Court of Exchequer), that the son and daughters took estates for lives as tenants in common, with contingent remainders in their shares to their respective children, by purchase, as tenants in common in tail, with cross-remainders in tail between such children in each respective share, with cross-remainders over in the whole of each of such shares respectively (on failure of all the children of any one son or daughter and their issue), to the survivor or survivors of the testator's son or daughters, for life, remainder in tail general to the children of such surviving son or daughters respectively, in like manner as in the original share given to such son or daughters respectively; and that the son and daughters and their children respectively took corresponding interests in the leaseholds devised by way of executory bequest after the death of the testator's widow. *Cursham* v. *Newland*, 2 Beav. 143. And see S. C. at law, 2 Bing., N. S., 58; 2 Scott 105; 4 M. & W. 101.

Consolidation of Shares.] 1. By a settlement trustees were directed to be possessed of 1,760*l.* in trust for a daughter, and her sons, at twenty-one, and daughters at twenty-one or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accruer between the three daughters and their children, in default of children, was declared, with a declaration that the provisions applicable to the original shares should apply to such surviving or accrued shares; and it was provided, that if either of the three daughters should die without having or leaving any child who should attain a vested interest, she might dispose of any part of "her share" not exceeding one-third by deed or will. On the death of one of the three daughters, her share accrued among the survivors; one of the survivors then died without a child, and appointed by will "one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l.*" The trustees paid so much of the share of the testatrix as had accrued into court, under the Trustee Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *Re Hutchinson's Settlement*, 5 De G. & Sm. 681; 17 Jur. 59.

4. Fund Treated as a Whole Fund.

2. Testator leaves a residue in trust for four, with survivorship; two died: the survived share shall survive as well as the original shares, being the case of an aggregate fund. *Worlidge* v. *Churchill*, 3 Bro. C. C. 465. And see *Langley* v. *Langley*, 6 L. R., Ir., 277.

3. Where residuary real and personal estate was directed to be all converted into personalty, and to be applied in payment of debts, etc., and the residue to be divided among testator's children, J., M., and C., and grandchild R., the share of M. to be paid as soon after his decease as convenient, and the shares of C. and R. at the ages of twenty-two and twenty-one respectively; and in case any of his children should die before their shares became so vested as aforesaid, the shares to go to the survivors equally; and if but one, the whole to that one. J. and C. died in testator's lifetime, C. under twenty-two, and R. survived testator, but died under twenty-one:—Held, first, that "vested" must mean "payable," and that the original shares of the deceased children survived to the survivors; and, secondly, that "whole" meant the whole residue, and therefore that the accruing as well as original shares devolved to M. as sole survivor. *Sillick* v. *Booth*, 1 Y. & Coll. C. C. 121, 739; 6 Jur. 142.

4. A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime, apply the profits to their maintenance; but in case of the death of any of them unmarried, and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew, and then a niece die, under twenty-five, unmarried, and without issue; the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker* v. *Lea*, T. & R. 413.

5. A testator gave a fund in trust for W. for life, and after her death in trust for the children of A, of B., and of C. who should survive the testator, "such children taking *per stirpes*, with benefit of survivorship among members of the same family:—Held, that the survivorship extended to accrued as well as original shares, so that the whole of each third share of the fund went to those objects of gift who survived the tenant for life. *Re Crawhall*, 2 Jur., N. S., 892; 8 De G. M. & G. 480.

6. The general rule is, that where a fund is given to a class of persons, with a direction that on the death of any of them their "shares" are to go over, the original and not the accruing shares will go over. But a testator may express a contrary intention, thus: where he shows an intention to keep the fund "aggregate" and unsevered, the rule does not apply. *Douglas* v. *Andrews*, 14 Beav. 347.

7. Where, in the disposition of real estate amongst various persons in different shares, with clauses of accruer and gifts over in certain events, the intention is shown of keeping the estate together in an aggregate mass, the word "share" will be construed to include accrued as well as original shares. *Dutton* v. *Crowdy*, 12 W. R. 222; 10 Jur., N. S., 28; 33 L. J., Ch., 241; 9 L. T., N. S., 630; 3 N. R. 234.

Real estate was devised to A. for life, with remainder to his children, as tenants in common in tail; and in case any of such children should die without issue, then, as to the share or shares of him, her, or them so dying, to the eldest surviving son for the time being of

A. in tail; and in case there should be no son, then to the others or other of the children of A., as tenants in common in tail; and if all such children but one should die without issue, or if there should be only one such child, then to such one or only child in tail; and in default of such issue, over:—Held, that the will showing an intention to keep the estate in an aggregate mass, and to accumulate all the shares which failed upon the eldest surviving son, the word "share" must be construed to extend to accrued as well as to original shares *Ib.*

1. Upon a bequest of equal legacies to testator's six children, to be paid on their respectively attaining twenty-one, or the marriage of the daughters; the interest to be paid in the meantime, and the principal as they might direct to their issue, but in case they should die without issue the principal to go among "the survivors" of his children in equal proportions; after directing his freehold estate to be sold and all the residue of his personal estate, he declared the trusts to be, equally to pay and divide the money therefrom, so soon as his youngest child should attain twenty-one, unto and amongst all his children, share and share alike, and in case of the death of any, leaving lawful issue, the share of the parent so dying to such issue:—Held, that the first bequest was limited to issue living at the death of the children, and that the gift over, on failure of issue, referred to the same objects; and as to the second bequest, that the residuary share of a child who attained twenty-one, and died before the period of division, passed to his representatives, and, *semble*, no child not attaining twenty-one took any interest; that the word "survivors," in the latter clause, was to be construed in its natural sense, and not to mean "others,' and that the construction of the word in one part of the will determined its construction in the other part also: lastly, that the gift of the parent's share to such issue applied both to the original and accruing shares of the residue, but not to the specific legacies mentioned in the former clause. *Leeming* v. *Sherratt*, 2 Hare 14; 11 L. J., N. S., Ch., 423; 6 Jur. 663.

5. Accrued Shares. Whether Subject to Limitations of Original Shares.

2. Upon the construction of a will:—Held, that accruing shares of personal estate were not subject to the trusts declared of the original shares. *Macgregor* v. *Macgregor*, 2 Colly. 192.

3. A testator gave the proceeds of real and personal estate to trustees upon trust to divide the same into six equal shares, one share for each of the testator's children; the shares of sons to be paid to them as soon as conveniently might be after his decease, the shares of daughters to be vested interests immediately after his decease, and to be settled upon them and their children. The will contained a proviso that if any of his sons should die without having any issue living at their deaths, the share intended for the son so dying should accrue for the benefit of the survivors of his said children, their executors, administrators, and assigns, in equal shares. One of the sons died in the testator's lifetime:—Held, first, that the surviving children took his share as well as their original shares absolutely, and not as an interest defeasible on their death without issue; secondly, that the accruing shares of the daughters belonged to them absolutely, and were not subject to the trusts for the settlement of the original shares. *Ware* v. *Watson*, 3 W. R. 496; 7 De G. M. & G 248; 2 W. R. 603.

4. A father bequeathed a fund equally for the use of his five sons, Edward, John, Charles, Crofton, and Henry, but directed that they were only to receive the interest on their legacies during their lives, and that after their respective deaths the interest was only to be applied for the use of their wife and children, if any, until the youngest of the children should reach twenty-one, and then the principal be divided among the survivors; and in case of those not leaving a wife or children, their proportion was to go to the next elder brother down to the youngest. Charles having died unmarried, and Crofton, his next younger brother, having subsequently died leaving a wife and children:—Held, that the accrued share which Crofton took on the death of Charles remained his absolute property. *Fitzgerald* v. *Fitzgerald*, 7 Ir. R., Eq., 436.

5. Testator gave a sum of stock to his wife for life, and, after her death, to his sons and daughters, and he directed the interest of his daughter's share to be paid to her for her separate use for life, and, at her decease, the capital to be divided amongst such children as she should have living at his decease, the shares of the sons to be paid at twenty-one, and the daughters at twenty-one or marriage, provided their mother was then dead, otherwise, her children's shares were not to be paid to them until her decease; her share was to be equally divided amongst such of his sons as should be then living; and if any of his said sons and daughters should die before his wife, and without leaving issue, their shares were to be divided amongst his other children:—Held, that the daughter's children living at the testator's death took absolute vested interests at twenty-one, though their mother was still living; and that her interest in the share of one of the testator's sons, who died in the lifetime of his widow, was not subject to the same trusts as her original share, but vested in her absolutely. *Gibbons* v. *Langdon*, 6 Sim. 260.

6. A gift between grandchildren living at the testator's death, to be divided between them on the death of the survivor of three persons, with a gift over to the survivors, in case of the death of any before he should be entitled to receive his share, and to be paid at the same time, and in the same manner, as before mentioned touching the original share. The gift over held to apply to the accruing as well as to the original share. *Eyre* v. *Marsden*, 2 Keen 564; 7 L. J., N. S., Ch., 220; 2 Jur. 583. Affirmed 4 Myl. & C. 231; 3 Jur. 450.

7. A testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease, for all and every the child or children of his daughter, share and share alike, when they should re-

spectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one, and have one or more child or children who should survive the testator's daughter, and live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided, also, that in case any child or children of his daughter should die before attaining twenty-one the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one to be equally divided between them if more than one, the issue of any deceased child or children to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age—Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not live to attain twenty-one, and was therefore not too remote. *Trickey* v. *Trickey*, 3 Myl. & K. 560.

1. A testator gave his real and personal estate to A., B., and C., as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime, his estate and interest should "go to the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor." A. died in the testator's lifetime—Held, that B. and C. took as joint tenants the share intended for A. *Leigh* v. *Mosley*, 14 Beav. 609. And see *Jones* v. *Hall*, 16 Sim. 500.

2. Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, "to be respectively paid at twenty-one or marriage." "But if any of my said children or grandchildren should happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child or children, or grandchildren, so dying unto and among those that shall be then living, share and share alike." Two of the children died before the testator; their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild, having survived the testator and attained twenty-one, died before the tenant for life; their shares transmissible to their representatives; no implication that the survivorship was to take place among the children and grandchildren distinctly from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Walker* v. *Main*, 1 Jac. & Walk. 1.

3. A., by will, directed as to his general residue, to pay and divide same, with the accumulations from the time of the decease of his mother (who had a life-interest therein), between and amongst a brother and four sisters, naming them, "and he did further will and direct that in case his brother, or any of his sisters, should depart this life before his or her share or shares of such residue should become payable, without leaving lawful issue him or her surviving, that in such case the share or shares of him or her so dying should be paid to the survivors or survivor in equal shares," with directions for maintenance and education of infant children of his brother and sisters so dying:—Held, that the original and accruing shares of any of the legatees so dying without issue went to the survivors in equal shares. *Spilsbury* v. *Kent*, 5 L. T., N. S., 343.

Held, also, that the children of either of the legatees took vested interests in the parent's share or shares on the death of such parent. *Ib.*

4. Three annuities for a term of years bequeathed in trust for three children, A., B., and C., respectively for life; in case of the death of either leaving any child or children, his or her annuity to be equally divided between such child or children, share and share alike; in case of the death of either without issue, his or her annuity to go to the survivor or survivors of them equally, share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid; A. died without issue; A.'s annuity went to B. and C., subject to the contingent limitation over; and upon B.'s death, leaving children, belongs in moieties absolutely to his administrator and C. *Vandergucht* v. *Blake*, 2 Ves. J. 533.

5. The testator devised his residuary freehold, copyhold, and leasehold estates to his son and four daughters "and their lawful issue respectively in tail general, with benefit of survivorship to and amongst their issue respectively as tenants in common;" but such issue, "being sons," not to have vested interests until they attained twenty-one, or, "being daughters," until twenty-one or marriage, with power to the trustees, after the death of his son or daughters respectively, to advance such issue during minority to the extent of one half the presumptive share of "each child;" and in case his son or daughters, or any or either of them, should die without leaving lawful issue, or with lawful issue, and such issue, being a son or sons, should not attain twenty-one, or, being a daughter or daughters, should not attain that age or be married, then the part or share of him or her so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares:—Held, that the testator's children took estates for life as tenants in common in the freeholds and copyholds, with remainder to the grandchildren in tail general in the shares of their respective parents, with cross remainders in tail between such grandchildren respectively, and with remainder for life to the survivors or survivor, others or other, of the parents in equal shares for life, with remainder in tail to their children, the shares accruing to such survivors, etc., to be subject to the same limitations and such benefit of survivorship as the original shares. *Cursham* v. *Newland*, 2 Beav. 145.

6. A father gave his residuary estate upon trust for his three daughters for life, and if any of his daughters should die leaving issue, a share proportioned to the number of his daughters was to go to the issue of such daughter, and if only one of such daughters should die leaving issue the whole to such issue, and if all his daughters should die

without issue then to his sisters. He had three daughters. One died leaving four children, one of whom died leaving two children born after their grandmother's death; afterwards another of his daughters died a spinster:—Held, that there were implied cross limitations, so that the surviving daughter had a life interest in half the share of the daughter so last dying. *Re Ridge*, 41 L. J., Ch., 787; 7 L. R., Ch., 665; 20 W. R. 878; 27 L. T., N. S., 141.

Held, also, that the gift to issue was to the issue living at the death of the daughter, and therefore the three survivors of the four children and the representative of the dead one were entitled to the second moiety, and would, if the third daughter of the testator died without issue, become entitled to the whole. *Ib.*

1. Gift by testator to his daughters, "the share or shares of such daughters to be for their sole and separate use," followed by a contingent gift over to the survivors:—Held, that the separate use attached to the accrued as well as the original shares. *Re Jarman's Trusts*, 1 L. R., Eq., 71.

IV. WORDS OF SURVIVORSHIP. TO WHAT PERIOD REFERABLE.

1. General Principles.

2. Under a bequest over, after an interest for life by words importing both a joint interest and a tenancy in common as to three, "or the survivor, share and share alike," the period to which the survivorship relates depends not on any technical words, but on the apparent intention collected from the particular disposition, or the general context. *Newton* v. *Ayscough*, 19 Ves. 534.

3. In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take, and the contingency to which the survivorship refers, is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument. *Bouverie* v. *Bouverie*, 2 Ph. 349; 16 L. J., N. S., Ch., 411; 11 Jur. 661. Reversing the judgment below.

4. Words of survivorship are to be referred to the period of division and enjoyment, unless the contrary intent be especially shown. *Cripps* v. *Wolcott*, 4 Madd. 11.

5. A testator gave and bequeathed three legacies of 3,000*l.* each to his three brothers, in the words following: "I leave and bequeath to my brother James 3,000*l.*, in trust to his surviving child or children; to my brother Robert W., 3,000*l.*, in trust to his surviving child or children; failing issue, I leave the 3,000*l.* to my brother William W., in trust to his surviving child or children; failing such issue I leave the 3,000*l.* to my brother Daniel O. W., in trust to his surviving child or children; failing issue, I leave the 3,000*l.* to the children of my brother James W." Similar legacies of 3,000*l.* each were given to the brothers Robert and Daniel, with the same phraseology as to "failing of issue, etc.":—Held, that the word "surviving" in the bequest meant surviving at the deaths of the respective fathers, and that the brothers of testator took life interests in these legacies. *Blount* v. *Wheble*, 21 L. J., N. S., Ch., 259.

6. A., by will, in 1841, gave the residue of his estate and effects, subject to a life interest vested in his wife, to his six grandnephews and nieces equally, share and share alike, and to their respective heirs or assigns, "declaring that if any of his residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally, share and share alike, among the survivors of his grandnephews and grandnieces equally":—Held, that the word "vest" did not alter the general rule, but that "survivors" meant the survivors at the death of the tenant for life. *Young* v. *Robertson*, 8 Jur., N. S., 825. S. C. *nom. Richardson* v. *Robertson*, 6 L. T., N. S., 75.

It is a settled rule of construction that words of survivorship in a will should be referred to the period appointed by that will for the payment or distribution of the subject-matter of the gift. *Ib.*

If a testator gives a sum of money, or the residue of his estate, to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, the period of distribution is the period of the death of the testator; and accordingly the event of the death upon which that contingency is to take place is referable to the interval of time between the date of the will and the death of the testator, and the words are construed to provide for the event of the death of any one of the legatees during the lifetime of the testator. But where a testator gives a life estate in a sum of money, or the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs, in that event, the payment to be made or the distribution to be made among the survivors, it is understood and regarded by the law that he means the contingency to extend over the whole period of time that must elapse before the payment is made or the distribution takes place; and in such case the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, namely, the expiration of the life estate. *Ib.*

2. Immediate Gift, but not Expressly Contingent.

7. Bequest to A. and B. in equal moieties,

but, in the event of the death of either, the whole to the survivor; and on the demise of either, should they have no children, then over:—Held, that the survivorship was confined to death in testator's lifetime. *Clarke* v. *Lubbock*, 1 Y. & Coll. C. C. 492; 6 Jur. 548.

1. A testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents and profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike:—Held, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common; and that the interests were vested in the children on the death of the testator. *Ashford* v. *Haines*, 21 L. J., Ch., 496.

2. Bequest to the children of A. who should be living at the testator's decease, equally, with survivorship in case of death without leaving issue; if leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death, as upon the construction the clause would be repugnant. *Shergold* v. *Boone*, 13 Ves. 370.

3. Bequest of personal estate in equal shares "to each and every of my children and their issue, whether sons or daughters, with benefit of survivorship":—Held, that the period of survivorship was the death of the testator. *Caulfield* v. *Giles*, 12 Ir. Eq R. 427.

4. Bequest to four persons in equal shares; and in case of the death of any one in the lifetime of the other or others, the share or shares of him or them so dying to go to the survivor or survivors:—Held, that the survivorship referred to the period of distribution, that is, the testator's death; and that consequently, on the death of one of the four legatees in the testator's life, there was not a lapse. *Howard* v. *Howard*, 21 Beav. 550.

5. By a will property was given to trustees, to apply the rents, interest, and proceeds for the maintenance of the testator's son Edward for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator absolutely. By a codicil it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil the testator gave 600*l.* stock to Edward, in addition to what he had left him by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—Held, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That, although in one codicil the words "in the event of the death of Edward" meant upon the death of Edward, it did not follow that the words in another codicil "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life interest and the other to a capital sum. That the period of survivorship must be referred to the period of distribution, namely, the death of the testator. That therefore Edward, having survived the testator, took the legacy of stock absolutely. *Re More's Trust*, 10 Hare 171.

3. Future Gift not Expressly Contingent, but no Prior Estate.

6. A. B. bequeathed 1,000*l.* to such persons, and in such proportions, as his wife should by deed or will appoint; and in default of appointment he bequeathed the 1,000*l.* unto, and to be equally divided between, her surviving brothers and sisters. The wife, by her will, which was held not to be an exercise of the power, not referring at all to her husband, or to his will, or to the power, bequeathed many legacies, to the exact amount of 1,000*l.*, and gave her clothes (she having no other property) to one of her sisters. When A. B. made his will, one brother of his wife had died. When A. B. died, there were two brothers and three sisters of his wife. When the wife died, there were no brothers and only two sisters living:—Held, that, under the words "surviving brothers and sisters" of the wife, the two sisters of the wife living at her death were entitled to the 1,000*l.* in equal moieties. *Davies* v. *Thorns*, 18 L. J., N. S., Ch., 212; 13 Jur. 383; 3 De G. & Sm. 347.

7. Testator gave a portion of his personal estate to the seven children of his son and his wife, naming them, "together with every other child hereafter to be born of the said (wife) during the life of the said (husband), or within nine months after his decease, in equal shares, with benefit of survivorship. He then directed their maintenance with the dividends until the youngest child should attain thirty; then upon trust for them respectively and the survivors and survivor of them in equal shares, with power to the trustees to make such distribution sooner if they think fit, provided the youngest child should have attained twenty-one:—Held, that the period of division was the death of the husband, or the short period limited after his death; that the clause of maintenance till thirty, and proposing payment till then, did not disturb the previous vesting in the children surviving at the death of the husband, so as to introduce remoteness; and that consequently one child having died, living the father, her share went over to those who should be surviving at his death. *Hodson* v. *Micklethwaite*, 2 Drew. 294; 23 L. J., Ch., 719; 2 W. R. 440; 2 Eq. Rep. 1157.

4. Future Gift, not Expressly Contingent, after a Prior Interest.

(*a*) *Death of Testator*, 8030.
(*b*) *Death of Testator where Tenant for Life Predeceases him*, 8031.
(*c*) *Period of Division*, 8031.
(*d*) *Period of Division where Several Life Interests*, 8033.
(*e*) *Rule in Case of Gifts of Real Estate*, 8034.

(*a*) *Death of Testator.*

1. J. devised lands to his son M., and other lands to his son J., and in case both of them should die unmarried, and without lawful issue, then his three daughters were to have the lands as tenants in common, and not as joint tenants. Both the sons died unmarried, and without issue; and two of the daughters died in the lifetime of the surviving son, leaving issue:—Held, that the three daughters had such a contingent interest vested in them upon their father's death as was transmissible to their representatives, and that the surviving daughter was not entitled to the whole. *Wilson* v. *Bayly*, 3 Bro. P. C. 195.

2. A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minority, and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children; and subject thereto, he bequeathed his leasehold and personalty unto three children, and the survivors and survivor of them. One died under twenty-one:—Held, that he took a vested interest at the death of the testator. *Bass* v. *Russell*, Taml. 18; 7 L. J., Ch., 177.

3. On a bequest of stock to the wife for life, and afterwards a moiety to be received and divided equally amongst the testator's brothers and sisters, and their issue:—Held, that the brothers and sisters living at the testator's death took vested interests, liable to be divested by their dying, leaving issue, before the period of division, and that the issue took by substitution. *Shailer* v. *Groves*, 6 Hare 162. But see 16 L. J., N. S., Ch., 367; 11 Jur. 485; and 2 Jur., vol. ii., p. 737. n., 4th edn.

4. W. S. by his will directed the interest of the residue of his estate to be paid to his children during their respective lives; and, after their decease, to be divided equally between all his surviving grandchildren who should be then living, share and share alike, until the youngest should attain twenty-one years, when he directed the whole to be turned into money, and to be divided equally between all such of his said grandchildren, and the children and child of any such grandchild as might then be dead, leaving lawful issue, such children or child to take only his or their parent's share; and if there should be only one such grandchild who might live to attain the age of twenty-one, then upon trust for such grandchild, his or her heirs, executors, etc.:—Held, that the bequest was confined to the children of the grandchildren who should be living at the death of all the testator's children; and that the children of a grandchild who died in the lifetime of some of the testator's children did not take any interest under his will. *Quære*, if the bequest was not void for remoteness. *Smith* v. *Farr*, 3 Y. & Coll. 328; 8 L. J., N. S., Exch. Eq., 46.

5. Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters, and, in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parent's place:—Held, that the brothers and sisters who survived the testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. *Gray* v. *Garman*, 2 Hare 268; 12 L. J., N. S., Ch., 259; 7 Jur. 275.

6. Testator gave 5,000*l.* stock to his sister for life; and at her decease the stock was to be equally divided among the testator's nieces, E. T., M. R. R., F. R. B., M. A. G. R., and A. L. R, or the survivors of them. And, after bequeathing another legacy, the testator directed that the remainder of his property should be divided into two equal shares, of which he gave one to his niece M. R. R., and the other between his nieces E. T. and F. R. B. The will then contained the following clause: "In case my niece E. T. should not survive me, her child or children are to inherit what I have bequeathed to her; and the same of any other of my nieces who may marry and leave children":—Held, that the words of survivorship occurring in the gift of the 5,000*l.* stock to the testator's nieces were to be referred to the testator's death. *Rogers* v. *Towsey*, 9 Jur. 575.

7. Gift for life followed by a gift to the surviving children of B. and C., "or their heirs and assigns":—Held, that *Cripps* v. *Wolcott* (4 Madd. 11) did not apply, and that the period of survivorship was the death of the testator. *Re Hopkins*, 2 Hem. & M. 411.

Held, also, that the "heirs and assigns" could not be read next of kin, and that all who survived the testator took vested interests. *Ib.*

8. Survivorship as to a class, in a gift after the death of the tenant for life, referred to the death of the testator, and not to the death of the tenant for life. *Evans* v. *Evans*, 25 Beav. 81.

Gift to A. for life, and after her decease to "the surviving children of B. and C., except the youngest son of B.," who was to have 30*l.* to his share more than the other. The will proceeded: "Should either of these children die, leaving no issue, his or her share to be then equally divided amongst the survivors":—Held, that the children of B. and C. took vested interests at the death of the testator in remainder expectant on the decease of A., with a gift to the survivors in the event of any one dying without issue in that interval. *Ib.*

9. A testator gave his residuary estate upon trust to pay to A. an annuity during her life, and to accumulate the surplus income till the expiration of six months after A.'s death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A. and of B., who should have lived to attain twenty-one, or in case of any of them being dead under that age who should have left issue, and pay and apply one share to each of the children of A. and B. that should have lived to attain twenty-one, and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age, leaving lawful issue:—Held, that the word "living" was not referable to the period of distribution, but to that of the testator's death, so that each child on attaining twenty-one took a vested interest absolutely. *Kidd* v. *North*, 3 De G. M. & G. 947.

10. A gift of residuary estate to A., and such of the children of B. as should be living at the death of C., their respective heirs, execu-

tors, etc., in equal shares as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivors, and other or others of them, the said children of B., and the said A., living at the decease of C., and his and their respective heirs, executors, etc., in equal shares, as tenants in common, and not as joint tenants, so and in such manner that the children of B. attaining twenty-one, and surviving C. and the said A., in case A. survive C., should take equally her capital:—Held, that A. surviving the testator, and dying in the lifetime of C., took nevertheless, with the children of B. who survived C., a vested share in the residuary estate. *Falkner* v. *Grace*, 9 Hare 282.

1. A testator devised and bequeathed his residuary estate in trust for his widow for life, and at her death to sell and pay, assign, or transfer the moneys arising therefrom to the testator's four children by name, equally to be divided between them, share and share alike, "or equally to divide the aforesaid effects between the survivors of" his children, immediately after his wife's decease, in case the youngest of the said children for the time being should then have attained twenty-one years; but if the youngest should not then have attained twenty-one years, the testator directed the trustees to receive the annual interest, produce, profits, and proceeds of the trust moneys, and pay and apply so much of the interest as should arise from the equal share of each child in the maintenance and advancement of each such child as the trustees should deem expedient:—Held, that there was a clear gift to the children equally, that the provision as to survivors was not sufficiently clear to control it, and that consequently all the children took vested interests, which were not divested by their dying in the lifetime of the widow. *Blackmore* v. *Snee*, 1 De G. & J. 455

2. S. gave all his hereditaments to his wife for life, or until her second marriage; and after her decease or marriage to trustees to sell and dispose thereof, and the money to arise therefrom he directed should be considered as part of his personal estate. After bequeathing legacies to his sons, he gave to his three daughters, S., E., and C., 600*l.* each; and after directing that his wife should be permitted to carry on the farming business during her life or widowhood, the testator directed that if she should marry again, his trustees should sell his effects, pay her a certain sum out of the produce, and the residue thereof unto and amongst all his children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them in the event of the death of any one of them without issue. But in case C. S. should continue his widow, then he directed his effects to be sold at her death, and gave the produce thereof amongst all his children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them. All the residue of his personal estate not disposed of he gave unto and amongst all his children (except A.), in equal shares and proportions, with the usual benefit of survivorship and accruer among them. And as to the legacies given to his daughters, S., E., and C., he directed that in case any one of them should die under twenty-one without having been married, the legacy of such one should be equally divided amongst all his surviving children living at his decease (except A.), in equal shares and proportions, with benefit of survivorship and accruer among them. C. S. survived her co-executors, and died a widow and intestate in 1854. The testator left eight children surviving, including A. All attained the age of twenty-one, and his daughters, S., E., and C., married. E. died in 1836, leaving her husband surviving, who subsequently married again, and died in 1854. The plaintiff, as the executor of this husband, claimed his first wife's share of the testator's estate and residue. On bill for the administration of the estate, the Court held that the three daughters took absolute interests in the property. *Gooch* v. *Slater*, 3 Jur., N. S., 881.

(*b*) *Death of Testator where Tenant for Life Predeceases Him.*

3. A testatrix bequeathed her property to her mother for life, and at her decease gave a legacy of 200*l.* to A., directing that then the residue should be equally divided between her surviving brothers and sisters:—Held, that the word "surviving" referred to the period of distribution, and the mother having died before the testatrix, that the brothers and sisters living at the death of the testatrix were entitled to the benefit of the gift, and that there was in the events which happened no bequest to the brothers and sisters who died before the testatrix. *Spurrell* v. *Spurrell*, 11 Hare 54; 17 Jur. 755; 22 L. J., Ch., 1076; 1 W. R. 322; 1 Eq. Rep. 192.

Where there is a gift to several persons, or the survivors of them, after the determination of previous life estates, the period of distribution of the fund is the period of ascertaining the persons in whom the fund vests. *Ib.*

(*c*) *Period of Division.*

4. Legacy after limitations for life, and in default of children to be paid equally between two persons, or the whole to the survivor of them:—Held, not vested till the time of division. *Daniell* v. *Daniell*, 6 Ves. 297.

5. Gift of real and personal estate, after a life interest to the testator's widow, to trustees to be converted into money, and divided among several persons named, and the survivor or survivors of them. Those only are entitled who survived the widow. *Hoghton* v. *Whitgreave*, 1 Jac. & Walk. 146.

6. Words of survivorship are to be referred to the period of division and enjoyment, unless the contrary intent be especially shown. *Cripps* v. *Wolcott*, 4 Madd. 11.

7. A testator bequeathed the residue of his personal estate to his widow in trust, to apply the interest and proceeds for her own use, and after her decease he gave what should be remaining of such residuary moneys unto and equally amongst all the daughters of T. D. and

their issue, with benefit of survivorship and accruer. T. D. had three daughters living at the testator's death. One of them died without issue in the lifetime of the testator's widow The two others survived the widow, and had issue living at her death:—Held, that the parties only in existence at the time when the property to be taken was to be ascertained were entitled, and that the two surviving daughters at the widow's death were absolutely entitled. *Gibbs* v. *Tait*, 8 Sim. 132; 5 L. J., N. S., Ch., 344.

1. Upon a bequest to one for life, with remainder to two others, with clause of survivorship between the latter, "if one or the other should die":—Held, that the survivorship had reference to the death of the tenant for life, and that one of the remaindermen having survived the testator, but predeceased the tenant for life, the surviving remainderman was entitled by survivorship. *Whitton* v. *Field*, 9 Beav. 368.

2. Testator bequeathed his residuary estate to his wife for life, after her death to his son and daughter, and their respective issue, with benefit of survivorship unto and between his said children, or their issue respectively:—Held, that the survivorship was to take place only in the event of death and failure of issue of the son or daughter happening during the lifetime of the testator's widow, and that upon her death the son and daughter were absolutely entitled. *Turner* v. *Capel*, 9 Sim. 158.

3. Devise and bequest of real and personal estate to trustees upon trust (subject to certain legacies and annuities) for A. for life, and after his decease upon trust to convey, assure, and pay the whole of the said real and personal estate to and amongst the children of A. and the issue of such children. But in case A. should die without issue, then to pay and distribute the same equally amongst all and every the children of B. and C. and the survivors of them; but, in case any such children should be then dead, leaving issue of his, her, or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might have been entitled to by survivorship or otherwise. A. survived the testator, and died without issue:—Held, that the period of the survivorship of the children of B. and C. is not to be referred to the time of the death of the testator, but to that of the death of A., being the period of distribution; and that the children of B. and C., living at the date of the will, and those born after that date and before the death of A., were entitled to the real and personal estate, with survivorship between them in case of the death of any such children without issue before the death of A., the children of such of the said children as died before A., leaving issue, being substituted for the original legatees. *Buckle* v. *Fawcett*, 4 Hare 536; 9 Jur. 891.

4. Testator bequeathed his personal estate to his wife for life, and after her death to a trustee in trust to pay the rents and profits of his personal estate for and towards the support and maintenance of his six nephews and nieces, and in case of the death of any of them, for the maintenance and support of the survivors. All the nephews and nieces survived both the testator and his widow. One of the nieces then died:—Held, that her share did not become undisposed of, but that she by surviving the testator's widow had become absolutely entitled to it. *Clarke* v. *Gould*, 7 Sim. 197.

5. A testator, after various bequests, gave to his wife, for her life only, all his remaining estates, and also gave her all his capital in trade, with three-quarters of the profits arising therefrom, for her life; but, nevertheless, in trust at his death for his then surviving children, share and share alike, independent of the rental of his said estates, which he gave and bequeathed to his surviving female children to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children:—Held, that such children did not take any interest under the will, the word "surviving" having reference to testator's widow's death, and not his own. *Wordsworth* v. *Wood*, 1 H. L. Ca. 129; 11 Jur. 593. Affirming 2 Beav. 25; 4 Myl. & C. 641; 9 L. J., N. S., Ch., 29; 3 Jur. 453; *id.* 1142.

6. Where there is a gift to one for life, and after her decease to be equally divided between three persons and the survivors of them, it is a gift vested subject to be divested, depending upon a special contingency, which not occurring, it was not vested; and therefore two out of the three persons dying in the lifetime of tenant for life, that one who survived her took the whole. *Bowyer* v. *Curall*, 2 W. R. 328.

7. A testatrix by her will gave thus, "to my sister C. N.'s surviving children 30*l* each;" she then gave to C. N. thus, "the interest of my funded property for and during her natural life, and after her decease such property to be equally divided between her surviving children":—Held, that though on the construction of the word "surviving" in the first clause the period of vesting and distribution was referable to the death of the testatrix, yet that the period of vesting in the last clause was to be referred to the death of C. N., and that those children who survived C. N. were entitled *Neathway* v. *Reed*, 3 De G. M. & G. 18; 17 Jur. 169; 22 L. J., Ch., 809.

8. A testatrix made a gift to her daughter C. S. to be paid to her weekly for "her natural life, and from and immediately after her decease" she directed the same to be divided among "her surviving children":—Held, that the remainder was to the children who survived C. S. *Re Pritchard's Trusts*, 3 Drew. 163.

9. A testator gave some property to his wife for life, and proceeded thus: "At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz., one-half to the widow

and children of my deceased brother J. B., the widow, if surviving, to have an equal share with the children":—Held, that the survivorship had relation to the death of the tenant for life, and not of the testator; and, secondly, that the children took in joint tenancy. *Hesketh* v. *Magennis*, 27 Beav. 395.

1. A testator gave all his real and personal property to his wife for life, and he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, and to be paid as soon as possible after the death of his wife:—Held, that, following the rule in *Cripps* v. *Wolcott* (4 Madd. 11), the survivorship must be referred to the death of the testator's wife, so that one of the cousins who survived the testator, and died in the lifetime of his widow, took nothing. *Hearn* v. *Baker*, 2 Kay & J. 383.

Held, also, that "survivors" must be construed to include a sole survivor, so that where only one of the legatees survived the widow such survivor took all the stock. *Ib*

2. A testator bequeathed a fund in trust for his sister A. for life, and after her death to be divided between the children of his sisters, B., C., and D., who should survive the testator, such children taking *per stirpes* "with benefit of survivorship among members of the same family":—Held, that the latter words of themselves meant survivorship at the death of the tenant for life, and could not be otherwise interpreted by comparison with other bequests in the same will, showing an intention that those bequests should not go over if the legatee had children. *Re Crawhall*, 8 De G. M. & G. 480; 2 Jur., N. S., 892.

3. A testator gave certain dividends to his son, and at his death to his (the testator's) surviving daughters and their lawful offspring. The testator left his son and also four daughters him surviving. The will was attested by two of the daughters, and of these two one died in the son's lifetime, and the other survived the son:—Held, that the period for ascertaining the survivorship was the death of the son; that the word "offspring" meant "issue," and that therefore the daughters took absolutely as joint tenants. *Young* v. *Davies*, 9 Jur., N. S., 399; 32 L. J., Ch., 372; 11 W. R. 452; 2 Dr. & Sm. 167.

4. A legacy to A. for life, and at her death to be equally divided between her two sons (who were named), or given to the survivor of them: the survivorship has reference to the death of the tenant for life. *Naylor* v. *Robson*, 34 Beav. 571.

5. A testator bequeathed a house, described as a copyhold, to his wife for life, "and at her death to be disposed of for the benefit of his surviving children, share and share alike." The house was, in fact, leasehold:—Held, that only those children who survived the widow were entitled to share in the proceeds of the house. *Thompson* v. *Thompson*, 29 Beav. 654; 7 Jur., N. S., 1263; 9 W. R. 728.

(*d*) *Period of Division where Several Life Interests.*

6. A testatrix bequeathed stock to T. P. and J. S. for their lives, and from and after their decease to the surviving children of the said T. P. and J. S., share and share alike:—Held, that the children living at the death of the survivor of T. P. and J. S. were alone entitled, and that they took *per capita* and not *per stirpes*. *Stevenson* v. *Gullan*, 18 Beav. 590.

7. Devise to trustees in trust to pay the yearly produce to A. and B. in equal shares for life, with survivorship in case of the death of either "without issue" But if either should die "leaving issue," then her part to be paid to her "children" equally; and after the death of both A. and B., to convey "to the heirs of the body" of A. and B., share and share alike, or to the survivors, and if but one, then to such "only child." There was a gift over if A. and B. should die "without issue":—Held, the children took as purchasers, and that a child of A. which survived its parent but died in the lifetime of B. was entitled to a share. *Gummoe* v. *Howes*, 23 Beav. 184; 3 Jur., N. S., 176; 26 L J., Ch., 323; 5 W. R. 219.

8. Bequest to A, and at his death (with certain exceptions) to B, and at her decease to be divided amongst four named persons, "or as many of them as may be living":—Held, that those only took who survived both A. and B. *Knight* v. *Poole*, 32 Beav. 548.

9. Devise of residue to the testator's wife for life, then to his daughter A.; upon her decease equally between his surviving brothers and sisters and those of his wife. The wife and daughter survived the testator, but the daughter predeceased the widow. Some of the brothers and sisters predeceased the daughter; the others survived her, but predeceased the widow:—Held, that the words "surviving brothers and sisters" referred to those who should survive the last living tenant for life, and that, in the events that happened, there was an intestacy. *Howard* v. *Collins*, 5 L. R., Eq., 349.

10. The period for ascertaining the survivorship among a class of legatees is the time for the distribution of their legacy, unless the testator has himself otherwise directed. *Drakeford* v. *Drakeford*, 11 W. R. 977; 9 L. T., N. S., 10; 33 Beav. 43.

Where a testator left all his unfunded property in cash, bills, jewels, plate, furniture, etc., to his widow; and bequeathed the interest on his funded property to his widow for life, and then to H. for his life, at whose death the principal was to be equally divided amongst H.'s surviving legitimate children and the testator's niece and granddaughter, R. H. died in the lifetime of the widow; R. died in the lifetime of the testator, and two of the surviving children of H. died in the lifetime of the testator's widow:—Held, that the survivorship had reference to the death of the brother only. *Ib.*

11. Under a bequest to two successively for life, with remainder to the survivors of a class:—Held, that the survivorship had reference to death of the last tenant for life. *Re Fox*, 35 Beav. 163.

Bequest of successive estates for life in residuary personal estate to the widow and sister of the testator, and after the death of the sister a direction to divide the residue among the testator's surviving brothers and

sister and their children. The widow survived the sister and brothers of the testator. Two of the brothers left issue:—Held, that the class of persons to take was to be ascertained at the death of the widow, and that they took *per capita*. S. C. 6 N. R. 374; 11 Jur., N. S., 735; 13 W. R. 1013.

1. A will contained a gift of the residuary estate to trustees upon trust to divide the same among all such of the testator's daughters as should be living at his death, and the trustees were directed to invest the share of each daughter and pay the income to her for life, with remainder to her children, and remainder in default of issue to the testator's "other daughters or other daughter surviving":—Held, that the period of survivorship referred to the death of the daughter whose share was to be distributed. *Beckwith* v. *Beckwith*, 46 L. J., Ch., 97; 36 L. T., N. S., 128; 25 W. R. 282. Reversing 25 W. R. 6.

(*e*) *Rule in Case of Gifts of Real Estate.*

2. The word "survivor" in gifts of personal estate may be taken as referring to the period of distribution. It is not equally settled that with regard to real estate it applies to the determination of the prior limitation. *Taaffe* v. *Conmee*, 10 H. L. Ca. 64; 8 Jur., N. S., 919; 6 L. T., N. S., 666.

The benefit of survivorship may be given to those who have life interests as tenants in common. *Ib.*

In gifts of personalty the word "survivor" is considered as referring to the period of distribution; and if the same rule were applicable in respect of real estate, it would be referred to the determination of the prior limitations; but the law in respect of real estate is unsettled. *Ib.*

3. A testator gave real estate to his wife for life, and directed that after her death it should be divided, share and share alike, amongst twelve persons mentioned by name, "or the survivors of them." All those persons survived the testator, but some of them died before the widow:—Held, that the rule laid down in *Cripps* v. *Wolcott* (4 Madd. 11) applies to real as well as personal estate, and that the estate belonged to such of the twelve persons as survived the tenant for life. *Re Gregson*, 2 De G. J. & S. 428; 5 N. R. 99; 10 Jur., N. S., 1138; 34 L. J., Ch., 41; 13 W. R. 193; 11 L. T., N. S., 460. Reversing 4 N. R. 222.

5. Gifts Expressly Contingent.

(*a*) *Whether to Death of Tenant for Life or happening of Event.*

4. Construction of will confining a clause of survivorship on death, not having issue, to the death of the tenant for life. *Jenour* v. *Jenour*, 10 Ves. 562.

5. W. devised all his real and personal estate to R. and E. during their lives, and after their deaths he devised "the whole of his estate unto the seven children of R. and E.," to be equally divided amongst the survivors or survivor of them, share and share alike; and should any of the children die leaving issue then the share of him so dying to be equally divided among such issue, the surviving parent or parents of such children receiving the interest of such share until the youngest should attain twenty-one. The seven children survived their parents:—Held, that they took absolute interests in the estate as tenants in common in fee. *Bird* v. *Swales*, 2 Jur., N. S., 273; 4 W. R. 227.

6. Bequest to A. for life, and after her decease to eight persons in equal shares, their interests therein to be vested from the time of the testator's decease; and in case of the death of any of the eight legatees before the tenant for life, the share or shares of him, her, or them so dying to be paid to the survivors or survivor equally. The eight residuary legatees survived the testator, but all died before the tenant for life:—Held, that survivorship was to be referred to the death of the tenant for life; and that as none of the residuary legatees survived her, the divesting clause had no operation, and each of the residuary legatees took his original gift. *Marriott* v. *Abell*, 7 L. R. 478; 38 L. J., Ch., 451; 17 W. R. 569; 20 L. T., N. S., 690.

7. Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—Held, that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares. *Bowers* v. *Bowers*, 5 L. R., Ch., 244; 39 L. J., Ch., 351; 18 W. R. 301; 23 L. T., N. S., 35. Reversing 21 L. T., N. S., 134; 8 L. R., Eq., 283; 38 L. J., Ch., 596; 17 W. R. 1004.

8. A testator, by will, made in 1851, having directed his executors to invest his personal estates, after payment of his debts, upon trusts therein expressed, thus proceeded: "As to 5,000*l.*, or the stocks, funds, or securities upon which the same shall be from time to time invested, upon trust to pay the dividends, interest, and produce thereof unto my wife for and during the term of her life, to and for her own absolute use and benefit; and from and after her decease, upon trust to pay, transfer, and assign the 5,000*l.*, or the stocks, funds, or securities upon which the same shall be invested, between my son E. and my grandson A., in equal shares and proportions; and in case of the death of either of them in the lifetime of my wife, then upon trust to pay the whole of the trust fund and interest as aforesaid unto the survivor of them, E. and A., his executors, administrators, or assigns," E. died in the lifetime of testator's wife:—Held (reversing 6 Jur., N. S., 209;

8 W. R. 267), that A. was absolutely entitled to the whole fund, subject to the life interest of the widow. *White* v. *Baker*, 6 Jur., N. S., 591; 29 L. J., Ch., 577; 8 W. R. 533; 2 De G. F. & J. 55.

1. A testator bequeathed to trustees 800*l.* upon trust to invest and pay the income equally amongst his four daughters, A., B., C., and D., for their lives, to their separate use; and in case of the decease of any or either of them, leaving issue of her or their body or bodies, then he bequeathed one-fourth of the said principal sum to be equally divided amongst such issue, and if but one to such one only; and in default of issue, then the share of her or them so dying he bequeathed to the survivors of them equally, and if but one to such only. By a subsequent clause in his will, the testator directed that, in case any or either of his children, to whom or to whose benefit any legacy or bequest was given by his will, should die before such legacy or bequest should have become vested in her or them, leaving lawful issue, then such legacy or bequest should descend to and become the property of such issue. A. died before the testator, but after the date of the will, leaving issue, and B. survived the testator and died without issue:—Held, that, by the effect of the subsequent clause in the will, the issue of A. were entitled to participate with C. and D., the surviving children, in the one-fourth share given over in the event of the death of B. without issue. *Willetts* v. *Willetts*, 7 Hare 38; 17 L. J., N. S., Ch., 457; 12 Jur. 670.

2. A testator gave certain property to trustees upon trust for his widow for life; and after her death directed the same to be sold, and the proceeds divided into two equal shares, one of which he gave, in five equal shares, to A., B., C., D., and E., and directed that, in case of the death of any or either of them before the widow, their respective shares should go to their respective husbands or wives, if any, and if not, then to their children, and, in failure of children, to the survivors of them, share and share alike. He gave the residue of the other moiety, after payment of a legacy, as follows: "To F., G., H., I., and K., and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike":—Held, that the second moiety was given to F., G., H., I., and K., in five equal shares, as tenants in common; held, also, that the words "in case of the death," in the gift of the second moiety, meant in case of death before the period of distribution, and applied to death in the testator's lifetime as well as to death after the decease of the testator, but before the decease of the testator's widow; held, also, that, although F. was dead when the will was made, the gift in favour of her children took effect; held, as to each moiety, that the share of each legatee who died before the period of distribution vested absolutely in such of his children as were living at the death of their parent, or at the death of the testator, whichever last happened. G. died a bachelor in the testator's lifetime, leaving H., I., and K. surviving him. H. died in the testator's lifetime. K. survived the testator, but died before the period of distribution. I. survived that period:—Held, that under the gift to the survivors G.'s share was divisible in moieties between I. and the personal representatives of K. *Ive* v. *King*, 21 L. J., N. S., Ch., 560; 16 Jur. 489; 16 Beav. 46.

3. Under a direction, that, after the decease of A., a fund "should be transferred to A. B. and C. D., or the survivor or survivors":—Held, that A. B., who survived C. D., but died in A.'s lifetime, was entitled to the whole. *Antrobus* v. *Hodgson*, 16 Sim. 450; 18 L. J., N. S., Ch., 93.

4. Interest of legacy to A. for life, remainder to B. and C., or in case one should die, living A., then to the survivor. B. and C. both die in the life of A.; the legacy was vested, and went to the survivor. *Scurfield* v. *Howes*, 3 Bro. C. C. 90.

5. Devise of real estate to three daughters for life, and after their decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughter, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren:—Held, that the survivorship had reference to the death of the last tenant for life, and not to a survivorship between the grandchildren; that the divesting clause never took effect, and that on the decease of the survivor of the three daughters the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns* v. *Household*, 21 Beav. 29.

6. A. gave his residuary estate, upon trust, that the whole should, on his youngest child attaining twenty-one, be valued, and specifically divided into three equal parts for his widow and two daughters respectively, and at the death of the widow her share was to be equally divided between the daughters, with a proviso, that if either of the daughters should die before such division of the property should have been made, leaving no surviving issue, then the part of the deceased should be given to the surviving sister; but if either should die and leave surviving issue, the part of her so dying should be equally divided amongst her surviving children. The income to go to the support of the widow and children. Both daughters having died before the widow:—Held, that the real and personal residuary estate of the testator had devolved on the two daughters in equal moieties, subject to the widow's life interest in one-third thereof. *Maddison* v. *Chapman*, 1 John. & H. 470.

7. Bequest after a life estate to A., B., and C. equally; "or, in case of the demise of each or either of them, to be divided between the survivors and survivor, or their representatives." All three died in the life of the tenant for life:—Held, that this being an alternative gift, their representatives were entitled to the fund. *Page* v. *May*, 24 Beav. 323; 3 Jur., N. S., 1047; 27 L. J., Ch., 242; 5 W. R. 840.

8. A married woman, having power to dispose of 1,500*l.*, by her will gave the interest of it to her husband for his life, and directed that, after his decease, the principal should be divided equally between the five daughters of her sister B.; and if any of them should die during her husband's lifetime, leaving issue, that the respective issue of such de-

ceased daughters should have equally divided among them their mother's share; but in case any of them should die during her husband's lifetime without lawful issue, that the 1,500*l.* should be divided, share and share alike, among the surviving daughters:—Held, that the word "surviving" had reference to the testatrix's husband; and therefore, as all the daughters died in his lifetime, and only one of them left issue, that four-fifths of the 1,500*l.* were undisposed of. *Watson* v. *England*, 15 Sim. 1; 9 Jur. 648.

1. A testator bequeathed his residue to his widow for life, with remainder to his nephews and nieces living at her decease, and he substituted their children for any who should die in her life. But if any of the nephews and nieces should die in the life of the wife without having any child "then living," he directed his share to go to the survivors of the nephews and nieces. A nephew died without children, in the life of the widow:—Held, that his share did not go to the survivors at his death, but the survivors at the death of the widow. *Essex* v. *Clement*, 30 Beav. 525.

2. Gift by a testator to his widow, for life, and after her death amongst his four children, naming them, as tenants in common; but if any of his children should die before his, her, or their share or shares should become payable, leaving issue, then such issue to take his, her, or their parents' share or shares; but if any one or more of his children should die before his or her share or shares should be payable, leaving no lawful issue, then such share or shares to devolve and go to his surviving child or children:—Held, that survivorship was not to be referred to the period of distribution, but to the time of the death of the legatees dying in the lifetime of the widow. *Wilmott* v. *Flewitt*, 11 Jur., N. S., 820; 13 W. R. 856; 13 L. T., N. S., 90.

3. Bequest of 3,000*l.* to trustees, upon trust to invest same either in a purchase or at interest, and pay interest to testator's wife during her life, and after her decease to divide the whole, principal and interest, "among his four children, share and share alike, and the survivors of them, but not before they should have respectively attained the age of twenty-one years, or days of marriage." C, the plaintiff's wife, who was one of the four children, attained twenty-one, but died in the lifetime of her mother. Trustees laid out greatest part of the money in the purchase of freeholds and copyholds, and lent another part on bond:—Held, that C. had a vested interest, and that survivors meant such as should be living at the death of the child before twenty-one, and not such as were living at the death of the mother, and that representative of C. was entitled to a fourth of the bond, and a fourth of the whole in government securities, and which had not been invested in land. *Weedon* v. *Fell*, 2 Atk. 124.

4. A testator devised all his real and personal estate to his wife for life, and after her decease to such of his children as should be then living, their heirs, executors, administrators, and assigns, share and share alike, as tenants in common, with benefit of survivorship, in case any died without issue under twenty-one; but if any of them should die, leaving lawful issue, the testator willed that such issue should take their father's or mother's share. The testator left several children, of whom one only, a son, survived the wife, but one of the others, a daughter, left issue:—Held, that the son was entitled to the whole property. *Exp. Hunter*, 3 Y. & Coll. 610.

5. A testator, by deed of disposition according to the Scotch law, after giving annuities to three persons, went on to direct that "the capital sums to be set apart to answer such annuities as and when the same should become tangible by the deaths of the said annuitants respectively, should be paid to and amongst seven persons *nominatim* (being respectively the children of two of the annuitants), and the survivors or survivor of them, on the first term of Whit-Sunday or Martinmas after their respectively attaining twenty-one or marriage." Then followed a provision for maintenance of the legatees during minority, also a power of advancement as to one of the legatees, and then a declaration that in the event of the deaths of any one or more of the said legatees before the term of payment of their shares as aforesaid, leaving lawful issue, and such issue should be in life at the time their fathers and mothers would have been entitled to receive payment of their shares, had they survived, then the share of the parent should go to the issue:—Held, affirming the judgment of the Court of Session, that the legatees had not a vested interest during the lifetime of the annuitants, the survivorship spoken of having reference to the periods of the deaths of the latter. *Pearson* v. *Casamajor*, Macl. & R. 685.

6. A husband gave moneys in trust to pay the income to his wife for life, on her death to divide the trust fund amongst his six children, share and share alike, with benefit of survivorship to be paid to them when the youngest survivor shall attain the age of twenty-one:—Held, that the period of survivorship was the death of the wife. *Wellock* v. *Ostle*, 21 W. R. 118; 27 L. T., N. S., 481.

7. Bequest of a fund to three granddaughters, in equal shares, for their respective lives, and afterwards to their respective issue; and in case any of the three should die without issue, her share to accrue and survive to the survivors, and the accrued shares to be subject to the same conditions:—Held, that the survivorship as to each share had reference to the death of each granddaughter, and that on the death of the last surviving granddaughter without issue, her share fell into the residue. *Nevill* v. *Boddam*, 28 Beav. 554; 6 Jur., N. S., 573; 29 L. J., Ch., 738; 8 W. R. 490.

8. A. gave a life interest in all his property to his wife, and, after her death, he directed that all his property in the funds or elsewhere, of every description, should be sold, and equally divided between his children, B., C., D., E., and F.; and he further directed that his executors should, upon dividing the whole of his said property equally as above directed, immediately lay out the whole of the moneys that would belong to D., E., and F., his above three daughters, as their shares of his said property, in 3 per cent. consolidated annuities; and that neither of them, his before-mentioned daughters, should have the power of receiving

more than the dividends due upon their respective shares. But in case of the marriage of all or either of his aforesaid daughters, the child or children of either of them his said daughters that should outlive their mother or mothers, should have his, her, or their mother's shares at their own disposal, both principal and interest; and in case of the death of one or more of his aforesaid children that might die unmarried, his, her, or their shares and share should be equally divided among the survivors of the aforesaid children or their children; and he gave and bequeathed unto his executrix and executor all the rest and residue of his estate and effects, both real and personal. The testator's widow died in 1838; and one of the daughters, who outlived the testator and the tenant for life, died without having been married:—Held (affirming the decision of the Court below), that the period of division as to the daughters' shares was, not the death of the tenant for life, but the deaths of the daughters; and that the gift over, upon dying unmarried, was not to be restricted to dying unmarried in the lifetime of the tenant for life. *Re Walker's Trust*, 16 Jur. 702; 1 W. R. 408. Affirming 1 W. R. 33.

1. A testator bequeathed a money fund to trustees, to be invested for his "five daughters, share and share alike, for their lives, and after the respective deaths of such of his daughters as should die without leaving issue, or leaving issue, if such issue should die under twenty-one years, to divide the fifth part or share of each of his said daughters who should so die without leaving lawful issue as aforesaid, in the following manner: "immediately, or as soon as conveniently can be after her decease, unto and amongst my son George and the survivors of them my five daughters, share and share alike, to whom I do give and bequeath the same accordingly, or to their respective personal representatives":—Held, that the word "survivors" referred to the death of the tenant for life whose share was to be divided. *Re Bate*, or *Re Bate's Trust*, 11 W. R. 768; 9 L. T., N. S., 226; 2 N. R. 265.

On the death of the last survivor of the five daughters without issue:—Held, that "personal representatives" were to be construed in their ordinary sense, and her entire share was directed to be paid to the executors of George, the son. *Ib.*

(*b*) *Gift to a Class to be Paid at Twenty-one, after a Life Interest with Benefit of Survivorship inter se.*

2. The word "survivors" in a bequest to children:—Held, upon the context of the will, to mean surviving so as to attain their respective ages of twenty-one. *Crozier* v. *Fisher*, 4 Russ. 398; 6 L. J., Ch., 118.

3. A testator bequeathed the interest of 3,000*l.* to his daughter for life; and, after her death, he bequeathed the principal in trust for her children, in equal shares, to be paid to sons at twenty-one, and to daughters at that age or on marriage, with interest in the meantime for their maintenance, with "benefit of survivorship in the event of any of the said children dying without issue":—Held, that the period of survivorship was limited to the time appointed for payment; and that therefore a daughter of the legatee for life, who died in the lifetime of the latter without having been married, but having attained twenty-one, took a vested interest, which did not become divested by the survivorship clause. *Tribe* v. *Newland*, 5 De G. & Sm. 236; 16 Jur. 286; 21 L. J., Ch., 283.

4. On a gift, after a tenancy for life, to a class equally, with benefit of survivorship, upon their severally attaining twenty-one, the survivorship held to refer to the attaining twenty-one; and the representatives of one who attained twenty-one, but died in the lifetime of the tenant for life, held entitled to a share. *Knight* v. *Knight*, 25 Beav. 111.

5. A testator gave a fund to trustees upon trust to pay the income to A. during his life, and after the decease of A. leaving issue, upon trust to pay, apply, assign, and transfer both principal and interest to and amongst all and every the child and children of A., equally to be divided between them, and if but one, then to such only child, to be paid to them, if sons, at twenty-one, and, if daughters, at that age or marriage, with benefit of survivorship; and in case there should be no child or children of A. at the time of his death, or if all and every such child or children should die before attaining twenty-one or marriage, then over. A. had eight children, of whom three died infants in their father's lifetime, two attained twenty-one and died in his lifetime, and three attained twenty-one and survived him:—Held, that the two children who attained twenty-one and died in their father's lifetime took vested interests, and that their representatives were entitled to share in the fund along with the children who survived their father. *Cornock* v. *Wadman*, 7 L. R., Eq. 80.

6. Devise of a sum of money to A. for life; then to her daughters and younger sons in such shares as she should appoint; and in default of appointment for the daughters and younger sons equally, and to the survivors; and in case no daughter or younger son, or that they should die before twenty-one or marriage, then over:—Held, that the portions vested in A.'s children at twenty-one, though they died in her lifetime. *Salisbury* v. *Lambe*, Ambl. 384; 1 Eden 465.

7. A husband gave property to his wife for life, and after her death to their children, share and share alike, "and the survivors and survivor of them," to be paid on the youngest of them attaining twenty-one; with a gift over in the event of "such issue dying before majority":—Held, that the survivorship was to be referred to the period of attaining twenty-one, and not to the death of the tenant for life. *Alty* v. *Moss*, 34 L. T., N. S., 312.

8. A testator bequeathed a reversionary interest, to which he was entitled on the death of a tenant for life, to such of the children of his three daughters as should attain twenty-one, and directed their several shares to be paid on their attaining twenty-one, with benefit of survivorship:—Held, that a grandchild of the testator who survived the testator and attained twenty-one, but died in the lifetime of the tenant for life, was entitled to a share. *Reid* v. *Worsley*, 14 Jur. 325.

9. Bequest of stock to trustees on trust for

testator's sister for life, and after her death then to pay the stock to her children, with a direction that the same should be paid to them in the manner therein mentioned, and with a gift over in case there should be no child of his sister living at her death, the stock to be paid in the same manner and in the same proportions as was thereinbefore "directed, had any or either of the children of" his sister "survived so as to have become entitled thereto":—Held, that the word "survived" here meant survived the sister, and that consequently on the whole will the interests of the children did not vest until the death of the tenant for life, and a sole surviving child took the whole fund. *Daniel* v. *Gosset*, 19 Beav. 478.

1. G. F. bequeathed his personal estate upon trust for the benefit of his wife for life, and at her death upon trust to transfer the same unto his three sons, G., W., and S., or to the survivors of them, if they, or the survivors of them, should all have attained the age of twenty-one years; but in case they should not have attained that age, upon trust to pay the rents, etc., for the maintenance, etc., of his said sons until they should have attained that age, and then upon trust to convey the trust estate to his said sons, or the survivors of them, as aforesaid; but in case neither of his said sons should survive his said wife, then upon trust to dispose of the said trust estate as his said wife should appoint. G. F. died in 1818, leaving his wife and his three sons surviving. Each of the sons attained twenty-one, but G. alone survived his mother:—Held, that G. F. did not intend that any son dying in the lifetime of the widow should have a vested interest. *Fisher* v. *Moore*, 1 Jur., N. S., 1011; 3 W. R. 584.

2. Bequest to A. for life, and "at her decease to her surviving children," when they have attained twenty-one:—Held, that the survivorship had reference to the death of A., and that those children only who survived her were entitled. *Huffam* v. *Hubbard*, 16 Beav. 579.

3. After certain bequests for life, the general residue was bequeathed to the surviving children of A., who was living:—Held, that the survivorship had reference to the death of the testator. *Lill* v. *Lill*, 23 Beav. 446.

4. A testatrix gave the interest of the residue to her brother during his life, and, after his death, she gave the residue to her executors, in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively, when they should attain twenty-one, with interest in the meantime: of those four persons, two died during the life of the brother:—Held, that they did not take a vested interest in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all her furniture, plate, etc., and all the other estate and effects of or to which she was then possessed or entitled, to trustees upon trust for her creditors; the assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope* v. *Whitcombe*, 3 Russ. 124; 6 L. J., Ch., 53.

5. Testator devised certain messuages to trustees upon trust to pay the rents to his wife for her life, and after her decease he gave and devised the said messuages to the same trustees in trust to sell, etc., and apply the proceeds amongst all his, the testator's, nephews and nieces, children of his brothers A. and B., and his sister C., and the survivors and survivor of them, share and share alike, to be paid to them respectively as they attained the age of twenty-one years. The testator's wife survived him:—Held, that the property was divisible among such only of the children of A, B, and C. as survived the widow. *Williams* v. *Tartt*, 2 Colly. 85.

6. Testator bequeathed 50,000*l.* to trustees in trust for his wife for life, and after her death he gave one-fifth of that sum to the same trustees in trust to invest it and pay the interest to his daughter for her life, and, upon her demise, to appropriate the interest for the use of any of her child or children until they reached the age of twenty-one years, and then the principal to be paid to the survivor or survivors of the children of his said daughter, share and share alike. The testator also gave 2,000*l.* to the same trustees in trust to invest it and to pay the interest to his daughter for her life, and after her decease to appropriate the interest for the use of any of her child or children until they reached the age of twenty-one years, when the 2,000*l.* was to be paid to the survivor or survivors of the said children of his said daughter. The daughter had two children who attained twenty-one, but only one of them survived her:—Held, that that child became entitled on her death to the whole of the trust funds in which she had a life interest. *Turing* v. *Turing*, 15 Sim. 139; 15 L. J., N. S., Ch., 272; 10 Jur. 366.

7. Testator bequeathed a fund in trust for Elizabeth D. for her life, and after her decease in trust for four of her children, whom he named, "or the survivor or survivors of them, for their maintenance until they severally attain the age of twenty-one years, when each of them will be entitled to claim a fair proportion of the principal." Only one of the children survived the mother:—Held, that that one was entitled to the whole fund, though two of the deceased children attained twenty-one. *Dorville* v. *Wolff*, 15 Sim. 510; 16 L. J., N. S., Ch., 179; 11 Jur. 160.

8. Gift of residue in trust for a testator's wife during widowhood, and on her death or marriage to pay it amongst his five children, or the "survivor or survivors" of them, at such ages as his wife should appoint, or in default at twenty-one. But in case of the death of any before his share should become "payable," leaving issue, then to pay his share to such issue. A child attained twenty-one, and died in the life of the wife, leaving issue. No appointment having been made:—Held, that the survivorship had reference to the cesser of the wife's estate, and that the issue, and not the representatives of the child, took the share. *Hind* v. *Selby*, 22 Beav. 373.

(c) Direct Gift at Twenty-one.

9. A testator bequeathed to his four children A., B., C., and D. 8,000*l.*, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, but with

benefit of survivorship, the same to be paid and payable to them respectively, upon their attaining the age of twenty-one years, the interest thereof in the meantime, or so much as by his executors should be considered sufficient, to be applied to their maintenance and education; and he left to B. and C. all the residue of his personal estate, and, in case of their decease before twenty-one, he bequeathed the said residue to A. and D. or the survivor of them, share and share alike, and, in case of the decease of all his before-named children before twenty-one, he gave the residue, including his lapsed legacies, to his brother. By a codicil he gave to his children E., F., G., and H. (who were born after the will), 4,000*l.* sterling, in equal shares, with the benefit of survivorship, not only as to them, but to the rest of the children named in the will, payable at twenty-one, maintenance to be granted by the Court of Chancery:—Held, that the share of G., who died under twenty-one, went to all his surviving brothers and sisters, and not to his widow and child. *Forrester* v. *Smith*, 2 Ir. Ch. R. 70.

The cases as to the period to which survivorship is to be referred reviewed and classified. *Ib.*

1. Personal estate was bequeathed upon trust to pay the income to the testator's wife till his youngest child attained twenty-one, she maintaining the children during their minorities, and then the capital was to be divided among the wife and children (by name), with benefit of survivorship:—Held, that the survivorship referred to the period of distribution, and that a child did not, on attaining twenty-one, acquire an indefeasible interest. *Vorley* v. *Richardson*, 8 De G. M. & G. 126; 2 Jur., N. S., 362; 25 L. J., Ch., 335; 4 W. R. 397.

(*d*) *Gift on a Contingency to a Class of Survivors.*

2. A testator bequeathed his residuary estate to R. S., the eldest son of P. S., and failing him to the next male child of P. S., and failing the male children of P. S. to seven persons whom he named, and the survivors and survivor of them, in equal proportions. R. S. died in the lifetime of his father, and P. S. died without any other issue. All the legatees died in the lifetime of P. S.:—Held, that the word "survivors" referred to the period of distribution at the death of P. S., and therefore the gift to the legatees failed, and the residue went to the next of kin of the testator. *McDonald* v. *Bryce*, 1 W. R. 261; 17 Jur. 335; 22 L. J., Ch., 779; 16 Beav. 581.

The case of *Cripps* v. *Wolcott* (4 Madd. 11), is a decision binding on this Court. *Ib.*

3. On a bequest to A. for life, and after her decease to three legatees, to be equally divided, or in case of the demise of each or either of them, to be divided between the survivors or survivor or their representatives:—Held, that the three legatees having predeceased A., the plaintiff, who was the legal personal representative of all three, was entitled. *McDonald* v. *Bryce* (16 Beav. 581) overruled. *Page* v. *May*, 5 W. R. 840; 24 Beav. 323; 3 Jur., N. S., 1047; 27 L. J., Ch., 242.

4. A testator bequeathed as follows: "I give to my daughter S. 50*l.* per annum for life. I give to each of my other daughters 5,000*l.*, the interest of which for their use independent of any husband they may have, and if they should have any children, the principal to be divided among them after her death if they should attain the age of twenty-one years; if not, it is to be divided between her surviving sisters, share and share alike. The testator died, leaving S. and four other daughters, A., B., C., D., surviving; of these, A. afterwards died, leaving two children, both of whom died under twenty-one, and B. survived A., but died before the survivor of her children:—Held, that the 5,000*l.* bequeathed to A. became, upon the death of the survivor of her children, divisible amongst her sisters, including S. then surviving, in exclusion of the representatives of B. *Carver* v. *Burgess*, 7 De G. M. & G. 96; 24 L. J., Ch., 401; 3 W. R. 308; 3 Eq. Rep. 421; 18 Beav. 541; 2 W. R. 125.

5. Testator, by will, directed his executors to place out upon government securities such a sum of money out of the interest thereof as should be sufficient to produce an annuity of 50*l.*, which he gave unto his daughter J. for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst his surviving children and their legal representatives, share and share alike. The testator had four children living at the date of his will and of his death, of whom the daughter J. was the survivor; she died without leaving issue:—Held, that the words "surviving children" meant children surviving the daughter J., and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate. *Taylor* v. *Beverley*, 1 Colly. 108; 13 L. J., N. S., Ch., 240; 8 Jur. 265.

LII. Intermediate Rents and Profits.

XV. *Under Shifting Clauses.* See VESTED, CONTINGENT, AND FUTURE INTERESTS, XII. II.

XVI. *Acceleration of Remainders.* See XLII. II., *ante.*

XVII. *What passes under a Devise of Rents, or Rents and Profits.* See XXXVIII. XXI., *ante*, and Cross References there.

XVIII. *Accretions to Specific Legacies.* See LIII. I. *post.*

XIX. *Interest on Legacies or Annuities.* See LEGACY, XIII.—ANNUITY, XIV., 2.

I. WHERE INTERESTS VESTED SUBJECT TO A GIFT OVER.

1. Bequest of stock, etc., and interest and dividends to accrue to testator's two great-nieces, equally to be divided and to be assigned, transferred, etc, to them, when and as they should respectively attain twenty-one, with limitations of their respective shares, on the event of death under twenty-one, to their respective children; survivorship in case of no children, and a direction that the executors should, during the respective minorities of the legatees, receive the dividends, interest, etc., and that so much as should be necessary should be applied for maintenance, etc., and the residue accumulate for their benefits respectively, until they should respectively become entitled to their respective parts. The surplus interest held to go with the principal upon the death of one under twenty-one without children. *Sisson* v. *Shaw*, 9 Ves. 285.

2. Where a legacy of residue is given in such a way as to vest, but so as to be liable to be divested on a given event, the interest in the meanwhile, and until the divesting, belongs to the legatee. *Barber* v. *Barber*, 3 Myl. & C. 688; 8 L. J., N. S., Ch., 36; 2 Jur. 1029. Affirming on this point 7 L. J., N. S., Ch., 70; 1 Jur. 915.

A testator, after bequeathing certain shares of his residuary estate (the produce of a mixed fund) to his son and daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance and education till twenty one, and that after that period he should have power to receive and dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should be invested, in trust, for her maintenance, education, use, and benefit, during her life, and for her children, if any, after her decease; and, if there was no issue living at her decease, the said property was to devolve to his son; and in case he was dead also, and had left no issue, the said property was to devolve to his executors thereinafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use and benefit till twenty-one, and that the said property should then be at her own disposal; and if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; and if both should die under that age, then the property bequeathed to them should devolve to and become the property of the four persons therein named and described, to be divided betwixt them in equal proportions, and their heirs for ever; which four persons he also appointed his executors. One of the four persons named executors renounced probate, and declined to act; and afterwards both the son and daughter died under twenty-one, and without issue:—Held, that the interest which accrued upon the shares of the son and daughter during their respective minorities, so far as it had not been applied to their maintenance and education, vested absolutely in them, and passed to their personal representatives. *Ib.*

3. A. by will devises 500*l.* to his infant grandson without appointing any time for payment, with proviso, that if the grandson dies before twenty-one, then the legacy to go over to B. The grandson shall have the interest of the legacy during his infancy. *Taylor* v. *Johnson*, 2 P. W. 204; Mos. 98.

4. Where a testator gives legacies to children, provided they attain twenty-one, with a gift over if the children die before twenty-one, and appoints trustees and guardians to the children, with a request that they will attend to their education, the children are entitled to the interest of their legacies for their maintenance and education, until they attain twenty-one or die under that age. *Mills* v. *Robarts*, 1 Russ. & M. 555; Taml. 476; 8 L. J., Ch., 141.

5. A bequest of a vested legacy, directed to be paid at twenty-one or marriage, and subject to be divested by death before those events (the testator not being *in loco parentis*), does not carry interest until the time for payment. *Re Bullen*, 12 L. T., N. S., 763.

6. Where legacies are given upon trust to accumulate, the interest and dividends will not pass by a gift over of the principal sums, unless the Court is satisfied, by a reference to other clauses of the will, that the interest and dividends were omitted in the gift over by clerical mistake. *Harvey* v. *Cooke*, 4 Russ. 34; 6 L. J., Ch., 84.

7. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn. A subsequent direction that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore, upon the death of the first tenant for life under twenty-five, the accumulation belonged to his personal representative. *Montgomerie* v. *Woodley*, 5 Ves. 522.

8. A testator bequeathed to trustees the money secured by a mortgage of Tilt Wood in trust for his nephew R. T. B., and after devising the legal estate in the premises, subject to the trusts and equities thereof, to the trustees, proceeded to provide that, "If the said R. T. B. shall not live to the age of twenty-one years, I give the money secured on Tilt Wood and the legal estate therein, subject as aforesaid to the trustees of my will, to become part of my residuary estate." The will further contained a declaration of the testator's intention that the clauses applicable contained in 23 & 24 Vict., c. 145, should apply thereto, but did not otherwise contain any clause relating to the maintenance of infants, or directions as to what was to come of the unapplied income of

the estates, shares, and interests under the will. R. T. B. survived the testator, and died under twenty-one. The trustees of the mortgage debt having received and invested (at compound interest) the interest thereupon down to R. T. B.'s death, paid a small sum of uninvested cash, part thereof, into court under the Trustee Relief Act:—Held, on a petition by the trustees of the residuary estate for payment out to them of this money, that the legal personal representative of R. T. B. was entitled to the accumulations of interest down to his death. *Re Buckley's Trusts*, 22 L. R., Ch. D., 583; 52 L. J., Ch., 439; 48 L. T. 109; 31 W. R. 376.

1. As to right of person taking a vested interest under the gift over to interest. See *Laundy* v. *Williams*, 2 P. W. 481.

II. BETWEEN DEATH OF TESTATOR AND BIRTH OF CHILDREN.

2. Legacy in trust for the children of A., to be equally divided between them with benefit of survivorship, and a provision for maintenance out of the interest: A. having no children at the death of the testator:—Held, that afterborn children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*, T. & R. 310.

3. Devise of the residue of real and personal estate, after provision made for payment of annuities and legacies, to the child or children of testator's natural daughter, and in case she should die without issue to S. and J.:—Held, the intermediate profits till a child was born should go to the residuary devisees, and not to the heir-at-law. *Gibson* v. *Rogers*, Ambl. 96; 1 Ves. 485; 4 Ves. 288. n.

4. Testator bequeathed 500*l.* to be paid to his grandson P. if he lived to be twenty-one, and in case he died before then, to the other child or children of his daughter equally, arriving at such age. P. died before twenty-one, and no child of P. was born or living at testator's death. The grandchildren, born after the death of testator, were held entitled to the 500*l.*; for not being *in esse* in his lifetime, he must have had in his view the future children of his daughter. *Haughton* v. *Harrison*, 2 Atk. 329.

A parent is bound by nature to support a child, but this has not been extended to grandchildren, and therefore not entitled to interest. *Ib.*

If the child or children of P. arrive at twenty-one, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable. *Ib.*

5. Devise of real and personal estate to the first son of A. when he should attain twenty-one, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the decree:—Held, that the profits of the personal estate should accumulate; and that as to the real estate, it was a good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance. *Bullock* v. *Stones*, 2 Ves. 521.

6. Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins* v. *Hopkins*, 1 Ves. 268; Ca. *temp.* Talb. 44, 1 Atk. 581. And see S. C. as cited in 4 Bro. C. C. 390.

7. Where on an executory devise the words "all the rest and residue" include intermediate profits. *Gibson* v. *Montfort* (*Lord*), 1 Ves. 491.

III. GIFT TO A CLASS. RIGHTS OF MEMBERS WHO ATTAIN VESTED INTERESTS.

8. In the case of a bequest to a class, where all the existing objects of it had attained vested interests, they were declared entitled to the annual income of the whole fund, though their shares might be diminished by other objects coming into being. *Scott* v. *Scarborough* (*Earl*), 1 Beav. 154; 8 L. J., N. S., Ch., 65.

Testator gave a sum of 15,000*l.*, due to him as a charge upon an estate, to his trustees, upon trust after making certain payments thereout to accumulate the interest thereof for twenty years, and at the expiration thereof the trustees to stand possessed of the interest of the said sum, upon trust to make certain payments; and he also directed that the trusts of the sum of 15,000*l.* should be dealt with as the trusts of a certain other term, and that, subject thereto, the said sum and the interest and accumulation should be in trust for a certain class of children; and there was a direction that the capital should sink into the estate upon which it was charged:—Held, that the accumulated interest only of the said sum after payment of the sums charged on it was given to the children specified. *Ib.*

9. Bequest of residue of real and personal estate to the children of A., equally with a bequest over thereof to other persons, if A. should die without leaving issue; this is a vested interest, defeasible, and the children, as they are respectively born, shall take the accruing interest equally. *Shepherd* v. *Ingram*, Ambl. 448.

10. T. gave the residue to trustees, *inter alia*, to lay out one-third part in securities, the interest to accumulatate for the benefit of the children of his niece, and if she should survive her husband, and have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one, and upon the children attaining their ages of twenty-one, equal shares of the principal to be transferred to them; the interest accrued between the elder and the younger children coming of age, decreed to be divided between them. *Hawkins* v. *Combe*, 1 Bro. C. C. 335.

11. A testator gave 200*l.* a year to S. for her life, and after her decease he gave 6,666*l.* 13*s.* 4*d.* consols to be divided equally among such of her children as should attain twenty-one. S. survived the testator, and died, leaving six children, five of whom had attained twenty-one in her lifetime:—Held, that the testator's residuary legatee was excluded from claiming any portion of the dividends of the fund. *Stone* v. *Harrison*, 2 Colly. 715; 15 L. J., N. S., Ch., 421; 10 Jur. 609.

12. The testator gave legacies out of a sum of stock to the grandchildren named in his will on their attaining the age of twenty-one, and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one, but

if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned:—Held, that the grandchildren were entitled to the interest during their minority. *Boddy* v. *Dawes*, 1 Keen 362.

1. Bequest of a personal fund to such of the children of I. N. as should live to attain the age of twenty-one years. I. N. had three children, two of whom having attained twenty-one, applied for payment of their shares. Under the circumstances of the case, the Court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds, without prejudice to the claim of after-born children of I. N. *Brandon* v. *Aston*, 2 Y. & Coll. C. C. 30.

2. Where a legacy depends on a contingency, the intermediate interest between the death of a tenant for life and the contingency happening, does not follow the principal, but falls into the residue. *Shaw* v. *Cunliffe*, 4 Bro. C. C. 144.

3. A testator devised the residue of his real estate to a trustee until one of his grandsons attained twenty-one; and in case his grandson Thomas attained twenty-one, in trust to pay him "the future rents." He bequeathed to the same trustee the residue of his personal estate, to accumulate until one of his grandsons attained twenty-one; and he directed payment of "the aggregate" of the residue of his personal estate and its accumulations, and the accumulations of the rents, to his grandson Thomas, from and after his attaining twenty-one. There was an interval of three years between the eldest grandson and Thomas attaining twenty-one:—Held, that the rents during that interval were undisposed of, and passed to the heir-at-law. *Marriott* v. *Turner*, 20 Beav. 557.

4. Under a disposition by will to the children of A. and B., payable at twenty-one or marriage, with a limitation over, upon failure of issue in the lives of A. and B., it was held, that all the children without restriction were entitled; and an apportionment being directed and the interest ordered to be paid to those who had attained twenty-one; children born afterwards, though entitled to a share of the capital, were not allowed to claim the bygone interest. *Mills* v. *Norris*, 5 Ves. 335.

5. Testator bequeathed 500*l.* to be paid to his grandson P. if he lived to be twenty-one, and in case he died before then, to the other child or children of his daughter equally, arriving at such age. P. died before twenty-one, and no child of P. was born or living at testator's death. The grandchildren, born after the death of testator, were held entitled to the 500*l.*; for not being *in esse* in his lifetime, he must have had in his view the future children of his daughter. *Haughton* v. *Harrison*, 2 Atk. 329.

If the child or children of P. arrive at twenty-one, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable. *Ib.*

6. Residuary personal estate was bequeathed in trust for all the sons and daughters of A. and B. (who were living), the shares to be vested at twenty-one, though "not payable or transmissible" until the death of A. and B. The will contained powers of maintenance:—Held, that the sons and daughters, on attaining twenty-one, acquired vested interests, subject to the rights of future-born children, and that, after attaining twenty-one, they were entitled, in the life of A. and B, to payment of their shares of the income, though not of the capital. *Ellis* v. *Maxwell*, 12 Beav. 104; 10 L. J., N. S., Ch., 266.

7. A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attained the age of twenty-one, and to accumulate the surplus; and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them 2,000*l*; and as soon as all and every the said grandchildren should have attained their ages of twenty-one, to pay and divide the trust fund unto and amongst all and every his said grandchildren:—Held, to be a gift for the benefit of all the children of the testator's two sons, born or to be born, not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born. *Mainwaring* v. *Beevor*, 8 Hare 44; 19 L. J., N. S., Ch., 396; 14 Jur. 58.

IV. FUTURE SPECIFIC BEQUEST.

8. Where a legacy depends on a contingency, the intermediate interest between the death of tenant for life and the contingency happening does not follow the principal, but falls into residue. *Shaw* v. *Cunliffe*, 4 Bro. C. C. 144.

9. Bequest of 1,000*l*, the "interest" for A. for life, with power to dispose of the "principal" to her children by will, and if no will, then "the said legacy" to go to her children "at twenty-one years of age." A. died in 1840, and her only child attained twenty-one in 1858:—Held, that he was entitled to the intermediate interest on the legacy. *Thruston* v. *Anstey*, 27 Beav. 335.

10. Under a bequest in trust for a parent for life, and after her death for her children at twenty-one, with an executory trust over in the event of all the children dying under that age:—Held, that the intermediate income between the death of the tenant for life and that of her only child, who died a minor, belonged to the child. *Ridgway* v. *Ridgway*, 4 De G. & Sm. 271; 15 Jur. 960; 20 L. J., Ch., 256.

11. Gift of personalty on trust to pay income to widow till son attains twenty-one, and then to pay and transfer to son absolutely:—Held, that income, until the son attained twenty-one, belonged to the personal representatives of the widow, who died during son's minority. *Lawton* v. *Eedle*, 2 W. R. 584.

12. Testator ordered his trustees out of certain funds to pay to his wife what should be to be returned of her portion, and to invest the

residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children, if any, if not to the younger children of H. W. W., if any, if not to the defendant W. W., and gave the residue of his effects to his wife. The niece and nephew had neither of them children: the intermediate interest from the death of the niece to that of the nephew shall not follow the principal but fall into the residue, and go to the wife's executors as personal estate of the testator undisposed of. *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58.

1. The income of chattels real specifically bequeathed, pending the vesting thereof, falls into the residue of the personalty. *Hodgson* v. *Bective* (*Earl*), 2 N. R. 269; 32 L. J., Ch., 489; 9 L. T., N. S., 18; 1 Hem. & M. 376. See S. C. *sub. nom. Bective* (*Earl*) v. *Hodgson*, 10 Jur., N. S., 375; 12 W. R. 625; 10 L. T., N. S., 202; 10 H. L. Ca. 656.

2. Testator gives part of his stock-in-trade to R. provided he attained twenty-one; he dies before twenty-one. The administrator of R. is not entitled to intermediate profits from testator's death to infant's. *Atkinson* v. *Turner*, 2 Atk. 41; Barnard. 74.

3. One devises personal estate to his son, and, if his son died within age and without issue, then the personal estate to go to the testator's brother. The son shall have the produce of the personal estate; and only the capital, in case of the infant's death, etc., shall go to the brother. *Tissen* v. *Tissen*, 1 P. W. 500.

4. A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for D. G. until he shall attain the age of twenty-five years, and are to transfer to him when they, in their discretion, shall think proper; he likewise directs that, if D. G. dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his, the testator's, estate; and he bequeaths the residue to W. F.; while D. G. is under twenty-five years of age, and has not had the stock transferred to him, neither he nor W. F. is entitled to receive the accruing dividends; but these dividends must accumulate to accompany the capital in its final destination. *Gordon* v. *Rutherford*, T. & R. 373; 2 L. J., Ch., 50.

5. Bequest of a specific sum in the funds, to be paid within twelve months. The sum was not transferred within the twelve months, and the executors received the dividends accruing during that period:—Held, that they belonged to the legatee. *Bristow* v. *Bristow*, 5 Beav. 289.

6. A., by will, gives 100*l.* South Sea stock to B., and another 100*l.* South Sea stock to C., payable in six months after his death. Before time expired an addition was made by the company to every 100*l.* stock:—Held, that the legatees were entitled to the additional as well as the original stock. *Mason* v. *Hawkins*, 4 Bro. P. C. 8.

7. C., having power to appoint a money fund to all and every or any child or children of hers, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment to be equally divided between them, by her will appointed different sums to several of her children; and reciting that her daughter M. had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she declared that she deemed her patrimony in that case sufficient for her maintenance, but in case M. should change her mind, and return to her family and friends, she bequeathed to trustees 1,000*l.*, in trust for M. to receive the interest of the same during her life, and at her decease to be divided amongst her children if any; or in either case of her not leaving the convent or not leaving issue, the 1,000*l.* to be divided amongst her three daughters therein named, and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned:—Held, that the power authorised an appointment to take effect upon the happening of a contingency; and that the interest which should accrue on the 1,000*l.*, while the contingency was undetermined, passed under the residuary bequest in the will. *Caulfield* v. *Maguire*, 2 J. & L. 141; 3 Ir. Eq. R. 164.

8. A testator devised one-fifth part of his freehold and copyhold estates to the use of his daughter J. for life; with remainder to the use of all and every the child and children of such daughter who should attain twenty-one; with remainder over if there should be no child who should attain that age. He then bequeathed his leasehold estates in trust for the persons entitled to the real estates, and to go in the same manner, or as near thereto as the rules of law and equity would permit; and he gave his residuary estate upon the same trusts as were declared with respect to his real estate, or as near thereto as might be. J. died in 1851, leaving one child only, H., who attained twenty-one in 1860.—Held, that the interim income of the fifth of the residuary personal estate followed the residue, and became vested in H. at twenty-one. *Holmes* v. *Prescott*, 10 Jur., N. S., 507; 33 L. J., Ch., 261; 12 W. R. 636; 11 L. T., N. S., 38.

Held, also, that assuming the remainder in the freeholds was contingent, H., on attaining twenty-one, became entitled to the corpus of the leaseholds, there being no rule of law to prevent the testator's intention taking effect as to them. *Ib.*

Held, also, that the remainder in the freehold estates was contingent, and, therefore, that the interim income of the leaseholds fell into the residue. *Ib.*

9. The interim income subject to the interim burden of a contingent specific legacy until the happening of the contingency falls into the residue of the testator's estate, or goes to his next of kin, as the case may be. *Guthrie* v. *Walrond*, 22 L. R., Ch. D., 573; 47 L. T. 614; 31 W. R. 285.

10. A testator bequeathed 20,000*l.* upon trust, after the decease of his daughter (a married woman), for all or such of her children as she should appoint; and in default, for all her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled; and powers of advancement to the extent of one-fourth of the portion to which any child should be presumptively entitled. The daughter, by her

will, appointed the fund upon trust to raise for each of her two younger children, F. and M., who should attain twenty-one, 2,000*l.*, and subject thereto, as to the whole of the fund, to all her children who should attain twenty-one, in equal shares as tenants in common. She died leaving four children. The eldest of these having attained twenty-one:—Held, that the child who had attained twenty-one was entitled to one-fourth of the income which had accrued since the death of her mother on the whole of the 20,000*l.*; and that she would, after payment to her of her share of capital, be entitled during the minorities of F. and M. to one-fourth of the income of the two sums of 2,000*l.* appointed to them in the event of their attaining twenty-one respectively. *Gotch* v. *Foster*, 5 L. R., Eq., 311.

V. FUTURE RESIDUARY BEQUEST.

1. Under a bequest of the residue of a personal estate to A., if he attain twenty-one, the profits will accumulate. *Trevanion* v. *Vivian*, 2 Ves. 430.

2. Where there is a devise of a residue, with devise over on a contingency, the devisee is entitled to the rents and profits till the contingency happens. *Shepherd* v. *Ingram*, Ambl. 450. And see *Lowther* v. *Cavendish*, *id.* 358.

3. A residuary estate was bequeathed, in the first instance, to be paid into the hands of the legatee on attaining the age of twenty-five years, and not till then, unless she married: the whole property then to be settled on her and her children; the legatee, on attaining the age of twenty-one unmarried, was held entitled to the income and the accumulations thereof. *Grant* v. *Grant*, 3 Y. & Coll. 171; 7 L. J., N. S., Exch. Eq., 20.

4. Devise to A., an infant, for life, and his first and other sons in strict settlement, with remainders for similar estates; the will farther directed, "during the minority of the A. family," an accumulation of the rents to be laid out on a purchase, "until the minor arrives at the full age of twenty-five years," and then "the heir to take full possession of this estate." A., being residuary legatee, is entitled absolutely to the accumulation. *Bingley* v. *Broadhead*, 8 Ves. 415.

5. Testator, after bequeathing an annuity and goods to his wife for her life, directs the whole of his fortune, in default of his own issue, and of a second son of his brother, and second son of his sister, to be divided between the plaintiff and the defendant, making the latter the residuary legatee:—Held, that under the words "whole fortune," the interest of the moiety, till the determination of the contingency, did not belong to the plaintiff; and that the residuary legatee was entitled to that and the reversionary interest in the goods left to the wife. *Mitford* v. *Wicker*, 2 Ken. Ch. 61.

6. A testator gave to three persons annuities of 25*l.* each, and gave the residue of the income of his estate during the lives of the annuitants to M. and N., to be paid to them during their lives in equal shares, and after the deaths of the annuitants, as to the residue of his estate, he gave the same to M. and N., and their several children, to be divided between them in equal shares; one of the annuitants died first, then M., and subsequently N.:—Held, that the surplus income between the death of N. and the death of the surviving annuitants was not undisposed of, but passed by the residuary bequest. *Cunningham* v. *Murray*, 17 L. J., N. S., Ch., 407; 12 Jur. 547. Reversing 1 De G. & Sm. 366; 16 L. J., N. S., Ch., 484; 11 Jur. 814.

7. Testator bequeathed residuary personal estate to his daughter B. (an infant), to be paid to her at twenty-one or marriage; and if she should die before twenty-one or marriage, he bequeathed the same to such son of E. as should first attain twenty-one; and if no son attain twenty-one, then to P. F. died under twenty-one, and unmarried:—Held, that the interest of the residue, from the death of F. to the time it will vest in the son of E., who is an infant, must accumulate, and is part of the residue, till the bequest to the son vests. *Green* v. *Elkins*, 2 Atk. 473.

There is a material difference between the profits of a real and personal estate: rents never can become part of the personal estate, but the profits of the personal estate are the estate itself. In the case of real estates, the thing itself is not disposed of, but descends till the contingency happens; personal estate neither descends nor goes to the next of kin, but is vested in the executor. *Id.* 476.

8. A testator gave his real and personal estate to trustees upon trust to pay the income to four persons for life as tenants in common, and after the death of the survivor to sell the real estate and stand possessed of the proceeds and of the stocks, funds, and securities upon which his personal estate should then be invested upon certain trusts for a class of children. By the death of one of the four his portion of the income became released, and was accumulated until the death of the survivor of the four:—Held, that the accumulation of the real estate was undisposed of and passed to the heir, but that the accumulation of the personalty passed as residue to the children. *Re Drakeley's Estate*, 19 Beav. 395; 2 W. R. 613.

9. A residuary devise of realty does not carry with it income not expressly disposed of, but it results to the heir-at-law as undisposed of. *Secus*, as to personalty, a residuary bequest of which, or of a share of which, carries with it *ex vi termini* all the income of such residue or share of residue, though not expressly disposed of, for the benefit of the legatees. Therefore, where a testator gave the residue of his real estate to uses commencing with an executory devise to an unborn person, and gave two-thirds of the residue of his personalty to trustees upon trust to invest in real estate, to be settled to uses, which were the same as those declared of his residuary realty:—Held, that the ordinary rule applied to the intermediate income of each class of property. As to the realty, that there was an intestacy as to such income, and it resulted to the heir-at-law. As to the personalty, that there was no intestacy, and that the income should be accumulated, and be added to the corpus to be laid out in land. *Hodgson* v. *Bective* (*Earl*), 2 N. R. 233; 32 L. J., Ch., 489; 9 L. T., N. S., 18; 1 Hem. & M. 376. But see S. C. varied on appeal as to the residuary personal estate, *sub. nom. Bective*

Earl) v. *Hodgson*, 10 Jur, N. S., 373; 12 W. R. 625; 10 L. T., N. S., 202; 10 H. L. Ca. 656; 3 N. R. 654.

VI. FUTURE SPECIFIC DEVISE.

1. Devise upon a future contingency, and no intermediate disposition of the rents and profits, a resulting trust for the heir. *Att.-Gen.* v. *Bowyer*, 3 Ves. 725.

2. Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and by the previous death of the devisee, the remainder accelerated. *Chambers* v. *Brailsford*, 18 Ves. 368.

3. A testator by his will dated in 1832, devised lands to T. for life, and from and after his decease to his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. The legal estates in the land were outstanding. T. died leaving an eldest son a minor —Held, that the eldest son would on attaining the age of twenty-one take an estate for life, and that the rents and profits in the meantime were undisposed of; but held on appeal, that on the death of T. the eldest son took an estate in fee liable to be devested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 1 L. R., Ch. D., 410; 45 L. J., Ch., 232; 34 L. T. 82; 24 W. R. 329.

4. Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life of the devisee over, yet, if real his heir, if personal his executor, will be entitled. *Chauncy* v. *Graydon*, 2 Atk. 621.

5. A. devised lands in trusts for B. for life, remainder in trust for his sons successively, remainder in trust for the future sons of C, remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future. B. died in testator's lifetime, and it was decreed, the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of A. should go to the heir; and afterwards, a son being born to B., upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some person should become entitled under the limitations of the will. *Hopkins* v. *Hopkins*, 1 Atk. 581; 1 Ves. 268; Ca. *temp.* Talb. 44. A corrected copy of this case was stated by Lord Loughborough, in *Habergham* v. *Vincent*, 4 Bro. C. C. 390.

The resulting trust of a freehold, to support remainders of a trust, may connect with the limitation in tail, though not created together with it. S. C. 1 Atk. 595.

There may be a resulting trust under a trust to appoint contingent remainders for the heir-at-law, in the same manner as under an executory devise. S. C. 1 Atk. 597.

6. One devises lands to his younger sons at twenty-four, and in the meantime the rents and profits of the premises to his eldest son, and dies; and the eldest son devises all those rents and profits of the premises to his younger brothers, but not to be paid them until twenty-four, and dies, leaving his younger brothers under twenty-four; only the rents and profits accruing from the death of the elder brother, the testator, shall pass. *Tissen* v. *Tissen*, 1 P. W. 500.

7. Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees, in trust to sell He afterwards erased, and by codicil declared that he intended to erase the direction to sell only; he then gave all his estates to the son of D who should first attain twenty-one, and change his name to E. D, at the death of the testator, had a son, who was still an infant, and afterwards had another son:—Held, that codicil revoked the devise of the S. and H. estates, and also the devise of the residue of his estates to the trustees, and that D's eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will, and those he afterwards purchased, and consequently was entitled to the rents during his infancy. *Duffield* v. *Elwes*, 2 Sim. & S. 544; 4 L. J., Ch., 189. See S. C. on appeal, *sub. nom.* *Duffield* v. *Duffield*, 3 Bli. N. S. 260; 1 Dow & Cl. 195.

8. Lands were devised in trust to maintain an infant till twenty-three, and then to convey them to him, and if he die before, to convey them to another. The infant is not entitled till twenty-three, and as the estate is not devised over if he dies under, the surplus of profits will go to testator's heir. *Tilly* v. *Simpson*, Mos. 244.

9. Term to raise portions, and the trustees to hold the estate till the son attain twenty-one, and then to convey to the son, there being no directions as to the intermediate profits:—Held, they should go to the heir-at-law as undisposed of; that case was distinguished from the present by reason that the trustees were to convey at twenty-one and nothing given before to the son. *Bland* v. *Bland*, cited Ambl. 96.

10. Devise of a house and appurtenances to wife during widowhood, but that the eldest son, when twenty-one or married, might have it on notice; the wife having married after the death of the former eldest son unmarried, and during the minority, etc., of the existing eldest son, it was declared that he would be entitled to the enjoyment on attaining twenty-one or marriage, upon giving notice; the intervening interest in the premises and appurtenances, being undisposed of, held to fall into the residue of the real and personal estates. *Bridgewater* (*Duke*) v. *Egerton*, 2 Ves. 122.

11. There is no case in which the contingent estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. *Sidney* v. *Wilmer*, 25 Beav. 260.

Where, therefore, an estate was limited to the children of A., born within fifteen years, with remainder to the plaintiff, and A. had no child, and the fifteen years had not expired:—Held, that the plaintiff had no right to the present rents. *Ib.*

An estate was devised to trustees for 500 years, with remainder to persons still unborn,

with remainder to the plaintiff. The trustees had active duties as to the management of the estate and large discretionary powers, and they were authorised, "during the minority of any person absolutely or presumptively entitled," to apply the surplus income for the benefit of such person, accumulating the surplus:—Held, that the plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate becoming vested in possession. *Ib.*

Power of maintenance of the "person for the time being entitled" to the estate:—Held, to include persons absolutely or presumptively entitled. *Ib.*

1. A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W. in tail male, and failing such issue, in trust for the first and every other son of his nephew H. in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term W. and H. were both living, and each had an only son:—Held, that until it should be ascertained whether there would be a second son of W., the rents of the real estates and the income of the personal estate were undisposed of and belonged respectively to the heir-at-law and next of kin. *Wade-Gery* v. *Handley*, 3 L. R., Ch. D., 374; 45 L. J., Ch., 712; 35 L. T. 85. Affirming 1 L. R., Ch. D., 653; 45 L. J., Ch., 457; 34 L. T. 233.

VII. FUTURE RESIDUARY DEVISE.

2. The testator devised all his real estate to a trustee, upon trust to pay the rents to A. for life, and after his death, and after the happening of a certain contingency, to settle the estate upon B. A. died before the contingency happened:—Held, that the intermediate rents belong to the heir-at-law of the testator. *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

3. Real estate was given to F. W. R. in tail; and failing issue, or in the event of F. W. R.'s death before returning from India, it was to sink into the residue of testator's estate, which was given to F. R. The trustees invested rents in real estate at and after the death of testator, and on the death of F. W. R. without issue in India his personal representative claimed the investments; but held they belonged to the residuary devisee and legatee. *Robertson* v. *Dewsbury*, 5 Jur. 260.

4. Testator devised the residue of his real estate to a trustee in fee, upon trust to accumulate the rents until one of his grandsons should attain twenty-one, and in case his grandson T. should attain that age, upon trust to pay to him the future rents for life, with remainder to his eldest son who should attain twenty-one, remainder in default to another grandson. And the testator bequeathed the residue of his personal estate to the same trustee, upon trust to accumulate until one of his grandsons should attain twenty-one, and then to pay the dividends arising from the aggregate accumulations of his (the testator's) residuary real and personal estate to T. from and after his age of twenty-one for life, and after his decease to pay the principal of such accumulations to his eldest or only son. One of the testator's grandsons attained twenty-one three years before T. arrived at that age:—Held, that the rents of the real estate during the intervening period were undisposed of, and passed to the heir-at-law. *Marriott* v. *Turner*, 20 Beav. 557.

5. A devise of residue of real estate upon contingent or future trusts does not carry with it the intermediate income; but such income results to a testator's heir-at-law; and the 7 Will. 4 and 1 Vict., c. 26, has made no difference in the law in this respect. *Hodgson* v. *Beetive* (*Earl*), 32 L. J., Ch., 489; 9 L. T., N. S., 18; 2 N. R. 233; 1 Hem. & M. 376. Affirmed on this point S. C. *nom.* *Bective* (*Earl*) v. *Hodgson*, 10 H. L. Ca. 656; 10 L. T., N. S., 202; 12 W. R. 625; 10 Jur., N. S., 373; 3 N. R. 654.

6. A testator devised a freehold to trustees for the benefit of E. for life for her separate use, and after her death upon trusts for such of the children of E. as being sons should attain twenty-one, or being daughters should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Re Eddels*, 11 L. R., Eq., 559; 40 L. J., Ch., 316; 24 L. T. 223; 19 W. R. 815.

VIII. FUTURE GIFT OF A MIXED RESIDUE.

7. Under an executory devise of a residue of real and personal estate, the intermediate rents and profits of the real estates pass as well as the interest of the personalty. *Genery* v. *Fitzgerald*, Jac. 468.

8. Devise of the residue of real and personal estate, after provision made for payment of annuities and legacies, to the child or children of testator's natural daughter, and in case she should die without issue to S. and J.:—Held, the intermediate profits till a child was born should go to the residuary devisees, and not to the heir-at-law. *Gibson* v. *Rogers*, Ambl. 96; 1 Ves. 485; 4 Ves. 288. n.

9. Devise of real and personal estate to the first son of A. when he should attain twenty-one, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the decree:—Held, that the profits of the personal estate should accumulate; and that as to the real estate, it was good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance. *Bullock* v. *Stones*, 2 Ves. 521.

10. A. by his will devised all his lands, etc., and all other his real and personal estate, upon trust as to the real estate, to repair and let the same, etc., and upon further trust, notwithstanding any limitation of uses or trusts thereinbefore mentioned, at discretion to sell and convey the same, except

the messuage given to his wife, and as to the money to arise upon such sales, upon trust to add the same to his personal estate, to constitute a part thereof. The testator then gave the residue of his personal estate, upon trust, after payment of debts, etc., and expenses of management and repairs, to be accumulated, by way of compound interest, until J. C. should arrive at the age of twenty-four years, and then upon trust to convey, assign, etc., to J. C. (upon his giving security, etc., for the regular payment of the annuities thereinbefore bequeathed) all the legal estate and interest in all his freehold, copyhold, and leasehold messuages, lands, etc., and all other his real and personal estate and effects not thereinbefore devised and bequeathed, etc. The testator also directed that his trustees should, for the purpose of J. C.'s education, appropriate out of the income of the testator's personal estate a sum not exceeding 800*l.* per annum until he should attain twenty-one years of age, and afterwards 1,500*l.* per annum until he should attain the age of twenty-four; with limitation over in case J. C. should die without issue before he attained the age of twenty-four:—Held, that the benefit intended to be given to J. C. was the produce of a mixed fund of the real and personal estate of the testator, and that the rents of the real estate until J. C. attained twenty-four did not result to the heir-at-law of the testator as undisposed of, but passed to J. C. as part of the fund given in trust. *Ackers* v. *Phipps*, 9 Bli. N. S. 430; 3 Cl. & F. 665. Reversing on this point *Phipps* v. *Williams*, 5 Sim. 41; 1 L. J., N. S., Ch., 96.

1. Gift by the testator to his wife for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided among his children living at that period or their heirs, and one-third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living and to their heirs.—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children "or to their heirs," but that the word "or" must be read "and;" and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan* v. *Reynolds*, 9 Hare 796.

2. A testator devised his residuary real estate to trustees, on trust to pay the rents to his wife for her life, and upon her death to apply the rents for the maintenance of his daughter, and to accumulate the surplus, and on the daughter attaining twenty-one, to pay to her the accumulations and the future income for her life, and upon her death on trust to convey the residuary real estate unto and equally between all and every her child and children who should live to attain twenty-one, as tenants in common in fee, but in case his daughter should die without leaving any child or children who should attain twenty-one, then on trust to convey the residuary real estate to such person or persons as the daughter should by deed or will appoint. And by another clause the testator bequeathed his residuary personal estate to the same persons as trustees, on the same trusts as those declared of the real estate, except the clause as to maintenance and accumulation. The will contained no disposition of the income of the realty or the personalty during the suspense of vesting. The daughter survived the testator and his wife, and died leaving an only daughter, who was an infant. The testator's daughter had, by her will, exercised the power of appointment in favour of other persons in the event of her leaving no child who should live to attain a vested interest under the trusts of her father's will:—Held, that the testator had in effect mixed up the whole of his property in one mass, and that the rule in *Genery* v. *Fitzgerald* (Jac. 468) applied; and that, consequently, the interim rents of the real estate, until the happening of the contingency, as well as the interim income of the personalty, must be accumulated, and follow the destination of the corpus. *Re Dumble. Williams* v. *Murrell*, 23 L. R., Ch. D., 360; 52 L. J., Ch., 631; 48 L. T. 661; 31 W. R. 605.

3. L. by his will gave all his freeholds and leaseholds to trustees upon trust to invest the surplus for four years, and to pay the interest from the proceeds of his plate and effects directed to be sold to his daughter for life for her separate use, without anticipation, with "remainder" to her children equally, remainder to the children of his brothers, and a like disposition of all his other property, and on the question whether the accumulations during the four years were undisposed of:—Held, that they were not; but a general gift of the residue passed everything. *Jarrad* v. *Tracey*, 1 W. R. 501.

4. T. settled his freehold estates (subject to appointment) on himself in tail, remainder to L. and his sons in strict settlement, remainder to C. for life, provided that if L. or any issue male of his body should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over, as if the person or persons so becoming entitled were dead without issue male. L. having afterwards become entitled in possession to his father's family estates, T. by his will appointed his said estates to H. (the eldest son of L.) and his sons in strict settlement, remainder to the heirs of A., deceased, provided that if any tenant for life in possession under the will should become entitled in possession to L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator devised his copyhold estates upon such trusts as would nearest correspond with the uses and trusts of

his freehold estates, and then gave all the residue of his real and personal estates to M. and W., their and each of their heirs, executors, etc., absolutely in equal third parts. On the testator's death in 1824, H. entered upon his estates under the will, and in 1833 he became entitled in possession to L.'s family estates, and had no son. A bill was filed by the residuary legatees, claiming the rents of all the estates accruing between 1833 and L.'s death or his having a son, against A.'s heir, who claimed the same rents, and against C. and B. (second son of L.), who claimed adversely to each other the rents of the freehold estates under the limitations in the settlement, in default of appointment of them by T.:—Held, by the Lords, first (partly affirming a decree made on that bill), that the plaintiffs were entitled to the rents of the copyhold estate under the residuary devise; secondly (partly reversing the decree), that no adjudication could be made in the cause as to the rents of the freeholds, the question as to them being between co-defendants. *Sanford* v. *Morrice*, 11 Cl. & F. 667. And see S. C. *nom. Morrice* v. *Langham*, 11 Sim. 260; 10 L. J., N. S., Ch., 38; 6 Jur. 334. S. C. *nom. Morrice* v. *Sandford*, 8 Jur. 967. And see S. C. at law, 8 Mees. & Welsb. 196; 10 L. J., N. S., Exch., 289.

1. Devise of residue to an infant, payable at twenty-one, remainder over; the infant died under age; the interest from the death of the testator to that of the infant shall go to her representative, not to the remainderman. *Chaworth* v. *Hooper*, 1 Bro. C. C. 82.

2. A testator gave the residue of his real estate to uses commencing with an executory devise to an unborn person, and gave two-thirds of the residue of his personalty to trustees upon trust to invest in real estate, to be settled to uses which were the same as those declared of his residuary realty:—Held (affirming the decree of Wood, Vice-Chancellor), that there was an intestacy as to the intermediate income of the realty, and that it resulted to the heir-at-law; and that the intermediate income of the personalty should be accumulated and added to the corpus, to be laid out in land, but (varying the order below) that such accumulation should be restricted to the term permitted by the Thellusson Act, and that the income from the expiration of that period to the determination of the contingency would pass to the next of kin. *Bective (Earl)* v. *Hodgson*, 3 N. R. 654; 10 H. L. Ca. 656; 10 L. T., N. S., 202; 12 W. R. 625; 10 Jur., N. S., 373. See S. C. *nom. Hodgson* v. *Bective (Earl)*, 2 N. R. 233; 32 L. J., Ch., 489; 9 L. T., N. S., 18; 1 Hem. & M. 376.

3. A bequest of a moiety of the interest of the residue of the testator's personal estate:—Held, upon the context of the will, to pass the interest of the proceeds of real estate, which were directed to be invested so as to form one mixed fund with the residue of the personalty. *Byam* v. *Munton*, 1 Russ. & M. 503; 8 L. J., Ch., 156.

4. Devise of freehold and leasehold estates to trustees in trust by rents and profits, or by sale or mortgage, to pay debts and legacies which his personal estate should not be sufficient for, and, subject thereto, in case J. B. should attain twenty-one, in trust for him, his heirs and executors:—Held, that the rents and profits till J. B. attained twenty-one were not undisposed of, but passed by the devise to the trustees, and were, after payment of legacies, annuities, and interest of the debts, to be applied to sink the principal of the debts. *Popham* v. *Aylesbury*, Ambl. 68. Report of this case corrected in 11 Ves. 662.

5. M., by will, gave all his property, real and personal, to trustees, directing them to pay the income to his son and heir J. until J. should attain thirty, and then convey to J. the residue. By codicil, M. recalled the direction to pay the whole income to J., and directed the trustees to pay to J. thereout 300*l.* yearly until he attained thirty, and then to dispose of "the said residue" as directed by the will:—Held, that the surplus income beyond 300*l.*, which accrued during the minority of J., was not undisposed of, but passed to the trustees under the word "residue." *Sturgis* v. *Campbell*, 12 L. T., N. S., 836.

6. A will contained a devise and bequest to T. of "all my real and personal property except such parts as are or shall at my decease be subject to the trusts of my marriage settlement and are hereinafter otherwise disposed of." The will contained a subsequent gift of 1,000*l.* out of the settled property to R., and of the rents and profits of the remainder of the settled property to R.'s wife in case R. should predecease T., but if R. should survive T., upon other trusts:—Held, that the income of the settled property during the joint lives of T. and R., being undisposed of by the will, passed to T. under the previous residuary gift. *Torrens* v. *Millington*, 26 W. R. 753.

7. A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W. in tail male, and failing such issue, in trust for the first and every other son of his nephew H. in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term W. and H. were both living, and each had an only son:—Held, that until it should be ascertained whether there would be a second son of W., the rents of the real estates and the income of the personal estate were undisposed of and belonged respectively to the heir-at-law and next of kin. *Wade-Gery* v. *Handley*, 3 L. R., Ch. D., 374; 45 L. J., Ch., 712; 35 L. T., N. S., 85. Affirming 1 L. R., Ch. D., 653; 45 L. J., Ch., 457; 34 L. T., N. S., 233.

IX. OF FUND SET APART FOR LEGACIES.

8. Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and interests of the investments will belong to tenant for life of the residue. Where sums are set apart to answer contingent legacies, the interest of them until the contingency happens is part of the income of the residue. Where the interest of a legacy is directed to be accumulated beyond the legal period, the interest of the legacy and the accumulations

after that period, and until the time of payment, is part of the capital of the residue. *Crawley* v. *Crawley*, 7 Sim. 427; 4 L. J., N. S., Ch., 265.

1. Gift by will of various annuities, with a direction by the testator that a sufficient part of his personal estate should be invested in 3 per cent. consols to meet the annuities, and that on the deaths of the annuitants the amounts respectively set apart to answer these annuities were to sink into residue. The testator bequeathed the residue of his estate as to two equal fourth parts thereof to his wife absolutely, and as to the other two equal fourth parts thereof upon certain trusts for the persons in his will named. The testator made a codicil to his will whereby he directed that the annuities should not commence till after the death of his wife. On bill filed by the annuitants asking for a sufficient sum to be set apart to meet these annuities, the question was raised who would be entitled to the income thereof during the life of the widow:—Held, that such income formed part of the residuary estate of the testator. *Crawley* v. *Dixon*, 3 Jur., N. S., 531.

2. Portions of a fund constituting the residuary personal estate of a testator were set apart by his executors to meet contingent legacies payable on infants attaining twenty-one:—Held, that the tenant for life of the general residue was entitled to the income derivable from those portions of the residuary estate set apart until such capital, or portions of it, were wanted for the payment of those contingent legacies in case they should become payable. *Allhusen* v. *Whittell*, 16 L. T., N. S., 695; 36 L. J., Ch., 929; 4 L. R., Eq., 295.

Held, also, that the tenant for life was not entitled to the income which might have been derived from what was clearly necessary for the payment of debts and legacies out of the capital of the residue. *Ib.*

3. Such part of interest of legacy of 4,000*l.* as was not wanted for support of M. Q. to accumulate and be added to, and managed along with, the principal sum for the benefit of the persons to be entitled to the same after M. Q.'s death, in that event the principal and the accumulations to go to her child or children. If no issue, 1,000*l.*, part thereof, to J. H.; 750*l.*, other part thereof, to G. W.; 750*l.*, other part thereof, to J. M.; and the remainder to T. H.:—Held, that the latter took the whole accumulations. *Woodhead* v. *Marriott*, C. P. C. 62.

4. Testator ordered his trustees, out of certain funds, to pay to his wife what should be to be returned to her of her portion, and to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children if any; if not, to the younger children of H. if any; if not, to the defendant W.; and gave the residue of his effects to his wife. The niece and nephew had neither of them children; the intermediate interest from the death of the niece to that of the nephew, shall not follow the principal, but fall into the residue, and go to the wife's executors as personal estate of the testator undisposed of. *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58.

5. A testator gave his whole estate to trustees to sell, and after payment of debts, expenses, and certain legacies, to pay out of the residue two annuities of 400*l.* each to F. and P., and one of 200*l.* to B., for their respective lives. And for the better fulfilment of that purpose, he directed them to vest sufficient capital sums on securities; and if the residue should not be sufficient, to vest whatever residue there might be, and pay the dividends to the annuitants in the same proportions; and if more than sufficient, to vest the surplus, and divide it and the capital sum set apart for the annuities, as the same should become tangible by the death of each annuitant, among other residuary legatees. B. predeceased the testator. The residue did not yield sufficient income every year to pay F. and P. 400*l.* each. On the death of F., her personal representatives and P. claimed payment of all the arrears out of the then enlarged income of the residue:—Held, by the Lords, that F. and P. were entitled to payment of 400*l.* each only in those years in which the income of the residue was sufficient; that when in any year that income was more than sufficient the excess belonged to the residuary legatees; that on F.'s death half the capital of the residue became divisible among them, and then P. became entitled to the income in each year of the other half; but when in any year this income exceeded 400*l.* the excess belonged to the residuary legatees, and neither P. nor F.'s representatives were entitled to any payment of arrears. No benefit accrued to the residuary legatees from the lapse of the annuity to B., except when thereby the income of the residue exceeded the amount of the other two annuities. *Casamajor* v. *Pearson*, 8 Cl. & F. 69.

6. Under an executory devise of a life interest in real and personal estate, to take effect upon the death of an annuitant, the surplus rents and dividends which accrue due during the life of the annuitant belong to the parties entitled for life. But a specific devise, liable to be resorted to for payment of the annuity, will not contribute *pro ratâ* to the annuity so as to increase the amounts of the surplus rents and dividends. *Thornton* v. *Thornton*, 3 N. R. 23.

7. A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children on their attaining twenty-one if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue. And he gave his residue to A. for life, remainder to B.:—Held, first, that the testator had made a positive settlement, and the Court could not add to it in any way. *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; 6 Jur., N. S., 265; 29 L. J., Ch., 469; 8 W. R. 289.

Held, secondly, that the income undisposed of after the wife's death fell into the residue. *Ib.*

Held, thirdly, that it was undisposed-of income merely, and passed as such to the tenant for life of the residue. *Ib.*

8. A testator bequeathed a sum of 5,000*l.*, bank annuities, in trust for such child or children of A., a bachelor, as should attain twenty-one, and directed that the same and the income thereof should be transferable and

payable to him, her, or them, on their respectively attaining such age; and in case no child of A. should attain twenty-one, he directed the bank annuities and unapplied income thereof to fall into his residuary personal estate, which he bequeathed upon trusts for tenants for life, with remainders over:—Held, that the dividends accruing between the death of the testator and birth of a child of A. fell into the residue as income. *Fullerton* v. *Martin* (1 Dr. & Sm. 31) followed. *Edmunds* v. *Waugh*, 2 N. R. 408.

1. A testatrix directed the trustees of funds over which she had a power of appointment, from and immediately after her death, to stand possessed thereof, to raise thereout 5,000*l*., and to pay the same to the five children of her deceased sister in equal shares, the shares of sons to be paid at twenty-one, the shares of daughters at twenty-one or marriage, and to apply the income arising from the residue of the funds as in the will mentioned:—Held, that this was a vested legacy, that it was severed from the remainder of the trust funds, and that the legatees were entitled to the interest of the fund set apart to answer it. *Dundas* v. *Murray*, 32 L. J., Ch., 151; 11 W. R. 359; 1 N. R. 429.

2. When a legacy is severed from the residue for the benefit of a tenant for life and a remainderman, the residuary legatees cannot claim the income accruing after the death of the tenant for life, though the remainderman has not yet attained a vested interest in the legacy. *Kidman* v. *Kidman*, 40 L. J., Ch., 359.

See also ANNUITY, IX.

X. OTHER CASES.

3. A testator gave the dividends of specific sums of stock of different amounts to his sons and daughters by name for their lives, and on the death of any son or daughter he gave the capital of which he had given the dividends to such son or daughter, to his or her children at twenty-one, and if no such child attained twenty-one, the capital was to fall into the residue, the interest of which he bequeathed to his widow for life, and after her death to the sons and daughters "during their several lives, to be divided between them," in proportion to the specific sums of stock of which the dividends were bequeathed to them. After the decease of the testator's "said children," the capital of the residue was to be divided among the children's children at twenty-one, and if any grandchild died under twenty-one, its share was to be divided amongst the survivors at twenty-one or their issue, and after the death of the widow and all the testator's "children and grandchildren without issue as aforesaid," over. By codicils he revoked the bequests to two of his sons and a daughter, and gave them for their lives the dividends of smaller specific stock than that so given by the will:—Held, that the dividends, the gifts of which were revoked, were not undisposed of, but passed by the residuary bequest as income of those tenants for life of it whose interests were not revoked. *Alt* v. *Gregory*, 8 De G. M. & G. 221; 4 W. R. 436; 3 W. R. 630; 2 Jur., N. S., 517.

4. When a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed:—Held, that the rents received between his death and the conveyance of the property passed to the devisee. *Watts* v. *Watts*, 17 L. R., Eq., 217; 43 L. J., Ch., 77; 29 L. T. 671.

5. Where a testator, having contracted to purchase an estate and taken a transfer of a mortgage on it, specifically devised it:—Held, that the devisee was not entitled to the interest on the mortgage between the testator's death and the completion of the purchase. *Puxley* v. *Puxley*, 1 N. R. 509; 8 L. T., N. S., 570.

6. Devise to the children of A., B., and C. who should be living when the youngest attained twenty-one, with a direction that "the present yearly rents" should be paid to the persons who brought up the children of C.:—Held, upon the context, that until the contingency happened, the rents were to be paid to such person in trust not only for the children of C., but of A. and B. *Sanders* v. *Miller*, 25 Beav. 154.

LIII. Legacy.

I. ACCRETIONS TO SPECIFIC LEGACIES.

7. Dividends on specific legacy of stock given with the dividends are due from death of testator. *Barrington* v. *Tristram*, 6 Ves. 345.

8. Bequest of a specific sum in the funds, to be paid within twelve months. The sum was not transferred within the twelve months, and the executors received the dividends accruing during that period:—Held, that they belonged to the legatee. *Bristow* v. *Bristow*, 5 Beav. 289.

9. A., by will, gives 100*l*. South Sea stock to B.; another 100*l*. South Sea stock to C., payable in six months after his death. Before time expired, an addition was made by the company to every 100*l*. stock:—Held, that the legatees were entitled to the additional as well as the original stock. *Mason* v. *Hawkins*, 4 Bro. P. C. 8.

10. If a specific bequest of shares is made under an impression that they are not subject to any increase, an accidental increase caused by a payment out of the general personal estate of the testator himself will pass to the legatee. *Maclaren* v. *Stainton*, 7 Jur., N. S., 691; 30 L. J., Ch., 723; 9 W. R. 908; 4 L. T., N. S., 715. Reversing 27 Beav. 460; 6 Jur., N. S., 360; 29 L. J., Ch., 401.

A., under the impression that he was not indebted, dealt with his entire estate, and made a specific gift of shares held by him in a company. A suit was afterwards instituted

against his executors by the company to which he was found to be indebted. The debt was paid out of the testator's general personal estate, and, in consequence, bonuses were declared upon all the shares of the company. A specific legatee claimed the bonuses in respect of his bequeathed shares:—Held, that the bonuses on the bequeathed shares did not form part of the general personal estate of the testator, but belonged to the specific legatee. *Ib.*

Some of the shares were bequeathed to parties for life, with remainder to other persons:—Held, that the bonuses belonged wholly to the legatees, and not to the estate. *Ib.*

1. A testator bequeathed all the interest arising out of what money he had in any banks:—Held, that a bonus or extraordinary dividend on the shares of the capital stock of a bank, paid in addition to the usual half-yearly dividend, and out of the net annual profits of the bank for the year, was not an accretion to the capital, and passed under the bequest. *French* v. *Craig*, 8 Ir. Ch. R. 142.

2. A testator having two policies upon his life for 1,000*l.* each, by will gave to his wife "the 2,000*l.* insured on his life." Subsequently he surrendered one policy. At his death bonuses were due on the other:—Held, that his widow was entitled to the 1,000*l.*, and also to the bonuses due upon the unsurrendered policy. *Roberts* v. *Edwards*, 33 L. J., Ch., 369; 33 Beav. 259; 9 Jur., N. S., 1219; 12 W. R. 33; 9 L. T., N. S., 360.

3 By the rules of an incorporated assurance company each shareholder was required to effect an assurance of a stated amount, and it was provided that one-third of every bonus on the policy should be added to the capital of the company. A shareholder, by his will, bequeathed all and every his shares and interest in this company, and all the advantages to be derived therefrom, and he bequeathed shares in other companies, in reference to which he also used the expression "shares and interest":—Held, that the policy effected by the testator, and the bonus which had been declared thereon, did not pass to the legatee. *Harington* v. *Moffat*, 22 L. J., Ch., 775; 4 De G. M. & G. 1.

4. A testator, being possessed of a policy of assurance for 1,000*l.*, on which a bonus of about 400*l.* had lately been declared, gave to his wife his "premium of assurance in the R. Company":—Held, that the bonus alone passed. *Barrow* v. *Methold*, 1 Jur., N. S., 994.

5. Testator gave several legacies in stock and directed his executors to transfer stock to the legatees to the amount of their respective legacies, either in consols or reduced annuities, within twelve months after his death. Some of the legacies were not transferred till after twelve months from the testator's death:—Held, that, notwithstanding the discretion, the legacies were specific, and that the legatees were entitled to the dividends from the death of the testator. *Chester* v. *Urwick*, 23 Beav. 402.

6. A testator, at the time of his death, was entitled to one hundred and twenty shares in the Great Western Railway Company. For thirty-eight of these he had been an original subscriber, and had signed the parliamentary contract, undertaking to pay the amount subscribed within ten years to the directors to be appointed by the Railway Act. The remaining eighty-two shares had been purchased by him as scrip. By the Act, which was passed in his lifetime, the directors had power to compel payment of the moneys subscribed, and also to make calls, and to enforce the payment of such calls by action, or otherwise to declare the shares forfeited, and to sell the shares. The Act also gave the proprietors of shares the right of sale and transfer, declaring, in effect, that the vendor ceased to be liable for calls after a proper memorial of such sale and transfer. All the calls had not been paid on the shares at the time of the testator's death. After his death the company passed a resolution, declaring that the proprietors of shares should be entitled to two new quarter shares in respect of each whole share. By his will, the testator had bequeathed thirty shares to A. and thirty shares to B., declaring that the legacies should be deemed specific so as to be capable of ademption:—Held, first, that the legatees were entitled to the income of the shares from the death of the testator; secondly, that the legatees were entitled to a proportional number of new quarter shares; thirdly, that the legatees were not entitled to have the deposits and calls on the new quarter shares, or the calls due on the eighty-two whole shares, or *semble*, the calls due on the thirty-eight original shares, paid out of the testator's general estate; fourthly, that the legatees, and not the executors, had the right of electing out of which class of shares their legacies should be delivered to them. *Jacques* v. *Chambers*, 2 Colly. 435; 15 L. J., N. S., Ch., 225; 16 *id.* 243; 10 Jur. 151; 11 *id.* 295.

7. The testator, after reciting that he was entitled to a policy of insurance on his life for 2,000*l.*, bequeathed 400*l.*, part thereof, to E.; 100*l.* and 100*l.*, other parts thereof, to two other legatees; and he left "the residue" to J. H. C. At the time of the testator's death, considerable sums by way of bonus were added to the policy:—Held, that the gift of "the residue" of the moneys, payable on foot of the insurance, was residuary and not specific, and that J. H. C. took the entire residue of the proceeds of the policy, including the bonuses, but subject to any liabilities for the satisfaction of which the policy was liable to be resorted to, and that such liabilities were to be borne primarily by the legatee of such residue in exoneration of the specific legatees of the insurance. *Corballis* v. *Corballis*, 9 L. R., Ir., 309.

8. Where a testator directs a specific sum to be sold, and a certain sum out of the sale moneys to be paid to A., and the residue to B., each of the legacies is specific, and the legatees are entitled to share the income of the fund from the testator's death between them, in proportion to the values of their respective legacies at that time. *Re Jefferys*, 35 L. J., Ch., 426.

9. A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the

testator, while a demonstrative legacy does not carry interest from the testator's death. *Mullins* v. *Smith*, 1 Dr. & Sm. 204, 210; 8 W. R. 739.

1. A testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother: a part of this property consisted of 7,000*l.* bank stock, which, after the brother's death, was increased by a bonus to 8,750*l.* The testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of 7,000*l.* The Court decreed that the 8,750*l.* passed by force of general expressions, which plainly manifested an intention to bequeath all that the testatrix derived from her brother. *Matthews* v. *Maude*, 1 Russ. & M. 397; 8 L. J., N. S., Ch., 106

2. Legacy of 1,000*l.* stock, held not to pass additional capital given by Bank of England as bonus under 56 Geo. 3, c. 96, subsequent to will, and before testator's death. *Norris* v. *Harrison*, 2 Madd. 268.

3. A testator gave to W. H. and M. H. the amount of the bond he held for 1,000*l.*: "when they got their principal money paid to them, they then to give to their uncle J. B. the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond":—Held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal. *Harcourt* v. *Morgan*, 2 Keen 274.

4. A gift of 300*l.* upon a bond does not carry the interest incurred in the testator's lifetime. *Roberts* v. *Kuffin*, 2 Atk 112.

5. Under bequests of the interest, dividends, and proceeds of a sum in stock to S. for life, and of the stock to A. after S.'s death; but if A. should die before twenty-one, etc., to S., a bonus on the stock given under stat. 56 Geo. 3, c. 96, was held to belong to A. as legatee of stock. *Hooper* v. *Rossiter*, 13 Price 771; 1 M'Clel. 527.

6. A testator gave all his estates and effects to trustees upon trust, after paying debts and legacies, to employ the residue for the use and behoof of his grandson G. C. and the heirs of the body of G. C. till he or they arrived at majority, when the trustees were to denude thereof in his or their favours; and failing G. C. or his lawful issue, before either of their attaining to majority, then such residue was to pertain to any posthumous heir male of testator's son T. C. (the father of G. C.), who had just died, at his or the heirs of his body attaining to majority; and failing of him without lawful issue, then to the daughters of T. C. equally. By a codicil he declared that, failing heirs of T. C.'s body, then in place of the residue pertaining to the daughters of T. C. equally it should solely pertain to the eldest heirs female of T. C. and their issue, the eldest heir female through the whole course of succession succeeding always without division, and secluding heirs-portioners. By another codicil, failing G. C. and the heirs of his body, he gave 4,000*l.* to each of his grand-daughters (except the eldest at the time) who should survive him, and the heirs of their bodies. G. C. came of age in 1799, and died unmarried in 1811; and there was no posthumous child of T. C.:—Held, upon the construction of this will and the codicils, affirming the interlocutor of the Court of Session, that G. C. on attaining twenty-one years did not take absolutely, so that on his death the whole residue would become divisible among his next of kin; but that he took only as first substitute in tail, and that upon the failure of the entail (upon his death leaving no heirs of his body) his eldest sister succeeded as heir substitute to him:—Held, further, that the accumulations of interest and profits from the death of the testator until G. C. attained majority belonged to G. C.; as did also some bonuses on Bank stock, part of the testator's property, which had been declared a few weeks before G. C. attained majority, but were payable at a day subsequent to that date. *Cuming* v. *Boswell*, 4 W. R. 752; 2 Jur., N. S., 1005.

7. In June 1865 a dividend of 7 per cent. per annum upon certain shares held by the testatrix was declared payable on the 15th July 1865 and the 15th January 1866. She died on the 31st December 1865.—Held, that the January dividend formed part of the corpus of her residuary estate, and did not pass under a bequest of the annual income of such residuary personal estate. *De Gendre* v. *Kent*, 4 L. R., Eq., 283; 16 L. T., N. S., 694.

8. In the case of a specific legacy of Bank stock, if the testator has died a few days before the dividend day, the legatee would take the dividend, although payable in respect of profits earned during the testator's life. *Clive* v. *Clive*, 1 Kay 600; 23 L. J., Ch., 981; 2 Eq. Rep. 913.

9. The dividend on shares in a public company, partly earned before the testator's death, but declared afterwards, belongs entirely to the specific legatee of the shares; and the Apportionment Act 1870 does not introduce any new rule in this respect. *Whitehead* v. *Whitehead*, 16 L. R., Eq., 528; 29 L. T. 289.

As between Tenant for Life and Remainderman. Income or Corpus.] See ACCRETION AND BONUS—APPORTIONMENT.

Intermediate Rents and Profits.] See LII. *ante.*

Interest on Legacies.] See LEGACY, XIII.

II. AMOUNTS, SHARES, AND PROPORTIONS.

10. Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining twenty-one, and in case of the death of either of them before that period, the legacy to be divided amongst the survivors:—Held, that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them to a separate legacy to that amount. *Stewart* v. *Garnett*, 3 Sim. 398.

11. Where there is a proviso in a will, that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund *pro tanto*; what is given to either of the daughters' children is to be looked upon as given to the daughter. *Thomas* v. *Bennet*, 2 P. W. 343.

12. Testator, possessed of 5,000*l.* three per cent. consols, bequeathed 2,000*l.* thereof to trustees in trust, as to 1,000*l.* for G., and as to

to 2,000*l.* for B.:—Held..that testator meant to give trustees 3,000*l.* in trust; bequest to them being mentioned only once, and the legacy of the 2,000*l.* to B. being mentioned twice. *Alfred* v. *Green*, 5 Madd. 92.

1. A testatrix bequeathed as follows: "As to all the rest of my personal estate, I give the same to A.. B., C., D., etc., upon trust, to pay one-third to P. S. T., for her own proper use; as to the remaining two-thirds, in trust to invest the same and receive the dividends, and pay the same for the use of F. I. T. and C. H. T., for and during the term of their natural lives; and after the decease of either of them, the said F. I. T. and C. H. T., then in trust to pay one-fourth part of the trust-fund unto P. S. T., to and for her own use and benefit, and to pay the dividends and profits of one other fourth part of the said trust-fund unto the survivor of them, the said F. I. T. and C. H. T., to and for his use, for and during the term of his natural life; and from and after the decease of the survivor of them, the said F. I. T. and C. H. T., in trust, to pay, assign, and transfer, and set over the said trust-fund, together with all interest that shall be due thereon, unto P. S. T., to and for her own proper use and benefit." P. S. T. died in 1821, F. I. T. in 1831, and C. H. T. in 1837:—Held, that C. H. T. was entitled, on the death of his brother F. I. T., to three-fourths of the two-thirds of the income of the trust-fund. *Wentworth* v. *Williams*, 11 L. J., N. S., Ch., 107.

2. By his will the testator bequeathed his residue between Ann Sarah Parker and ten other persons (naming them). Two of the legatees having died, the testator, by a codicil, gave the residue between eight persons, naming them, and Ann Sarah Parker, G. F., and Ann Parker. It appeared that Ann Sarah Parker and Ann Parker were the same persons:—Held, that she was entitled to one-tenth, and not to two-elevenths of the residue. *Read* v. *Strangeways*, 12 Beav. 323.

3. Under words in will "to pay to each of my younger children (three daughters), as and for their respective portions, a sum equal to one-fourth of what shall remain to my (eldest) son William, payable to each of my said daughters respectively, at her or their respective ages of twenty-one, or marriage, etc.:—Held, that all daughters were only entitled to a sum equal to a fourth of what remained to the eldest son, or each of them to one-seventh (such appearing to be testator's intent), and that the time of testator's death was that at which the amount of his property and proportions of the shares were to be computed. *Colclough* v. *Gaven*, 3 Dow 267.

4. Testator directed his trustees to invest 1,400*l.* upon trust for his wife for life, and 800*l.* upon trust for his daughter for her life; and he directed the income of the 1,400*l.* to be paid to his daughter for life if she survived his wife. He then directed his trustees, after the decease of his daughter, to pay and divide the two sums of 1,400*l.* and 800*l.* between his daughter's children; but if she died unmarried, or, being married, died without issue, then he gave the two sums, as to the sum of 800*l.*, equally between the brothers and sisters of his wife, and the remainder of the sums equally between his own brothers and sisters. The testator's daughter having survived the testator, and having died unmarried in the lifetime of the testator's widow, the brothers and sisters of the testator's widow claimed the whole fund in which the 800*l.* had been invested:—Held, that the same was divisible in the proportion of eight to fourteen between the brothers and sisters of the testator's widow and the brothers and sisters of the testator. *Hewitt* v. *George*, 18 Beav. 522.

5. A testator devised his Upton Park estate to his five daughters and his grandson, as tenants in common for their respective lives with remainders over. By a codicil he devised to his son Alfred and his heirs "the like share he had given to his five daughters in the Upton Park property, in every respect whatever":—Held, that Alfred took one-seventh in fee. *Bedborough* v. *Bedborough*, 34 Beav. 284.

6. A testator bequeathed 2,400*l.*, part of his preferential stock in a railway company, upon trust for the benefit of a niece; 1,000*l.*, other part of his preferential stock, upon like trusts for the benefit of another niece; and the rest of his preferential stock upon like trusts for the benefit of a third niece. The preferential stock was composed of various kinds of stock of different values.—Held, that the whole of the stock must be apportioned ratably amongst the three nieces. *Sley* v. *Barber*, 16 W. R. 812.

7. A. bequeathed property amounting to 1,279*l.* to B. Subsequently B., after referring to the will of A., and that he was desirous of making the following legacies to A.'s relations, bequeathed to them legacies amounting to 2,800*l.*; and proceeded: but if the property "I became entitled to under the will of A. should fall short and be deficient in paying such legacies, my desire is, that 500*l.* out of any other part of my personal estate shall be paid and applied for that purpose":—Held, that the legacies, though nominally amounting to 2,800*l.*, were limited to 1,279*l.* plus 500*l.*, and that they must therefore abate. *Read* v. *Strangways*, 14 Beav. 139; 20 L. J., N. S., Ch., 487.

LIV. Gifts Void, Illegal, or Against Public Policy.

8. Legacy left to procure a dukedom, void. *Kingston (Earl)* v. *Pierepont*, 1 Vern. 5.

9. Bequest of stock to government, "in exoneration of the national debt," directed to be transferred to such persons as the King under his sign manual shall appoint. *Newland* v. *Att.-Gen.*, 3 Meriv. 684.

10. A power given to a charitable institution by its special act to acquire lands by will infers a power to persons to give to it lands by will. *Perring* v. *Trail*, 22 W. R. 512.

11. *Quære*, whether a direction to bury testator in a monument to be erected in unconsecrated ground, is void. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., N. S., Ch., 40.

12. Bequest for purchasing the discharge of poachers, committed to prison for non-payment of fines, fees, or expenses under the game laws.—Held, void, as encouraging offences, and opposed to public policy. *Thrupp* v. *Collett*, 26 Beav. 126; 5 Jur., N. S., 111.

See also Charity—Condition—Roman Catholic, I.

LV. Death Simply Regarded as a Contingent Event.

I. WHERE GIFT IS IMMEDIATE.

1. Bequest to A., and, in case of her death, to B.:—Held, an absolute interest in A. *Hinchley* v. *Simmons*, 4 Ves. 160.

2. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting. *King* v. *Taylor*, 5 Ves. 806.

3. Legacy to "A., or in case of his death," etc., construed to mean to A., absolutely, if living. *Turner* v. *Moor*, 6 Ves. 557.

4. Legacies to two sisters, with a direction, in case of the death of either, reciprocally to devolve to the other: that direction confined to the case of lapse by the death of either, in the life of the testator, and did not prevent the vesting absolutely. *Cambridge* v. *Rous*, 8 Ves. 12.

5. Residuary bequest in trust for the use and benefit of A., and in case of her death to be equally divided between the children of B. Payment decreed to the executor of A., as having taken the absolute interest. *Ommaney* v. *Bevan*, 18 Ves. 291.

6. Bequest to the use and behoof of A., and in case of her decease to the use and behoof of her children, share and share alike:—Held, a life interest only in A. The capital to her children after her decease. *Douglas* (*Lord*) v. *Chalmer*, 2 Ves. J. 500.

7. Testatrix bequeathed as follows: "I give the legacy of 4,000*l.* to A., and in case of his decease I give the same legacy to his wife, and at her decease to their eldest daughter:—Held, that A. having survived the testatrix was absolutely entitled to the legacy. *Crigan* v. *Baines*, 7 Sim. 40.

8. Words of will after giving legacy were, "And in case of legatee's death, then to children":—Held, that words referred to legatee's death before testator, and that legatee surviving him took absolutely. *Slade* v. *Milner*, 4 Madd. 144.

9. Rule that a bequest to any person, and in case of his death to another, with no reference to the period within which that event is to take place, vests absolutely if such person survive the testator. *Home* v. *Pillans*, Coop. *temp.* Brough. 198; 2 Myl. & K. 15.

10. A testator resident abroad gave a legacy to A., "or in case of his decease, or at his decease, to be equally divided amongst his children." He gave other legacies in similar terms to B., C., etc., and he directed these sums to be paid to the above persons, then residing in Wales; and he appointed executors in trust, to send them to the respective individuals within six months:—Held, that the parents took absolute interests. *Arthur* v. *Hughes*, 4 Beav. 506.

11. Legacy of stock in trust for the use, exclusive right, and property of A., but should she happen to die then in that case among her children; another legacy of stock to A., to be paid her as soon as possible, or, in the event of her death, among her children; another legacy of stock to B., and in case of her death among her children: all these legacies held absolute in the respective mothers. *Webster* v. *Hale*, 8 Ves. 410.

12. One devises to A. 500*l.*, to B. 500*l.*, and so to five others the like sum; "and if any to whom I have given any money legacy happen to die, then his or her legacy, and also the residue of my personal estate, to go to such of them as shall be then living." Decreed, it should be taken to be living at the death of the testator, and not at any time after, so that the death of any of the legatees after would not carry it to the survivors. *Trotter* v. *Williams*, Pre. Ch. 78.

13. Residuary personal property held to be vested in A. and B. in equal moieties, and descendible in the same proportions to their respective children, notwithstanding words giving the property to the survivor "in the event of the death of either," the word "death" being held to refer to death in the testator's lifetime. *Clarke* v. *Lubbock*, 1 Y. & Coll. C. C. 492; 6 Jur. 548.

14. Bequest of 1,000*l.* to testator's sister, and, in case of her demise, 800*l.* to A., and the remaining 200*l.* to B. The sister entitled for life, then to go in the proportions. *Billings* v. *Sandom*, 1 Bro. C. C. 393.

15. General disposition of all the testator's estates, real or personal, to his wife and two children, to be equally divided among them, subject to annuities; on death to devolve to his children equally; the portion of the wife, upon her death, to his children equally; upon their death before her, their portion to her during life, with a limitation over: upon the death of all without issue of the children, whether an estate for life or absolute to the wife, *quære*. *Chalmers* v. *Storil*, 2 Ves. & B. 222

16. Devise to "children, share and share alike.' First codicil appointed a guardian "during minority,"—second codicil "in the event of the death of any of the children, their portion to be divided among the survivors, share and share alike":—Held, that "in the event of the death" meant death during minority. In a will "in the event of the death of the devisee" are never construed to mean the event of a lapse by death before the testator, except from necessity. *Montgomery* v. *Montgomery*, 2 Ir. Eq. R. 161.

17. Bequest of a legacy to the plaintiff for her sole use and benefit, and "in the event of her death, then" to her youngest surviving son:—Held, that the event contemplated a death in the testator's lifetime, and that the plaintiff, having survived him, was entitled absolutely. *Schenk* v. *Agnew*, 4 Kay & J. 405.

18. Bequest to four persons equally, and "in case of the death" of any or either of them, "in the lifetime of the other or others," their shares to go to "survivor or survivors of them":—Held, that the survivorship had reference to the period of the testator's death. *Howard* v. *Howard*, 21 Beav. 550.

19. A testator gave certain gifts to different persons, including some express estates for life. He then gave certain leaseholds to his

daughter M. (a married woman) for her own proper and absolute use and benefit; and afterwards provided, that in case she should die, the premises should go and be for the sole use and benefit of her children living at her decease. The testator appointed M. his sole executrix. M. survived:—Held, first, that the gift was not for her separate use independent of her husband. *Taylor* v. *Stainton*, 2 Jur., N. S., 634; 4 W. R. 538.

Held, secondly, that the subsequent gift for the benefit of her children was only substitutionary, to prevent a lapse in case of her decease before the testator; and that, as she survived the testator, it did not cut down the absolute interest given to her in the first instance; and the property was therefore held to belong to her husband, and to pass to his assignees in bankruptcy. *Ib.*

1. A testator gave legacies to his two brothers, and directed that if either of them "die in my lifetime" his legacy should go to his children, but the legacies were not to be paid till six months after his wife's death. By a codicil reciting the effect of his will and the death of one of his brothers, he directed his legacy to be held for the benefit of his widow for life, and after her death the principal to be paid to her children; and he directed that if his other brother "shall die leaving a widow," such widow should have an interest in the legacy given him in like manner as he had directed the legacy of the deceased brother:—Held, that the words "shall die leaving a widow" meant die in the testator's lifetime, and that interest was payable from the death of the widow. *Hood* v. *Hood*, 18 W. R. 88.

2. The will of S. C., after bequeathing her property to A. C. and J. C., continued thus, "In case of the demise of either the said A. C. or J. C., I do hereby bequeath the same . . . to the survivor for her sole use and benefit during her or their natural lifetime":—Held, that the residue was not disposed of, and that A. C. and J. C. took only as tenants for life. *Watson* v. *Watson, Clarke, In goods of*, 7 P. D. 10; 51 L. J., P., 13; 47 L. T. 24; 30 W. R. 275.

3. A testator by his will bequeathed personal estate to J. W. upon trust for his, the testator's, wife absolutely, and in case his said wife should die in his lifetime, he directed that all his said estate should be held by his said trustee upon certain trusts (which failed), and subject to those trusts he bequeathed all his property to J. W. absolutely:—Held, that the gift to J. W. was dependent on the event of the testator surviving his wife, and that J. W. did not become entitled from the mere fact of the gift to the wife failing to have practical operation. *Underwood* v. *Wing*, 4 De G. M. & G. 633; 1 Jur., N. S., 169; 24 L. J., Ch., 293.

4. A testator left legacies to three persons, and if any of them died their share was to go to the others. One of the legatees and the testator died at the same instant.—Held, that "death" must, according to the ordinary rule, mean death in the testator's lifetime, and that the legacy of the legatee so dying became part of the residue. *Elliott* v. *Smith, Re Elliott*, 22 L. R., Ch. D., 236; 52 L. J., Ch., 222; 48 L. T. 27; 31 W. R. 336.

II. FUTURE GIFT.

5. Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context. *Tilson* v. *Jones*, 1 Russ. & M. 553.

6. In order to advance the apparent intention of the testator, the words "if he should die" were construed "when he should die." *Smart* v. *Clark*, 3 Russ. 365.

7. Bequest over in case of death of devisee generally, and not expressly referable to any certain event or time, within or before which such dying must occur, to give effect to the remainder:—Held, not necessarily to refer to a dying in the lifetime of the testator, but will be construed so as to give effect to such intention on part of testator as may be presumed from the language of the will to have been his object. *Harvey* v. *M'Laughlin*, 1 Price 264.

8. A testatrix bequeathed a legacy to A., his executors, etc., "but in case he should die leaving lawful issue," she bequeathed it to A.'s children. A. survived the testatrix:—Held, that A. took a life interest only. *Johnston* v. *Antrobus*, 21 Beav. 556.

9. The expression "in case of either of their deaths," in a gift over:—Held, not to be confined to deaths taking place during the life of the tenant for life after the testator's death only. *Le Jeune* v. *Le Jeune*, 2 Keen 701; 1 Jur. 235.

Bequest of copyhold and leasehold property to the testator's widow for life; and at her death, the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his share to be divided amongst the surviving children:—Held, that the child of a son who died in the testator's life was entitled to such share as her parent, if he had survived the widow, would have been entitled to. *Ib.*

10. The words "in case of the death" construed to refer to death in the life of the tenant for life. *Galland* v. *Leonard*, 1 Swan. 161; 1 Wils. 129.

Words importing contingency applied to an inevitable event, construed to refer to the occurrence of the event under peculiar circumstances. *Id.* 164.

11. Construction of will.—Continuance of annuities.—Construction of a gift over, if certain persons should die. *Astley* v. *Declieve*, 8 L. J., Ch., 20.

12. Bequest to A. for life, and after her death to B. and C. or their children, in case of their decease. B. died in the lifetime of the tenant for life, leaving children:—Held, that B. took a vested interest, liable to be divested in the event which happened. *Bolitho* v. *Hillyar*, 11 Jur., N. S., 526; 13 W. R. 600.

Bequest to A. for life, and afterwards to the testator's brothers and sisters, share and share alike, or their children in case of their decease:—Held, that the children of a brother, who survived the testator, but died in the life of the tenant for life, were entitled. S. C. 34 Beav. 180.

13. In a bequest of 1,000*l.* to certain persons

for life, and (after their decease) of 400*l.*, part thereof, to A. and B., part and part alike; viz., 200*l.* to A. and 200*l.* to B. for the trouble they might have in the execution of the will; "but in case of either of their deaths," to the survivor; "and in case of both their deaths, to the heirs, executors, and administrators of such survivor, 200*l.* only." The words, "in case of death" were held to refer to death in the lifetime of the tenant for life of the 1,000*l.* *Green* v. *Barrow*, 10 Hare 459; 1 W. R. 197.

1. A testator gave his whole property to his wife, upon condition that she should pay an annuity of 150*l.* to his mother during her life, and after her death to his wife, to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died leaving her husband surviving her:—Held, upon her death, that in the events which had happened, the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it. *Joslin* v. *Hammond*, 2 Myl. & K. 113; 3 L. J., N. S., Ch., 148.

2. A testator gave freehold and leasehold property to his wife for life, and after her death, to A., B., and C., share and share alike (there being neither words of inheritance nor of restriction as to their interest), and after their decease to their children. A., after the death of the testator and tenant for life, died without issue:—Held, that A. was not absolutely entitled, and that his share fell into the residue. *Waters* v. *Waters*, 3 Jur., N. S., 654; 26 L. J., Ch., 624.

3. Legacy of 3,000*l.* to testator's wife A. for life, and after her death one-third to each of his daughters, M. and H., with proviso that if either daughter should die unmarried, or without issue, benefit of survivorship; and if both should die unmarried or without issue, then to son. Also, two-thirds of residue in same manner subject to such contingencies in favour of their issue, and with like benefit of survivorship as was before declared as to the 3,000*l.* A. died in life of testator:—Held, on her death the daughters M. and H. took vested interests in shares of 3,000*l.*, and of the residue. *Laffer* v. *Edwards*, 2 Madd. 210.

4. A. bequeathed stock to his aunt for life, and, after her death, to his father; "and, in case of his death, then to devolve on his brothers and sisters, or their representatives." The father and two brothers predeceased the aunt:—Held, that the death of the father meant death in the life of the tenant for life; that the brothers and sisters who survived the aunt, and the representatives of those who predeceased her, were entitled to the stock. *Re Henderson*, 28 Beav. 656.

5. A residue was given to the wife for life, and afterwards in separate moieties to different persons. One moiety was given over "in case of the death of any or either of them before my said wife," and the other in case of the death of "any or either of them," without specifying any period:—Held, under the circumstances, that the gift over in both cases was to be construed on death "before my said wife." *Ive* v. *King*, 16 Beav. 45; 16 Jur. 489; 21 L. J., Ch., 360.

6. A testator gave stock to trustees, the interest to be paid to A. for life, and after his death the capital to be divided amongst the children of the testator's late daughter B., or their descendants, but should there be none of them surviving, then the capital to be equally divided amongst such other grandchildren as might then be living, or in default thereof to his legal representative. B. had seven children, three of whom died without children in the lifetime of testator; of the remaining four one alone survived, A., the tenant for life; three died before A., and only one of these three left issue:—Held, that the words "should there be none of them surviving" referred to the testator's death, and that the children of B. who survived the testator took vested interests. *Re Dawes*, 4 L. R., Ch. D., 210.

III. DEVISE OF REAL ESTATE.

7. The rule established in numerous cases, that a bequest to A., and in case of his death to B., gives A. an absolute interest in case he survives the testator, is not to be extended to devises of real estate. Accordingly, upon a devise of a certain share of a real estate to the testator's sisters, Mary and Lucy, share and share alike; "and in case of their demise," to be equally divided amongst their children, or their lawful heirs:—Held, that the sisters took estates for life only, with remainder to their children as tenants in common in fee. *Bowen* v. *Scowcroft*, 2 Y. & Coll. 640; 7 L. J., N. S., Exch. Eq., 25.

LVI. Words "Death without Issue," etc. Whether they refer to Indefinite Failure of Issue or Failure of Issue at the Death.

See also LVII. *post.*

I. GIFTS OF PERSONAL ESTATE.

1. General Rule. Indefinite Failure.

8. Remainder of trust of a term to one after default of issue of another, is void. *Pearse* v. *Reeve*, Poll. 29.

9. Limitation of personals after the death

of any person without issue is bad. *Green* v. *Rod*, Fitzg. 68.

1. Limitation of trust of term to A. after death of B., without heir of his body, is void. *Burges* v. *Burges*. Poll. 40.

2. Limitation of sum of money to K. for life, then to her children, and if no children to L., is void. *Boucher* v. *Anthram*, Pol. 37.

3. How far personals may be limited over. *Att.-Gen.* v. *Hall*, Fitzg. 314.

4. No personal property can be limited on so remote a contingency as the death of a person dying without issue generally. *Grey* v. *Montagu*, 3 Bro. P.C. 314. Affirming 2 Eden 205.

5. Trust of term is limited to issue of J., and for want of issue, to G. J. has issue, and dies; issue die. Limitation to G. is void. *Warman* v. *Seaman*, Poll. 114.

6. Remainder of trust of term limited after another's dying without heirs is void. *Buckhouse* v. *Bellingham*, Poll. 33.

7. Devise of a personal estate to one and his issue, or to one, and if he die without issue over, remainder is void. *Gibbs* v. *Barnadiston*, Pre. Ch. 323.

8. Remainder of lease for years on general dying without issue, too remote. Otherwise, if without issue living at the death. *Exel* v. *Wallace*, 2 Ves. 120.

9. Interest of residue of personal estate given by will to a woman for life, then the residue to her nieces; if they die without issue, over: the last limitation over is too remote, and on the death of the aunt the nieces take the whole. *Everest* v. *Gell*, 1 Ves. J. 286.

10. Personal estate bequeathed to F., her executors, administrators, and assigns; but in case of the death of F. without issue, remainder over: this remainder over too remote, as it must be construed a general dying without issue. *Bygge* v. *Bensley*, 1 Bro. C. C. 187.

11. Devise and bequest in trust to pay the income to A. for use during life, with remainder in default of issue to B. for his use during life: remainder in default of issue to C. for life in the same manner, with remainder over. The remainder after the limitation to A. for life is void as too remote, and, A. being heir-at-law and residuary legatee, his title to the real estate and personal was established. *Boehm* v. *Clarke*, 9 Ves. 580.

12. A limitation of personal estate, after the death of the first taker without issue generally, is void. *Beauclerk* v. *Dormer*, 2 Atk. 308.

Testator says, "I make D. my sole heir and executrix; and if she dies without issue, then to go to plaintiff":—Held, that the limitation over of the personal estate was void, and cannot be confined to D.'s dying without issue living at the time of his decease. *Ib.*

13. A limitation by will of personal estate, after the death of N., without lawful issue, is too remote, and void. *Jeffrey* v. *Sprigge*, 1 Cox 62.

14. Limitation of personal property after an indefinite failure of issue void, as too remote, otherwise if confined to the time of the death. Courts endeavour to support such limitation, taking advantage of any expression to construe the event, never having had issue, or to confine it to the death. *Widdison* v. *Hodgkin*, 2 L. J., Ch., 484.

15. Bequest of personal estate to A. during his life, and if he has no heirs, then over:—Held, the bequest over was void, as being too remote. *Bodens* v. *Galway* (*Lord*), 2 Eden 297.

16. Devise of leasehold for years to A., if he dies without issue, remainder over, the whole interest vests in the first taker; otherwise if a lease for lives; for if the taker makes no use of his power on his death, it vests in the remainderman, who takes as special occupant. *Saltern* v. *Saltern*. 2 Atk. 376.

17. Bequest of money to testator's wife, and the issue of her body, and failing such issue, to such of her heirs whom she should appoint by written will:—Held, that the subsequent words did not control the previous limitation, and, therefore, that a bequest over of the money was void, as being too remote. *Howston* v. *Ives*, 2 Eden 216.

18. Bequest of money to A., upon condition that he should pay an annuity to B., and in case B. should die without issue, then to be equally divided amongst such of the testatrix's nearest relations as should at that time be living:—Held, the bequest over was too remote. *Destouches* v. *Walker*, 2 Eden 261.

19. The sense of the words, "die without issue," or "for want of issue," not to be departed from without satisfactory evidence, that they were not intended in that sense. *Donn* v. *Penny*, 12 Ves. 548.

20. Legacy given upon a man's dying without issue; the man dies leaving issue, which issue within six months after died without issue: the legacy not due, it not being intended to arise upon any remoter contingency than the man's dying without issue living at his death. *Nichols* v. *Hooper*, 1 P. W. 198; 2 Vern. 686.

21. A., possessed of a term, devised it to his wife for life, remainder to his first son for life, and if he died without issue, to his second son, etc. The remainder to the second son was held void. *Lore* v. *Windham*, 1 Lev. 290; 2 Ch. Rep. 14.

22. Residue of personal estate bequeathed to the children of the testator's two daughters, their executors, etc., with a limitation over in case both his daughters should die without issue, a vested interest in the grandchildren, and the limitation over, is too remote. *Rawlings* v. *Goldfrap*, 5 Ves. 440.

23. Testator bequeathed 5,000*l.* in trust to pay the interest to his nephew John for life, remainder to John's first son for life, remainder as to the principal for the children of John, and *for default of such issue* to pay the interest to the second and other sons of John successively and to their respective issue; and *for default of issue male of John*, to pay the interest to the testator's nephew Charles for life, etc., etc.:—Held, that the words in italics did not mean "if John shall never have a son," so as to make the limitation to Charles take effect by way of substitution, but that that and all the other limitations subsequent to the limitation to the first son of John were void for remoteness. *Burley* v. *Evelyn*, 16 Sim. 290; 12 Jur. 712.

24. Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life, and in case she dies without issue all to be divided between four nephews and nieces named; the part of one only for life, and

then to be divided between the survivors. The limitation over too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of the death: as to what property it extends to, *quære*. *Barlow* v. *Salter*, 17 Ves. 479.

Devise for life, and in default of issue to another for life, and in default of his issue remainder over; the limitation over void, as to the personal property, either as too remote, or an estate tail by implication. *Id.* 484.

1. A., by will, gives the surplus of his personal estate to his daughter, whom he makes executrix, and willed, that if she died without issue, it should go over to B. and that she should give security that if she died without issue it should go over accordingly. The devise is void; but whether the directing a bond to be given, etc., does not alter the case, *quære*. *Deering* v. *Hanbury*, 1 Vern. 478.

2. A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee. A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*, and, if the brother died without issue, the two nephews to inherit from the brother; and he then proceeded to state that the reason why he left only the interest to his brother and two nephews was, that if they died without issue, the money might go to his three cousins, to be divided equally between them. The brother and nephews all died without issue — Held, that the gift over to the cousins was void, as being too remote. *Lepine* v. *Evrard*, 2 Russ. & M. 378; 1 L. J., N. S., Ch., 150.

3. A. limited 10,000*l.*, on failure of issue of the body of husband and wife, to B. in tail; the remainder is void as an executory devise, being too remote; otherwise, where the limitations are for life, that confining it to a failure of issue during the lives in being; and in the case of executory devises, it has been held to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time. *Trafford* v. *Boehm*, 3 Atk. 449.

4. A testator, who was an Armenian merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies, and directed the residue of his estate and effects to be divided into sixteen shares, six of which were to be placed in the Government funds of Great Britain, there to remain for ever in the testator's name, and the interest thereof to be received by his three sons, Alexander, John, and Lewis, successively for life, and after the death of the survivor of his three sons the interest to be received by the first and other sons of Alexander, and their issue in succession for life; and in default of issue of Alexander, the interest to be received by the first and other sons of John, and their issue in succession for life, with a similar direction in default of issue of John, for the benefit of the issue of Lewis:—Held, that after the life estates to the testator's three sons, the rest of the gifts were void for remoteness. *Raphael* v. *Boehm*, 22 L. J., Ch., 299.

5. A father, by will made in 1821, after a gift of leaseholds to his daughter, gave all the remainder of his property whatsoever to his wife, the income to her for life, and at her death to his daughter, for her own benefit and her children, or one only child if she should have any (all that was given to her being for her own benefit, and not to be subject to the debts, control, or disposition of any husband she might marry); but if she should die without issue the leaseholds were to be enjoyed by his wife for life, and at her death to his sister S. for her life, and at her death, together with all that was left to his wife for her life, to be equally divided between all the grandchildren of his sister. The daughter died without having had a child:—Held, that she was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to the widow's life interest, and that the limitations over, if the daughter "should die without issue," were void for remoteness. *Fisher* v. *Webster*, 14 L. R., Eq., 283; 26 L. T., N. S., 765; 42 L. J., Ch., 156.

2. Death Without Leaving Issue.

6. One possessed of a term devises it to A. and B., and if either of them die and leave no issue of their respective bodies, then to C.: this held a good limitation to C., if A. or B. left no issue at their death. *Forth* v. *Chapman*, 1 P. W. 664.

7. According to Lord Hardwicke's note of *Forth* v. *Chapman* (1 P. W. 664), Lord Macclesfield held, that the words "leave no issue" must relate to the time of the deaths of the testator's two nephews, and could not be extended to a dying without issue generally. See *Beauclerk* v. *Dormer*, 2 Atk. 308.

No authority can be produced where it has been held that a limitation of personal estate shall be confined to a dying without issue living at the death of the first taker. *Sed quære*. *Ib.*

8. Devise of a term to A. for life, remainder to such children as the testator shall leave at his death; and if all his children die without leaving issue, then to B. The children die without leaving any issue at the time of their death: this is a good devise over to B. *Atkinson* v. *Hutchinson*, 3 P. W. 258.

Where the words of a devise of leasehold would make an express estate tail in the case of a freehold, there a devise over of such leasehold is void; *secus*, if the words in the former devise would, in the case of a freehold, make an estate tail only by implication. *Id.* 259.

9. Devise of bank-stock to daughter for life, remainder to such child or children of her as should be living at her death; and if she should not leave any child, or if all children should die without issue, then to J.; the daughter had a son born at the time of making the will:—Held, the words "without issue" were to be construed "without leaving issue," and that the remainder over to J. was a good remainder, and not too remote. *Sheppard* v. *Lessingham*, Ambl. 122.

Personal estate may be limited on life of

child *in esse*, and twenty-one years after. *Id.* 124.

The Court never held a limitation after the death of a person not *in esse*, without issue, good. *Ib.*

In general a limitation of personalty, after dying without issue, is void: but the Court will, if possible, so construe the words "dying without issue," as to support the limitation over. *Ib.*

1. Testator devises leasehold premises to his executor, after payment of certain sums, to pay the rents to A. for life, and then that his natural daughter should have the same for her life; and in case she should die, leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will:—Held, the devise over to the executors not too remote. *Taylor* v. *Clarke*, 2 Eden 202.

2. As to limitation of personal estate, after contingent limitation in tail. See *Sabbarton* v. *Sabbarton*, Forrest 245.

3. A man gives his estate to his wife so long as she shall remain unmarried, but if she marries then to his daughter; and in case the daughter should die without leaving issue, then to J. The daughter died without issue in the mother's lifetime, who still remained a widow:—Held, that the reversionary interest belonged to J. upon the death of the daughter without issue then living. *Gordon* v. *Adolphus*, 3 Bro. P. C. 306

4. Devise of freehold and leasehold estate to A. and B., as tenants in common, and if either of them should die without leaving issue, then as to the share of such of them as should so die without issue as aforesaid, to the use of the survivors of them, the said A. and B., and the heirs of his body. And in case both of them should die without issue of his or their body or bodies, then to the use of C. for life, with remainder to the trustees to preserve, etc., and divers remainders over:—Held, that the limitation to the survivor was a good limitation by way of executory devise, that by the word issue in the succeeding clause, the testator intended such issue as were to take under the prior limitation, and that consequently the limitation over to C. was not too remote. *Radford* v. *Radford*, 1 Keen 486; 6 L. J., N. S., Ch., 138.

5. Bequest of 2,000*l.* in trust for testator's niece, who was then unmarried, with a bequest over if she should die without leaving any issue to attain twenty-one:—Held, not to give her an absolute vested interest in the 2,000*l.*, as the death referred to could not be construed to mean a death in the lifetime of the testator. *Daniel* v. *Warren*, 2 Y. & Coll. C. C. 290; 7 Jur. 462.

6. Bequest of residue to A. for his life, and his heirs male after him; and, if he should not leave any son, then to go to B. and his heirs male. Upon the death of A. without leaving male issue, the limitation to B. takes effect. *Mansell* v. *Grove*, 2 Y. & Coll. C. C. 484; 7 Jur. 666.

7. Testatrix by her will gave 500*l.* to each of her two nieces to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made. And by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die without issue:—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross-remainders between them. *Holloway* v. *Collier*, 1 W. R. 266.

8. A testator, by his will, dated in 1850, gave all his property real and personal, whether land in New South Wales, or in the Island of Ceylon, or funds in the hands of A. & Co., of Calcutta, or of G. in England or elsewhere, to the members of the firm of A. & Co., in trust for the benefit, in equal portions, to the extent of the annual income of his property, of his brothers E. and C., or the heirs of their bodies lawfully begotten; and the meaning of his will was, that if either brother should die leaving lawfully begotten heirs of his body, then should the share or portion of such brother descend to such lawfully begotten heirs; but if one brother should die without lawful issue, then should the whole annual income be paid to the surviving brother; or in case of his death also, to his lawfully begotten heirs; but in case both brothers should demise without lawfully begotten heirs, then should the whole property be divided among his nearest of kin. The testator then appointed executors, with power to appoint other executors; also with full power to get in all moneys, and to sell, dispose of, and convert into money all his real and personal estate, either by public auction or private contract, as to his executors should seem meet:—Held (6 Jur., N. S., 138; 8 W. R. 176), that the testator's personalty was subject to an executory gift over, on the death of his two brothers without leaving issue living at his death; he also declared that the real estate should be sold, and the proceeds, with the personalty, should form a common fund. On appeal:—Held, that the decision as to the personalty was correct, but that there was no conversion of the realty; and that the brothers took an estate tail as tenants in common, with cross-remainders between them of such lands as were subject to English law; and an inquiry was directed as to the effect to be given to the will regarding the lands in Ceylon, by the law prevailing there. *Greenway* v. *Greenway*, 29 L. J., Ch., 601.

3 Gift over "at," "after" Decease.

9. Testator gave the residue of his personal estate to trustees for the use of B. during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body after his decease I give all such residue to O.; this creates a contingency, with a double aspect, and in the event of B. having no child, the limitation to O. is good. *Trotter* v. *Oswald*, 1 Cox 317.

10. Testator gave fourth of personal estate to son absolutely, but by codicil directed that son's share should be only for life of himself and wife, provided they had no issue, and that at their death it should fall into the residue:—Held, son did not take absolutely, but subject

to executory bequest over in case there was no issue of him and wife living at death of survivor. *Rackstraw* v. *Vile*, 1 Sim. & S. 604; 2 L. J., Ch., 102.

1. One by will gives all his lands, money, etc., to his wife, provided if wife dies without issue, then 80*l.* shall remain to his brother after his wife's death. The brother dies in the lifetime of the wife. It was decreed, the legacy good. *Pinbury* v. *Elkin*, 2 Vern. 758, 766; Pre. Ch. 483; 1 P. W. 563.

2. Bequest to testator's daughter and her children, and in default of such issue, and in case of her death, to A. and B., the limitation over takes effect on her dying without children. *Gawler* v. *Cadby*, Jac. 346.

3. A testatrix bequeathed a moiety of her residuary estate to her daughter E. B. O., so that the annual interest thereof should be received by her for her natural life, and upon her decease to go and be equally divided amongst all and every her children lawfully begotten; and in case of her decease without lawful issue, then to J. O. E. B. O. married, and had only one child, which died an infant in her lifetime:—Held, that the word "then" did not mean the instant of death of E. B. O., the mother, but death without issue generally, or without ever having had issue; and that the child of E. B. O., notwithstanding its death in its mother's lifetime, took under the will of the testatrix an absolute vested interest in a moiety of her residuary estate. *Pye* v. *Linwood*, 6 Jur. 618.

4. Gift Over to Several and the Survivor.

4. One having two nephews, A. and B., devises his personal estate to them; and if either die without children, then to the survivor; this is good. *Hughes* v. *Sayer*, 1 P. W. 532.

5. If separate legacies are given to two or more persons with a limitation over to the survivor or survivors, in case of the death of either without issue, the presumption, *primâ facie*, is that the testator had not in his contemplation an indefinite failure of issue. Where pecuniary legacies were bequeathed to several persons for their lives, and if any of them should die without issue, their proportions to be divided among the survivors; the sums were directed to be secured in court, and the dividends paid to the legatees for their respective lives, with liberty to any person to apply upon the death of each legatee. Whether such legatees took an absolute interest in their respective legacies, subject to an executory bequest over in case of their death, leaving no issue, or whether they took an interest for life only, *quære*. *Ranelagh* v. *Ranelagh*, 2 Myl. & K. 441; 1 L. J., N. S., Ch., 183.

6. A testator, who had two sons and one daughter, gave the interest, dividends, and annual proceeds of 3,000*l.* stock, standing in his name, to W., one of his children, for life; and, after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of W., to be equally divided between and amongst them; if more than one, share and share alike, and if but one, the whole to such one, to be paid or transferred to him, her, or them, on his, her, or their attaining twenty-one, and the interest to be in the meantime applied for maintenance and education. He gave similar legacies to each of his other two children and their children; "and upon the death of either of my said sons or daughters without issue, then I direct that the interest, dividends, and produce so, as aforesaid, given and bequeathed to him, her, or them so dying, shall be paid and payable to the survivors or survivor of them, my said sons and daughter, in equal shares and proportions." The testator's son, W., survived him and had one child, who predeceased him:—Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of W. took a vested interest at his birth, but liable to be devested by the death of W. without leaving issue living at his death, and that the gift over, therefore, took effect. *Westwood* v. *Southey*, 2 Sim. N. S. 192; 21 L. J., N. S., Ch., 473; 16 Jur. 400.

7. Testatrix, before the statute 1 Vict. c. 20, bequeathed the residue of her personal estate to her son A. and her daughter B., to be divided equally between them, in case they were both living, at the time of her decease; but if either of them should happen to die before her, or at any time after, without issue, then she bequeathed the share of him or her so dying, and without issue, to the survivor of them. A. and B. survived the testatrix. A. died unmarried in the lifetime of B.:—Held, that the moiety of the residue given to A. devolved to B. *Turner* v. *Frampton*, 2 Colly. 331; 10 Jur. 24.

8 A., seised and possessed of real and personal estates, devises a chattel interest to B., her executors, administrators, and assigns, and freehold and chattel estates and interests to C., her heirs, executors, administrators, and assigns, with a proviso that in case either should die unmarried, or being married should die without issue, then that the bequests so appointed for such of them so dying unmarried, or being married should die without issue, should go to and remain to the survivor of them, her heirs, executors, administrators, and assigns:—Held, that the words, "without issue," meant an indefinite failure of issue, and not issue living at the time of the death of the devisee. *O'Donohoe* v. *King*, 8 Ir. Eq. R. 185.

9. Devise of an estate charged with two several legacies to A. and B.; and in case A. or B. die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, etc. A. dies without issue in the testator's lifetime:—Held, the legacy lapsed, the contingency on which it was given over being too remote. *Massey* v. *Hudson*, 2 Meriv. 130.

5. Gift Over to Persons then Living.

10. J. H., by his will, gave to C. H., his adopted daughter, 20,000*l.* 3 per cent. consols, and his house and landed property at C. and M. The will then proceeded in the following terms:—"But in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews who may be living at the time; and the land, etc., at C., to my nephew the Rev. J. H.; and that at M., to my nephew, Lieut. J. H., etc. I request R. C. and D. S. to be her guardians,

and allow whatever they please for her education annually, and after she has left school; and if she marries, it must be with their consent, and the property to be solely settled upon herself and children. and in no way changed or alienated" :—Held, that under this limitation, the 20,000*l.* consols vested absolutely in C. H. *Candy* v. *Campbell*, 8 Bli. N. S. 469; 2 Cl. & F. 421.

1. A testator directed, that as his sons attained twenty-five, his executors should pay them a share of his estate and effects, it being his will that his sons and daughters should receive equal shares of his estate. And as his daughters attained twenty-five, the executors were to invest 1,000*l.* each for them for life, and the difference between this and their share paid to them. In case any daughter "should die without issue," the 1,000*l.* was to be divided "amongst such of his children as might be then living, and the issue of such as might be dead, share and share alike," the issue to take the like share as the parent would if living have been entitled to :—Held, that the gift over was on an indefinite failure of issue; that there was an absolute gift of the 1,000*l.*, in the first instance, to the daughters, which had not effectually been cut down, and that the daughters were absolutely entitled to the 1,000*l.* *Webster* v. *Parr*, 26 Beav. 236.

2. H., after devises and bequests to his son S., and to his daughters M. and E., gave the whole that was contained in the lease upon the White Lion premises between his wife and his daughter E., share and share alike, during his wife's life; and after her death he devised her share to his daughter E.; but should she die without legal issue, then he devised the White Lion property between such of his aforesaid children as might be then living; or, if none of them should happen to be then alive, he gave the same between his grandson R., and the legal issue of his son S. Upon his death his widow and his daughter E. entered into possession of the White Lion premises, and they continued in such possession until 1853, when E. died, without ever having been married :—Held, that as the gift over was so framed as to show that a personal benefit to R. was intended, the words "should A. die without legal issue," did not mean an indefinite failure of issue, but issue living at the death of E.; and that in the event which had happened, the testator's children living at the death of A. were entitled. *Jones* v. *Cullimore*, 5 W. R. 539; 3 Jur., N. S., 404.

3. A testator, after making a gift to the issue of his nephew, directed that if there should be no child or children, or remoter issue, of his nephew who should survive him and his nephew, and should live to attain the age of twenty-one, then the gift should go over :—Held, that the will must be construed to mean issue born in the lifetime of the testator and his nephew, and that the gift over was not void for remoteness. *Gee* v. *Liddell*, 2 L. R., Eq., 341; 12 Jur., N. S., 541; 35 L. J., Ch., 640; 14 W. R. 853.

4. A. bequeathed to his son Hugh and to his heirs a chattel interest in certain premises, and should his son die without lawful child, he directed that the yearly produce of the premises should be divided in equal portions between the testator's wife and his daughters Isabella and Mary Jane, or such of them as might then be in existence. The wife predeceased Hugh, who died unmarried :—Held, that upon the death of Hugh, Isabella and Mary Jane became entitled in equal shares to the testator's interest in the premises. *Wilson* v. *Chesnut*, 1 Ir. R., Eq., 559; 16 W. R. 417.

5. Testator, after giving property to his three children, and the longest liver of them and their heirs, directed "that, should all his children die without heirs, the property was to be divided between the children of his brothers and sisters alive on the death of his last child" :—Held, that the limitation over was void for remoteness. *Garratt* v. *Cockerell*, 1 Y. & Coll. C. C. 494; 6. Jur. 909.

6. Gift Over on Death under Twenty-one.

6. Devise of a term to J. S., and his assigns for ever; but if he dies without issue before twenty-one, then to go over to his brother. This is a good devise over. *Martin* v. *Long*, 2 Vern. 151; Pre. Ch. 15.

7. Bequest of 1,300*l.* to testator's daughter, provided if she died before twenty-one, and without issue, the legacy should go over to A.; decreed, the devise over in case of the granddaughter's dying without issue under twenty-one, is good, the contingency being to happen before the legatee attains twenty-one. *Pawlet* v. *Doggit*, 2 Vern. 86.

8. Bequest of 100*l.* to A., to be improved till he should attain the age of twenty-one: and in case he should die before twenty-one, or afterwards without issue, then the money to be equally divided between the testator's sons and daughter :—Held, the limitation over too remote. *Gray* v. *Shawne*, 1 Eden 153.

9. Bequest to the testator's two natural sons with survivorship, upon the death of either before twenty-one and without issue, but in the event of both dying without issue, over; the interest beyond maintenance to be added yearly to the principal for their benefit to be paid when they attain twenty-one. The limitation over upon the death of both established: as to the accumulation :—Held, a vested interest; and the payment only postponed. *Kirkpatrick* v. *Kirkpatrick*, 13 Ves. 476.

10. A. devises portions to his four children, payable at their respective ages of twenty-one, or marriage; and in case any of them should die before the time of payment, or should die without issue, then his or their share to the survivor or survivors of them. One of them died under age, and without issue. This, though a limitation of a personal estate, is good, but liable to the contingency of survivorship till it comes to the last of the four children. *Nicholls* v. *Skinner*, Pre. Ch. 528.

7. Where Implied Gift to Issue.

11. Tremor devises the term to A. for life, remainder to such of his issue as he shall appoint; and if A. die without issue, remainder to B.; this is a good devise to B. *Target* v. *Gaunt*, 1 P. W. 432; Gilb. Eq. Rep. 149; 10 Mod. 402.

12 Testator gave a legacy to his son, an estate in fee to a nephew, then several parts of his

freehold estates, and the future purchase of freehold to be made with part of his personal property, and all his leasehold to his wife for life; then to his son and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit. If he die without issue, as well present freehold and leasehold as the estates to be purchased, to be sold, the produce to go over, no part of his present freehold and leasehold, or the estates to be purchased, to be sold during life of wife and son. All the rest, residue, and remainder of his property and effects whatsoever and wheresoever, after paying debts, etc., to the wife; the son is tenant for life, and the devise over is good; but estates not mentioned do not pass by it. *Hockley* v. *Mawbey*, 1 Ves. J. 143.

1. Bequest of a term of years to R. for life, remainder to the issue of R., in such manner as he should appoint, and for want of appointment, remainder to the first son of the body of R., and if no issue male, to the daughters of R., as tenants in common, and not as joint tenants, and for default of such issue remainder over:—Held, that R. took an estate for life only. *Keating* v. *Keating*, Ll. & G. *temp.* Plunk. 291.

2. A testator gave all his real and personal property in trust to be disposed of for the benefit of his daughter for life, and at her decease that she should be at liberty to will the same to issue as she might think fit, but in case of her dying without issue, then he wished the property to go to his brother and sister for their lives, or if his brother should die in the lifetime of his daughter then to his brother's children:—Held, that the daughter took an estate tail in the realty, and an absolute interest in the personalty. *Simmons* v. *Simmons*, 8 Sim. 22; 5 L. J., N. S., Ch., 198.

8. When Restricted in Other Cases.

3. Devise of 400*l.* to A., and if A. die without issue, then to B.; this is good, and must be intended, if A. die without issue living at his death. *Pleydell* v. *Pleydell*, 1 P. W. 748.

If the Court should admit of a distinction between chattels real and personal, it would introduce confusion. *Ib.*

4 Limitation of personal property, if A. should die without issue male, to B. if living, if not C. and D. in succession of age to enjoy, etc., not too remote. *Southey* v. *Somerville* (*Lord*), 13 Ves. 486.

5. A father is the judge of the *quantum*, and also of the time when his daughter's provision shall take place, and a limitation to a daughter on failure of issue male of an eldest son or sons, is not too remote, but shall be considered as a provision. *Goring* v. *Nash*, 3 Atk. 191.

A father limited a copyhold estate to a first son in tail, and to a second, third, fourth, and fifth son, but not having surrendered it, the second son brought his bill to have the want of a surrender supplied. The Court will decree it for all the sons in the same order that the father left it; for where it does not introduce a hardship, or leave other children in distress, the Court will always decree the provision made for one child to be as extensive as he intended. *Ib.*

6. A. gives all his worldly substance to his daughter J., provided she marries with the consent of his executors; but if she should marry without such consent, or should die without issue, then he gives his estate to other persons; the daughter married with consent, but died without ever having any issue; upon a question when this bequest over took effect, it was held to take effect upon the death of the daughter without issue living at that time. *Kelly* v. *Fowler*, 3 Bro. P. C. 299.

7. "Dying without issue":—Held, to mean without issue at her (testator's daughter's) death. *Chamberlain* v. *Jacob*, Ambl. 72.

8. Bequest of personal estate after a contingent limitation in tail, which did not take effect, established. *Phipps* v. *Mulgrave* (*Lord*), 3 Ves. 614.

9. A devise of real estate to A., and the heirs of his body lawfully begotten, and in case of his death without leaving issue of his body, to go over. The testator then bequeathed the residue of his personal estate to A.; and in case he should happen to die without issue of his body lawfully begotten, that in such case the residue should also go over. The bequest over of the residue not too remote, but a good executory bequest, as depending on the same event on which the real estate had been limited over. *Foley* v. *Irwin*, 2 Ball & B. 435.

10. A. limited 10,000*l.* on failure of issue of the body of husband and wife to B. in tail, the remainder is void as an executory devise, being too remote; otherwise where the limitations are for life, that confining it to a failure of issue during the lives in being, and in the case of executory devises, it has been held to be a reasonable construction if it falls within the compass of ever so many lives in being at the same time. *Trafford* v. *Boehm*, 3 Atk. 449.

11. A testator, by his will, gave his residuary estate to trustees, upon trust to permit his two sisters to receive the income thereof for their lives, and after the death of the survivor to pay the capital among their children. If they should die without issue, then in trust for the testator's brother Thomas; but if he should be dead, in trust for his children; and if Thomas and his children should be then dead, in trust for the testator's next of kin. By a codicil, the testator gave as follows: "In addition to my will, I do leave my effects, failing my brothers and sisters and their heirs, to my cousins," naming them. The testator had, in addition to his sisters and brother, one other brother. They all died without leaving any children:—Held, that the gift in the codicil was to take effect or to fail at the time of division; that the bequest to the cousins was not too remote, but took effect. *Re Pattison*, 5 De G. & Sm. 591; 22 L. J., Ch., 286.

12. A testator bequeathed to his daughters A. and C. 1,000*l.* each, to be left at interest by his executors and trustees, and the interest regularly paid to them; and should they marry, it must be with the consent of their brother; and even in that case their husbands were to have no control over principal or interest; and the receipt of his daughters was to be a sufficient discharge of the interest. Should either of his daughters die, or both of them, without issue, they might by their last will and testament dispose of 500*l.* each of 2,000*l.* to any of their brothers or sisters, or nephews and nieces, but to no other person; the remaining 1,000*l.*

to be divided amongst his surviving children, share and share alike; and should his daughters, or either of them, wish to purchase an annuity with their share of the 2,000*l.* for their life or lives, with the consent or under the direction and advice of their guardians, they were to be at liberty to do so. C. died intestate and without issue:—Held, first, that the daughters took life interests only in the 1,000*l.* *O'Neill* v. *Montgomery*, 12 Ir. Ch. R. 163.

Held, secondly, that as to 500*l.* of C.'s share, a trust was created for the brothers and sisters, and nephews and nieces, living at her death, and that they were entitled equally to the 500*l.* in default of appointment. *Ib.*

Held, thirdly, that the brothers of C. who survived her were entitled to the remaining 500*l.*, her sisters having died before her. *Ib.*

II. ABSOLUTE INTERESTS IN PERSONALTY WHERE ESTATES TAIL IN REALTY.

1. Where Interest Only Given.

1. A bequest that 4,000*l.*, and a further sum of 1,500*l.*, shall pertain to J. after the death of R. without lawful issue, is too remote, and the whole shall vest in R. *Glover* v. *Strothoff*, 2 Bro. C. C. 33.

2. Interest of money is devised to A. for life, and if he died without issue, then the principal to go over to another. The remainder over is good. *Smith* v. *Clever*, 2 Vern. 38.

3. N. devised an annuity of 300*l.* per annum to his wife for life, then to accumulate to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body, and, in case of his having no issue, remainder to the next eldest son and his heirs male. The daughters married in the life of the wife; the eldest and two other sons of testator died, leaving the wife without issue: this is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise in the fourth son of testator, who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of the testator. *Turner* v. *Turner*, 1 Bro. C. C. 317; Ambl. 776.

4. A testator gave to each of his five daughters 400*l.* per annum for their lives, and after their respective deceases he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of his daughters should die without issue, then he directed such annuity to cease, and fall into the residue of his estate:—Held, that the words, "in case any or either of his daughters should die without issue," did not give to the daughters an absolute interest in the annuities. *Hedges* v. *Harpur*, *Hedges* v. *Blicke* or *Blick*, 27 L. J., Ch., 742; 4 Jur., N. S., 1209; 3 De G. & J. 129; 6 W. R. 842.

2. Where Corpus Given.

5. Personal estate bequeathed to F. H., her executors, administrators, and assigns; but in case of the death of F. H., without issue, remainder over; this remainder over too remote, as it must be construed a general dying without issue. *Bigge* v. *Bensley*, 1 Bro. C. C. 187.

6. A testator, by his will, gave certain real and personal estate to his daughter for life, with power for her "to will the same to her issue as she might think fit; but in case of her dying without issue," the testator directed that the property should go to his brother and sister; but if the brother died before the daughter, then to the brother's children in equal shares:—Held, that the testator's daughter took an estate tail in his real estate, and an absolute interest in his personalty. *Simmons* v. *Simmons*, 8 Sim. 22; 5 L. J., N. S., Ch., 98.

7. A testator, by his will, devises all his real estate to executors for the purposes thereinafter stated; and after empowering them, either to continue his business, or to dispose of it, he gives the profits of it in the one case, and interest of the moneys arising from such sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives the rents and profits of all his real estates during her life, and at her decease he devises and bequeaths to her heirs all his estates, real and personal, as tenants in common; if his daughter has but one child, such child is to possess the whole, but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders the real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates, when sold, and the rents of them until they are sold. The daughter died without having had issue:—Held, that the daughter took an estate tail in the freeholds; that the real and personal estate being given over together, she took the personal estate absolutely; that the annuity of 150*l.* was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

8. Devise and bequest to A., and the heirs of his body, with limitation over, in case of no such heirs:—Held, an estate tail in real estate, and an absolute interest in personal, the limitation over being void; but if expressed "if he leaves no such heirs," it would be good, as confined to the time of the death, and not after an indefinite failure of issue. *Crook* v. *De Vandes*, 9 Ves. 197.

9. Bequest of personal estate to one for life, and if he has no heirs, over:—Held, he took an absolute interest. *Boden* v. *Watson*, Ambl. 398.

10. J. H., by his will, gave to C. H., his adopted daughter, 20,000*l.* 3 per cent. consols, and his house and landed property to C. and M. The will then proceeded in the following terms: "But in case of her death without

lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time; and the land, etc., at C., to my nephew the Rev. J. H.; and that at M. to my nephew Lieutenant J. H.; and I request R. C. and S. D. to be her guardians, and allow whatever they please for education annually, and after she has left school; and if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated:—Held, that under this limitation the 20,000*l.* consols vested absolutely in C. H. *Candy* v. *Campbell*, 8 Bli. N. S. 469; 2 Cl. & F 421.

1. Bequest of portion of a chattel real "to my son J., and if he die without a lawful male heir, his part of the land falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son, without any incumbrance:"—Held, that J. did not take an absolute interest in his portion of the lands, and that the gift over to R. was not too remote. *Dodds* v. *Dodds*, 11 Ir. Ch. Rep. 374, 476.

2. A gift by will of all testator's funded property and other personal and real estate to his daughter S., she paying all his debts; "and S. shall in no way dispose of any of the funded property, but to hold the same for her natural life: and if she should die without issue, the landed property should go to J. for life. I will and direct that all the funded property shall go to W. and her heirs for ever":—Held, that S. took the funded property for life only, and that on her death it belonged to W. *Exp. Hovill, Re Banks' Trust*, 2 Kay & J. 391.

III. GIFTS OF REAL ESTATE.

1. *Death without Leaving Issue*, 8064.
2. *Gift Over on Failure of Testator's Own Issue*, 8064.
3. *Gift Over "at," "after" Decease*, 8065.
4. *Gift Over in Other Cases*, 8066.
5. *Enlargement of an Express Gift for Life into an Estate Tail by Implication*, 8066.
6. *Other Cases*, 8067.

1. Death without Leaving Issue.

3. Death without leaving issue signifies, as to real estate, a general failure of issue. *Franklin* v. *Lay*, 6 Madd. 258.

4. *Time court*, by will pursuant to power, leaves to her husband "all the profits and revenues of my estate of A. and B. for life, and after his death my said estates to my children, if I should leave any to survive me; but if I leave no such child or children, nor the issue of such, the said estates to J. H., making him sole heir in default of issue, and after the death of my husband." The children take an estate tail, not fee simple, and the remainder to J. H. is good, not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby* v. *Stonehouse*, 2 Ves. 611.

5. Devise to A. and the heirs of his body, but if he leaves no such heirs, over:—Held, that limitation over would be good as confined to the time of his death and not after an indefinite future of issue. *Crooke* v. *De Vandes*, 9 Ves. 197.

6. A gift of real estate to A. for life, with remainder to her children as tenants in common, and in case A. should die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. *Parr* v. *Swindels*, 4 Russ. 283; 6 L. J., Ch., 99.

7. Devise to A., B., and C., etc, share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued from issue to issue for life; but if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and for default of any issue then over:—Held, that A, B, C., etc, take estate tail with cross-remainders. *Mortimer* v. *West*, 2 Sim 274.

8. Devise to A. for life, with remainder to B. and his heirs, but if B. died in the lifetime of A, without leaving lawful issue, then immediately after the death of A. the lands were to be sold, and the produce divided. And in case B. should outlive A. and die "without leaving any lawful issue," then the lands were to be sold by B.'s executors, and the proceeds divided. B. survived A.:—Held, that he took an estate tail, and not an estate in fee, with an executory devise over, and therefore that he could make a good title to a purchaser. *Feakes* v. *Standley* 24 Beav. 485.

2. Gift Over on Failure of Testator's Own Issue.

9 The testator, being married and in ill health, devised the estates in question, after failure of issue male of his own body (and issue male would have taken under his marriage settlement), to the defendant, who was his heir-at-law, for life, with remainder over:—Lord Northington declared, that the devise, being after a general failure of issue male, was too remote and void, and that the defendant took as heir-at-law; but reversed upon a bill of review. *Lytton* v. *Lytton*, 4 Bro. C. C. 441.

10. A testator was tenant for life of two estates with remainder to his wife for life, with remainder to their first and other sons in tail male, with remainder to himself in fee. By his will (made before 1837) he devised one of these estates, "in default of issue of his body, and subject to the life interest of his wife," to trustees for his brother E., for life, with remainder to his first and other sons in tail male. And he devised his other estate, "in the same terms," to the same trustees, to raise money to pay his debts, and subject thereto, in trust for his brother R. for life, with remainder to his first and other sons in tail male. The testator died without issue:—Held, that by the words "in default of issue," the testator in the case of the estate devised to pay debts, clearly referred, not to a general failure of issue, but to a failure at the time of his death; that the same construction must prevail as to the other estate; and consequently that both estates were well devised. *Bagot* v. *Legge*, 34 L. J., Ch., 156; 12 W. R. 1097; 4 N. R. 492; 10 Jur., N. S., 994; 10 L. T., N. S., 898.

11. A devise to A. and B. and their heirs in

default of issue male and female of the testator's own body, is, at the testator's death, a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz., at the death of the testator without issue. *French* v. *Caddell*, 3 Bro. P. C. 257.

1. An estate at C. was settled on A. for life, remainder to his first and other sons in tail male, remainder to A. in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, etc., in case of failure of issue of my body by my said wife, I give and devise the same," etc. He then limited the estate to his brothers in succession, and to their respective first and other sons in tail male. The Court was of opinion that the devise was good. *Egerton* v. *Jones*, 3 Sim. 409.

2. A term being limited in trust for H. in tail, remainder if I die without male issue in the life of H. to C. in tail: the remainder is good. *Howard* v. *Norfolk* (*Duke*), 2 Swan. 454.

3. If personalty be bequeathed to wife and children, and in case she die without issue by him a bequest over:—Held, a good executory bequest. *Evit* v. *Williams*, 9 Mod. 209.

4. Estates settled on the husband for his life, with remainder to his sons successively in tail, remainder to the husband in fee, were devised by the husband, in case he should die without having any issue by his wife, to his wife for her life, remainder to his brother for his life, with remainder in trust for sale, with a direction to pay 4,000*l.* out of the proceeds, rents, and profits, to the eldest daughter of the brother, to be a vested interest on her attaining twenty-one or day of marriage:—Held, that, upon the true construction of the will, the ulterior limitation depended on the failure of issue at the death of the testator, and not on the general failure of issue, and that the daughter was entitled to the 4,000*l.* *Re Rye's Settlement*, 10 Hare, 106; 16 Jur. 1128; 22 L. J., Ch., 345; 1 W. R. 29.

Where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. *Ib.*

The fixing of the time of the death of living persons as the period of payment, considered as inconsistent with the notion that the legacy was to take effect only on general failure of issue. *Ib.*

3. Gift Over "at," "after" Decease.

5. A testator devised lands to his son A. and his heirs for ever, and in case A. should die without lawful issue, desired that, after his death, all the property should go to his daughter and her heirs; and in case both A. and the daughter should die without lawful issue, desired the property should go to his brothers:—Held, an estate tail in A., and not fee simple, with an executory devise over. *Jones* v. *Ryan*, 9 Ir. Eq. R. 249.

6. A devise to J., W., C., etc., and their heirs, each in due succession as named, with usual limitations in failure of issue in A. B., and on the decease of A. B., does not import an indefinite failure of issue in A. B., but the limitation over to J., W., etc., is good by way of executory devise, these words meaning issue living at the time of decease of A. B., the first taker. *Stratford* v. *Powell*, 1 Ball & B. 1.

7. A testator, who died in 1833, devised his residuary real and personal estate to his eldest son and his heirs, executors, etc.; provided and his will was, that, in case his said son should die without leaving any lawful issue of his body, such part of his said residuary estate as was freehold and situate in certain places should at his death be divided into two equal parts, one of which parts he gave to his second son and his heirs, and the other to his daughter and her heirs.—Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living. *Exp. Davies*, 2 Sim. N. S. 114; 15 Jur. 1102; 21 L. J., Ch., 135.

8. A devise to A. and to his heirs and assigns for ever, and, in case he should die without child or children of his body lawfully begotten, a gift over to the children of B., their heirs and assigns for ever, on the decease of A.:—Held, to confer an estate in fee simple upon A., subject to be defeated by an executory devise, if, at his decease, there should be no issue of A. living. *Parker* v. *Birks*, 1 Kay & J. 156; 24 L. J., Ch., 117; 3 W. R. 102.

9. A testator was possessed of two estates in Ireland, Flesk Castle and Dick's Grove. The former he held under a lease for lives renewable for ever; the latter he held in fee. In 1833 he made a will, in which he said, "I give, devise, and bequeath to my son John Coltsmann all those my property, lands, tenements, and premises at and about Flesk Castle," together with plate, furniture, etc. "I also devise and bequeath to my son John Coltsmann my lands, tenements, and premises at Dick's Grove." All his estates, etc., were made chargeable with an annuity to his wife. He afterwards made a codicil, in which he said, "If it should happen that my son John Coltsmann die without heirs of his body lawfully, etc., in that case, and in default of such heirs I do hereby devise and direct that my lands, etc., at Flesk Castle, and the plate and furniture in my will specified, also my lands, etc., at Dick's Grove," all charged with the annuity to his wife, "and also with a reasonable provision, made with my consent, by my son for his wife, payable for her life, shall at my son's death descend and be transferred to my grandson Daniel Cronin, his heirs, etc., for ever, the heir for the time being to add the name of 'Coltsmann' to the name of Cronin." In the event of the contemplated death of the son without heirs, a charge was created in favour of a married daughter. The son never had any child. While in possession he executed disentailing deeds of both estates, and devised them to his wife:—Held, that, reading the will and codicil together, John Coltsmann took the estate of Flesk Castle in fee, with an executory devise over to Daniel Cronin, in the event that happened of John Coltsmann dying without

heirs of his body living at his death; and, as to Dick's Grove, that as the law then (1835) stood, the gift was a gift of that estate to John Coltsmann for life only, with a contingent remainder to Daniel Cronin, in the event of John Coltsmann dying without heirs of his body living at his death. *Coltsmann* v. *Coltsmann*, 3 L. R., H. L., 121; 16 W. R. 943. See also *Fay* v. *Fay*, 5 L. R., Ir., 274.

4. Gift Over in Other Cases.

1. Under a devise of one estate to R. and his heirs, and if he dies without lawful issue then to W., he paying his two sisters 500*l.* apiece, and a devise of another estate to W. and his heirs, and if W. die without lawful issue then his estate to R., he paying his two sisters 500*l.* apiece, and if R. and W. die without lawful issue then to testator's three daughters and their surviving issue; R. took an estate in fee which was not cut down to an estate tail. *Fisher* v. *Barry*, 2 Hog. 153.

2. A devise of real estate to A., "and his heirs and assigns for ever," and, from and after his decease without issue, "to be equally divided amongst the then surviving legatees, share and share alike":—Held, that the first limitation to A., being of an estate in fee in the largest terms, and the gift over being to the survivor of certain ascertained persons, a personal benefit was intended for them, and therefore the gift over must be taken to refer, not to an indefinite failure of issue, so as to cut down A.'s estate in fee to an estate tail, but to a failure of issue to take place within the lives of the executory devisees; and that event not having happened:—Held, that the executory devise had failed, and the estate in fee of A. became absolute. *Greenwood* v. *Verdon*, 1 Kay & J. 74; 21 L. J., Ch., 65; 3 W. R. 124; 3 Eq. Rep. 181.

3. A testator, in 1825, left all his property to his executor for the purpose of paying the following bequests, first paying debts and funeral expenses. He then bequeathed lands for ever to his illegitimate son T., giving him power to will and dispose of same if he had a family, but if he shall die without issue, then to go to the use of his daughter J., also illegitimate:—Held, that the executor took the fee in the lands, and that T. took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation conferred the fee upon J. on indefinite failure of issue of T., J. taking the entire estate remaining in the executor. *Ormsby* v. *Anderson*, 14 W. R. 379.

4. B. by will, dated 1822, gives to his daughter S. certain lands in consideration that she pay to C., or her heirs, 50*l.* by instalments of 10*l.* per annum for five years, to commence twelve months after testator's decease; but in case S. dies without lawful issue, the lands to go to testator's son T. or his heirs, in consideration that he pays to testator's son J. or his heirs the sum of 250*l.* twelve months after the decease of testator's daughter S. After the testator's death S. executed a disentailing deed, by which she affected to convey the property to trustees upon trust for the survivor of herself and her husband. S. died without issue, leaving her husband surviving, and the title deeds of the property were in his possession. On a special case, submitting the questions whether the husband of S. was entitled to retain the deeds, and whether the charge of 250*l.* in favour of J. was a valid charge upon the property:—Held, having regard especially to the two charges of 50*l.* and 250*l.* created by the testator's will, that S. took an estate in fee simple with an executory devise over in the event of her dying without leaving issue living at her death, and therefore that the husband of S. was not entitled to the deeds, and that the 250*l.* was a valid charge on the property. *Blinston* v. *Warburton*, 2 Kay & J. 400; 25 L. J., Ch., 468; 2 Jur., N. S., 858.

5. A testator devised realty to trustees on trust to pay the rents and income thereof to his wife for the maintenance, education, and benefit of his infant son until twenty-one, without liability to account for the same, and upon his said son attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for his said wife during life or widowhood, with remainder over:—Held, that the infant son was a tenant in fee simple in possession, with an executory limitation over. *Re Morgan's Estate*, 24 L. R., Ch. D., 114; 48 L. T. 964; 31 W. R. 948.

See also XLIII. v. 10 *ante*.

5. Enlargement of an Express Gift for Life into an Estate Tail by Implication.

6. An express limitation for life, followed by a limitation over, in case the taker should die without issue not leaving any children:—Held, on objection to title taken in a suit for specific performance, to confer an estate tail. *Machell* v. *Weeding*, 8 Sim. 4; 5 L. J., N. S., Ch., 182.

7. Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over—implied estates tail to M. and C., with cross-remainders in tail. *Stanhouse* v. *Gaskell*, 17 Jur. 157.

8. An estate for life cannot be enlarged to an estate tail by connecting it with a gift on failure of issue living at a particular time, as it may by connecting it with a gift upon the failure of issue generally. *Jenkins* v. *Hughes*, 6 Jur., N. S., 1043; 8 W. R. 667.

9. A gift of real estate to A. for life, with remainder to her children as tenants in common, and in case A. should die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. *Parr* v. *Swindels*, 4 Russ. 283; 6 L. J., Ch., 99.

10. In a devise of land to A. for life, and if A. die without issue then to B.; though here is an express estate for life to A., yet the subsequent words will turn it into an estate tail: but where lands are devised to A. for life, remainder to trustees, etc., remainder to his first, etc., son in tail male, etc., and if A. dies without issue then, etc., this will not give an estate tail to A.; but the words "without issue" must be intended "without such issue." *Blackborn* v. *Edgley*, 1 P. W. 606.

11. J. being seised of some lands in fee and *cestui que trust* or other lands, devises them

to A. for life; remainder to his first and second son in tail male (going no further); and after A.'s death without issue male, then to a charity:—Held, that A. was tenant in tail until issue born, saving as to the trust estate. *Att.-Gen.* v. *Sutton*, 3 Bro. P. C. 75; 1 P. W. 754.

1. Devise to S. for life, remainder to his eldest son and his issue male, and for want of issue of S., to, etc. S. died without issue, and:—Held, he took an estate tail in remainder, like in *Langley* v. *Baldwin*; 1 Eq. Cas. abr. pl. 29, cited in 1 P. W. 759; 1 Ves. 26. *Stanley* v. *Lennard*, Ambl. 355; 1 Eden 87.

2. The Court held, upon the particular language of a will, that an estate tail would not be implied in A. and B., though an estate was given to them for life, and the property was, upon failure of their issue male, limited over to their granddaughters, and there was no express limitation which would include all their issue male. *Houston* v. *Platt*, 7 L. J., Ch., 20.

3. A testator, in a very ungrammatical and obscure will, devised real and personal property, so as to vest the whole legal interest in trustees, in trust for A. and B., during their lives to their separate use. Some unfinished and unconnected portions of sentences succeeded, and these were followed by a direction that, after the decease of A. and B., and failure of their male issue, the property should go to the granddaughter. A. and B. had each only one child, a daughter, and both these daughters were mentioned in the will:—Held, upon the whole context of the will, that A. and B. were only tenants for life, and that an estate in tail male was not to be raised in them by implication. *Houston* v. *Hughes*, 5 Russ. 116.

4. When the general intent is to make a strict settlement, it shall prevail, though some of the limitations may seem contingent; but where the intent to create an estate tail is not plain, but doubtful, the Court will lay hold of anything, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier* v. *Tracy*, 3 Atk. 781, 797.

J. devised all his lands, etc., to his daughter, B., for life, remainder to trustees to preserve, etc., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over, and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin, C., should attain the age of twenty-one; and in case of the death of C. under twenty-one without issue, then to B. for life, remainder to his first, etc., son in tail, remainder to E. for life, remainder to his first, etc., son in tail, remainder over. The Ld. Ch. inclined to confine the contingency in the will of J. of B.'s dying without issue of her body living at her death, to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Id.* 775; Ambl. 204. And see 2 Ken. Ch. 40.

5. Testator devised to S. K. certain real estate for life, charged with the annuities mentioned in his will, and then proceeded: "But in case the aforesaid annuitants, or any of them, shall survive the said S. K., I then give the aforesaid estate unto the eldest surviving son of S. K., charged with the aforesaid annuities; but in default of issue male, I give the above-demised premises unto his brother T. K., charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same conditions; but in default of issue male, my will is, that the aforesaid demised premises do descend unto my heirs-at-law, charged nevertheless with the above-mentioned annuities." S. K. survived all the annuitants mentioned in the will, and after his death J. K., his eldest son and heir-at-law, enjoyed the estate during his life, and then died, leaving a widow and an only daughter:—Held, first, that the dispositions of the devised estate after the death of S. K. were not meant to be contingent on his being survived by all or any one of the annuitants mentioned in the will. Secondly, that S. K. took an estate in tail male, and this estate not having been barred either by himself or by his eldest son J. K., his second son S. K. was entitled to the estate as tenant in tail male, subject to the dower of J. K.'s widow. *Key* v. *Key*, 17 Jur. 769; 22 L. J., Ch., 641; 4 De G. M. & G. 673: 1 Eq. Rep. 82.

6. Devise to T. during his natural life, and from and after his decease unto his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son, then over. T. died leaving an eldest son a minor:—Held, that on the death of T. the eldest son took an estate in fee liable to be devested on his death under the age of twenty-one, with an executory devise over in that event to T. in tail. *Andrew* v. *Andrew*, 1 L. R., Ch. D., 410; 45 L. J., Ch., 23; 34 L. T. 82; 24 W. R. 329.

6. Other Cases.

7. Limitation over after legitimate heirs, too remote, unless capable of being confined to the period of the party's death. *Barret* v. *Beckford*, 1 Ves. 519.

8. One devises all his lands, after the death of his executors, to A. and his heirs for ever; but if he die, leaving no son, then to B. This is a good executory devise to B. if A. dies without issue, because the contingency must happen within the compass of a life. *Fairfax* v. *Heron*, Prec. Ch. 67.

9. A., owner in fee, by his will, left his third son, M., the lands of G. for ever; "but in case he should die unmarried, or without lawful issue, in that case he may will one-half of it as he pleases, and the other half to go, share and share alike, between my surviving sons and their families." The will ended in these words:—"All the bequests given my son R., my grandson M., son to my son J., and also my other three sons M., C., and H., of my property, no part of it shall or will be liable or pay any debts they may contract, nor sell or mortgage same; but always go in the male line, free of any debt of theirs." M. did die without issue, having executed a disentailing deed of the lands of G., and devised them to B. and his heirs:—Held, that M. took an estate tail under A.'s will. *Re Thompson*, 14 Ir. Ch. R. 517; 16 Ir. Ch. R. 228.

10. A testator by his will devised S. and H. estates to trustees upon trust for R. and the heirs of his body, but in case he should die under twenty-one, and without issue, H. estate was to be in trust for A. and the heirs of her

body, but in case she should die under twenty-one, and without issue, upon the same trusts as were thereinafter declared concerning S. estate; and if R. should die under twenty-one, and without issue, as to S. estate, for the testator's son and daughter-in-law for their lives and subject to the trusts thereinbefore thereof declared, in trust for other persons named. Both R. and A. attained twenty-one, and died without issue. *Per* Lord St. Leonards:—The proper construction of the devise is, that the estate should go over if R. died at any time without issue. *Grey* v. *Pearson*, 5 W. R. 454; 26 L. J., Ch., 473; 3 Jur., N. S., 823; 6 H. L. Ca. 61.

1. H., by will, gave his personalty to his wife, and all his real estate by description for the maintenance of herself and his three children, until his son G. attained twenty-one, when he gave him certain portions of the property charged with an allowance to his (testator's) wife; to his son H., when twenty-one, certain portions on the same condition; and to his daughter E., at twenty-one, certain portions; as to some to the wife for life, and at her decease to the daughter absolutely. If G. died without issue, then H. to possess the property; and if H. died before G. without issue, then G. to have H.'s property. If E. died without issue, her property to be equally divided between her brothers, or the survivor; but if she survived them and they left no issue, then she to have all the property. But if the wife survived all the children, to her for life; remainder to his (the testator's) nephews and nieces equally. If there should be an after-born child which survived G. and H., they leaving no issue, the whole to such child; and if such child died without issue, to the wife for life, as if there had been only three children. Testator left four children, one after-born, and nephews and nieces. G. died an infant and unmarried; and on petition by H. to have certain money paid into court by a railway company, paid out to him—ordered accordingly; and held, that the wife took a life estate until eldest son attained twenty-one, and that there were three estates tail successively, and H. was now tenant in tail. The after-born child presented a counter-petition, which was dismissed with costs as against the company; but the costs of the daughter and H. appearing separately:—Held, not costs occasioned by adverse claimants. *Re Hinks's Estate*, 2 W. R. 108.

Implied Gift to Issue.] 2. Testator devised the residue of his freehold estates to his son S. for life, remainder to such issue male or female as S. should appoint: but if S. should die without issue male or female, testator devised same to his daughter M., if she married with consent, and to the issue of such marriage male or female. M. married with consent, and S. died without issue:—Held, that the defendant, a son of M., took no estate under the will. *Beasley* v. *Hourigan*, Hay. & J. 497.

3. Devise to testator's son A., and to his issue male and female, in such shares, manner, and proportions as he might by deed or will appoint, with power to jointure a wife; and in case of the death of A. without lawful issue, then to testator's three daughters equally, share and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns:—Held, that A. took an estate tail. *Whitsitt* v. *Thompson*, 12 Ir. Eq. R 119.

4. A testator devised the lands of A. to his son S. during his natural life *sans* waste, remainder to trustees to preserve, etc., and from and after the decease of the said S. to the use of the heirs male of the said S., in such shares and proportions and subject to such charges as the said S. should by deed or will appoint; and in case of the said S. dying without issue male, to permit his second son J. to receive the rents for his life *sans* waste, remainder to trustees to preserve, etc; and from and after the decease of the said J. to the use of the male children of the said J. in the same manner and with the like power of appointment, and charging as he had hereinbefore devised the same to the male children of his son S., with remainders over in the same terms to testator's third son T., and remainder to his male children, and remainder to his own right heirs. He then devised the lands of B. to his son J. for life, with remainder to his male children as he should appoint, and in default of appointment to the first son of J., and the heirs male of his body, remainder in like manner to the second, third, and every other son of J., and if J. died without issue male to S., to be disposed of among his issue as he should think proper; and he directed that if S. should die without issue male, and that in consequence thereof the lands of A. should descend to his second son J. and issue male, then the lands of B. should immediately descend and go to T. and his issue male, and he gave powers of leasing to S, J., and T., as they should respectively become seised of the said estates:—Held, that S. took an estate tail in the lands of A. *Phillips* v. *Phillips*, 10 Ir. Eq. R. 518.

IV. EFFECT OF THE WILLS ACT, 1 Vict., c. 26, s. 29

5. In ascertaining whether the words "die without issue," in a will made subsequently to the 1 Vict., c. 26, mean an indefinite failure of issue, a contrary intention, within the meaning of s. 29, is not to be inferred from the use of those very words. *Re O'Bierne*, 1 J. & L. 352; 7 Ir. Eq. R. 171.

Under a bequest of personalty by will executed subsequently to the 1 Vict., c. 26, to "A. and B., to be divided equally, with a request to A. that, should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B." A. does not take an absolute interest in the moiety. *Ib.*

6. Mere presumption of intention is not sufficient to exclude the operation of the 29th section of the Wills Act. *Re Mid-Kent Railway Act*, 1856, *Exp. Bate*, 1 N. R. 470.

7. The 29th section of the Statute of Wills has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which additional words, upon the authority of decided cases, modify their meaning. *Morris* v. *Morris*, 17 Beav. 198; 17 Jur. 966; 1 Eq. Rep. 167; 1 W. R. 377.

A testator devised an estate in fee to his son, but if he should die under twenty-one, over. By a codicil he limited the estate over, in the event of the son dying without issue,

"or" under twenty-one:—Held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently that A., on attaining twenty-one, had an absolute estate in fee simple. *Ib.*

Semble, also, that if the clauses were construed disjunctively, the devisee would have an estate tail by virtue of the words "die without issue," notwithstanding the 1 Vict., c. 26, s. 29. S. C. 1 W. R. 377.

1. The principle of construction applied, in the case of wills made since 1837, to the words "die without issue" by the Wills Act, 7 Will. 4 and 1 Vict., c. 26, s. 29, is not affected by the limitation over being in case the first taker shall "die without male issue." *Upton* v. *Hardman*, 9 Ir. R., Eq., 157.

By a will, made in 1839, a perpetually renewable freehold was devised to A., subject to payment of debts and legacies, and in case he should "die without male issue," to B, but with a power to A. to charge the lands with a jointure and portions for his female issue:—Held, first, that A. took an estate quasi in fee, with an executory devise over in the event of his dying without leaving male issue at his death. *Ib.*

Held, secondly, that the language of the will did not evince any contrary intention excluding the application of the rule. *Ib.*

2. A testator since the Wills Act devised real estate to A., and if he should die without leaving lawful issue in the lifetime of B., then over. A. died in the lifetime of B., leaving issue one child, who also died in the lifetime of B.:—Held, that the gift over took effect. *Jarman* v. *Vye*, 2 L. R., Eq., 784; 35 L. J., Ch., 821; 14 W. R. 1011.

3. A., by will dated in May 1839, bequeathed to his illegitimate son R. certain leaseholds, and if R. should die without "heirs or issue," over:—Held, that as s. 29 of the 7 Will. 4 and 1 Vict., c. 26, is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body," and therefore ("without heirs," in the will, meaning "without heirs of the body," R. being illegitimate) the will did not confer the absolute interest on R., with an executory devise over in the case of his dying without issue living at his death, but an estate tail, and, the property being leasehold, the absolute interest. *Re Sallery*, 11 Ir. Ch. R. 236.

4. A testator, in 1846, gave his residuary real and personal estate to J. S. L. and the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to P. C. L. in the same manner; and if P. C. L. should die without heirs male of his body lawfully begot, then the property to go to A. in the same manner. By a codicil the testator, after reciting that by his will he had directed that in the event of the death of J. S. L. "without leaving male issue him surviving," the residue of his real and personal estates should go to P. C. L., revoked that bequest, and in the event of the death of J. S. L. "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of J. S. L.:—Held, that the Wills Act, 1 Vict., c. 26, s. 29, did not apply, and that the gifts over to P. C. L. and A. were void as to the personalty, as being on an indefinite failure of heirs male, and that the codicil did not alter their effect, and that under the will and codicil J. S. L. took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him. *Dawson* v. *Small*, 9 L. R., Ch., 651.

5. A testator devised his fee simple lands to be equally divided between his sons J. and T., and then proceeded as follows: "The fee simple estates and the freeholds to descend to the heirs of J. and T. for ever; but in the event of both sons dying without issue, then to be equally divided between my daughters, share and share alike":—Held, that J. and T. took estates tail with cross-remainders between them. *Fay* v. *Fay*, 5 L. R. Ir., 274

6. A testator bequeathed 1,000*l.* to trustees upon trust for his son A. for life, with remainder to the children of A. He then gave the residue of his estate and effects to his trustees, upon trust for all his children in equal shares, and the heirs of their respective bodies. The following words were then added in a parenthesis: "Except as to my son A. and his children, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than that of any other child.' The will then declared that in case of a failure of issue of any child, the share of him or her whose issue should fail should be held on the trusts therein mentioned. The testator left freehold estates and personalty applicable to the trusts declared of the residue:—Held, that the words "failure of issue" were not made by the 29th section of the Wills Act to mean failure of issue at the death of A. *Green* v. *Green*, 18 L. J., N. S., Ch., 465; 14 Jur. 73; 3 De G. & Sm. 480.

7. A. gave his real and personal estate upon trust as to the income for his brothers, E. and C., or the heirs of their bodies, and declared that if either brother should die, leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue, then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heir; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among the testator's nearest of kin. And he appointed executors, with power to appoint other executors, as to them might seem fit, also with full power to get in and receive all moneys, or securities for money, and to sell, dispose of, and convert into money all other his real and personal estate, either by public auction or private contract, as to them should seem meet:—Held, that there was an effectual gift over of the personalty to the next of kin, in the event of E. and C. dying without leaving issue at their respective deceases. *Greenway* v. *Greenway*, 2 De G. F. & J. 128; 1 Giff. 131; 5 Jur. N. S., 888.

The object of the 29th section of the 7 Will. 4 and 1 Vict., c. 26 is to redress the inconvenience arising from the words "dying without issue," and similar words having

acquired a legal meaning, different from the popular meaning. *Ib.*

Held, also, that there was no conversion of the real estate into personalty from the death of the testator. *Ib.*

Held, also, that the brothers took the real estates as tenants in common in tail, with cross-remainders in tail, with remainder to the next of kin in fee. *Ib.*

LVII. Words "Death without Issue," etc. When Referable to the Objects of a Prior Devise.

I. GIFTS OF PERSONAL ESTATE.

1. In General.

1. The words "if he shall happen to die without issue" may be so controlled by the context of a will as to mean children, and the remainder over will in that case not be too remote. *Att.-Gen.* v. *Bayley*, 2 Bro. C. C. 553.

2. Three annuities for a term of years bequeathed in trust for three children, A., B., and C., respectively for life; in case of the death of either leaving any child or children, his or her annuity to be equally divided between such child or children, share and share alike; in case of the death of either without issue, his or her annuity to go to the survivor or survivors of them equally, share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid. A. died without issue; A.'s annuity went to B. and C., subject to the contingent limitation over; and upon B.'s death, leaving children, belongs in moieties absolutely to his administrator and C. *Vandergucht* v. *Blake*, 2 Ves. J. 533.

3. Produce of estate devised for sale directed to be paid between J. and A., the wife of B., in equal proportions, share and share alike; and in case either should die leaving children, trustees to stand possessed of moiety so given to J. and A. to and for the use and benefit of such child or children at twenty-one, equally to be divided if more than one; and until twenty-one, money to be invested in funds. Interest for children's maintenance. If either J. or A. should die without children, survivor to take share:—Held, J. and A. only tenants for life. *Farthing* v. *Allen*, 2 Madd. 310.

4. Bequest to the children of testator's daughter, to the number of four, of the sum of 1,000*l.* each, if more the 4,000*l.* to be divided between such as should be living at testator's death; but if his daughter should die without issue, then over: a child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy. Bequest of the residue to his daughter and her issue, and for want of such issue over; the limitation over too remote, and therefore void. *Salkeld* v. *Vernon*, 1 Eden, 64.

5. Limitation of a trust of a term to a man for life, remainder to his first, etc., son in tail, and for want of issue male then to all his daughters; there never having been a son, adjudged the trust to the daughter good. *Higgins* v. *Dowler*, 1 P. W. 98; Salk. 156; 2 Vern. 600.

6. Bequest of an annuity to A. and B., and to the survivor for life; and if A. should have any "children," then to be equally divided between them; but if A. should die "without lawful issue," then to C. and his heirs for ever:—Held, that the children of A. took absolute interests in a perpetual annuity. *Robinson* v. *Hunt*, 4 Beav. 450.

7. Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate, at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations. *Malcolm* v. *Taylor*, 2 Russ. & M. 416.

A testatrix, after bequeathing divers annuities and legacies, and amongst others a sum of stock to M. M., to vest at twenty-one or marriage, devised and bequeathed a West India plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books, and certain portraits unto E. G. T. and M. T., for their lives equally; and after the death of either, the whole to the survivor for life; and after the decease of the survivor, then unto the children of M. T., as she should by deed or will appoint; and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; the funded property to be an interest vested in them, being sons at twenty-one, and being daughters at twenty-one or marriage; but in case M. T. should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of A. W., and their heirs; and in case M. T. should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits, unto M. T. for life; and after his decease to his eldest son for ever; but in case M. T. should die under age, and without issue, then the said residue of her money in the funds, plate, books, and portraits unto M. M. absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto E. G. T. and M. T. absolutely. M. T. having survived E. G. T., and died without having been married, it was held that the stock legacy to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded

property for the benefit of T. M., and did not sink into the general residue. *Ib.*

1. Bequest of personal estate to A. for life, remainder to the children of A. equally, and in default of issue of A., upon trust to sell and divide equally amongst B. and C. and all their children "then" living, share and share alike:—Held, that the gift was not too remote, and that B. and C. and their children living at the death of A. alone took the personal estate as tenants in common absolutely. *Cormack* v. *Copous*, 17 Beav. 397.

2. Gift to daughters for life, with remainder to the child or children of such daughters as they should appoint, in default of appointment equally. And on the death of such of the said daughters after attaining twenty-one as should die without issue, her share to be paid to her personal representative:—Held, that "issue" meant issue who should be entitled under the former gift, *i.e.*, children. *Re Wyndham's Trusts*, 1 L. R., Eq, 290.

3. Termor devises the term to A. for life, remainder to such of his issue as he shall appoint; and if A. die without issue, remainder to B. This is a good devise to B. *Target* v. *Gaunt*, 1 P. W. 432; Gilb. Eq. Rep. 149; 10 Mod. 402.

4. Testator gave a legacy to his son, an estate in fee to a nephew, then several parts of his freehold estates, and a future purchase of freehold to be made with part of his personal property, and all his leasehold to his wife for life; then to his son and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit. If he die without issue, as well present freehold and leasehold as the estates to be purchased, to be sold, the produce to go over, no part of his present freehold and leasehold, or the estates to be purchased, to be sold during life of wife and son. All the rent, residue, and remainder of his property and effects whatsoever and wheresoever, after paying debts, etc., to the wife. The son is tenant for life, and the devise over is good; but estates not mentioned do not pass by it. *Hockley* v. *Mawbey*, 1 Ves. J. 143.

5. Devise to A. for life, with power to trustees to settle a jointure on his wife, and, subsequent thereto, in strict settlement on the issue of such marriage; but if A. should die without any issue of his body, then over. The latter words give him an estate tail by implication. *Allanson* v. *Clitherow*, 1 Ves. 24.

6. A testator bequeathed a sum of stock to trustees upon trust to pay the interest to his son during life, with a direction, if he married a woman with a fortune of a specified amount, to settle the fund upon her and the issue of such marriage; but in case of the son's decease, leaving no issue of his body, the stock was given over to various persons; and the testator also disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died leaving issue of that marriage:—Held, that the son's life interest in the stock was not extended by implication to a quasi estate tail; that the issue of his marriage took no interest in the stock; that the gifts over failed; and that after the son's death the stock belonged to the residuary legatee. *Andree* v. *Ward*, 1 Russ. 260; 4 L. J., Ch., 98; and *Green* v. *Ward*, 1 Russ. 262; 4 L. J., Ch., 99.

7. Upon a bequest of equal legacies to testator's six children, to be paid on their respectively attaining twenty-one, or the marriage of the daughters; the interest to be paid in the meantime, and the principal as they might direct to their issue, but in case they should die without issue the principal to go among "the survivors" of his children in equal proportions; after directing his freehold estate to be sold and all the residue of his personal estate, he declared the trusts to be, equally to pay and divide the money therefrom, so soon as his youngest child should attain twenty-one, unto and amongst all his children, share and share alike, and in case of the death of any, leaving lawful issue, the share of the parent so dying to such issue:—Held, that the first bequest was limited to issue living at the death of the children, and that the gift over, on failure of issues, referred to the same objects; and as to the second bequest, that the residuary share of a child who attained twenty-one, and died before the period of division, passed to his representatives, and, *semble*, no child not attaining twenty-one took any interest; that the word "survivors," in the latter clause, was to be construed in its natural sense, and not to mean "others," and that the construction of the word in one part of the will determined its construction in the other part also; lastly, that the gift of the parent's share to such issue applied both to the original and accruing shares of the residue, but not to the specific legacies mentioned in the former clause. *Leeming* v. *Sherratt*, 2 Hare 14; 11 L. J., N. S., Ch., 423; 6 Jur. 663.

8. The testator gave his real and personal estate in trust for his nephew, John, for life, and after his death to be conveyed and transferred to the eldest son of John on his attaining twenty-one, with limitations over in like manner, if there were no such son of John, to two other nephews of the testator, and their sons successively; and in case none of them, the said three nephews, should have a son who should survive the survivor of them, and attain twenty-one, the testator then devised the estate in like manner to a fourth nephew and his sons, with remainders over to their respective daughters:—Held, that the testator, in the words of devise to the fourth nephew, must be construed to mean that such limitation should take effect in case none of the first three nephews should leave a son surviving his parent and attaining twenty-one,—a different construction being repugnant to specific directions as well as to the general scheme of the will,—creating cases of intestacy,—and supposing a capricious and irrational intention; and that, therefore, a son of John, surviving his father and attaining twenty-one, was entitled to an absolute conveyance and transfer of the real and personal estate. *Hillersdon* v. *Lowe*, 2 Hare 355; 12 L. J., N. S., Ch., 321; 7 Jur. 482.

9. A testator by his will gave to C., described as his natural daughter, a sum of stock, and his house and land at C., with a direction, that if she married, the property should be settled solely upon herself and children but in case of death without lawful issue, the money

so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H. :—Held, that C. took an absolute interest in the stock. *Campbell* v. *Harding*, 2 Russ. & M. 390.

1. A testator gave the income of his personal and the rents of his real estate to his daughter for life, for her separate use; and after her decease and that of his wife, he gave the residue of his real and personal estate to trustees in trust, to sell and pay half the produce "to the issue" of his daughters equally, to be paid at twenty-one; and if only one child, then to such one child; and he directed the trustees to apply the interest in the maintenance and education of such issue; "and in default of such issue," he gave such moiety of the residue between his nephews and nieces living at the death of his daughter; and he gave the other moiety of the residue at the decease of his wife and daughter, without issue, to the trustees to permit his godson to take the income for life, and after his decease to certain charities :—Held, that "issue," in the first clause, was to be construed "children," but in the second clause in its ordinary, unrestricted sense, and consequently that the gift over of the first moiety upon the death of the daughter without issue was good, but was too remote as to the second. *Carter* v. *Bentall*, 2 Beav. 551; 9 L. J., N. S., Ch., 303; 4 Jur. 691.

2. By a settlement made in 1811 the Cardigan family plate was settled upon trust for Robert Earl of Cardigan for life, and after his death for James Thomas Lord Brudenell, the son and heir apparent of Robert Earl of Cardigan, for his life, and after his death in trust for the first son of the body of James Thomas Lord Brudenell, his executors and assigns; but if such first son should die under twenty-one, without leaving issue male living at his death, then for the second son, his executors, administrators, and assigns, with like executory trusts in favour of the other sons of James Thomas Lord Brudenell; and if he should not have any son or sons, or having such all of them should die under twenty-one, and some of them should leave issue male living at his death, then in trust for the second son of Robert Earl of Cardigan, his executors, administrators, and assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third and other sons of Robert Earl of Cardigan; and if there should not be any son of Robert Earl of Cardigan or James Thomas Lord Brudenell who should live to attain twenty-one or should die under that age leaving issue male living at his death, then in trust for the settlor. Robert Earl of Cardigan had only one son, James Thomas Lord Brudenell, who attained twenty-one and died without issue :—Held, that upon his death the ultimate trust in favour of the settlor took effect, the words "any son" in the gift over being read "any such son as is hereinbefore mentioned." *Cardigan* v. *Curzon-Howe*, 9 L. R., Eq., 358; 22 L. T., N. S., 640.

3. Under a gift by a testator to his daughter for her life, with remainder to her children, with remainder, in the event of any such children dying under twenty-one, to their children who should survive his daughter and attain twenty-one; and after several intermediate limitations, with a limitation over, provided there should be no child of his daughter, or, being such, they should not attain twenty-one, or leave issue who should attain twenty-one :—Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not attain twenty-one, and was therefore not too remote. *Trickey* v. *Trickey*, 3 Myl. & K. 560.

4. A testator gave his residuary estate to such children as his nephews and niece W., T., and D. should leave at their respective deceases, one-third to the "child or children" of W., and the two other thirds similarly to the "child or children" of T. and D. respectively, and directed that, in case of the death of a nephew or niece without leaving any "children or child," then that third share should be paid to the "children or child" of the other or others leaving "children or a child;" but that if W., T., and D. should all die "without leaving any issue lawfully begotten," the whole residue should go to the children of G. W., T., and D. All died, without leaving children, but one of them left grandchildren :—Held, that "children" must be construed in its natural sense, and not so as to include grandchildren: that "issue" was not to be read "such issue," so as to be confined to children; and that therefore, in the events which had happened, the fund was undisposed of. *Pride* v. *Fooks*, 3 De G. & J. 252; 5 Jur., N. S., 158; 28 L. J., Ch., 81; 1 L. T., N. S., 292. Reversing 4 Jur., N. S., 678.

5. A father gave a fund of 66,666*l.* 13*s.* 4*d.* consols to trustees, upon trust to pay 1,000*l.* a year to each of his two daughters for their lives, and after the death of each daughter he gave 33,333*l.* 6*s* 8*d.* consols, which he described as the share of each daughter, unto and among all and every such child or children she might happen to leave at her decease, to be equally divided between them when and as they should attain the age of twenty-one years, and if but one child, then to such only child; and in case either of his daughters should die without issue, he directed that the 33,333*l.* 6*s.* 8*d.* consols, being the share of her so dying, should be transferred by his trustee to such person or persons, and in such manner as she by her will and testament in writing duly executed might direct and appoint. There was a general residuary gift. One of the daughters executed the power and died, having had one child, who died in her lifetime, leaving children who survived their grandmother :—Held, that the words "die without issue" meant such issue as were previously mentioned, and that the power was validly exercised. *Re Merceron, Davies* v. *Merceron*, 4 L. R., Ch. D., 182; 35 L. T., N. S., 701.

2. Effect of the word "Such."

6. Devise of a personal estate to A. for life, and afterwards for her children, and the yearly interest and produce to be for their maintenance till the sons attain twenty-one, and the daughter eighteen, at which ages their respective portions to be paid, and for want of such issue, then to B. A. dies without issue, and the devise over to B. was held good, the words "for want of

such issue" being the same as "for want of such children." *Staines* v. *Maddock*, 3 Bro. P. C. 108; S. C. *nom. Maddox* v. *Staines*, 2 P. W. 421.

1. One possessed of a term devises it to A. for life; remainder to his first, etc., son in tail successively; remainder to his daughter; and if A. shall have neither son nor daughter, then to J. S. A. dies, having never had a son or daughter; the devise over to J. S. is good. *Stanley* v. *Leigh*, 2 P. W. 686.

2. Limitation of trust of term to several persons for life successively, then to the child, etc., of one of them, and for want of such issue, or after their decease, to S. for life, is a good limitation to S. *Oakes* v. *Chalfont*, Pol. 38.

3. A term was limited to A. for life, then to B. for life, then to such child as B. should leave at his death, and for want of such a child to C. *Quære*, if the remainder to C. is good. *Heyward* v. *Rogers*, 1 Vern. 461.

4. Bequest of residue to testator's daughter and her issue, and for want of such issue over. The limitation over too remote, and therefore void. *Salkeld* v. *Vernon*, 1 Eden 64.

II. GIFTS OF REAL ESTATE.

1. In General.

5. A testatrix devises to A. for life, remainder to A.'s first and other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross-remainders between them in tail, remainder to trustees for a term of years upon trusts to raise and pay such legacies as she had thereafter given or should give by any codicil; and in a subsequent part of the will she bequeaths various legacies from and immediately after the decease and failure of issue of A.:—Held, that "failure of issue" in the gift of the legacies must be construed "failure of such issue" as were included in the limitation of the estate; and that therefore the bequests were not too remote. *Morse* v. *Ormonde* (*Lord*), 1 Russ. 382; 4 L. J., Ch., 158; 5 Madd. 99.

6. Devise to A. for life, with power for trustees to settle a jointure on his wife, and subject thereto in strict settlement on the issue of such marriage; but if A. should die without any issue of his body, then over. The latter words give him an estate tail by implication. *Allanson* v. *Clitherow*, 1 Ves. 24.

7. On a gift of real and personal estate to A. and B. for life, with estates tail to their issue in certain events only, as it was held, followed by a limitation over on a general failure of issue male of A. and B., estates tail were raised by implication in A. and B. *Franks* v. *Price*, 3 Beav. 182; 9 L. J., N. S., Ch., 383. And see S. C. at law, 5 Bing. N. S. 87; 6 Scott 710.

Testator, after giving various life estates in his real and personal property, directed that, if M. H. should, after the death of J. and certain other first tenants for life, die before N. H., the last tenant for life, leaving issue male, then his trustees should convey one moiety of his real estate to trustees, to the use of the first and other sons of M. H. successively in tail male, with remainder to N. H. for life, with remainder to his sons in tail male; and he directed one moiety of his personal estate to be invested in the purchase of real estate to be settled to the same uses. The testator then gave corresponding directions with regard to the other moiety, in the event of N. H. dying before M. H. And in case M. H. and N. H. should both die without issue male, then the testator directed his trustees to convey his real estate to such persons as would be his right heirs at the death of the survivor of M. H. and N. H., and to transfer his personal estate to such persons as would be his next of kin. M. H. died without issue in the lifetime of J., etc. On J.'s death N. H. claimed an absolute interest in the personal estate, and suffered a recovery of the real estate, and afterwards died without issue:—Held, that although M. H. died in the lifetime of J., and although, from the circumstance of M. H. dying in the lifetime of N. H., the events in which the estate was limited to the issue of N. H. did not take place; still, under the terms of the will, N. H. became entitled, on the death of J., to both moieties; and that he took the personal estate absolutely, and took an estate tail in the real estate. *Ib.*

8. A testator by his will expressed his desire of bequeathing his estates to his children, "in such manner that the same shall be enjoyed by them respectively only for and during the period of their natural lives; in order, therefore, to limit the same strictly in entail on them, my said children, and to their several and respective heirs of their bodies respectively." He then devised his real estates to trustees, upon trust, as to part of his real estates, to his son W., for life, "and after his decease the same to go and descend to his first and other sons and daughters in tail in order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so as that each possessor shall take only a life estate and interest in the same;" and in the event of W.'s decease without issue, then he devised his estates to his trustees, upon trust to allow his other children, whom he enumerated, "to possess and enjoy the same, strictly limited to life interest, and in tail to each of them respectively, in the order of primogeniture, males to be preferred to females":—Held, that W. took an estate for life only. *Towns* v. *Wentworth*, 11 Moo. P. C. 526; 6 W. R. 397; 1 L. T., N. S., 274.

9. V. bequeathed his residuary estate to M., in trust to be invested in land, and to go with the entail as in his father's (N.'s) will. N. had devised his estates to V. for life; remainder to his first and other sons successively in tail; remainder to his son J. for life: and similar remainders to the first and other sons of J. in tail: remainder, as to one moiety, to the use of his eldest daughter Marianne during natural life; remainder to the use of the first son of Marianne and the heirs of his body; remainder to the use of the second, third, and every succeeding son of Marianne, and their heirs, according as they should be in seniority of age and priority of birth; remainder to the use of the daughter or daughters of Marianne and their heirs, share and share alike, as tenants

in common, etc.; remainder to the use of his second daughter Eliza Maher during her natural life, with the like remainders and limitations over to the sons and daughters of Eliza and their heirs, as thereinbefore contained respecting the sons' daughters of Marianne; and as to and for the other remaining moiety of the devised lands to the use of his daughter Eliza Maher during her natural life, with the like remainders and limitations over to the sons and daughters of Eliza and their respective heirs as thereinbefore contained respecting the sons and daughters of Marianne as to the first-mentioned moiety. And in default of issue of Eliza, to the use of his daughter Marianne during her life, with the like remainders and limitations over to the sons and daughters of Marianne and their respective heirs as thereinbefore contained respecting the sons and daughters of Eliza. J. survived V., and died in 1850. Both died without issue. Marianne died in 1854, leaving two sons: Edmond, who died without issue in 1870, and Lory. Eliza died in 1875, without ever having had issue. Edmond, after his mother's death, barred the entail in the moiety, in which she took a life estate, and was paid the half of the residuary estate in a cause instituted to administer V.'s assets:—Held, that, on Eliza's death, Lory, the then surviving son of Marianne, became tenant in tail of the half of V.'s residuary estate, in which she had a life interest, and that he, having barred the entail, was absolutely entitled to that half of the funds; as, on the true construction of N.'s will, Eliza's second and other children would take successive estates tail, as well as her first son, and as (although her daughters would take as tenants in common in fee) the words which prefaced the gift over "in default of issue" were to be construed in default of her children, according to the rule approved of in *Foster* v. *Hayes* (4 E. & B. 717, 734). *Smyth* v. *Power*, 10 Ir. R., Eq., 192.

2. Gift to some only of the Issue.

1. Devise to S. for life, remainder to his eldest son and his male issue, and for want of issue of S., to, etc. S. died without issue:—Held, he took an estate tail in remainder, like in *Langley* v. *Baldwin* (1 Eq. Cas. Abr., pl. 29, cited in 1 P. W. 759; 1 Ves. 26). *Stanley* v. *Lennard*, Ambl. 355; 1 Eden 87.

2. J. being seised of some lands in fee and *cestui que trust* of other lands, devises them to A. for life; remainder to his first and second son in tail male (going no further); and after A.'s death, without issue male, then to a charity:—Held, that A. was tenant in tail until issue born, saving as to the trust estate. *Att.-Gen.* v. *Sutton*, 3 Bro. P. C. 75; 1 P. W. 754.

3. Devise to trustees to invest in stock and pay dividends to testator's son for life, and after his decease to his eldest son and his heirs for ever; and in case of their death without issue, to his (testator's) nearest relation, and the nearest relation of such nearest relation for ever. This is a double contingency, and, in the event of the son dying without issue, is good. *Marsh* v. *Marsh*, 1 Bro. C. C. 293.

4. A testator, before the Wills Act came into operation, devised his "estate" at A. to S. K. for life, charged with life annuities; but in case the annuitants, or any one of them, survived S. K., he gave the aforesaid "estate" to S. K.'s eldest surviving son, charged with the annuities; but in default of issue male he gave the aforesaid "estate" to T. K., charged in like manner, and unto his eldest son upon the same conditions; but in default of issue male the premises were to descend to the testator's heirs, charged as above:—Held, first, that the limitation to S. K.'s eldest surviving son ought not to be construed literally so as to make it dependent on S. K. being survived by one of the annuitants; secondly, that the words "in default of issue male" were not to be construed referentially as meaning in default of an eldest surviving son, but generally, so as to give S. K. an estate in tail male; thirdly, that the use of the word "estate" was not in the above will sufficient to give the eldest surviving son of S. K. an estate in fee-simple; fourthly, that where, upon the careful perusal of an instrument, it is impossible not to be satisfied that a strict and ordinary interpretation of its language would disappoint the intention with which it was framed, such an interpretation is not to be adopted. *Key* v. *Key*, 4 De G. M. & G. 73; 17 Jur. 769; 22 L. J., Ch., 641; 1 Eq. Rep. 82.

5. A devise to trustees and their heirs, in trust for A. for life, and his first, etc., sons in tail; but if A. dies without an heir male of his body begotten, then to go over. A. is only tenant for life, and the words "if he dies without an heir male," etc., do not give him an estate tail by implication. *Bamfield* v. *Popham*, 2 Vern. 427; 1 P. W. 54; Salk. 236.

6. Devise to A.. and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters, and to their heirs male for ever, an estate in tail male in A. *Wight* v. *Leigh*, 15 Ves. 564.

7. A. being seised of an estate for lives renewable for ever, devised it to B., C., and D. as tenants in common for their respective lives, with remainder to the issue male of B., C., and D. respectively, in such shares as B., C., and D. respectively should appoint, with powers to each of charging for daughters' portions; and in case either should die without issue male or female, then the share of B. to go to C. and his issue male with like powers; that of C. to D., and that of D. to B. And in failure of issue male of B., C., and D., then to their issue female as tenants in common during their lives. And in default of such issue, then to E. and his issue:—Held, that C. took an estate quasi in tail. *Briscoe* v. *Briscoe*, Hayes 34.

8. J. M. by his will devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. G. M. and the heirs male of his body; and in default of issue of the body of

the said T. G. M. for every other son of T. M. successively, for the like estates and interests, and on failure of all such issue of the body of T. M. upon trust for him and his heirs and assigns for ever. P. M. never had any children:—Held, that P. M. took an estate for life, with remainder to his first unborn son if such son had been born, and that all the remainders over were void; held, also, that effect was to be given to the gift over to T. M. and his sons, in default of issue of the body of P. M., etc., as an independent claim, and that it was subsequently valid. *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 457; 22 L. J., Ch., 313. And see S. C. 15 Jur. 1050; 14 Jur. 1083; 7 Hare 568.

1. Devise to A. for life, with remainder to his first son who should attain twenty-one, in fee, and in default to all his daughters in fee; but in the event of A. dying without any issue male who should attain twenty-one, or any issue female, then over:—Held, that A. took for life only, and that his estate was not enlarged by the gift over in default of issue. *Sanders* v. *Ashford*, 28 Beav. 609.

2. Bequest of a residue upon trust for the testator's grandson, B., the son of Isaac, at twenty-five, for life; and, after the death of B., in case he shall have a son who shall attain twenty-one, then for such son of B. who shall first attain twenty-one, absolutely; and in default of such son of B., and after B.'s death, then upon like trust for the testator's grandson J., etc., with like limitations successively in favour of any other grandsons, sons of Isaac, born in the testator's lifetime, and their respective sons first attaining twenty-one; and in default of a son of any such grandson attaining twenty-one, then upon trust for any son of Isaac, born after the testator's decease, who shall first attain twenty-one, absolutely; and in case no son of any son of the testator's son Isaac then born, or thereafter to be born in the testator's lifetime, nor any son of his son Isaac, born after his decease, shall live to attain twenty-one, then from and immediately after the decease of all the sons and grandsons of his son Isaac, upon trust for the testator's nephew G., for life; and upon the decease of his nephew G., in case he shall have a son who shall live to the age of twenty-one, then upon trust for such son who shall first attain twenty-one, absolutely:—Held, upon the whole context of the will, that the words "after the decease of all the sons and grandsons" must be read as if they had been "after the decease of all the aforesaid," or "all such sons and grandsons;" and that the limitation over in favour of the first son of G. attaining twenty-one was therefore not too remote. *Ellicombe* v. *Gompertz*, Myl. & C. 127.

3. A gift to children in tail not comprehending all the issue, followed by a limitation over in terms "on failure of issue," will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than those provided for were intended to take. If the question had arisen entirely under the will making the gift, and the words "there being a failure of issue of," etc., had been found in that will, following limitations to the issue like those contained in a previous will, in this case those words would have been construed to refer to a failure, not of issue generally, but of such issue as the will had previously provided for. For the purpose of determining the meaning of such a limitation, the principles of construction must be the same whether the instrument be a deed or a will. *Eno* v. *Eno*, 6 Hare 171; 16 L. J., N. S., Ch., 258; 11 Jur. 746.

4. It is a rule of construction that where there is a gift to some only of a class, and then a gift over upon failure of all the class, it is to be construed upon failure not of the whole class, but of those only who are specified before. *Bryan* v. *Mansion*, 5 De G. & Sm. 737; 17 Jur. 202; 22 L. J., Ch., 233.

A testatrix gave a fund to trustees, upon trust to pay the dividends to her niece; and, after her decease if her husband should survive her, and she should leave no "issue" living at her decease, then to the husband for life; but if she should leave "issue," then upon trust to pay a moiety of the dividends to the husband, and to apply the other moiety, during his life, for the benefit of "such issue" during their minorities. After the decease of the niece as to one moiety of the fund, and after the decease of the survivor of her and her husband then as to the whole of the fund, the trust was to transfer and divide the same unto and amongst the "children" of the niece, the shares of sons to be vested at twenty-one, and of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for "children," during minority; and in case the niece should die in the lifetime of the husband leaving issue, and all should die unmarried, then the trust was to pay the whole of the dividends unto the husband. "And from and after the decease of my said niece and her husband, and the survivor of them, and failure of issue of my said niece, upon trust to transfer the fund to other persons":—Held, that the word "issue" in previous parts of the will obviously meant "children," and that the gift over on failure of "issue" meant a failure of "children," and that the gift over took effect. *Ib.*

3. Effect of the word "Such."

5. In a devise of land to A. for life, and if A. die without issue, then to B., though here is an express estate for life to A., yet the subsequent words will turn it into an estate tail; but where lands are devised to A. for life, remainder to trustees, etc., remainder to his first, etc., son in tail male, etc., and if A. dies without issue, then, etc.; this will not give an estate tail to A., but the words "without issue" must be intended "without such issue." *Blackborn* v. *Edgley*, 1 P. W. 606.

6. Testator having given a residue of realty and personalty to his daughter for life, upon her death gave one moiety to her issue, using other expressions which showed "issue" to mean "children," and in default of such issue over; and as to the other moiety, he gave it "on the decease of his daughter without issue," on certain trusts:—Held, that "issue" in the first clause was to be construed as "children," but not in the second clause, and

that the gift over of the second moiety was too remote. *Carter* v. *Bentall*, 2 Beav. 551; 9 L. J., N. S., Ch., 303; 1 Jur. 694.

1. J. devised all his lands, etc., to his daughter B. for life, remainder to trustees to preserve, etc., remainder to the use of the first son of B., remainder to the heirs male of the body of said first son, with divers remainders over; and in case of the death of B. without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin C. should attain the age of twenty-one; and in case of the death of C. under twenty-one without issue, then to D. for life, remainder to his first, etc., son in tail, remainder to E. for life, remainder to his first, etc., son in tail, remainder over. The Ld. Ch. inclined to confine the contingency in the will of J. of B.'s dying without issue of her body living at her death to the death of C. under twenty-one, and that the subsequent limitations to C. after attaining twenty-one, and to D. and E., are not contingent but vested remainders. *Lethieullier* v. *Tracy*, 3 Atk. 775; Ambl. 204. And see 2 Ken., Ch., 40.

2. A testator devised to his grandson C. an estate for his own use during his life, remainder to the first son of the body of C. lawfully begotten, severally and successively in tail male, of the name of C.; and for want of such lawful issue of that name, "either by my grandson C. or my son, then I give and devise it amongst my daughters and their children, share and share alike, to hold unto them, his, or her, or their heirs for ever, as tenants in common, and not as joint tenants":—Held, that C. took an estate for life, with remainder to his first and other sons in tail. *Parker* v. *Tootal*, 11 H. L. Ca. 143; 11 Jur., N. S., 185; 34 L. J., Exch., 198; 13 W. R. 442; 12 L. T., N. S., 89; 5 N. R. 378. And see S. C. *nom. Barrow* v. *Tootal*, 7 H. & N. 962; 8 Jur., N. S., 991; 10 W. R. 357; 6 L. T., N. S., 472.

3. Testator devised an estate to A. for life, remainder to trustees to preserve, etc., remainder to all the children of A., as tenants in common, and not as joint tenants, and for want of such issue to B. for life, remainder to trustees to preserve, etc., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue to C. in fee:—Held, that the children of A. took estates for life, with cross-remainders between them for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross-remainders between them for life, with remainder to C. in fee. *Ashley* v. *Ashley*, 6 Sim. 358; 3 L. J., N. S., Ch., 16.

4. Devise to several for life; and after the death of the surviving tenant for life, to a son of my nephew A. and his heirs and assigns, and for want of such issue over:—Held, that this was a gift in fee to the first-born son of A. *Ashburner* v. *Wilson*, 17 Sim. 204; 14 Jur. 497; 19 L. J., Ch., 330.

5. Testator devised lands to his son A. F. for life, and after the decease of A. F. to his first son lawfully issuing, and for default of such first issue to the use of the second, third, and every other son, and the heirs of his or their bodies, the elder to be always preferred before the younger of such sons and the heirs of his body, and for default of such issue, then to the use of all and every the daughters of A. F. and the heirs of the body of such daughter and daughters, with remainders over:—Held, that the first son of A. F. took neither by construction nor by implication an estate tail, but a life estate only. *Barnacle* v. *Nightingale*, 14 Sim. 456; 9 Jur. 221.

6. A. being seised in fee, devised one moiety of his estate to his sister M. for life, remainder to her first and other sons in tail male, and for want of such issue, remainder to her issue female and the heirs of their body, with power to M. to charge 1,000*l.* for younger children, and for want of such issue, remainder to his sister I. for life, with precisely similar remainders to her issue. The other moiety was limited to I. for her life and to her issue, and then to M. and her issue, in precisely the same way as the first moiety; and for want of issue of M. and I., the whole to L. for life, with remainders over. By codicil, reciting the marriage of M. and D., he devised one moiety to M. for life, remainder to the issue of M. successively, and the heirs of their bodies, "as in said will limited, and for default of such issue to D. for life, with remainder over, as in said will limited." The codicil contained the following clause: "I ratify my will with respect of my real estate in every particular not hereby altered; the only alteration I intend hereby is, that if my sister Margaret should die without issue, or failing issue, that the said D., her husband, or any other husband she may have, should hold a moiety of my estate during his life." M., after the death of D., suffered a recovery to the use of herself, her heirs and assigns for ever:—Held, that, under the limitations in the will, M. took only an estate for her life, and that she did not take an estate tail female, after the estate in tail male to her first and other sons:—Held, also, that from the words "in default of such issue to D.," etc., in the codicil, there was no ground for implying an estate tail in M., the word "such" being referential to the devise in the will of her sons in tail male, and her daughters in tail general:—Held, also, that the devise in the codicil to D., or any future husband, if M. should die without issue, or failing issue, was to take effect on the determination of the express limitations in the will to M.'s first and other sons in tail male, and to her daughters in tail general, and not on a general failure of M.'s issue, and that therefore M. did not take an estate tail by implication. *Hamilton* v. *West*, 10 Ir. Eq. R. 75.

7. A. devised an estate to his daughter for life, and after her decease to her son or sons, daughter or daughters, to him, her, or them, or his, her, or their heirs for ever; but should his daughter die without having such heir or heirs, then the estate to be sold within three months after her death, and the produce divided amongst other persons. The daughter died without having had any issue:—Held, that the gift over was valid, and took effect. *Polley* v. *Polley*, 29 Beav. 134.

8. In a will of a testator, who died in 1804, he devised real estate to his daughter for life, with remainder to her sons successively in tail, with remainder to her daughters as tenants in common (without words of limitation), and in default of such issue, to his son in fee:—Held, that the daughters took for life

only. *Re Arnold*, 33 Beav. 163 ; 9 Jur., N. S., 1186 ; 12 W. R. 4 ; 9 L. T., N. S., 530.

A devise for life contained in a will cannot be enlarged by a recital in a codicil that such devise was in tail. *Ib.*

1. A testator devised lands in question to trustees, to the use of A. for life, remainder to the use of the first and other sons of A., and in default of such issue over :—Held, that the words "in default of such issue" did not operate to enlarge, by implication, A.'s life's estate. *Purcell* v. *Purcell*, 2 Dr. & W. 217 ; 1 Con. & L. 371 ; 4 Ir. Eq. R. 558.

2. Devise of real estates, upon trust to pay the rents and profits unto or to the use of R. L. and his assigns, for his life ; and from and after his decease, unto the first and other sons of R. L. ; and in default of such issue, in trust for the first and other daughters of R. L. ; and in default of such issue, to pay the rents and profits as therein mentioned ; and an ultimate remainder over :—Held, that R. L. did not take an estate tail in the devised premises, nor an estate for life, with remainder to his first and other sons successively in tail, nor an estate for life, with remainder to his first son in fee. *Bridger* v. *Ramsey*, 10 Hare 320.

3. A. devised lands in trust for J. B., a reputed son, for his life, and after his decease for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common ; and in default of issue of the said J. B., to and for the testator's right heirs :—Held, that J. B. took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughter. *Baker* v. *Tucker*, 3 H. L. Ca. 106 ; 14 Jur. 771. Affirming S. C. *nom. Tucker* v. *Baker*, 11 Ir. Eq. R. 104.

4. A devise of "all my real and personal fortune" to A. for life, and after his decease to "the first and every other son in succession of A. ;" and "in default of such issue," to B. for life, with the same limitations to his sons ; and in default of such issue, to the daughters of A. and B. ; and in default of such issue, to C. for life, with the same limitations repeated as to her sons and daughters ; and in default of such issue, to X. in fee :—Held, to give successive life estates in all the limitations previous to the gift to X. *Bevan* v. *White*, 7 Ir. Eq. R. 473.

4. Death without Leaving Issue.

5. Devise to A. for life, remainder to her first child, and his or her heirs ; but if such child should die under twenty-one, without leaving issue, in like manner to every other child of A. ; for in case of issue, it was the testator's will that they should inherit the estate ; but in case A. should die without leaving issue of her body, or having such issue, such issue should die under twenty-one, without leaving issue, then he devised the estate ever. A. never had issue :—Held, that she took a life estate only, and that the devise over took effect. *Goymour* v. *Pigge*, 7 Beav. 475 ; 13 L. J., N. S., Ch., 323 ; 8 Jur. 526.

6. Devise to A. for life ; remainder to all and every the children of her body, their heirs and assigns, as tenants in common ; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her, One died, leaving a child who survived A. ; the other died without issue :—Held, that the word "leaving" meant "having ;" and that the two children of A. took vested interests as tenants in common in fee. *Exp. Hooper*, 1 Drew. 264 ; 21 L. J., Ch., 402. And see *Tarbuck* v. *Tarbuck*, 4 L. J., N. S., Ch., 129.

III. DEVISE OF REVERSION.

7. A., having the reversion in fee of lands settled upon the marriage of B. his son, in the usual manner, devises all the lands in that settlement on failure of issue of the body of B., and for want of heirs male of his own body, to his daughter F. and the heirs of her body. This will does not give an estate tail by implication to B. The devise to F. is executory, and is void as being on too remote a contingency. *Lanesborough* (*Lady*) v. *Fox*, Forrest. 262.

8. A., by a deed on his marriage, settled his estate upon the issue of the marriage, remainder to his own right heirs ; and if he should die without issue male and leave one daughter, then the lands to be charged with 3,000*l.* for her at twenty-one, and 150*l.* yearly maintenance in the meantime. A. having then no issue, by his will devised thus : "And whereas by the settlement made on my wife I have reserved the inheritance of my lands in myself, after the estate tail therein is spent, now in case I die without issue, or that such issue shall die without issue of his, her, or their body, or that the estate tail limited by that settlement shall determine, I give all my said manors to my kinsman B., and to his first and other sons in tail male ; remainder to C. in fee." A. had afterwards a daughter :—Held, that this daughter was entitled under the will to the whole estate as a tenant in tail, and that B. took nothing. *Cornwall* v. *Williams*, Colles's P. C. 117.

9. A. devises lands to his eldest son for life, remainder to the heirs male of his body lawfully begotten ; remainder to the youngest son in like manner ; remainder to any after-born son of the testator's for life ; remainder to the heirs male of the body of such after-born son ; and for want of such issue, to his brother J. for life, with remainder to the heirs male of his body. The testator was on his death-bed at the time of making his will, and died in about three weeks afterwards. The younger son, however, died before him, and the eldest son enjoyed the estate, but died without having barred the entail. Upon a question, whether the limitation over to the testator's brother ought not to be considered as depending upon a general failure of issue, and consequently too remote :—Held, that a remainder after estates tail was vested in the brother, and that the testator had not the event of a second marriage in contemplation. *Jones* v. *Morgan*, 3 Bro. P. C. 323.

10. A testator, who was entitled, under his son's marriage settlement, to a reversion on the death of the survivor of his son and his son's wife without issue living at the death of

such survivor, devised to trustees upon trust to sell, after the several deceases of his son and his son's wife without issue. The proceeds of the sale were to be divided between the testator's six daughters or such of them as should be then living, and the children of such of them as should be dead leaving issue. But in case only one of his said daughters or only one child of his said daughters should be living at the time of the death of the survivor of his son and his son's wife (they leaving no issue), then the whole was to go to such child or grandchild:—Held, that the trust for sale was not void for remoteness, as the will sufficiently referred to the issue mentioned in the settlement. *Lewis* v. *Templer*, 12 W. R. 128; 10 L. T., N. S., 638; 33 Beav. 625.

Held, also, that the class to take must be ascertained at the period of distribution. *Ib.*

LVIII. Death Coupled with a Contingency. Death of Object of Prior Gift in the Testator's Lifetime, and Substitution.

I. GIFT OVER ON DEATH OF A. UNDER A GIVEN AGE, WHO DIES UNDER THE GIVEN AGE.

1. Bequest over, in case of the death of a legatee before a certain period, takes effect on his death within that period during the testator's life. *Humberstone* v. *Stanton*, 1 Ves. & B. 388.

2. One devises portions to his children, A., B., and C., and if any die before twenty-one or marriage, the portion of the child so dying to go to the survivor. One of the children dies in the lifetime of the testator. This is not a lapsed legacy, but shall go over to the surviving children. *Perkins* v. *Micklethwaite*, 1 P. W. 274.

3. Legacies of 300*l.* each to three children at twenty-one, or marriage, and if any should die before that time his legacy to survive to others. One died before testator:—Held, his legacy survived. *Hickman* v. *Stroud*, 2 Eq. Abr. 541.

4. J. devised 3,000*l.* apiece to his three daughters, A., B., and C., at twenty-one or marriage. If any died before, to go to the survivors. B. died in the lifetime of the testator: her legacy shall go to the surviving daughters. *Ledsome* v. *Hickman*, 2 Vern. 611.

5. Legacy to A., in case she shall be living with the testatrix at her decease, with limitations over upon the death of A. before twenty-one or marriage, fails by the death of A. in the lifetime of the testatrix. *Allen* v. *Callow*, 3 Ves. 294.

6. One gives a legacy of 200*l.* apiece to his children, payable at twenty-one, and if any of them die before twenty-one, then the legacy given to him so dying to go over to the surviving children. One of the children dies in the life of the testator; though the legacy lapses as to the legatee dying under twenty-one, yet it is well given over to the surviving children. *Willing* v. *Baine*, 3 P. W. 113.

7. Devise of a legacy of 1,500*l.* to A., payable at his age of twenty-one, and if A. died before then to B. A. dies in the lifetime of the testator, yet B. shall have the legacy. *Miller* v. *Warren*, 2 Vern. 207. *Sed quære*, note there.

Death of A. Over Age.] See Vested, Contingent, and Future Interests, XIV. II.

II. GIFT OVER ON DEATH BEFORE LEGACY IS PAYABLE OR RECEIVED.

8. Divers legacies given by a will, and the will is, that if any legatee died before his legacy was payable, it should go to his brothers and sisters. A legatee died in the testator's lifetime. No lapsed legacy, but shall go to his sister. *Darrel* v. *Molesworth*, 2 Vern. 378.

9. A testator gave to A. a sum of stock to be paid to him within six months after the testator's decease, and in case it should happen that A. should die not having received the legacy, and he should leave any children, such children should be entitled to the same in equal proportions, payable at twenty-one or marriage. A. died during the testator's lifetime, leaving three children who had attained twenty-one, and were living at the testator's decease:—Held, that the legacy lapsed, and the children took no interest therein. *Smith* v. *Oliver*, 11 Beav. 481; 18 L. J., N. S., Ch., 80; 13 Jur. 159.

10. A. devises 500*l.* legacy to the second son of I. S., and devises other legacies to the other sons of I. S., and declares, that, if any of the younger sons of I. S. should die before they are capable of receiving their share, the share or legacy of them so dying shall go to the survivor; the second son dies in the testator's lifetime: this 500*l.* given to the second son shall not survive. *Rider* v. *Wager*, 2 P. W. 330.

11. A testator gave the residue of his estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death, to transfer the trust moneys to his two nephews B. and C., share and share alike, and if either of his nephews died before his share of the trust moneys became payable, without leaving issue, the share of him so dying was to go to the survivor; B., one of the nephews, died in the testator's lifetime, and left no issue:—

Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A., to the surviving nephew C. *Humphreys* v. *Howes*, 1 Russ. & M. 639; Taml. 497; 8 L. J., Ch., 165.

1. A testatrix directed her trustees to place out a sum of 1,000*l.*, and to pay the interest to B. R. for life, and after his decease the principal to be divided between his son and daughter, but in case of the decease of either of them before the same should be payable, then such principal and interest to be paid to the survivor of them. The daughter of B. R. died before the teststrix:—Held, that the daughter's share in the 1,000*l.* did not lapse, but that the whole legacy was vested in the son subject to his father's life-interest, and was not liable to be divested by the death of the son during the life of his father. *Hues* v. *Jackson*, 23 L. J., Ch., 51; 2 Eq. Rep. 462; 2 W. R. 83.

2. A testator left his residuary estate to M. for life, with remainder over to certain beneficiaries, and he directed that, in case any of them should depart this life before the time of distribution, leaving issue, and such issue should die before attaining twenty-one, the share of the beneficiary so dying should be equally divided amongst the survivors of the class:—Held, that the beneficiaries who survived the testator took an absolute interest in the gift, and that there was a lapse as to the shares of those dying in the testator's lifetime. *Taylor* v. *Sparrow*, 13 L. T., N. S., 494.

3. Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, "to be respectively paid at twenty-one or marriage." "But if any of my said children or grandchildren should happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child or children, or grandchildren, so dying, unto and among those that shall be then living, share and share alike." Two of the children died before the testator; their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild, having survived the testator and attained twenty-one, died before the tenant for life; their shares transmissible to their representatives; no implication that the survivorship was to take place among the children and grandchildren distinctly from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Walker* v. *Main*, 1 Jac. & Walk. 1.

4. A testator declared that the trustees of his will should stand possessed of the residue of the money to arise from his real and personal estate upon trust, "for all and every my first cousins-german, to be divided equally amongst them, share and share alike. And in case any of my said cousins shall depart this life before their respective shares shall become due or payable, leaving any lawful issue, I direct that such issue shall have the same share or shares of the same residue as his, her, or their parent or parents would have been entitled to if living." The testator had several first cousins-german living at the date of his will, two of whom died in his lifetime; the others survived him. One of those who died left seven children, the other left no issue:—Held, first, that the words "due or payable" referred to the time of the testator's death; secondly, that the issue of the deceased cousin were entitled to their parent's share; thirdly, that the share of the cousin who died without issue did not lapse. *Coort* v. *Winder*, 8 Jur. 770.

III. GIFT OVER ON DEATH WITHOUT ISSUE.

5. Devise of an estate charged with two several legacies to A. and B., and in case A. or B. die without lawful issue, then the whole of the said two legacies to go to the survivor, his executors, etc.; A. dies without issue in the testator's lifetime:—Held, the legacy lapsed, the contingency on which it was given over being too remote. *Massey* v. *Hudson*, 2 Meriv. 130.

6. Executory trust for three for their lives as tenants in common, if any died without issue living at their deaths, their shares to go to survivors with contingent remainders in tail, and remainders over. Two of them dying in testator's lifetime:—Held, their shares lapsed and went over. *Sperling* v. *Toll*, 1 Ves. 70.

7. Bequest of chattels to two legatees, share and share alike, and, upon the demise of either of them without lawful issue, then the share of her so dying to go to the other. One of the legatees died in the testator's lifetime:—Held, that the other was absolutely entitled by survivorship. *Mackinnon* v. *Peach*, 2 Keen 555; 7 L. J., N. S., Ch., 211.

8. A testator gave his real and personal estate to trustees upon trust to pay the income to his wife, until his youngest child should attain the age of twenty-one, and then upon trust to pay the income in fifths to his wife for life, and to his four daughters for life; and on the death of his daughters respectively, to convey and assign their respective shares to their children respectively; and on the death of his wife, he directed the shares given to her to be divided amongst the daughters in the same manner as the original shares given to them. And his will was, that in case any or either of his children should die without issue, the share or shares of her or them so dying should go and belong to all and every the child or children of such of his said daughters as should happen to leave issue, his, her, and their heirs and assigns, as tenants in common; but in case all his said children should die without leaving lawful issue, then he devised and bequeathed his said real and personal estate unto his brothers and sisters to hold to them, their heirs, executors, administrators, and assigns as tenants in common:—Held, that the share of one of the daughters, who died under age and without issue, did not pass under the gift over to the brother and sisters; but that there was an intestacy as to that share in the events that had happened. *Bastin* v. *Watts*, 4 Jur. 791.

9. A testator gave the residue of his estate to trustees, upon trust, to pay the dividends to A. during her life; and after her death to transfer the trust moneys to his two nephews B. and C., share and share alike, and if either of his nephews died before his share of the

trust moneys became payable, without leaving issue, the share of him so dying was to go to the surviver; B., one of the nephews, died in the testator's lifetime, and left no issue:—Held, that there was no lapse as to any part of the residue, and that the whole went, upon the death of A, to the surviving nephew C. *Humphreys* v. *Howes*, 1 Russ. & M. 639; Taml. 497; 8 L. J., Ch., 165.

IV. GIFT OVER ON DEATH COUPLED WITH OTHER CIRCUMSTANCES.

1. A testator gave his residuary estate in trust for his wife for life, and after her death he directed that one-sixth of the fund should be held to pay the income to his daughter H., for life, and after her death for her children, who being a son or sons should attain twenty-one, or being a daughter or daughters, attain that age or marry. He gave other shares upon similar trusts for others of his children by name, and their children respectively. The will contained a proviso, that if any of his children should die without having any child who, under the above trust, should become absolutely entitled to a share of the trust fund, then, as well the original share given as also the share accruing under the proviso to each child whose issue should so fail and his or her children or child, should go to the survivors or survivor of the testator's children; and if more than one, in equal shares during their lives, and after their deaths the shares to be respectively transmitted to such their respective children or child as thereinbefore expressed with respect to their original shares. H. was living at the date of the will, but died childless in the testator's lifetime:—Held, that her share was not undisposed of, but that the gift over in the proviso took effect. *Rackham* v. *De La Mare*, 2 De G. J. & S. 74; 10 Jur., N. S., 190; 12 W. R. 363; 9 L. T., N. S., 699; 3 N. R. 398.

2. A testator gave certain property to trustees, upon trust for his widow for life; and after her death, directed the same to be sold, and the proceeds divided into two equal shares, one of which he gave, in five equal shares, to A., B., C., D., and E., and directed that, in case of the death of any or either of them before the widow, their respective share should go to their respective husbands or wives, if any, and if not, then to their respective children, and in failure of children, to the survivors of them, share and share alike. He gave the residue to the other moiety, after payment of a legacy, as follows: "to F., G., H., I., and K., and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike":—Held, that the words "in case of the death," in the gift of the second moiety, meant in case of death before the period of distribution, and applied to death in the testator's lifetime, as well as to death after the decease of the testator, but before the decease of the testator's widow:—Held, also, as to each moiety, that the share of each legatee who died before the period of distribution vested absolutely in such of his children as were living at the death of their parent, or at the death of the testator, whichever last happened. *Ive* v. *King*, 16 Jur. 489; 21 L. J., Ch., 560; 16 Beav. 46.

3. A testator gave the income of a fund to trustees, in trust to pay the same to A. B. for life, and after her decease to pay the principal money to her daughters, C. and D., in equal shares, with a gift over to the issue of either of them dying in the lifetime of A. B.; and should either C. or D. die in the lifetime of A. B. without leaving issue, then the whole fund was to go over to the survivor of the two daughters; but in case both of them should die in the lifetime of A B. without leaving issue, then in trust for W. W. absolutely. The testator died in 1844, leaving A. B. and her daughter D surviving. C, the other daughter, died in his lifetime unmarried;—Held, that upon the death of A. B. the surviving daughter was entitled to the whole fund. *Re Domvile's Trusts*, 17 Jur 361; 22 L. J., Ch, 947.

4. Testator ordered the interest of the residue to be paid to his sisters for life, and, in case any of them should die leaving issue, then to transfer the principal of the residuum to the children of the sister so dying at twenty-one; one of the sisters died in the life of the testator: her children shall take her share. *Rheeder* v. *Ower*, 3 Bro. C. C. 240.

5. Gift of personalty to A. for life, remainder to the children of tenant for life *nominatim*, or such of them as should be living at the death of tenant for life. If any of them should die in the lifetime of tenant for life, leaving issue, such issue to take the share the parent would have been entitled to. There were four children of the tenant for life, who all died in lifetime of tenant for life. Two died in the lifetime of testatrix, and one of those two left issue. None of the others left issue.—Held, that the children of the deceased child took the whole fund. *Ashling* v. *Knowles*, 3 Drew. 593.

6. A testator gave to A. a legacy to be vested in him when and as he should attain the age of twenty-one, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his legacy, the testator gave the legacy over, to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. *Re Gaitskell*, 15 L. R., Eq, 386; 28 L. T. 760; 21 W. R. 768.

7. A testator bequeathed his residuary estate in trust for all and every his children and child then born or thereafter to be born, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain or marry under that age, in equal shares as tenants in common; and if there should be but one child, then the whole in trust for that one child. And he declared that the share to which each of his daughters, on her attaining twenty-one, or marrying under that age, should become entitled under the trusts aforesaid, should be held by the trustees in trust for such daughter for her life, and afterwards for her children:—Held, that the children of a daughter who died in the lifetime of the testator did not take any interest.

Stewart v. *Jones*, 3 De G. & J. 532; 5 Jur., N. S., 229.

1. Testator bequeathed a sum of stock to his wife, and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife; but if any or either of them should die in her lifetime, leaving a child or children, such child or children who should be living at the time of the wife's death should be substituted in the place of such of his sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife; the third died a bachelor.—Held, that one-third of the stock fell into the residue. *Hustler* v. *Tillbrook*, 9 Sim. 368.

2. Bequest to the children of A. who should be living at the testator's decease, equally, with survivorship in case of death without leaving issue; if leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death, as upon that construction the clause would be repugnant. *Shergold* v. *Boone*, 13 Ves. 370.

3. A father made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters. A daughter having died in the testator's lifetime leaving children who survived him:—Held, that the gift of the daughter's share did not fail, and that her children were entitled. *Re Speakman, Unsworth* v. *Speakman*, 4 L. R., Ch. D., 620; 46 L. J., Ch., 608; 35 L. T. 731; 25 W. R. 225.

4 A., by his will, gave his residuary personal estate, and the proceeds of his real estate, in trust for his nephews and nieces, the children of his brother F., and his late sister, E. B., and the brother and sister of his wife; and in case either of his nephews or nieces should die in the lifetime of his wife, leaving child or children, such children to be entitled to the father or mother's share. A nephew died in the lifetime of the testator, leaving a child:—Held, that such child was entitled to her father's share of the residue, as being a gift to individuals, and not to a class. *Jones* v. *Frewin*, 12 W. R. 369; 10 L. T., N. S., 330; 3 N. R. 415.

5. When a testator devised real estate upon trust for A and the testator's brothers and sisters for their lives, with benefit of survivorship where any of them should die without leaving children, but where any should die leaving children, upon trust to let such children have their parents' share until the death of the survivor of A. and his brothers and sisters, and upon the death of such survivor upon trust to convey the shares of their parents among the children of A. and his brothers and sisters:—Held, that in the case of A. and of a brother and sister of the testator who were living at the date of his will, but who died before him, their children were entitled to shares during the continuance of the life estate of the testator's surviving brothers and sisters, but that the children of a brother who was dead at the date of the will were excluded from such shares. *Habergham* v. *Ridehalgh*, 39 L. J., Ch., 545; 9 L. R., Eq., 395; 18 W. R. 427; 23 L. T., N. S., 214.

V. DEATH OF OBJECT OF PRIOR GIFT BEFORE DATE OF THE WILL.

1. *Gift to Individuals Nominatim*, 8081.
2. *Children let in to take Original Shares*, 8082.
3. *Gift to a Class, or their Issue or Heirs*, 8084.
4. *Direction that Issue should take their Parents' Share*, 8085.
5. *Effect of the words "Said," "Such,"* 8087.
6. *Other Cases*, 8088.

1. Gift to Individuals Nominatim.

6. Distinction between a substitutional gift after a bequest to persons as a class, and one following a gift to individuals nominatim. *Ive* v. *King*, 16 Beav. 46; 16 Jur. 489; 21 L. J., Ch., 560.

Bequest to A. for life, and afterwards equally between a number of persons by name; and in case of the death of any of them before A., their respective shares to go to their respective children, and on failure of children to the survivors. The following points were decided as to the several original legatees: first, Ann was deceased at the date of the will:—Held, nevertheless, that her children took by substitution: secondly, William was living at the date of the will, but he died before the testator:—Held, also, that his children took his share, and that the class was to be ascertained at the death of the testator: thirdly, Thomas survived the testator, and died in the lifetime of the widow:—Held, that his children took, but were to be ascertained at Thomas's death: fourthly, it was held, that to entitle a child to take, it was not necessary that he should survive the tenant for life: fifthly, Charles died without issue:—Held, that the survivors were to be ascertained at his death, and not at the death of the tenant for life. *Ib.*

7. A testator directed his residue to be divided on the death of his wife (who survived him) equally between his brothers and sisters by name, and declared that if any of them should die leaving issue, his, her, or their shares should go to his, her, or their respective issue:—Held, first, that the class was to be ascertained, as to the issue of a legatee who had died before the testator, at the death of the testator, and as to the issue of a legatee who had survived him at the death of the legatee. *Holgen* v. *Neale*, 11 L. R., Eq., 48; 40 L. J., Ch., 36; 95 L. T. 681; 19 W. R. 144.

8. Testator bequeathed a sum of stock in

trust for three persons *nominatim* in equal shares and proportions, to be transferred to them when they shall attain twenty-one. But if any of them shall depart this life under age and unmarried, then the share original and accruing of him, her, or them so dying to go to the survivors; and if all of them should die under twenty-one and unmarried, the stock to fall into residue. One of the three persons named died prior to the making of the will:—Held, that the share of the one so dying passed to the other two persons named. *Re Sheppard's Trust*, 1 Kay & J. 269.

1. Gift by will to the testator's wife for life, and after her death to A. for life, and after the death of the survivor, to the testator's brothers and sisters, *nominatim*, and the brothers and sisters of his wife also, *nominatim*, "now living," and the children of her deceased brother and sister; but in case any or either of his brothers and sisters, or the brothers and sisters of his wife "now living," should happen to die in the lifetime of his wife and of A., or of the survivor of them, without leaving issue, then the share or shares of such of them as should so die should be equally divided between the survivors; but in case any or either of the testator's brothers and sisters, and the brothers and sisters of his wife, so dying, should leave children, then the share or shares of him, her, or them so dying should be equally divided among the children of him, her, or them so dying that should be living at the death of the testator's wife and A. Prior to the date of the will one of the testator's brothers (H.) had died leaving children, but the testator made his will in ignorance of the death of such brother:—Held, that the words "now living" applied only to the brothers and sisters of the testator's wife, and that the children of his brother H. were entitled to the share to which their father would have been entitled if he had survived the testator. *Hannam* v. *Sims*, 2 De G. & J. 151; 4 Jur., N. S., 863; 27 L. J., Ch., 251; 6 W. R. 347.

2. Bequest to "each of the present nieces of P. E., for her own absolute benefit, and in case any of them shall die in my lifetime, leaving a child or children who shall survive me, then and in every or any such case the legacy intended for her so dying shall go to her child or children, in equal shares, if more than one." P. E. had seven nieces, but at the date of the will only one was surviving, and she was a widow, seventy-five years of age, without children then living, but there were living several daughters and granddaughters of the deceased nephews and nieces of P. E.:—Held, that the children of nieces who were dead at the date of the will were not substituted for their deceased parents. *Crook* v. *Whitley*, 5 W. R. 383; 26 L. J., Ch., 350; 3 Jur., N. S., 703; 7 De G. M. & G. 490. Affirming 4 W. R. 534.

2. Children let in to take Original Shares.

3. Testator devised an estate to trustees in trust for R. T. for life, and after the death of R. T., in trust, to convey the estate unto, between, and amongst all and every, and such one or more of the child or children of R. T., who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R. T. survived the testator, and died, leaving several children, and the issue of another child who was dead at the date of the will:—Held, that such issue were entitled, amongst them, to an equal share of the estate with the surviving children. *Tytherleigh* v. *Harbin*, 6 Sim. 329.

4. Testator bequeathed his residuary estate to his grandchildren, and in case they should all die without leaving issue then to the children of A. and their issue in equal shares, or unto such of them as should prove their right within two years after the death of his grandchildren without issue. A. had five children, two of whom were living at the date of the will and survived the testator; the others died before the date of the will, but two of them left issue:—Held, that all A.'s descendants who were living at the death of all the testator's grandchildren without issue, or who should be born within the two years, would be entitled to participate in the residue. *Clay* v. *Pennington*, 7 Sim. 370; 6 L. J., N. S., Ch., 183.

5. Testator, by will dated 1828, bequeathed a fifth of his residuary estate to W. R., E. R., and J. R., and all other the children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take the share which their parent would have taken if living. One of the children of J. R., not named in the will, had gone abroad in 1809, and had not been heard of since 1815:—Held, by the Court, that he must be presumed to have died before the date of the will, and that his children were entitled to the share which he would have taken if he had survived the testator. *Rust* v. *Baker*, 8 Sim. 443; C. P. C. 172.

6. Bequest in trust for all the children of the testator's late uncle J. B. deceased, to be divided equally amongst them and the issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of their deceased parents equally amongst them:—Held, that a grandchild of J. B., whose parent was dead at the date of the will, was entitled to take. *Bebb* v. *Beckwith*, 2 Beav. 308.

7. Where a sum directed by a testatrix to be set apart for an annuity was bequeathed, on the death of the annuitant, to such of the testatrix's nephews and nieces as should be "then" living, and the child or children of such of them as should be "then" dead:—Held, that the children of a nephew who was dead at the date of the will were entitled to participate, and that their interest vested at the death of the testatrix. *Re Faulding*, 26 Beav. 263; 4 Jur., N. S., 1289; 28 L. J., Ch., 217.

8. The grammatical construction of a will will be followed so as to give a child the share of its deceased parent, even though the parent was dead at the date of the will, when the testator is shown to be acquainted with that fact. *Re Jordan*, 8 L. T., N. S., 307; 2 N. R. 57.

When a gift to a child of its deceased parent's share of an estate is made in such

terms as show that the testator did not contemplate the future death of the parent, the gift does not come within the strict definition of a "substitution gift." *Ib.*

Therefore, the rule, that where issue are substituted for parents, the parent must have been capable of taking, in order to entitle the issue, does not apply. *Ib.*

1. Children cannot take by substitution for their deceased parent who forms one of a class, unless the parent, if living, could himself have taken. *Coulthurst* v. *Carter*, 15 Beav. 421; 16 Jur. 532; 21 L. J., Ch., 555.

A testatrix devised and bequeathed her real and personal estate to trustees, upon trust to pay the income to M. W. for her life, and then to M. W.'s mother for her life (in case she survived M. W., and M. W. left no issue surviving); and after the decease of M. W., and also after the decease of her mother, in case the gift to the mother should take effect, upon further trust to sell the real estate. The testatrix then directed the sale moneys to form part of her residuary personal estate; and in the event of M. W. dying leaving no issue (which event happened), she gave one moiety of her residuary personal estate, from and after the decease of the survivor of M. W. and M. W.'s mother, unto and among the child and children then living of A. A., and the issue then living of any child or children of the said A. A. dying in the lifetime of the said M. W., and to their respective executors, administrators, and assigns, share and share alike, the issue of any such deceased child or children of the said A. A. taking only the share or shares that their respective parent or parents would have taken if living at the death of M. W. And the testatrix declared, that if all or any one or more of the children of the said A. A. should die without issue in the lifetime of M. W., then she gave the share or shares of him, her, or them so dying unto and among the child and children of M. H who should be living at the death of M. W., and to their respective executors, administrators, and assigns, equally to be divided between them, share and share alike. The testatrix died in 1825. M. W. died a spinster in 1830. M. W.'s mother died in 1850. A. A. had seven children, of whom the said M. H. was one. Five of them had died without issue before the date of the will. M. H. was dead at the date of the will, but left children, all living, except one H. C., who survived M. W., and died in the lifetime of M. W.'s mother, leaving two children, who survived M. W.'s mother:—Held, first, that the words "then living" referred to the period of distribution, and that H. C. took nothing, as she did not survive that period. Secondly, that H. C.'s children took nothing, as she did not die in the lifetime of M. W. Thirdly, that the words "dying in the lifetime of the said M. W." were not confined to death after the date of the will; and that although M. H. was dead when the will was made, her children, who survived the period of distribution, were objects of the gift, and took among them one-half of the above-mentioned moiety of the trust fund. Fourthly, that in the events which had happened, the other half of that moiety was undisposed of. *Ib.*

2. A father gave property to the children of A. living at a prescribed period, and the issue of deceased children, so as such issue should have no greater share than their parents would have taken if living, and he afterwards provided that if any one or more of such issue should be then dead, having left lawful issue, then the issue of such issue as should be so dead should receive the share which their, his, or her parent would have taken if living:—Held, that the effect was to create a joint tenancy amongst the members of the various families, subject to this, that if any one died leaving issue it must be considered for the purpose of determining the share which such issue were to take, as if he had survived the period of distribution, but had severed the joint tenancy at the date of his death. *Heasman* v. *Pearce*, 41 L. J., Ch., 705; 7 L. R., Ch., 275; 20 W. R. 271; 26 L. T., N. S., 299; 40 L. J., Ch., 285; 11 L. R., Eq., 522.

Held, also, that the issue of grandchildren of A. must be confined to children, and that the issue of a grandchild who was dead at the date of the will took. *Ib.*

The words "then living," though in one clause of a will they were held by virtue of the above-mentioned proviso to refer to the period of distribution, were in another clause, to which the proviso was held inapplicable, considered to refer to the death of a tenant for life. *Ib.*

3. A testator gives all his property, real and personal, to trustees, directing them to stand seised and possessed of all his said estates, real and personal, upon trust to receive the rents, dividends, and annual profits, and pay the same from time to time to his son G. during his life until he should become bankrupt or insolvent, or make a composition with his creditors; and from and after any of such events, upon trust to receive the rents, dividends, and profits, and accumulate the same at compound interest, and lay out the same on mortgage, such accumulations to continue to be made for twenty-one years after his the testator's death. There was then power to the trustees to apply such sums as they should think fit towards the maintenance of his son's wife (if he should have one) and the maintenance and education of his children (if any), until the expiration of twenty-one years, and then to apply the rents, dividends, profits, and accumulations equally amongst his son's children until the younger attained twenty-one, and the issue of such as were then dead, such issue to take only the share the parent would have been entitled to if living; and when the youngest attained twenty-one, the testator gave all his real and personal estate and accumulations amongst his son's children in the same words as he had used in the former clause relating to the accumulations for twenty-one years. And in case his son should die without leaving lawful issue living at his death, then over to the testator's brothers and sisters equally, and the issue of such as should be then dead, the issue to take only the parents' share. The testator then gave to his trustees power of leasing during his son's life for seven years, and of sale and exchange at any time. G., the son, died without issue, and never having become bankrupt or insolvent, or made any composition with his creditors; a sister of the

testator died before the date of the will, leaving children; the rest survived him, some dying and leaving children before the death of G., the testator's son:—Held, first, that the gift to the issue was original, and the children of a sister deceased before the date of the will took. *Etches* v. *Etches*, 3 Drew. 447; 4 W. R. 487.

Held, secondly, that a brother surviving the testator, but foredeceasing the tenant for life, took a vested interest, and his representatives were entitled. *Ib.*

Held, thirdly, as to a sister who survived the testator, but died before the tenant for life, leaving a child who also died before the tenant for life, the representatives of that child were entitled. *Ib.*

1. The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under twenty-one without issue, the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then living of his sister Mary Miles, and the issue then living of such of them as should be then dead, equally amongst them, *per stirpes*. The testator's son died under twenty-one, without issue, in the testator's lifetime; and the testator's wife also died in his lifetime:—Held, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, *per stirpes*, to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles, such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator, were also entitled *per stirpes* to an equal share of the said moiety of such residuary estate; and that the share of the child of a daughter would not lapse by the death of such a child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell* v. *Holmes*, 3 Hare 438; 8 Jur. 396.

3. Gift to a Class, or their Issue or Heirs.

2. Bequest of a legacy to A. for life, and after her death equally to and amongst her sisters living at her death, or their children:—Held, first, that the children of a sister who was dead at the date of the will took no interest; secondly, that the children of the surviving sister took *per stirpes*. *Congreve* v. *Palmer*, 1 W. R. 156; 16 Beav. 435; 23 L. J., Ch., 54.

3. Bequest to be equally divided between G. and "my brothers and sisters, or their children," and unto J.:—Held, that the children of such of the brothers and sisters as were dead at the date of the will could not take by substitution. *Re Wood*, 31 Beav. 323.

4. A testator, after giving his residuary personal estate to all and every the children of his uncle F. or their issue in equal shares, gave his real estate to A. for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of F. or their issue in equal shares *per capita*." Four of the six children of F. were dead at the date of the will, and two survived the tenant for life:—Held, that the issue of the four deceased children of F. alive at the death of the testator or born during A.'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares. *Re Sibley*, 5 L. R., Ch. D., 494; 46 L. J., Ch., 387; 37 L. T., N. S., 180.

5. The testator, by will, bequeathed all his share in an estate in Barbadoes "to all the children of" his dear departed wife's sister, M. H. M., "or in event of decease, to their descendants, share and share alike." M. H. M. had six children, of whom five were living at the date of the will and at the death of the testator, and one had died prior to the date of the will, leaving issue an only daughter:—Held, following the decision in *Christopherson* v. *Naylor* (1 Meriv. 320), that the issue of the child of M. H. M., who was dead at the date of the will, was not entitled to a share of the property, but that it went to the five children of M. H. M. who survived the testator. *Re Webster's Estate*, *Wigden* v. *Mello*, 23 L. R., Ch. D., 737; 52 L. J., Ch., 767; 49 L. T. 585.

6. Gift to one for life, and after his death to his children "then living, or their legal personal representatives, share and share alike":—Held, that the representatives took, as a distinct class, and not by substitution, and that the representatives of children who died in the lifetime of the testator, and of those who were dead at the date of the will, participated. *King* v. *Cleaveland*, 26 Beav. 26; 4 Jur., N. S., 702; 28 L. J., Ch., 76. Affirmed 4 De G. & J. 77; 28 L. J., Ch., 835.

7. A testator directed that certain stock should, after the death of his wife, be divided among his "children then living, or their heirs." Two of the children were dead at the date of the will; three survived the testator and died in the lifetime of his wife; and two survived her:—Held, first, that the "heirs" of the children who predeceased the wife (including the two who were dead at the date of the will) were entitled to share in the fund along with the children who survived her. *Re Philps*, 7 L. R., Eq., 151; 19 L. T., N. S., 713.

Held, secondly, that by "heirs" were meant the statutory next of kin of the children. *Ib.*

Held, thirdly, that such next of kin were to be ascertained, in the case of the children who survived the testator, at the time of the death of each child; but in the case of the children who predeceased the testator, at the time of the testator's death. *Ib.*

8. A testator gave real and personal estate to A., charged with the payment of annuities

to the testator's six children "or their heirs respectively":—Held, that the annuities were personal estate, and that the statutory next of kin of one of the six children who was dead at the date of will were entitled to one of the annuities. *Parsons* v. *Parsons*, 8 L. R., Eq., 260; 17 W. R. 1005.

1. A testatrix by her will, dated in 1836, gave all her personal property and also her real property to trustees on trust for payment of her debts and legacies, and subject thereto she gave "all her personal and real property as aforesaid," between her five sisters, *nominatim*, and the survivors of them, in equal shares during their lives and spinsterhood, and upon the death or marriage of all her said sisters she directed that her "property should be divided into equal proportions or shares between her brothers and sisters then living or their heirs." She had twelve brothers and sisters, of whom one brother died before the testatrix was born, one sister died before the date of the will, two brothers and one sister died in her lifetime after the date of the will, and the rest survived her. The last survivor was one of the five sisters named in the will, who died a spinster:—Held, first, that (notwithstanding the will was before the date of the Wills Act) the word "or" in the gift in remainder could not be read "and," and that there was no intestacy. *Wingfield* v. *Wingfield*, 9 L. R., Ch. D., 658; 47 L. J., Ch., 768; 39 L. T. 227; 26 W. R. 711.

Held, secondly, that the word "heirs" must be construed distributively so as to mean heirs-at-law as to the real estate, and statutory next of kin (including widows) as to the personal estate. *Ib.*

Held, thirdly, that such heirs-at-law and next of kin were to be respectively ascertained, as regarded brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as regarded those who survived her at their respective deaths. *Ib.*

4. Direction that Issue should take their Parents' Share.

(*a*) *In General*, 8085.
(*b*) *Direction to take Parent's Share which he would have been entitled to if living*, 8086.

(*a*) *In General.*

2. Bequest "to each and every the child and children of my brother and sisters which shall be living at the time of my death; but if any child or children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby intended for such child or children so dying shall be for his, her, or their issue." The issue take only by substitution; therefore only the issue of such children as were living at the date of the will are entitled in the event of the death of their respective parents during the testator's lifetime. *Christopherson* v. *Naylor*, 1 Meriv. 320.

3. A testator, in 1858, gave legacies to his cousins, the sons and daughters of the brothers and sisters of his late mother and father; and if it should happen that any of those cousins should die during his lifetime, and leave issue which should survive him, he directed that the legacies which would have been payable to any deceased parent should be paid to the children; and if the executors should fail to discover any one or more of his said cousins who might be living at the time of his decease, or any one or more of the children of his cousins as might have died during his lifetime, and an application should be made to the executors by any one or more of his cousins, or by the children, within eighteen months after his decease, the bequests were to be void:—Held, that the children of cousins who had died before the date of the will were entitled to legacies. *Christopherson* v. *Naylor* (1 Meiiv. 320) commented upon. *Phillips* v. *Phillips*, 10 Jur., N. S, 1173; 13 W. R. 170; 11 L. T., N. S., 472; 5 N. R. 102.

4. Where a testator gave the residue of his property, in trust to divide it *per capita*, and not *per stirpes*, among his nephew and nieces, the children of his brother and sister; and in case any or either of his nephews or nieces should die in his lifetime, leaving lawful issue, then to pay the share of each so dying unto his or her children:—Held, that the children of a nephew who died before the date of the will were entitled to the shares which their parent would have taken. *Parsons* v. *Gullifford*, *Tarry* v. *Skurray*, *Exp. Tarry*, 10 Jur., N. S., 231; 10 L. T., N. S., 60.

5. A mother, among other legacies, gave to the children of her late cousin, H., 1,000*l.* The will contained a proviso that if any legatee should die in her lifetime leaving children, such legacy should not lapse, but should be paid to the children of the deceased legatee. One of the children of H. was dead at the date of the will, leaving children:—Held, that the children of the deceased child could not take under the proviso in the will, inasmuch as the deceased child was not a "legatee" within the meaning of the clause. *Hunter* v. *Cheshire*, 8 L. R., Ch., 751; 21 W. R. 778; 29 L. T., N. S., 383. Affirming 21 W. R. 320; 28 L. T., N. S., 7.

6. A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then dead, leaving children; he directed that the children should stand in the place of their parents:—Held, that the children of such children of B. as died in the testator's lifetime and who were also dead at the date of the will took no share of the residue. *Butter* v *Ommaney*, 4 Russ. 73.

7. Gift by a testator of his real and personal estate to his wife for her life, and the residue to be equally divided between her brothers and sisters; and in case any of them should be dead at the time of her decease, leaving issue, such issue to stand in their parent's place:—Held, first, that no brother or sister who died before the date of the will was capable of taking under the bequest, and, therefore, the issue of any brother or sister who was dead before the date of the will could not take by substitution; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife. *Gray* v. *Garman*, 2 Hare 268; 12 L. J., N. S., Ch., 259; 7 Jur. 275.

1. Testator, by will in 1860, gave property to trustees on trust for his sister for life, and after her death on trust to pay the principal to the child or children of his sister equally at twenty-one, "and if any of them die leaving issue, the share or shares of such of them as shall so die shall go to their respective issue," and if any should die under the age of twenty-one without issue, the share or shares of such of them as should so die should lapse. The testator died in 1861. His sister died in 1881, having had three children, two of whom were dead at the date of the will, one leaving issue, and the other without issue:—Held, that the issue of the child dead at the date of the will were not entitled under the will. *Christopherson* v. *Naylor* (1 Meriv. 320) followed. *Re Barker, Asquith* v. *Saville*, 51 L. J., Ch., 835; 47 L. T. 38.

2. A testatrix, having a power of appointment over a fund, bequeathed all her money under settlement to be divided, share and share alike, between her nephews and nieces, the children of those who might be deceased to be entitled to the share of their parents:—Held, that the children of a nephew who was dead at the date of the will were not entitled to a share of the fund. *Atkinson* v. *Atkinson*, 6 Ir. R., Eq., 184.

3. When a testator devised real estate upon trust for A. and the testator's brothers and sisters for their lives, with benefit of survivorship where any of them should die without leaving children, but where any should die leaving children, upon trust to let such children have their parents' share until the death of the survivor of A. and his brothers and sisters, and upon the death of such survivor upon trust to convey the shares of their parents among the children of A. and his brothers and sisters:—Held, that in the case of A. and of a brother and sister of the testator who were living at the date of his will, but who died before him, their children were entitled to shares during the continuance of the life estate of the testator's surviving brothers and sisters, but that the children of a brother who was dead at the date of the will were excluded from such shares. *Habergham* v. *Ridehalgh*, 39 L. J., Ch., 545; 9 L. R., Eq., 395; 18 W. R. 427; 23 L. T., N. S., 214.

4. A testator gave the surplus of his property to trustees to divide among his nephews and nieces, and directed that, "in case any of them should be dead or die leaving issue," such issue were to take their parents' share:—Held, that the issue of three who were dead at the date of the will were entitled to their parents' shares. *Re Jenks*, 18 W. R. 1085.

5. A testator devised his real estate to trustees, upon trust during the lives of the children of A., B., and C. (all deceased), and of the survivors and survivor of them, to pay the rents and profits to them in equal shares, and directed that the shares of such of them as should die in the lifetime of the others or other of them leaving issue should be paid to such issue, the share of the parent being divided equally among the issue if more than one. He further directed that after the death of the survivor of the children of A., B., and C., his real estates should be sold, and the proceeds of sale divided between the children of A., B., and C., equally; and that the shares of such of them as might die under age and without issue should accrue to the other or others of them, but that the shares of such of them as might die under age leaving issue should belong to such issue, and be divided amongst them equally if more than one:—Held, that the representatives of those children of A., B., and C., who died without issue in the lifetime of other members of the same class, were not entitled to a share of the rents and profits; and that the issue of such of the children of A., B., and C. as were dead at the date of the will took no benefit under it. *Kelsey* v. *Kelsey*, 38 L. T., N. S., 471.

6. A father gave his residuary estate to his wife for life, and after her decease to such of the children of his two late sisters as should survive his wife and should attain twenty-one or marry, in equal shares; but in case any of such children should be dead at his decease, then he directed that such issue should take the share of their deceased parent:—Held, that the gift to the issue of deceased children was a substitutionary gift, and that the issue of a child who was dead at the date of the will could take nothing. *West* v. *Orr*, 8 L. R., Ch. D., 60; 47 L. J., Ch., 294; 38 L. T., N. S., 5; 26 W. R. 409. Affirming 35 L. T., N. S., 51.

7. A testator bequeathed a legacy to his first cousins, to be equally divided between them. He then gave the share or shares of those of his first cousins, if any, who might die in his lifetime, unto all and every the children of all his first cousins who might so die in his lifetime, share and share alike; such shares to be taken *per capita* and not *per stirpes*:—Held, that the children of a first cousin who had died before the date of the will were not entitled to participate in the legacy. *Re Hotchkiss*, 8 L. R., Eq., 643; 38 L. J., Ch., 631.

(b) Direction to take Parent's Share which he would have been entitled to if living.

8. A testator may so express himself as to cause a child of a deceased child to represent, and be substituted for that deceased child; though he never intended a share for the deceased child. *Loring* v. *Thomas*, 1 Dr. & Sm. 497; 7 Jur., N. S., 1116; 30 L. J., Ch., 789; 9 W. R. 919; 5 L. T., N. S., 269.

A. gave property to trustees to divide equally between the children of D.; provided, that in case any child or children of D. shall die in her lifetime, then the child or children of each such child or children so dying should stand in the place of his, her, or their deceased parent, and should be entitled to the same share or shares which his, her, or their parent would have been entitled to if living at the time of the decease of the testatrix:—Held, that the words "shall die" did not necessarily refer to a death after the date of the will, but that the children of a child who was dead at the date of the will would share. *Ib.*

9. Bequest to the testator's nephews and nieces living at his death, with a proviso, that in case any of his nephews or nieces should die in his lifetime, leaving children him surviving who should attain twenty-one, then such children were to stand in the place of their respective parents, and were to be entitled to the same share as their deceased parent would

have been entitled to if living at the testator's decease.—Held, that the child of a niece (who died before the date of the will) having survived the testator, and attained twenty-one, was entitled to her parent's share. *Re Chapman*, 9 Jur., N. S., 657; 11 W. R. 578; 32 Beav. 382.

1. A brother bequeathed to his sister Susan all the property he might die possessed of for life, and after her death he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the lifetime of his sister Susan, the share which would have been theirs to be equally divided among their children.—Held, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent. *Adams* v. *Adams*, 14 L. R., Eq., 246; 20 W. R. 881; 27 L. T., N. S., 505.

2. A testatrix by her will gave a sum of money to trustees on trust, after the death of the widow of a cousin, for the children of the cousin, share and share alike; provided that in case of any of the children dying in the lifetime of the testatrix leaving issue, such issue should take the share to which their parent would have been entitled if living. One of the children was dead when the will was made, and a codicil showed that the testatrix was aware of this:—Held, that the issue of that child took a share in the money. *Re Lucas's Will*, 17 L. R., Ch. D, 788; 29 W. R. 860.

3. Gift by will in trust for A. for life, and after her death for the children of A. who should be living at her death equally, with a proviso that if any child of A. should die in the lifetime of A. leaving issue who should be living at A.'s death, the issue of such child should take the share which his, her, or their parent would have taken if living at the death of A., and with a gift over if there should be no such child or children or issue of a child or children of A. so living at her death. One child of A. died before the date of the will leaving issue who survived A.:—Held, that the gift to issue was original, not substitutional, and that, therefore, the issue of the deceased child of A. were entitled to take. *Re Woolrich*, *Harris* v. *Harris*, 11 L. R., Ch. D., 663; 48 L. J., Ch., 321.

4. A testator bequeathed his residuary estate and effects to trustee upon trust to pay the income to certain persons for their lives, and subject thereto bequeathed one-fourth of his estate and effects to his nephews and nieces, the children of L., in equal shares; and in case of the death of any of his said nephews and nieces leaving issue, he directed that such issue should take the share that his, her, or their deceased parent would have taken if living:—Held, that the children of nephews and nieces who died before the date of the will, and of a nephew who died after the date of the will, but before the testator, took, by substitution, the shares which their respective parents would have taken if living at the testator's death. *Re Potter*, 8 L. R., Eq., 52; 20 L. T., N. S., 649; 39 L. J., Ch., 102.

5. A testator gave a sum of 5,000*l.* in the event of the death of his nephew, J. W., without leaving issue, to be equally divided among all the brothers and sisters of J. W. who should be living at the time of his death, and the children then living of any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only the share that their parent would have taken if living:—Held, that a child of a brother of J. W., which brother was dead at the making of the will, took no share of the 5,000*l.* *Waugh* v. *Waugh*, 2 Myl. & K. 41.

5. Effect of the words "Said," "Such."

6. Testator bequeathed his residue to trustees in trust for all his children living at the decease of his wife, as tenants in common; and if any such children should die before his wife, and should leave issue, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, provided that until the portions thereby provided for any of the said children of his said sons or daughters who might have died before their mother should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his will had four sons and one daughter, and he had had another daughter who was then dead, leaving children who survived the testator.—Held, that those children were entitled to a share of the residue. *Giles* v. *Giles*, 8 Sim. 360; 6 L. J., N. S., Ch., 176; 1 Jur. 234.

7. Testatrix, having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life, "and after her decease I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary, and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part." The testatrix had another son and daughter, both of whom were dead at the date of her will, leaving children:—Held, that their children were entitled to shares of the residue. *Jarvis* v. *Pond*, 9 Sim. 549; 8 L. J., N. S., Ch., 167.

8. A testator bequeathed stock in trust for a daughter for life; and in case there should be no child of the daughter living at her decease, or being such, they should all die under twenty-one, then he bequeathed the stock unto all and every his children then living, and the child or children of such of his children as should be then dead, in equal shares, but so that such his grandchildren should only have among them such share as their parents would respectively have been entitled to in case they had been then living:—Held, that children of a child of the testator, known by him to be dead at the date of the will, did not take any interest. *Re Thompson's Trusts*, 5 De G. M. & G. 280; 2 W. R. 218, 445; 2 Eq. Rep. 236.

9. When a testator gave legacies to his brother and three sisters, *nominatim*, and gave his residue in trust for his brothers and sisters who should be living at the death of his wife,

and the child or children of such of his said brothers and sisters as should have died in the lifetime of his wife, equally to be divided between his said brothers and sisters and child or children of deceased brothers or sisters, such child or children taking, nevertheless, no more than his, her, or their parent would have taken, and it appeared that he had one brother only surviving at the date of his will, but had had two other brothers, who were then dead, leaving children:—Held, that such children were entitled to a share in the residue. *Re Thompson's Trusts* (5 De G. M. & G. 28) explained. *Re Jordan's Trusts*, 2 N. R. 57.

1. A testator gave property to trustees to pay the income after the death of his wife to "all the children of my sisters or late sisters who shall be living at the decease or second marriage of my wife, and the issue then living of such of the said children of my sisters as shall be then dead":—Held, that the issue of one of the nieces who was dead, to the testator's knowledge, at the date of the will took the share to which their mother would have been entitled, had she survived the wife. *Hall* v. *Woolley*, 18 W. R. 129; 39 L. J., Ch., 106.

2. Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their share should be paid to them at twenty-one, and that, in case any of them should die under that age leaving issue, their shares should be paid to their issue at a certain time, but if any died without leaving issue their shares to be paid to the surviving children, and the issue of such of them as were dead, *per stirpes*; and he bequeathed another sixth part to his sister M. C. for life, and after her death unto and amongst her issue, and to be payable at the like time, and with the like benefit of survivorship, and in like manner as before expressed as to the other sixth part. M. C. had six children living at testator's death, and had had another, who had died before the date of the will, leaving a daughter:—Held, that she was not entitled to take either in her own right under the description of issue, which by reference meant the children of M. C., or by substitution for her mother, as she died in the lifetime of the testator. *Peel* v. *Catlow*, 9 Sim. 372; 7 L. J., N. S., Ch., 273; 2 Jur. 759.

3. Bequest to each of A.'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in existence at my death, to go to their respective descendants:—Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v. *Pepper*, 27 Beav. 86.

6. Other Cases.

4. Words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will, or at the death of the testator. *Parker* v. *Tootal*, 11 H. L. Ca. 143; 11 Jur., N. S., 185; 34 L. J., Exch., 198; 13 W. R. 442; 12 L. T., N. S., 89; 5 N. R. 378.

Where, therefore, there was a gift (after the happening of certain events) amongst my daughters and their children, the child of a daughter who had died before the date of the will was not entitled to a share of the property thus devised. *Ib.*

VI. DEATH OF OBJECT OF PRIOR GIFT BETWEEN DATE OF THE WILL AND DEATH OF THE TESTATOR.

5. Devise of estate to B., for life, then to testator's nephews, etc., and to the children of them that should be then dead. Issue of nephews who died in testator's lifetime not entitled. *Thornhill* v. *Thornhill*, 4 Madd. 377.

6. Testator gave the residue of his estate in trust for his wife for life, and after her death for his children who might then be living, the shares of each to be paid at twenty-one, with benefit of survivorship as to the shares of any dying in the wife's lifetime and without issue, provided that if any did die in the wife's lifetime, leaving issue, such issue should have their parent's share. One of the children, after he had attained twenty-one, died in the lifetime of the testator, leaving issue:—Held, that such issue was entitled to the parent's share. *Smith* v. *Smith*, 8 Sim. 353; 6 L. J., N. S., Ch., 175. Overruling *Thornhill* v. *Thornhill* (4 Madd. 377). And see *Collins* v. *Johnson*, 8 Sim. 356.n.

7. A testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, and directed that, "in case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents":—Held, that "decease" meant decease during the testator's life—that the children of L. who survived the testator took absolutely, and that the children of one child of L., who died between the date of the will and the death of the testator, took the share which this parent would have taken. *Re Hayward, Cherry* or *Creery* v. *Lingwood*, 19 L. R., Ch. D., 470; 51 L. J., Ch., 513; 45 L. T. 790; 30 W. R. 315.

VII. CLAUSES SUBSTITUTING CHILDREN FOR LEGATEES WHO DIE BEFORE PERIOD OF DISTRIBUTION OR ENJOYMENT. WHETHER CHILDREN MUST SURVIVE THE PERIOD OF DISTRIBUTION OR THEIR OWN PARENTS.

8. Bequest to widow for life, and afterwards to transfer to testator's children then living, with a gift to the issue of such children if dead, the issue to take only the share their father would have been entitled to:—Held, that the issue took by substitution, and that to entitle them they must survive the tenant for life. *Bennett* v. *Merriman*, 6 Beav. 360.

9. Testator bequeathed his residuary personal estate to trustees in trust, to pay the interest to and amongst all the children of his brother for their respective lives; and after their deaths, as they should respectively die, he gave the principal of their respective shares to their respective children, and, if any of his brother's children should die without leaving any child, he gave their shares to their

surviving brothers and sisters for life, and afterwards to their respective children, in the same manner as their original shares were given. One child of the testator's brother had three children, one of whom was born at the testator's death, and that child and another died in their parent's lifetime:—Held, that, on the death of the parent, the surviving child became entitled to the whole share of which the parent had been tenant for life. *Amies* v. *Skillern*, 14 Sim. 428; 14 L. J., N. S., Ch., 165; 9 Jur. 129.

1. Testator bequeathed one moiety of his residuary personal estate to trustees to pay the interest and dividends equally amongst such of his children as should be living at a certain period for their lives, and, after the death of any of them, upon trust to stand possessed of a proportionate share of the fund for the use of the issue of the child or children so dying absolutely; "but in case of such child or children dying without leaving issue, then upon trust to stand possessed of the proportionate share of the child so dying, in trust for, and equally to be divided between and amongst my other children then living and the issue of such of them as may then be dead, such issue nevertheless only taking the share their, his, or her parent would have taken if living." H., one of the children of the testator, who was living at the period of distribution, died, leaving issue a daughter, who died without issue. Afterwards W. and A., two others of the testator's children, died without issue:—Held, that the daughter of H. took no interest in the shares of W. and A. *Macgregor* v. *Macgregor*, 2 Colly. 192.

2. A. bequeathed his residuary estate upon trust to pay the dividends to his cousin for life; and as to the principal from and after her decease, in trust for all her children who should be living at her decease, and the issue of such of them as should then be dead leaving issue, as tenants in common; but the issue, if more than one, of any deceased child to take as a class as if by representation, and not as individuals:—Held, that the issue of a child who died in the cousin's lifetime, were a class to be ascertained at her death. *Penny* v. *Clarke*, 1 De G. F. & J. 424; 6 Jur., N. S., 307; 29 L. J., Ch., 370; 8 W. R. 286. And see S. C. Johns. 619.

3. A testator left the residue of his estate in trust for his wife for life, and after her decease to belong to all and every such of his brothers and sister as should be living at the decease of his said wife, and all and every the children and child of such of his said brothers and sister as should be then dead, *per stirpes* and not *per capita*. The sister died in the lifetime of the tenant for life, leaving a son and daughter. The daughter also died in the lifetime of the tenant for life, leaving issue:—Held, that the personal representative of the daughter was entitled to participate, together with the son, in the deceased's sister's share. *Re Cawthorne*, 13 W. R. 215; 11 Jur., N. S., 9.

4. A testator directed payment of his debts, and gave all his personal estate and effects (by description) to his wife, for her sole use for life. He then gave to her a cottage at B. for her sole use for life, and after her death to fall into the residue of his estate; and he gave two houses in N. Street, one in K. Place, and one in M. Street, to her in the same words. And he directed that the aforesaid properties, and all other his property, real and personal, should be disposed of for the benefit of his children (or any of them) or so many as should survive the death of his wife; nevertheless if any married and died leaving issue, they should inherit and have the benefit of the father's or mother's share, and that the property therein contained should be kept in repair and let for the best rents; and after deducting the interest on mortgage and repairs, he divided among his sons and daughters, provided that his property should not be sold, but let until his youngest son attained twenty-one. Then there was a discretionary power to the executors to sell and pay off interest and just claims, and divide the residue equally among his sons and daughters. The widow claimed to be entitled in fee to the premises in N. Street, K. Place, and M. Street, and to be recouped the mortgage money she had paid off; she also claimed dower:—Held, that she was put to her election, both as to the property given by the will, and as to dower. Also that there was a forfeiture. And that there was a gift to those children who survived the wife, and the issue of those that died in her lifetime, leaving issue. *Hilton* v. *Hilton*, 15 W. R. 193.

5. Testator had four daughters, A., B., C., and D., and by his will gave 4,000*l.* to each of his daughters A. and B., with a direction, that if either of them died unmarried, 3,600*l.*, part of the 4,000*l*, should be divided among his surviving daughters, and the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A., but the other three died in her lifetime. The five children of C. took vested interests in equal fifths of the fund, as well those who died before as those who survived A. *Stanley* v. *Wise*, 1 Cox 432.

6. Testator gave his residuary real and personal estate to trustees, in trust to pay the rents, interest, and dividends thereof to his wife for her life, and after his decease to sell, convert into money, collect, and get in the same, and to pay and divide the moneys to arise therefrom unto and equally between and amongst such of the children of his sisters Martha, Phœbe, Alice, etc., as might be living at the time of the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions, such issue only to take the share which their respective parents would have taken if living; provided such children or issue should then have attained twenty-one, otherwise to pay to them the interest of their shares until they should attain that age, and then to pay them the principal. The testator's wife survived him. Each of his sisters had several children. A child of Martha died before the testator's wife, leaving children, and one of those children also died before the testator's wife:—Held, nevertheless, that that one took a vested and transmissible interest in the testator's residuary estate. *Lyon* v. *Coward*, 15 Sim. 287; 15 L. J., N. S., Ch., 460; 10 Jur. 486.

7. A testator gave a sum of money to trustees in trust, to pay the interest to his daughter for life, and after her decease to divide the principal between all and every the children of his said daughter, who should be living at the

time of her decease, and the lawful issue of such of them as should be then dead leaving issue, so as that the issue of each child so dying should take the share which their deceased parent would have taken if living, and so as that such issue of each child so dying should take equally, share and share alike, to be paid to all such children and issue upon their respectively attaining, and in case they should live to attain the age of twenty-one years, with clauses directing the application of the income for the maintenance of the children and issue as the trustees might think fit. One of the children of the tenant for life died in her lifetime, leaving children, some of whom died in the lifetime of the tenant for life:—Held, that the time of the death of the child of the tenant for life, and not the time of the death of the tenant for life, was the period for ascertaining the class of his issue who were to take; and that the children of the deceased child living at his death, though they subsequently died in the lifetime of the tenant for life, took vested interests. *Barker* v. *Barker*, 5 De G. & Sm. 753; 17 Jur. 125; 21 L. J., Ch., 794.

1. J. B., after giving certain annuities and legacies, gave all the residue of his real and personal estate to trustees, with liberty to sell the same for the benefit of his personal estate; and upon further trust to pay the annuities and legacies, and from and after the decease of the last survivor but one of the annuitants, his children and grandchildren, upon further trust for sale as aforesaid, and to render residue into money, and divide the same equally share and share alike with and among the said survivor, whose annuity should then cease; and all and every the testator's grandchildren as should be living, if any should be born after the date of that his will, and the children of such living grandchildren, either the said annuitants or born after the date of his will, as tenants in common, except only that the child or children of any grandchild should be entitled to the share or part the parent would be entitled to receive, if more than one, in like manner as tenants in common. All the testator's children being dead, and two annuitants being still living, as between whom it appeared that an arrangement had been come to abandoning the right of survivorship:—Held, on a petition by a great-grandchild of the testator claiming to be entitled to a vested interest in the share of his deceased mother, and in opposition to the wishes of an assignee of the share of one of the grandchildren of the testator, that the great-grandchildren of the testator took vested interests under the will, and that a part of the fund might be distributed under the order of the Court. *Bellamy* v. *Hill*, 2 Sm. & G. 328.

2. Under a deed of appointment the trustees were directed to pay the interest of the trust funds to the husband of the appointor for life; and after his death to divide the property equally between all the children of A., born or to be born, who should be living at the death of her husband, and the children of those who might then be dead, such children to stand in the place of their parents respectively, and to take such share as their parents, if living, would have been entitled to. A. left five children, one of whom died, leaving six children, and four of these six died before the husband of the settlor:—Held, that the six children, or their representatives, were entitled equally to one-fifth of the trust funds, but that there was no substitution. *Harcourt* v. *Harcourt*, 26 L. J., Ch., 536; 5 W. R. 478.

3. Bequest of interest to one for life, and after her death upon trust to transfer the principal among the children living at her decease, "or the children of any child who may be then dead." A grandchild who predeceased its parent:—Held, excluded from a share in the fund. *Crause* v. *Cooper*, 1 John. & H. 207.

4. Under a bequest for the testator's daughter A. for life, and in case of her death without issue, her share to go among the survivors of the testator's children and the children of such of them as shall have died leaving issue, such issue to take the share of their respective parent:—Held, that children of testator's children who survived their own parents and predeceased the tenant for life, took vested interests on the death of their parents. *Re Wildman*, 1 John. & H. 299.

5. Where a gift to one and his issue is an original gift to the issue, it is not necessary for the issue to survive their own parent, but where it is substitutional it is necessary; but neither in the case of an original nor a substitutional gift is it necessary for the issue to survive the tenant for life. *Lamphier* v. *Buck*, 2 Dr. & Sm 484; 11 Jur., N. S., 837; 34 L. J., Ch., 650; 13 W. R. 767; 12 L. T., N. S., 660; 6 N. R. 196.

6. A testator devised and bequeathed his residuary real and personal estate to trustees, to pay the annual proceeds to his wife for her life, and from and immediately after her decease, to divide and distribute it amongst such of his nephews and nieces named in his will as should be living at her death in equal shares; but if any or either of them should then be dead, leaving issue, then such issue to be entitled to their father's or mother's share, but in equal proportions:—Held, that the word "issue" was to be read as "children," and that the gift to the issue was not substitutionary for the gift originally given to the parents, but an original, independent, and unconditional gift; and that the only child of one of the testator's nephews, who died after the testator, but before the period of distribution, acquired a vested interest in the share her father would have taken if he had then been alive, even although such child also died before the period of distribution. *Martin* v. *Holgate*, 1 L. R., H. L., 175; 15 W. R. 135; 35 L. J., Ch., 789. Reversing S. C. *nom. Holgate* v. *Jennings*, 34 Beav. 79; 11 L. T., N. S., 501; 11 Jur., N. S., 5; 34 L. J., Ch., 120; 5 N. R. 180.

7. Real estate was devised upon trust (after the death of the tenant for life) to sell and divide the proceeds equally among such of the testator's five daughters as should be living at the decease of the life tenant, and the children, grandchildren, and issue respectively to take and have equally amongst them, if more than one, the part or share which their, his, or her parent respectively would have been entitled to had such parent been then living." One of the daughters, whose share was now in question, died before the tenant for life, having had ten children, of whom three survived the period of distri-

bution, the other seven having died before that period, some with, others without, issue:—Held, that the gift to the children, grandchildren, and issue was an original gift, and that the share was divisible into tenths, and that one-tenth went to each stock, irrespectively of the objects of gift surviving the mother or the period of distribution. *Re Orton*, 3 L. R., Eq., 375; 36 L. J., Ch., 279; 15 W. R., 251; 16 L. T., N. S., 146.

1. A husband, who died in 1854, gave all his property to his wife for life, and after giving pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue after his mother's death, and to his heirs: and in case his son should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C., who died, in 1869, a bachelor and intestate:—Held, a gift on the death of C. without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead. *Burt* v. *Hellyar*, 14 L. R., Eq., 160; 41 L. J., Ch., 430; 26 L. T., N. S., 833.

2. A testator gave 500*l.* upon trust to pay income thereof to a daughter for life, and if she died without issue, then to pay the same sum and interest to his four sons (naming them), share and share alike; but in case any of his sons should be then dead, the testator directed that the part or share of him or them so being dead, should be paid to his or their child or children, share and share alike if more than one; or if but one, then to such only child; but if there should be no child, then to his or their legal representatives. One of the sons died a bachelor, and the others leaving children, some of whom died in their parent's lifetime; others survived their parent, but died before the tenant for life; and others survived both their parent and the tenant for life:—Held, that legal representatives meant executors and administrators; that the gift to the sons, being an absolute gift, liable to be divested, the gift to the children was by substitution; and that the gift being substitutional, it was necessary, to entitle the children to take, that they should survive their own parents, but that it was not necessary for them to survive the tenant for life. *Re Turner*, 2 Dr. & Sm. 501; 34 L. J., Ch., 660; 13 W. R. 770; 12 L. T., N. S., 695.

3. Bequest to H. S. for life, and after her decease to the testator's four brothers and sister, "or such of them as should be then living," equally. And in case any of them should be then dead, then he bequeathed the deceased child's share to the children, "to be paid at the time before mentioned." The brothers and sister all died in the lifetime of H. S., one (A. B.) having had no children:—Held, that the representatives of A. B. were entitled to his share, and that all the children took, whether living at the death of H. S. or not. *Masters* v. *Scales*, 13 Beav. 60.

4. Gift by a testator of personal estate to his wife for life, remainder between and among his seven children by name, or such of them as should be living at his wife's decease and the issue of such as should be dead leaving issue, with power to apply the presumptive share of such issue for maintenance. A son of the testator died after his father's death, leaving an infant daughter, who died in the lifetime of the testator's widow:—Held, that such infant took a vested share. *Re Pell*, 3 Giff. 152; 9 W. R. 733; 4 L. T., N. S., 511; 8 Jur., N. S., 207.

5. A testator gave his Three per Cent. Consols to his wife for life, and after her decease he directed that one-half of his consols should become the property of his cousin M., or in case of her decease he directed that it should be "equally divided between her children living." M. died in the testator's lifetime, leaving one daughter B., who survived the testator, but died before the tenant for life:—Held, that B. took a vested interest in the fund, notwithstanding her death in the lifetime of the tenant for life. *Hodgson* v. *Smithson*, 5 W. R. 3; 26 L. J., Ch. 110; 8 De G. M. & G. 604; 2 Jur., N. S., 1199. Affirming 21 Beav. 354; 2 Jur., N. S., 315; 4 W. R. 427.

6. Devise and bequest of real and personal estate to trustees upon trust (subject to certain legacies and annuities) for A. for life, and after his decease upon trust to convey, assure, and pay the whole of the said real and personal estate to and amongst the children of A. and the issue of such children. But in case A. should die without issue, then to pay and distribute the same equally amongst all and every the children of B. and C., and the survivors of them: but, in case any such children should be then dead, leaving issue of his, her, or their body or bodies lawfully begotten, then such issue to have as well such original share or shares as the father or mother of such issue so dying would have been entitled to if then living, as also such other share or shares thereof as the father or mother of such issue so dying might have been entitled to by survivorship or otherwise. A. survived the testator, and died without issue:—Held, that the period of the survivorship of the children of B. and C. is not to be referred to the time of the death of the testator, but to that of the death of A., being the period of distribution; and that the children of B. and C., living at the date of the will, and those born after that date and before the death of A., were entitled to the real and personal estate, with survivorship between them in case of the death of any such children without issue before the death of A., the children of such of the said children as died before A., leaving issue, being substituted for the original legatees. *Buckle* v. *Fawcett*, 4 Hare 536; 9 Jur. 891.

7. A testator by his will gave 4,000*l.* to be invested in stock in trust to pay the dividends to his daughter S., during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but in case G. should survive his daughter, then in trust for H., F., E., A., and W., his five sons, and their respective issue (if any), to be divided among them in equal shares and proportions, such issue to take *per stirpes* and not *per capita;* he gave also the residue of his personal estate to his sons H., F., E., A., and W., "and their respective issue (if any), such issue to take *per stirpes* and not *per capita*,

to be divided among them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one years, to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively attain such age." Declared that, S. dying in the lifetime of G., the sons of the testator living at such event would be absolutely entitled to the stock in equal shares, but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund which their parents would have been entitled to if living, such issue to take such shares equally among them, and adjudged, that the sons living at the death of the testator took an absolute interest in the residue. *Dictum*, that if any of the sons had died in the lifetime of the testator, his children, living at the death of the testator, would have taken, by substitution, the share of the parent. Whether grandchildren. or more remote descendants, would take as issue, and in what proportions, *quære*. *Pearson* v. *Stephen*, 5 Bli. N. S. 203; 2 Dow & Cl. 328.

1. Where a testator gave a life interest to his wife, and immediately after her death to his two sons, at twenty-one, if then living, and to the issue of either of them that shall be then dead, such issue taking the share the parent (if living) would have been entitled to only, with a gift over, in the event of both dying under twenty-one without lawful issue; and one of the sons died in the lifetime of the wife, without leaving issue, but having had a son who had died in his lifetime:—Held, that the child of the son who predeceased the tenant for life, and who had died in his father's lifetime, did not take, but that there was an intestacy as to the moiety given to the son, who died during the life of the tenant for life. *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 49; 8 Jur., N. S., 500; 10 W. R. 286; 6 L. T., N. S., 13; 31 L. J., Ch., 622.

2. Testator gave 20,000*l*. stock in trust for his daughter A. for life, for her separate use, and after her death in trust for her children as tenants in common, to be vested at twenty-one, or death under that age, leaving lawful issue. By a codicil testator, instead of the 20,000*l*. given by his will, gave 15,000*l*. in trust for his daughter for her life, after her death to her children to be equally divided amongst them or the survivors, share and share alike:—Held, that only those children of A. who survived their mother took shares. *Haley* v. *Bannister*, 23 Beav. 336.

3. A testator devised realty to his wife for life, with remainder to A., B., C., D., and E. as tenants in common, and in case of the death of either in the life of his wife, leaving issue, his share was to go among all his children as tenants in common in fee, but in case of the death of any one in the lifetime of the wife without leaving issue living at his death he gave his share to the survivors:—Held, that the gift to children was substitutional, and those children only who survived their fathers could take under it. *Hurry* v. *Hurry*, 39 L. J., Ch., 824; 10 L. R., Eq., 346; 18 W. R. 829; 22 L. T., N. S., 577.

4. A condition of survivorship does not attach to a substitutionary gift. *Re Merricke*, 14 W. R. 473.

A testator, by reference, gave the income of a fund to M., who was unmarried, for life, with a gift to her husband (if any) for his life; and upon the decease of the longer liver of M. and her husband, he directed his trustees to pay, assign, and transfer the capital to his four children, A., B., C., and D., who should be then living, "or to the issue of such of them as should be then dead," such issue taking their parent's share. "Issue" as used in the will was clearly equivalent to "children":—Held, that upon the death of any one of the four, A., B., C., and D., whether before or after the termination of the life estates, his children then living took vested interests in the fund, and that his children then dead were wholly excluded. S. C. *nom. Re Merrick's Trusts*, 1 L. R., Eq., 551; 12 Jur., N. S., 245; 35 L. J., Ch., 418; 14 L. T., N. S., 130.

5. Bequest to A. for life, and after her death to pay and divide it amongst her children living at her decease, and the issue of such of them as should be then dead leaving issue, such issue to take their parents' share, with a gift over if all the children of A. should die in her lifetime without leaving issue. Two children died in the life of A., leaving children:—Held, that grandchildren of A. who predeceased their parents did not take; but that grandchildren of A., who survived their parents, but died in the life of A., took vested interests, which passed to their representatives. *Thompson* v. *Clive*, 23 Beav. 282.

6. A bequest of personalty to trustees upon trust to pay the interest thereof to the testator's daughters A. and B. for their lives and the life of the survivor, and upon the decease of the survivor to pay and transfer the capital equally among all the testator's children, and the issue, if any, of A. and B., and of any other deceased child, in such manner that such issue might be entitled to such share or shares as his or their deceased parent or parents respectively if living (A. and B. excepted), would have been entitled to:—Held, that the whole fund belonged to the testator's children other than A. and B., and to the children living at the death of such as had died leaving children. *Re Bennett*, 3 Kay & J. 280.

7. When there is a gift by will to such of a class of persons as shall be living at the happening of a particular event, and to the issue of such of the class as shall be then dead leaving issue, the gift to issue is not to be restricted to issue who survive their parent, but all the issue of any member of the class who has pre-deceased the particular event leaving issue are entitled to share, whether they have or have not survived their parent. *Re Smith*, 47 L. J., Ch., 265; 7 L. R., Ch. D., 665; 26 W. R. 418.

See also XLIV. IX. *ante*.

VIII. OTHER CASES.

8. A gift to the sisters of the testator living at a particular time, or the issue of any or either then dead, is not a substitutionary but a substantive gift to the issue. *Attwood* v. *Alford*, 2 L. R., Eq., 479.

1. A testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease to distribute and divide the whole, etc., among such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share":—Held, that "issue" here meant children; and that the words, "should then be dead leaving issue," meant, should before then have died leaving issue, and that the gift to the issue was not substitutionary for the gift originally given to the parents, but an original independent and unconditional gift. *Martin* v. *Holgate*, 1 L. R., H. L., 175; 15 W. R. 135; 35 L. J., Ch., 789. And see *Smith* v. *Smith*, 5 L. R., Ch., 342.

2. Bequest of a fund in trust for A. and his wife B., for life; and after their decease, upon trust to pay the principal sum equally amongst the testator's nephews and nieces, children of A. and B. then living, or their legal personal representatives, share and share alike. A. and B. had seven children; two of them died in the lifetime of the testator, another died before the surviving tenant for life, and the remaining children survived:—Held, that the representatives took as a distinct class, and not by substitution, that the fund was divisible into sevenths, payable to the surviving nephews and nieces, and the representatives of those that were dead. *King* v. *Cleaveland*, 4 Jur., N. S., 702; 26 Beav. 26; 28 L. J., Ch., 76. Affirmed 4 De G. & J. 477; 28 L. J., Ch., 835.

See also XI. II. and III. *ante*.

LIX. Death Coupled with a Contingency. Death of Object of Prior Gift after the Testator.

See also LVIII. VIII. *ante*—LX. to LXV. *post*.

I. GENERAL RULE. DEATH AT ANY TIME.

1. Immediate Gift.

3. A testator directed his residuary real and personal estate to be divided into fourteen shares, and gave such shares to persons whom he named, and directed that the whole of them should have the benefit of survivorship between them, in the event of any one or more of them dying without issue:—Held, that the "dying" meant was not "dying in the testator's lifetime." *Smith* v. *Stewart*, 4 De G. & Sm. 253; 15 Jur. 834; 20 L. J., Ch., 205.

4. When there is a gift over in the event of death without issue, the rule is that death without issue must be held to mean death without issue at any time, unless a contrary intention appears in the will; and the introduction of a previous life estate does not alter that principle of construction. *Olivant* v. *Wright*, 1 L. R., Ch. D., 346; 45 L. J., Ch., 1; 33 L. T. 457; 24 W. R. 84.

5. Bequest of residue to the testator's daughters, A. and B., in equal proportions, and in case of the death of either the whole to the survivor of them, and in the event of marrying, and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not then among the children of C. A. and B. survived the testator, and A., who died without having been married, bequeathed the whole of her property to B.:—Held, that the bequest did not become absolutely vested in A. and B. on the death of the testator, but continued subject to the executory bequest over in favour of C. *Child* v. *Giblett*, 3 Myl. & K. 71; 3 L. J., N. S., Ch., 124.

6. Produce of estates devised to be sold, directed to be paid between J. and A., the wife of B. in equal proportions, share and share alike, A.'s share to her sole use and benefit; and in case of death of either, leaving any children or child, trustees to stand possessed of moiety so given to J. and A., to and for the use and benefit of such child or children at twenty-one, equally to be divided if more than one, and until twenty-one, money to be invested in funds; interest for children's maintenance; if either J. or A. should die without children, survivor to take share: J. and A. held only tenants for life. *Farthing* v. *Allen*, 3 Madd. 310.

7. Whenever there is an interest limited by will, either by way of remainder or by way of executory interest, if all the preceding estates are out of the way, or the events on which the executory interest is limited have occurred, it is immaterial whether those estates are taken out of the way, or those events occur in the lifetime of the testator, or after his decease. *Varley* v. *Winn*, 2 Jur., N. S., 661; 25 L. J., Ch., 831; 4 W. R. 792.

If there be an executory bequest of personalty depending either upon the determination of a preceding limited interest or upon a collateral event of defeating an interest previously given, and such limited interest determine, or such collateral event happen during the lifetime of the testator, the executory bequest does not lapse. S. C. 2 Kay & J. 700.

Where, therefore, there was a bequest to the testator's five daughters of 6,000*l.* each, to be invested by the executors within seven years from his death, "in trust for them or their children, *but if any of my daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those*

who have issue, share and share alike, as they arrive at the age of twenty-one; and if only one, the whole to go to that one only." One daughter died without issue in the lifetime of the testator:—Held, that the 6,000*l.* given to her passed by the gift over to those of the testator's daughters who were living at his death, and had issue then living, absolutely. *Ib.*

Held, also, that the words above printed in *italics* ought to be read as though in a parenthesis. *Ib.*

As to each daughter's own legacy of 6,000*l.*, it was directed to be invested, and the interest paid to her for life. *Ib.*

2. Future Gifts after a Prior Interest.

1. Gift by will of freeholds and leaseholds to A., *durante viduitate*, and then to B. absolutely, with a gift over to B.'s brother and sister, "if he should die and leaving no children." B. survived A.:—Held, that he then took an absolute vested interest not liable to be divested on his subsequent death without children, and that, therefore, the gift over in that event failed. *Edwards* v. *Edwards*, 15 Beav. 357; 16 Jur. 259; 21 L. J., Ch., 324.

Construction of gifts in the following form: first, to A., and if he shall die, to B.; second, to A., and if he shall die without children, to B.; third, to X. for life, with remainder to A., and if he shall die, to B.; and fourth, to X. for life, with remainder to A., and if he shall die without leaving children, to A. In the first case the contingency has reference to the death of the testator; in the second, to the death of A.; in the third and fourth, to the death of the tenant for life. *Ib.*

A testator gave all his freehold and leasehold property to trustees, upon trust to pay the rents to his wife for her life, if she should so long continue his widow, and directed that in case of her marrying again she should receive an annuity. He then disposed of the property among his three children, the gift to take effect in possession immediately upon the decease or marriage of the widow. He directed his trustees to make over the shares of the children to them immediately upon the widow's death, as soon as they arrived at the age of twenty-one years; and further directed, that if one of his children should die leaving no children, his or her share should be equally divided between the other two and for their heirs for ever, and that if two of his children should die leaving no children, their shares should go to the surviving one, and his or her heirs for ever:—Held, that the share of a child who attained twenty-one, and survived the widow, did not go over on his subsequently dying without leaving children. S. C. 21 L. J., N. S., Ch., 324; 16 Jur. 259.

2. The fourth rule laid down in *Edwards* v. *Edwards* (15 Beav. 357; 21 L. J., Ch., 324), that where a life or other estate is given to one or more of the objects of a testator's bounty, and on the determination of that estate the subject disposed of is given to another person with a direction that if the latter shall die, without leaving a child, his share shall go over, the words indicating death without issue refer to that event occurring before the period of distribution, that is, before the determination of the estate, as there stated, disapproved of. *Ingram* v. *Soutten*, 44 L. J., Ch., 55; 7 L. R., H. L., 408; 23 W. R. 363; 31 L. T., N. S., 215. Reversing S. C. *nom. Re Heathcote's Trusts*, 9 L. R., Ch., 45; 43 L. J., Ch., 259; 29 L. T., N. S., 415; 22 W. R. 42. And affirming 21 W. R. 862; 29 L. T., N. S., 161.

The fourth rule would be better stated thus: "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition."—*Per* Lord Hatherley. *Ib.*

A husband bequeathed his residuary personal estate to trustees upon trust to pay the income to his wife for life, and after her death upon trust (in the events which happened) to pay the income to his daughter for life, with a gift over in the event of her death without issue, to his two sons; with a gift over in the event of both his sons dying without issue to H. "But in case H. shall die without leaving any issue living at the time of her death," then over. The widow died in 1823; his two sons survived her, and both died without issue in the lifetime of his daughter, who died without issue in 1866. H. survived the daughter, and died without issue in 1872:—Held, that H. having died without issue, the gift over took effect; for in such a case death without issue at any time must be taken to be intended, unless there are any expressions in the will pointing to an earlier termination of the trust. *Ib.*

3. When there is a gift over in the event of death without issue, the rule is that death without issue must be held to mean death without issue at any time, unless a contrary intention appears in the will, and the introduction of a previous life estate does not alter that principle of construction. *Olivant* v. *Wright*, 24 W. R. 84: 33 L. T., N. S., 457; 1 L. R., Ch. D., 346; 45 L. J., Ch., 1.

4. There is no authority that the words introducing a gift over in the case of the "death unmarried or without children" of a previous taker, do not indicate, according to their natural meaning, death unmarried or without children at any time, or that the ordinary and literal meaning of the words is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper. *O'Mahony* v. *Burdett*, 7 L. R., H. L., 388; 23 W. R. 361; 31 L. T., N. S., 705.

II. GIFT OVER ON SEVERAL EVENTS. IMMEDIATE GIFT.

5. A. B. devised real estate to C. D., his heirs, executors, and administrators; he then directed that if C. D. should die without issue, the estate should go to other persons; and in case C. D. died and leaving issue, they were to take their deceased parent's share:—Held, that the words "in the lifetime of the testator" could not be imported into the will. *Gee* v. *Town Council of Manchester*, 19 L. J., N. S., Ch., 151; 14 Jur. 825. And see S. C. at law, 21 L. J., N. S., Q. B., 242; 16 Jur. 758.

6. Testatrix bequeathed to trustees 3,000*l.*, upon trust to pay the interest for the main-

tenance of A., and to pay him the principal when he should attain twenty-one; but directed that in case he should die before his legacy should become payable, leaving lawful issue, such issue should take his legacy. The testatrix then gave half the residue of her estate upon trust for B. for her life, and after her death she gave this half to A. at the time his 3,000*l.* legacy became payable, and, "in case of his death without leaving lawful issue," then the same to be equally divided between C., D., and E. A. survived the testatrix, attained twenty-one, and died in the lifetime of B., without having been married:—Held, that the share of the residue had vested in him absolutely, subject to the life estate of B., and that C., D., and E. took no interest therein. *Woodburne* v. *Woodburne*, 19 L. J., N. S., Ch., 88; 14 Jur. 565; 2 W. R. 131; 3 De G. & Sm. 643.

1. A testatrix made the following bequest: "I give to A. A. the sum of 400*l.*, to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one. In the event of her decease, at, before, or after the said period, the sum so bequeathed to be divided between E. M. and A. M." A. A. took a life interest only in the legacy. *Miles* v. *Clark*, 1 Keen 92.

2. Bequest of testator's residuary personalty equally between his four children (*nominatim*) to be equally divided between them share and share alike, and in case of either of them leaving issue, the issue of such child to take the parent's share; but in the event of their dying without leaving issue, then the share or shares of the one so dying to form part of the residue:—Held, that the testator's children took for their respective lives only. *Cooper* v. *Cooper*, 1 Kay & J. 658; 3 W. R. 470.

3. A testator by his will (dated in 1841) gave all his real and personal estate to trustees in trust, to convert, and pay, apply, and divide the proceeds into three equal shares; one he directed his trustees to invest upon trust to pay the income to his daughter H. for her separate use; and from and after her death leaving issue, to such issue as therein mentioned. And the will contained provisions that, in case any of his said children or grandchildren should happen to die without leaving issue, the share or shares of him, her, or them, so dying, should go to the survivors of them, his said children and grandchildren. And also that, if any of his said children or grandchildren should happen to die leaving issue, the share or shares of him, her, or them should go to such issue as therein mentioned:—Held, that the sons J. and T. took life interests only. *Clayton* v. *Lowe* (5 Barn. & Ald. 656) observed upon. *Gosling* v. *Townshend*, 2 W. R. 23. Affirming 17 Beav. 245.

In a gift to A. (without any limitation of interest), "and if he should happen to die, leaving lawful issue," then to such issue, the contingency has reference to the death of A., and not to that of the testator. A., therefore, does not take an absolute interest. S. C. 17 Beav. 245.

4. Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship," in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—Held, that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares. *Bowers* v. *Bowers*, 5 L. R., Ch., 244; 39 L. J., Ch., 351; 23 L. T. 35; 18 W. R. 301. Reversing 21 L. T. 134; 8 L. R., Eq., 283.

III. WHEN RESTRICTED TO PERIOD OF VESTING.

5. Bequest to a female when and if she should attain twenty-one, to her sole and separate use; and in case of her death leaving children, her share to go to her children:—Held, to vest an absolute interest in the legatee on her attaining twenty-one. *Home* v. *Pillans*, 2 Myl. & K. 15; Coop. *temp.* Brough. 198; 4 L. J., N. S., Ch., 2.

6. In applying the rule that a clear gift in a will is not to be cut down by any subsequent provision, unless the latter is equally clear, the plain intention of the testator, and not the comparative lucidity of the two parts of the will, is to be regarded. *Randfield* v. *Randfield*, 8 H. L. Ca. 225; 30 L. J., Ch., 177; 6 Jur., N. S., 901; 9 W. R. 1. And see S. C. 6 W. R. 98; 5 W. R. 768; 2 De G. & J. 57; 4 Drew 147.

A. devised all his freehold and copyhold estates to his son, "when he have obtained the age of twenty-one, upon the following conditions," and directed that his own widow should receive an annuity out of these estates; he then gave to his son all his personal estates, consisting of ships, bonds, and funded stock, "but should the hand of death fall on my widow and son, and my having no other children, or my son any issue, my will is then that should he leave a widow, she shall receive an annuity out of my real estates as before mentioned, the residue then to be equally divided, share and share alike, after paying such legacies as I may hereafter name, the division to be" between certain persons specifically mentioned ("they paying all my son's debts, funeral expenses, and demands, or my wife's, should she be the longest liver"). The son became twenty-one some years before the will was executed; he married, but died without ever having had issue:—Held, that the gift over affected only the real estate. *Ib.*

7. A testatrix devised to trustees freehold premises in trust to receive the rents, and after paying thereout all proper outgoings, and applying thereout, if they thought fit, any money towards the maintenance of S., to let the residue accumulate until S. should attain twenty-one, and then to pay such accumulations to him, but if he should die under such age without leaving issue living at his decease, then such accumulations should be for the benefit of the person to whom and in like manner and form as these premises were limited in the like event, and when S. should have attained twenty-one, then the trustees were to stand seised of the premises in trust for him in fee; but if he should not leave any issue living at his decease, then the trustees should

stand seised of the premises in trust for A. in fee, and if A. should not leave any issue living at her decease, then over. S. attained twenty-one, and died without ever having had issue: —Held, that the premises vested in S. in fee on his attaining twenty-one, subject to be divested in the event of his dying without issue, which event having happened, the limitation over in favour of A. took effect. *Smith* v. *Spencer*, 6 De G. M. & G. 631; 6 W. R. 136; 3 Jur., N. S., 193. Affirming 2 Jur., N. S., 778; 4 W. R. 729.

1. A testator gave to two trustees, in trust for the child or children of his daughter-in-law, the sum of 700*l.* to each child, to be paid by his executors as soon as each child became of the age of twenty-one years; or by mutual agreement the trust was to continue longer after each child should have passed the age of twenty-one; the aforesaid sums to remain in the stock and possession of his executors until the whole sum be paid to the said trustees, for the sole use of the said children; but should either child or both children of his daughter-in-law die without leaving issue, then the 700*l.* for one child; or if both die and leave no issue living, 1,400*l.* for the use of other persons:— Held, that the grandchildren of the testator, upon attaining twenty-one, took absolute interests in the money liable to be divested in the event of their dying without leaving issue. *Cotton* v. *Cotton*, 23 L. J., Ch., 189; 2 W. R. 207.

2. A testator gave the residue of his estate to trustees, upon trust to pay, apply, and dispose of it to two women, A. and B., when they should attain their respective ages of twenty-one years, directing that their shares should not be subject to the control of their husbands; but in case both or either of them died without issue living at the time of their respective deceases, then he gave the share of her or them so dying to his nephews and nieces:—Held, upon the whole context of the will, that the executory devise over of the residue was not confined to the death of A. and B., or either of them, under twenty-one, and without leaving issue; but would take effect upon their respective deaths at any time, without leaving issue then living. *Gray* v. *Folds*, 7 L. J., Ch., 182.

3. Under a bequest of stock to A. for life, and after the decease of A. to the testator's great-grandchildren, share and share alike, if they were living at the time of A.'s death, but that they should not receive any part of the capital till they arrived at twenty-one; but if any one, or all, of the said children should die before they arrived at the age of twenty-one years, the shares or part of those so dying should go to B. and C., share and share alike: —Held, that the attaining twenty-one was not confined to the event of surviving A., and, therefore, that on the decease of one of the children in the lifetime of A., under twenty-one, the share of such child passed to B. and C., and did not lapse so as to go to the testator's residuary legatee. *Goodchild* v. *Fenton*, 3 Y. & J. 481.

4. A testatrix in 1823 devised lands to A. and B. as tenants in common in fee, and in case of the death of either under twenty-one and leaving no child, the whole to go to the survivor, and in case of the death of both leaving no child, then over. A. died under twenty-one without issue; B. attained twenty-one:—Held, that the gift over would take effect in case of his death, leaving no child. *Else* v. *Else*, 41 L. J., Ch., 213; 13 L. R., Eq., 196; 20 W. R. 286; 25 L. T., N. S., 927.

5. A testator bequeathed his personal estate to his brothers and sisters absolutely; and declared, that if any of them should die in his lifetime, or afterwards, without leaving lawful issue, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue, his share should be divided amongst his issue; and he declared, that none of the legatees should be entitled to any bequest until they attained twenty-one:— Held, that on attaining twenty-one the brothers and sisters took absolute interests, and that the limitation over was to take effect only in the event of the death of a legatee under twenty-one, in the lifetime of the testator, or afterwards. *Monteith* v. *Nicholson*, 2 Keen 719; 6 L. J., N. S., Ch, 247.

6. A testator bequeathed his residue to his children, in terms which gave them a vested interest, subject to be divested in favour of their children on their death under twenty-one. He then provided, that if it should happen that he should leave no such children or child living to attain twenty-one, "or such, if any, dying without leaving lawful issue," then over:— Held, that "the dying" referred to was dying under twenty-one, and that the testator's children, on attaining twenty-one, acquired an indefeasible interest. *Pearman* v. *Pearman*, 33 Beav. 394.

7. J. devised land to trustees for R. for life, and after her death for sale and investment of the proceeds, and to pay and apply the interest in the educating and bringing up of all and every his nephews and nieces, the children of G., during their minorities, and to pay to his nephews and nieces his, her, or their equal part or share in the proceeds when and as he, she, or they should respectively arrive at his, her, or their ages of twenty-one; and in case any or either of his nephews or nieces should die without leaving issue, then the share of him, her, or them so dying should go the survivor and survivors of them, and be paid to him, her, and them respectively when his, her, and their original share and shares should become payable as aforesaid; and if any or either of them should at the time of such sale be of such age, then to be paid to them so of age immediately after such sale, and he gave and bequeathed the same to his nephews and nieces accordingly:—Held, that the shares of the nephews and nieces were indefeasibly vested at twenty-one. *Re Johnson*, 10 L. T., N. S., 455.

8. A testator bequeathed a legacy to each of his two nephews and his niece, if they should respectively survive him and attain twenty-one, when the legacies to his nephews were "to be paid." In case of the death of either of his nephews or niece leaving issue, such issue to take the parent's legacy, as by his or her will directed; if no will, equally; but in case of the death of either, before his or her legacy payable, his or her legacy to go to the survivor; during minority income to be applied for maintenance and education; the niece's legacy to be settled:—Held, that the nephews

took only a life interest in the legacies, and that after their deaths, if they left children, the corpus would go to such children as their parents might appoint by will; if no children, that the nephews would take absolutely. *Martineau* v. *Rogers*, 25 L. J., Ch., 398.

1. A testatrix bequeathed a legacy of stock upon trust for her nephew R. until he should attain the age of twenty-one, and then over. And she directed that in case any of the four legatees therein named (R. being one of them) should happen to depart this life without leaving lawful issue, then in trust for the survivors or survivor of them, in certain proportions. R. attained his age of twenty-one, but died without issue:—Held, that he took an absolute vested interest in the legacy on his attaining twenty-one. *Re Hayne*, 18 L. T., N. S., 16.

IV. WHERE GIFT CONTINGENT ON SURVIVING THE TENANT FOR LIFE.

2. A testator gave his residuary estate to his wife for life, and then to be divided into three shares; and he gave one-third between the children of his brother T. B., living at the death of his wife, one-third to his niece F. G., and the remaining one-third to his nephew and niece T. B. and S. B.; and in case such, any, or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go between his and her children. T. B.'s children all died in the lifetime of the widow, but some left children:—Held, that the latter were entitled to the first-mentioned one-third. *Garey* v. *Whittingham*, 5 Beav. 268; 11 L. J., N. S., Ch., 334; 6 Jur. 545.

3. C. in 1814 bequeathed the residue of his personal estate to trustees, in trust for the benefit of his wife for life; and after her death he directed that an annuity should out of the same be purchased for his brother; and then he bequeathed the residue to H., "in case he was living at the time of the decease of his wife, or to his children, if he should marry and leave any; but if he should die without leaving issue," then he bequeathed the residue to other persons. The widow died in the lifetime of H., who in 1844 died a bachelor:—Held, that the words "die without leaving issue" referred to the death of H. in the lifetime of the widow, and that as he survived her, his residuary legatee was entitled to the fund. *Andrews* v. *Lord*, 6 Jur., N. S., 865; 8 W. R. 405; 3 L. T., N. S., 803.

4. S. bequeathed property to his wife's niece "for her own absolute use, provided that she survived his wife, or if she married before her aunt's death, then the property was to go equally between her children; but if none, then to her husband." If she died unmarried before her aunt, the testator directed that at his wife's decease the property should go to other persons in the will named. The niece married, and had children in the lifetime of the aunt, whom she survived. The dividends on the fund in court had been, since the death of her aunt, paid to the niece, who petitioned to have the principal transferred to her:—Held, that in the events which had happened, she was absolutely entitled. *Re Sarjeant*, 9 Jur., N. S., 116. S. C. *nom. Re Serjeant*, 11 W. R. 203; 7 L. T., N. S., 501.

V. WHEN RESTRICTED BY EXPRESS DIRECTIONS TO DIVIDE, CONVEY, OR SETTLE.

5. Bequest of personal estate, being in trust, to pay the interest to M., the testator's widow, during her life, and on her death "to pay and divide the trust moneys unto and equally between his daughters H. and A., for their own use and benefit absolutely, and in case of the death of them, H. and A., or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one, then to divide the trust money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H. and A., without leaving issue living at their respective deaths, or of all their children dying minors. On surviving the tenant for life, H. and A. become entitled to the absolute interest. *Galland* v. *Leonard*, 1 Swan. 161; 1 Wils. 129.

6. A testator gave all his freehold and leasehold property to trustees, upon trust to pay the rents to his wife for her life, if she should so long continue his widow, and directed that in case of her marrying again she should receive an annuity. He then disposed of the property among his three children, the gift to take effect in possession immediately upon the decease or marriage of the widow. He directed his trustees to make over the shares of the children to them immediately upon the widow's death, as soon as they arrived at the age of twenty-one years; and further directed, that if one of his children should die leaving no children, his or her share should be equally divided between the other two, and for their heirs for ever; and that if two of his children should die leaving no children, their shares should go to the surviving one, and his or her heirs for ever:—Held, that the share of a child who attained twenty-one, and survived the widow, did not go over on his subsequently dying without leaving children. *Edwards* v. *Edwards*, 16 Jur. 259; 21 L. J., Ch., 324; 15 Beav. 357.

7. A testator, being entitled to a reversionary fund upon the death of a husband and wife without leaving issue who should attain the age of twenty-one years, bequeathed the fund to trustees upon trust to divide the same between "his children living at the time of the decease of the tenants for life, or such others lawfully begotten as would have been entitled to it at the death of their parents":—Held, that the surviving children took, to the exclusion of a grandchild whose father died after the testator, but before the death of the last tenant for life. *Miller* v. *Chapman*, 3 W. R. 101. And on appeal, 3 W. R. 300; 24 L. J., Ch., 409.

8. Real and personal estate, including a business, was devised and bequeathed in trust to pay an annuity out of the income to the testator's widow during her life, and after her decease the property, including all accumulations, was devised and bequeathed to the

testator's son W.; but if he should die without leaving issue, the testator directed the trustees to sell and convert, and to distribute the proceeds among certain persons:—Held, that the gift over only contemplated the son's death in the lifetime of his mother, and that the son having survived the widow, took on her death an absolutely vested interest. *Edwards* v. *Edwards* (15 Beav. 357) approved and followed. *Dean* v. *Hanley*, 6 N. R. 95; 11 Jur., N. S., 686; 13 L. T., N. S., 89.

1. A testator devised and bequeathed his real and personal estate to trustees, upon trust to stand possessed of the rents and proceeds thereof, and to pay an annuity of 500*l.* a year to his widow for her life, or so long as she should continue his widow; and from and immediately after her death or marriage again, upon trust to pay and apply such annual rents and proceeds for the maintenance and advancement of such of his children as should be under twenty-one as his trustees should think proper; and when the youngest of his children should attain that age, then upon trust to call in all his moneys, and distribute all his property equally between his children, except so much as would secure to his wife (if she should be then alive and married) an annuity or yearly sum of 100*l.*, as thereinafter mentioned:—Held, that the period of division among the children of the testator was upon the death or second marriage of the testator's widow, in case the youngest child should have attained twenty-one, and not absolutely upon the youngest child attaining such age. *Beckton* v. *Barton*, 5 Jur., N. S., 349; 28 L. J., Ch., 673; 27 Beav. 99.

The testator directed, that in case of the death of any of his children leaving issue, the share or shares of such deceased parent or parents should go to his, her, or their children:—Held, to have reference to the death of the children before the period of distribution. *Ib.*

The testator, upon the marriage of his daughter, and after the date of his will, settled a sum of money upon his daughter, her husband and children:—Held, to amount to an advancement, and that the daughter must be put to her election. *Ib.*

2. A wife gave all her property (consisting of realty and personalty) to her husband during his life to receive the rents and profits, and after his death to be divided amongst her five children, share and share alike; and if any of her children should die without issue, then that child or children's share to be divided, share and share alike, among the children then living; but if any of her children should die leaving issue, then that child, if only one, should take its parent's share; if more than one, to be divided equally amongst them:—Held, that there was a sufficient contrary intention within the meaning of the above-stated rule, that "after his death" meant immediately after his death, at which time the property was to be divided, that this was the time of division referred to throughout the will, that death without issue must be restricted to death without issue in the life of the tenant for life, and that therefore all the children who survived the tenant for life took indefeasible shares in the property. *Cleaver* v. *Wright*, 1 L. R., Ch. D., 346; 45 L. J., Ch., 1; 24 W. R. 84; 33 L. T., N. S., 457. Reversing 20 L. R., Eq., 220; 23 W. R. 406; 32 L. T., N. S., 18.

3. A. gave the income of his residuary real and personal estate to his wife for life, and after her death gave the same to all his children absolutely; but in the event of the marriage of any of his daughters, he directed that the interest should be paid to them for life, and after the death of any of them to their husbands for life; and upon the death of the survivor, that the principal should be divided amongst the children of his married daughters, to vest in them at twenty-one, or at twenty-one or marriage, with benefit of survivorship, and with clauses for maintenance and advancement; and if any of such daughters should have no children living at her death, the principal of her share was to be at her own disposal:—Held, that this was an express gift to the children of the daughters, and that the direction applied to all the daughters of the testator, and not to those only who married before the death of the testator's widow. *Witham* v. *Witham*, 30 L. J., Ch., 888; 5 L. T., N. S., 133.

Held, also, that the contingency of a daughter's marrying was not restricted to a marriage in the lifetime of the widow. S. C. 3 De G. F. & J. 738.

4. A testator bequeathed his residue to his wife for life, and at her decease "to be equally divided between his two daughters B. and C.," and in case of marriage to be settled on themselves. The tenant for life was still living, and B. had never been married:—Held, that B. took an absolute vested interest on the death of the testator. *Smith* v. *Colman*, 25 Beav. 216.

5. G. by his will bequeathed property to belong to and be given up to his child or children on attaining twenty-five. And he provided that if his eldest son should come to the inheritance of a certain estate, then that the share of such son in the above-mentioned property should be made over to his brothers and sisters equally:—Held, that the eldest son having attained twenty-five without having come to the above-mentioned inheritance, was entitled to his share absolutely. *Glyn* v. *Glyn*, 5 W. R. 241; 26 L. J., Ch., 409; 3 Jur., N. S., 179.

6. A testator gave and bequeathed all his real and personal estate to his trustees in trust for his wife for life, and after her death upon trust to convey, assure, and divide the same unto and amongst all his children in equal shares as tenants in common on their respectively attaining twenty-one; and in case of the decease of any or either of his said children without issue under that age, or before they should acquire vested interests therein, then the trustees were to convey, assure, pay, and divide the shares of the children so dying to the survivors:—Held, that the testator's children, on attaining twenty-one, acquired absolute vested interests in the real and personal estate. *Wheable* v. *Withers*, 16 Sim. 505; 18 L. J., N. S., Ch., 156.

7. Where there was a gift over in the event of a legatee dying "before receiving his legacy," and a legatee died after the period contemplated for payment had arrived, but without receiving the legacy, by reason of a

suit having been instituted, and the money paid into court:—Held, that the gift over did not take effect. *Whiting* v. *Force*, 2 Beav. 571; 9 L. J., N. S., Ch., 345.

VI. WHEN RESTRICTED IN OTHER CASES.

1. Future Gifts after a Prior Interest.

1. The words "if A. B. shall happen to die, leaving a child or children," construed to mean, upon the effect of the whole will, the death of A. B. before the testator's widow. *Da Costa* v. *Keir*, 3 Russ. 360; 5 L. J., Ch., 161.

2. A testator gave a fund, subject to the life interest of his wife, to A., B., and C., equally to be divided between them; "but in the case of the decease of C. without leaving lawful issue," he gave one-third between A. and B.:—Held, that upon the decease of the wife, C., who was then living, became absolutely entitled to one-third of the fund. *Barker* v. *Cocks*, 6 Beav. 82.

3. Devise of copyholds in trust for the testatrix's sisters E. and N. for life, and after the death of each her moiety to go to her children, to be equally divided between them and their heirs and assigns respectively, with benefit of survivorship as tenants in common in fee, and not by way of entail; and if all of them should die without lawful issue before attaining twenty-one, then the moiety of the children so dying to go to the children of the other sister; the moiety of the children of N. to those of E. in the one case, and, in the other, the moiety of the children of E. to those of N. N. had two children only, who were born after the death of the testatrix, and died infants:—Held, the children of N. took an absolute fee. *Grimshaw* v. *Howarth*, 1 Jur. 558.

4. A testator, after directing the interest of a sum of stock to be paid to his widow for her life, and after her death to be applied towards the bringing up of his three children, until they attained twenty-one years, proceeded: "And upon their severally attaining twenty-one years, after the decease of my wife, to pay, transmit, and divide the principal sum unto and amongst my three children in equal shares; and in case all my said three children should die without leaving lawful issue in the lifetime of my wife, then I give and bequeath the same unto my wife absolutely; and if either of my said sons shall depart this life leaving lawful issue, such issue shall have and be entitled to such share as their respective parents would have had or be entitled to." T., a son of the testator, died in the lifetime of the testator's widow, having attained twenty-one, and leaving lawful issue:—Held, that the gift over to the issue of T. had taken effect, and that T. had not acquired an absolute vested interest so as to pass to his administrator; held, also, that as to the share of E. R., a son of the testator, who had died under twenty-one, there had been an intestacy. *Revell* v. *Saggers*, 1 W. R. 517.

5. Devise to A. for life, with remainder to B. in fee; but if B. should die, leaving issue, then to his children. B. survived A., and died leaving children:—Held, that the gift to his children did not take effect. *Slaney* v. *Slaney*, 33 Beav. 631.

6. A testator devised the residue of his estate and effects to trustees, upon trust to permit his wife to receive thereout during her life 40*l.* per annum, and after her decease he gave and bequeathed his residuary estate and effects equally between and amongst his three children and their respective heirs, executors, administrators, and assigns, share and share alike; and in the event of the death of any or either of his children without leaving lawful issue, the share or shares of him or them so dying without leaving such lawful issue should go and belong to the survivors or survivor of his children, and to the child or children of any deceased child or children which might then be dead, so that the child or children of any deceased child or children should take only the share or shares absolutely which his, her, or their parents or parent were or was entitled to, or interested in during his, her, or their lifetime or respective lifetimes. The widow having died:—Held, that the three children who were living at her decease were entitled absolutely, and not for life only, to equal shares of the property. *Re Allen*, 3 Drew. 380; 25 L. J., Ch., 286; 4 W. R. 137.

7. A testator gave certain funds upon trust for three persons during their lives, and after the death of the survivor, upon trust for the six children of A. who should be living at the time of the testator's decease, and the issue of such of them as should be living at the time of the testator's decease, and the issue of such of them as should have departed this life leaving issue then living, but so that the issue should take their parent's share. But if any of the six children should die without leaving lawful issue then surviving them, the share of those so dying should go to the survivors or survivor of them. All the six children survived the tenants for life:—Held, that the property vested in them absolutely to the exclusion of their issue. *Johnson* v. *Cope*, 2 W. R. 90; 17 Beav. 561.

8. A testator directed his real estate to be sold on the death of his widow, and the produce paid to his six children and the issue of such of them as should die leaving issue, equally, "the issue of any such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over, in case of any of the children dying in his lifetime or after his decease, without having a child:—Held, that a child who survived the widow became absolutely entitled, and that her children took nothing. *Wood* v. *Wood*, 35 Beav. 587.

9. A mother devised lands to her daughter S. for life, with remainder to her husband for life, and after the death of the survivor of them to all the children of S. by her then husband who should be living at the testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivors

or survivor of the children that should leave such lawful issue as tenants in common in fee:—Held, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz, the death of the surviving tenant for life. *Besant* v. *Cox*, 6 L. R., Ch. D., 604; 25 W. R. 789.

1. A husband gave the income of 4,000*l.* to his wife, which he directed after her death to fall into the residue. He gave his residue to his four sons *nominatim*, with benefit of survivorship; but if they should leave issue, their shares were to go over to their issue:—Held, that the 4,000*l.* belonged absolutely to the sons who were alive at the death of the widow, and the issue of such as were dead. *Re Hill*, 40 L. J., Ch., 594; 12 L. R., Eq., 302; 24 L. T., N. S., 494; 19 W. R. 740.

2. Immediate Gifts.

2. A testator, having three sons and three daughters, gave by will his residuary estate in trust to be divided into six shares ("being as many shares as" he had children), one share to be for the benefit of each child in manner following, viz., the share of sons to be paid to them as soon as convenient after the testator's death, and the shares of daughters to be vested in trustees for their respective benefit as thereinafter mentioned; provided, that if any son died without leaving issue living at his death, the donee intended no such son, etc., any share accruing under that proviso, should accrue to the survivors of the testator's children, their executors or administrators; and he directed his daughters' shares to be invested upon trusts therein mentioned for them and their children. By a codicil, reciting that he desired to settle more distinctly the shares of one of his daughters, he revoked the will as to her share, and gave it in trust for her for life, and after her death to such of her children as should attain twenty-one, or being daughters, marry; and in case she should have no child living at her decease who would attain a vested interest, in trust for the testator's children who should be living at her decease, and the representatives of such as should be dead. One of the testator's sons died in his lifetime, a bachelor, and the above-mentioned daughter died after the testator's death, a spinster:—Held, first, that the surviving son's shares, both original and accruing, vested absolutely on the testator's death, the clause of substitution, as to sons' shares, operating only in case of death in the lifetime of the testator. *Ware* v. *Watson*, 7 De G. M. & G. 248; 2 W. R. 603; 3 W. R. 496.

Held, secondly, that the daughters' accruing shares vested in them absolutely. *Ib.*

3. W. C., by an instrument bearing date the 19th March 1788, conveyed his estate and effects to trustees, upon trust to pay his debts and legacies; and after payment of the same, he directed his trustees to lay out and employ the residue for the use and behoof of G. C., his grandson, and the heirs of the body of G. C., till he or they should arrive at majority, when the trustees were to denude thereof in his or their favours, with such conditions, as to not altering the succession thereof, as to the trustees might seem proper; and failing of G. C. or his lawful issue before either of their attaining majority, the residue should pertain, under the same conditions, to any other heir male of his (the testator's) son's body, if such should exist, by his widow bearing a posthumous child, and that also at his or the heirs of his body attaining majority; and failing of them without issue, then the residue was to pertain to the daughters of his (the testator's) son T. equally. By a codicil, dated the 22nd March 1788, he declared that failing heirs male of his son T. C.'s body, and the succession opening to the heirs female of his body, then in place of the residue pertaining to the daughters of his son T. C. equally, the same should solely pertain to the eldest heirs female of his son T. C. and their issue, the eldest heir female, through the whole course of succession, succeeding always, without division, and secluding heirs portioners; and the trustees were directed to denude upon such heir attaining his majority. By another codicil, dated the 23rd February 1790, the testator, failing his grandson G. C. and the heirs of his body, gave to each of his granddaughters (except the eldest at the time) who should survive him, and the heirs of their bodies, 4,000*l.*, over and above the 1,000*l.* which he had given to them by the instrument of the 19th March 1788, and which it was provided should bear interest from the failure of his grandson and his heirs. W. C. died on the 27th March 1790. G. C. came of age on the 21st May 1799, and died unmarried and intestate on the 30th April 1811. There was no posthumous child of T. C. Upon proceedings being instituted by the trustees for the purpose of having the trust estate wound up:—Held, upon the construction of the instrument and the codicils referred to, that G. C. did not take an absolute interest in the capital of the residuary estate of the testator on attaining his majority, but that on his death, without leaving heirs of his body, the succession opened to heirs female successively, and therefore that the eldest sister succeeded as heir substitute on the death of G. C. *Cuming* v. *Boswell*, 2 Jur., N. S., 1005; 4 W. R. 752.

4. Bequest of residue to A. and B. equally; and in case they should be married at the time it became payable, to be paid for her separate use, "and her receipt alone for the same to be a sufficient discharge." There was a gift over to C. and D., in case A. and B. should die without leaving issue:—Held, that this case was an exception to the general rule, and that the gift over was confined to A. and B. dying without leaving issue in the life of the testator. *Re Anstice*, 23 Beav. 135.

5. Bequest to four persons equally; but in case any one should die leaving lawful issue, then to his sons at twenty-one, etc.; but in case any of the four should die without leaving lawful issue, then his share should go to the others or other of them, and to A., and to the respective issue of such one or more of them, including A., as should die leaving issue, such issue taking the respective shares which the parent would have taken if living. One of the four legatees died in the lifetime of the testatrix without ever having been married; A. survived the testatrix:—Held, that there was no lapse, and that A. took an absolute interest in

a share of the deceased legatee's bequest. *Johnston* v. *Antrobus*, 21 Beav. 556.

1. Gift over, after an absolute bequest, in the event of death without leaving issue surviving, construed, upon the context, such a death under twenty-one. *Brotherton* v. *Bury*, 18 Beav. 65; 2 W. R. 46.

A testator gave his personal estate, and the produce of his real estate (which was to be sold on his youngest child attaining twenty-one) between his children equally. There was a gift over, if any child should die after the testator's decease, without leaving issue surviving him (omitting the words "under twenty-one"). There was a maintenance clause, out of interest, and an advancement clause, out of capital, until the "shares should become payable and transferable," and which referred to the time when the legatees would be absolutely entitled to receive, as being on attaining twenty-one. A child died after attaining twenty-one, without leaving issue:—Held, that his share did not go over, but belonged to his representative. *Ib.*

2. A brother gave all his personal estate to his two sisters, one of whom was twenty-five years old, and the other under that age; and he directed that the former should have the immediate control of her share, and the younger upon the age of twenty-five years. And "in case of the death of either of my sisters before me, or before marrying and having children, the whole of the property to go to the survivor":—Held, that the younger sister who after the testator's death attained twenty-five, but had not married and had children, took, at twenty-five, an absolute and indefeasible interest in her share. *Clark* v. *Henry*, 40 L. J., Ch., 151; 11 L. R., Eq., 222; 24 L. T., N. S., 256; 19 W. R. 319. Affirmed 40 L. J., Ch., 377; 6 L. R., Ch., 588; 19 W. R. 706.

3. A father gave his residuary estate upon trust to be divided equally amongst all his children in equal shares and proportions, with benefit of survivorship in case of the deaths of any of his children without leaving lawful issue, his, her, or their respective executors, administrators, and assigns:—Held, that death without issue meant death in the testator's lifetime; that there was no implied gift to the issue of a child dying between the date of the will and the testator's death; and that the children who survived the testator took absolutely. *Re Smaling, Johnson* v. *Smaling*, 26 W. R. 231.

4. By a will, made before 1838, a testator devised unto his seven children, "and their heirs for ever, the fee-simple" of real estate; and if either of his children should die leaving children, the share of him or her so dying to go to such children; but if any of his children should die, and leave no child, the share of him or her so dying to go to his (the testator's) surviving children and their heirs for ever. All the seven children survived the testator:—Held, that the word "die" must be construed to mean die in the lifetime of the testator; and therefore that the seven children took as tenants in common in fee. *Apsey* v. *Apsey*, 36 L. T., N. S., 941.

5. Residuary bequest to two granddaughters of testator "in trust, till they come of age or marry, the interest to be received in the meantime, and paid to them; but if one of them should die before marriage, or twenty-one, then to survivor and her children; but if both should die, leaving no issue, then I give them power to leave it by will as they should think proper." One legatee married, and the other attained twenty-one:—Held, that both acquired vested interests. *Thackeray* v. *Hampson*, 2 Sim. & S. 214. S. C. *nom. Thackeray* v. *Dorrien*, 3 L. J., Ch., 89.

6. A testator gave legacies to his two brothers, and directed that if either of them "die in my lifetime" his legacy should go to his children, but the legacies were not to be paid till six months after his wife's death. By a codicil reciting the effect of his will and the death of one of his brothers, he directed his legacy to be held for the benefit of his widow for life, and after her death the principal to be paid to her children; and he directed that if his other brother "shall die leaving a widow," such widow should have an interest in the legacy given him in like manner as he had directed the legacy of the deceased brother:—Held, that the words "shall die leaving a widow" meant die in the testator's lifetime, and that interest was payable from the death of the widow. *Hood* v. *Hood*, 18 W. R. 88.

LX. Gift Over on Death before Legacy is Payable or Legatee Entitled in Possession.

See also LVIII. II. *ante.*

I. *Immediate Gifts*, 8101.
II. *Future Gifts after a Life Interest*, 8102.
III. *Equivalent Words—"Entitled"; "Entitled in Possession,"* 8104.
IV. *Decisions under Settlements and Vesting of Portions.* See VESTED, CONTINGENT, AND FUTURE INTERESTS, III. II.

I. IMMEDIATE GIFTS.

7. A testator declared that the trustees of his will should stand possessed of the residue of the money to arise from his real and personal estate upon trust, "for all and every my first cousins-german, to be divided equally amongst them, share and share alike. And in case any of my said cousins shall depart this life before their respective shares shall become due or payable, leaving any lawful issue, I direct that such issue shall have the same share or shares of the same residue as his, her, or their parent or parents would have been entitled to if living." The testator had several first cousins-german living at the date of his will, two of whom died in his lifetime; the others survived him. One of those who died left seven children, the other left no issue:—Held, first, that the words "due or payable" referred to the time of the testator's death; secondly, that the issue of the deceased cousin were entitled to their parent's share; thirdly, that the share of the cousin who died without issue did not lapse. *Coort* v. *Winder*, 8 Jur. 770.

8. A. bequeathed pecuniary legacies to two

nephews and a niece by name, if they survived him and attained twenty-one, when the nephews' legacies were to be paid. In case of the death of either of the nephews, or of the niece, leaving issue, such issue to take the parents' legacy as the parents should by will appoint; but in case of the death of either of the nephews or the niece before his or her legacy became payable, the legacy to go to the survivors. During the minorities of the legatees the trustees were to apply the income of the legacies for their maintenance and education. The legacy of the niece, and any share she might acquire by the death of her brothers, or either of them, were to be settled for her separate use:—Held, that the word paid must be construed as vested, or payable, and that the executory gift to the issue would take effect in the event of the parent dying after attaining twenty-one. *Martineau* v. *Rogers*, 8 De G. M. & G. 328.

II. FUTURE GIFTS AFTER A LIFE INTEREST.

1. A testator gave stock to trustees, to be divided after the death of the two persons who had life interest in it among A., B., C., D., and E., in equal shares; and he directed that, if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them so dying without issue, should go to and be equally divided among the survivor and survivors of them. A. died, leaving issue, who were living at the time fixed for the distribution of the fund; then B. died, leaving a son, who died without issue before the period of distribution; shortly afterwards, and also before the period of distribution, C. died without issue:—Held, that B.'s personal representatives were not entitled to any portion of the fund; that the one-third of B.'s share, which on the failure of her issue survived to C., did not, on C.'s death, survive to the other legatees, but was transmitted to her personal representative; that the words "survivor and survivors" were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of B. and C. went over to A.'s personal representatives. *Crowder* v. *Stone*, 3 Russ. 217; 7 L. J., Ch., 93.

2. Real and personal estate were given upon trust, during the life of A., out of the income, to pay A. 200*l.* a year, and one-third of the residue to B.; and on the death of A., to sell and pay one-third to B., then a gift over, on the death of B., before his share should "become due and payable." B. died in the life of A.:—Held, that the gift over took effect. *Creswick* v. *Gaskell*, 16 Beav. 577.

3. A husband by his will gave his real and personal estate to trustees upon trust for his wife for life, and then to stand possessed of the same for all and every of his children, share and share alike, until his youngest child should attain the age of twenty-one, and upon his youngest child attaining such age, then upon trust for all his children, share and share alike. He then directed that if any of his children should die before his, her, or their share or shares should become transferable and payable, without leaving issue, then the share or shares of the child or children so dying should go over to the survivors; but in case any of his children should die before his, her, or their share or shares should become payable, leaving issue, then the trustees were directed to transfer and pay the share or shares of such deceased child or children unto his, her, or their issue, share and share alike, when they should attain twenty-one:—Held, that the substitutionary gift to the issue of deceased children was sufficient to divest the share of a child who attained twenty-one, but died in the lifetime of the testator's widow, the tenant for life. *Chell* v. *Chell*, 23 W. R. 252.

4. Gift of residue in trust for wife during widowhood, remainder among five children or the survivor at such age as wife should appoint, in default at twenty-one; but share of child dying before it should become payable, to issue of child:—Held, that the issue of a child who attained twenty-one and died in the lifetime of the wife was entitled. *Hind* v. *Selby*, 22 Beav. 373.

5. The rule in *Emperor* v. *Rolfe* (1 Ves. 208) applies to the will of a person *in loco parentis*. The Court will apply this rule in cases where the language of the testator does not necessarily imply an intention to benefit children dying before the tenant for life. *Jackson* v. *Dover*, 4 N. R. 136.

6. Testator bequeathed 10,000*l.* in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J. when and as they should attain twenty-one, as tenants in common, and if any of them should die before their shares became payable, leaving issue; but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as the original shares should become payable; and if J. L. J. should have no child, or having such, they should all die under age and without issue, then the trust fund to sink into the residue, which the testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died in his lifetime without issue:—Held, that "payable" meant "attain twenty-one," and, consequently, that one-fourth of the fund vested in the deceased child. *Jones* v. *Jones*, 13 Sim. 561; 13 L. J., N. S., Ch., 16; 7 Jur. 786.

7. A testator devised his real estates to his widow for life, and after her death directed the executors to sell, and divide the proceeds equally between his seven children; the shares of his three sons to be vested in them respectively when and as they should attain twenty-one, and the shares of his four daughters to be vested interests in them when and as they attained that age or were married. During the minorities of his children, their shares were directed to be invested and applied for their maintenance and advancement. In case any of the children should die leaving issue lawfully begotten "before the share of such child or children so dying as aforesaid shall become due and payable," the share was to be equally divided "amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years;" the interest of such child's share so dying, leaving issue, to be applied for the advancement, etc., of such issue during minority. E.,

one of the testator's daughters, married and died in the lifetime of the testator's widow, leaving an infant child, and having assigned her share by way of mortgage:—Held, that the words due and payable did not postpone the vesting of the share until the death of the tenant for life, and that E.'s assignee was entitled, and not her infant daughter, under the gift over. *Mendham* v. *Williams*, 2 L. R., Eq, 396; 15 L. T., N. S., 130.

1. A testator, after giving all his real and personal estate to trustees, upon trust after payment of debts, funeral and testamentary expenses, to permit his wife to receive the rents of the realty and enjoy the personalty for her life, she maintaining his son E. during his minority, and after his decease to the use of the testator's sons T., J., and E, as tenants in common, subject to the payment of 200*l.* to each of his daughters H. and M. at the expiration of six calendar months after the decease of his wife, provided that if either or both of his said daughters should happen to die in the lifetime of his wife, or before their respective portions became payable, leaving lawful issue, such issue should have the portion of the parent so dying. H., one of the daughters, died in the lifetime of the testator's widow, unmarried; and upon the question whether the legacy of 200*l.* given to her was vested or not:—Held, that it was vested. *Wilkinson* v. *Chamberlain*, 3 W. R. 601.

2. A testator, by his will, bequeathed an annuity to his daughter, and directed that after her death the trustees should hold 2,000*l.*, part of the fund set apart to secure the annuity, upon trust to pay and divide the same unto and equally between the child and children of the daughter as and when they should respectively attain twenty-one, and in case any of the children should die before their shares should become "payable as aforesaid" without leaving issue, the share or shares of him, her, or them so dying should be paid to the survivor or survivors of them, equally if more than one, and if but one, the whole to that one, with power for the trustees, during the respective minorities of the children, to apply the income of his, her, or their expectant share or shares towards his, her, or their maintenance and education. And if all such children should die under twenty-one, without leaving issue, the fund was given over:—Held, that the children's shares absolutely vested at twenty-one, and were not divested by subsequent death without issue in the lifetime of their mother. *Partridge* v. *Baylis*, 17 L. R., Ch. D., 835; 44 L. T. 737; 29 W. R. 820.

3. A testator gave the interest of a fund to his widow for life, with a power of appointment amongst all his children, and in default of appointment amongst all such children, with a gift over to the widow, in case all the children should die before their shares should become payable. The widow appointed the fund to her two children, one of whom died in her lifetime:—Held, that the survivor took the whole fund. *Bielefield* v. *Record*, 2 Sim. 354.

4. Testator directed his executors to purchase out of his residuary estate a certain sum of stock, etc., to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living. Provided, that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his lifetime; one of the daughters died three months after the testator:—Held, nevertheless, that she had a vested interest in one of the shares. *Collins* v. *Macpherson*, 2 Sim. 87.

5. A testator gave his real and personal estate, after paying four annuities, to one for life, and after his death, he directed his personal and the produce of his real estate to be divided amongst the children of A. living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not, then his trustees were either to invest it and pay and apply the residue of the income in the maintenance, etc, of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares. There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share became payable. One of the children predeceased an annuitant:—Held, nevertheless, that the bequest was vested, and that the gift over did not take effect. *Butterworth* v. *Harvey*, 9 Beav. 130; 9 Jur. 999.

6. Personalty was given to parents for life, with remainder to all their children equally, the shares to be paid at twenty-one or marriage, unless in the lifetime of the parents, in which case payment was to be made on the death of the survivor. There was a gift over on the death of a child before becoming entitled to payment. A child attained twenty-one, but died in the lifetime of her parents:—Held, that the gift over did not take effect. *Re Williams*, 12 Beav. 317; 19 L. J., N. S., Ch., 46; 13 Jur. 1110.

7. Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, to be respectively paid at twenty-one or marriage. "But if any of my said children or grandchildren shall happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such share of my child or children, or grandchildren, so dying, unto and among those that shall be then living, share and share alike." Two of the children died before the testator. Their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild, having survived the testator and attained twenty-one, died before the tenant for life. Their shares transmissible to their representatives. No implication that the survivorship was to take place, amongst the children and grandchildren distinctly, from the equality of legacies, or from the bequest to each class being made by distinct clause. *Walker* v. *Main*, 1 Jac. & Walk. 1.

8. Trust by will subject to an interest for life, to pay and transfer to the testator's nephew and nieces equally at twenty-one, with survivorship, in case any should die before his or their shares should become

payable, and a limitation over in case all should die, etc. Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax* v. *Wilson*, 16 Ves. 171.

Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brothers and sisters of the testatrix, and in like manner to the survivors or survivor of them; the share of those who died in the life of the niece passed to their representatives. *Ib.*

1. A testator gave real and personal estate to trustees on trust, after the death of a tenant for life, to sell and convert into money, and "to pay and divide the moneys arising therefrom among" eleven persons named equally, as and when they should respectively attain twenty-one, with a gift over of the shares of any of them who should die "before such legacy, or share, or any part thereof, should become payable." All of them survived the testator, and attained twenty-one, but some of them died before the tenant for life:—Held, that "payable" was equivalent to "vested," and that the gift over did not take effect. *Haydon* v. *Rose*, 39 L. J., Ch., 688; 10 L. R., Eq., 224; 18 W. R. 1146; 23 L. T., N. S., 334.

2. Where there is a gift for life, followed by a gift in remainder, which is to vest upon the attainment of a particular age, or any other event personal to the legatee in remainder, with a gift over in the event of the latter dying before the legacy is payable or receivable, or vested in possession, or the like, in any form of expression that signifies "paid" or "received," all such expressions are to be read as equivalent to "vested," and refer to the period at which the property is to vest. *West* v. *Miller*, 37 L. J., Ch., 423; 6 L. R., Eq., 59; 18 L. T., N. S., 429; 16 W. R. 602.

A testator bequeathed his personalty to trustees, to invest the same and pay the income to his wife, until his daughter should attain twenty-one, and as soon as she should attain that age then to call in all invested moneys, and divide the same between the daughter and his son; and in case of the death of either without issue before their respective estates or interests should be received, then to pay the estate or interest of him or her so dying to the survivor. But in case of the death of either previous to the time aforesaid leaving issue, then to such issue, with other remainders over. By a codicil, he directed the investments and payments to his wife to be continued during her life, though she might live beyond the daughter's attainment of the age of twenty-one; and, reciting that his son was dead, he gave the share and interest, which he would have taken, to the daughter, to be paid and applied along with her own. The daughter survived the testator and attained twenty-one, but died in the lifetime of his wife, leaving a child:—Held, that the daughter took an absolute vested interest in the fund on attaining twenty-one, which her death in the lifetime of the wife did not divest in favour of the child and the other persons entitled over. *Ib.*

III. EQUIVALENT WORDS—"ENTITLED"; "ENTITLED IN POSSESSION."

3. Construction of a gift over upon death before becoming entitled to payment. *Re Williams*, 12 Beav. 317; 19 L. J., N. S., Ch., 46; 13 Jur. 1110.

Trust of a sum of consols for all and every the children of A. and B., the shares of sons to be paid, assigned, or transferred to them at twenty-one, and the shares of daughters at twenty-one or marriage, unless such respective times of payment should happen in the lifetime of A. and B., or the survivor, in which case the same should be paid, assigned and transferred immediately on the death of survivor of A. and B.; and in case any of the same children should happen to die before he or she should become entitled to the payment, assignment, or transfer of his or her share, then the share of the party so dying should be paid, etc., to the survivors or survivor who should become entitled to have their, his, or her shares or share paid, assigned, or transferred to them, him, or her, as aforesaid:—Held, that a child who attained twenty-one, but died in the lifetime of A. and B., was entitled to a share, and that the benefit of the trust was not confined to children living at the period of distribution. *Ib.*

4. A testator gave the residue of his estate upon trust, to pay the interest to his widow during her life for her separate use, and after her decease to pay the principal to C. for her own use, and to be at her own disposal, but if C. should happen to die leaving any child living at her decease, then to such child or children; and if she should happen to die without any child living at her decease, then to D. and E.; but if either of them should die before they should become entitled to receive the fund, then he gave the whole to the survivor, and if they should both die in the lifetime of his widow then he gave the whole to his wife absolutely. C., having survived the widow, was entitled to the residue absolutely. *Da Costa* v. *Keir*, 3 Russ. 360; 5 L. J., Ch., 161.

5. Testator, having a power to appoint by deed or will, executed a will, and afterwards a deed, and then a codicil to his will. By his will he appointed four denominations of land to his four sons, giving one denomination to each and his heirs, "to go to them immediately after the death of his wife, and in case of the death of any or either of his said younger sons before he or they should be respectively entitled thereto,—then the part or share of him or them, so dying, to go to and be divided amongst the survivors equally, share and share alike." By the deed he partly displaced the appointment contained in his will, and appointed to his third son and his heirs the denomination of land given by his will to his fourth son, leaving the latter without provision; then, by a codicil, he appointed to his fourth son and his heirs another denomination of land "instead of" that given by his will:—Held, that the words "and in case of the death of any or either of his said younger sons," etc., referred to the event of the death, not of the testator, but of his wife. Held, also, that although the appointment by the will would have been subject to the clause of survivorship, the appointment by the codicil was absolute to him and his heirs. *Charitable Donations (Commissioners of)* v. *Cotter*, 2 Ir. Eq. R. 196; 2 Dr. &

Wal. 615; and the decision was affirmed, S. C. 1 Dr. & War. 498; where, however, it was held, that the period of vesting was the death of testator, not of tenant for life.

1. Entitled construed as entitled in possession. *Turner* v. *Gosset*, 34 Beav. 593.

Subject to prior life and possible absolute interests, there was a bequest of a portion of the residue to A., with a gift over to his children or other issue, in case of his decease before he should become entitled:—Held, that this meant entitled in possession. *Ib.*

2. The will of the testator in this matter contained a bequest of 25,000*l.* to trustees, upon trust to invest the same, and to pay the interest to his daughter for life, and from and after her decease to pay the principal unto and amongst all her children equally, share and share alike, if more than one, and their respective executors, administrators, and assigns: and if but one, to that one, his or her executors, administrators, and assigns, "on the respective attainments of such children to the age of twenty-one years, being sons, or on their respective attainments to that age or days of marriage, being daughters;" the interest of their respective shares from time to time, until their respectively becoming entitled to the principal, to be applied in their respective maintenance; and in case any of the children of his said daughter should happen to die before being entitled in possession to his, her, or their share or shares under the will, the share of the child so dying was to go to the survivors or survivor of them. The daughter had two children only who attained twenty-one, the rest having died under age, and unmarried. One of these two children survived the testator, but died in the lifetime of her mother:—Held, that the gift over did not take effect, but the personal representatives of the deceased child were entitled to her share. *Re Yates's Trusts*, 21 L. J., N. S., Ch., 281; 16 Jur. 78.

3. Bequest of personal estate to A. for life, and after her death to the testator's brothers and sisters; but if any of the brothers or sisters should die before they became entitled to their shares, the shares of them so dying to go to their children. The testator left five brothers and sisters; two of whom died in the lifetime of A.:—Held, that the word "entitled" had reference to the death of the testator, and not to the death of A., and that the shares had therefore vested absolutely in the brothers and sisters, and that the representatives of each of them who had died were entitled to a fifth of the fund. *Henderson* v. *Kennicot*, 2 De G. & Sm. 492; 18 L. J., N. S., Ch., 40; 12 Jur. 848.

4. A gift over, after a tenancy for life, on death "without becoming entitled to the receipt of the trust moneys," construed "without attaining a vested interest." *Hayward* v. *James*, 28 Beav. 523; 6 Jur., N. S., 689; 8 W. R. 676; 29 L. J., Ch., 822.

A testator gave to trustees shares in his residuary estate for the benefit of his daughters for life, and after their death for their children, to be equally divided, and to be "assigned and paid," the shares of sons at twenty-one, the shares of daughters at twenty-one or marriage; but if either should die before his or her share became "payable," and in case her daughters or either of them should die without issue, or leaving issue, all of them should die without becoming entitled "to the receipt of the trust moneys," then over:—Held, that the shares of children vested at twenty-one or on marriage, and that they took an interest in the fund absolutely, and that the gift over did not take effect. *Ib.*

5. The testator gave all his real and personal estate to trustees, upon trust to sell and invest, and set apart a sufficient sum to produce an annuity to his widow for her life, and that the trustees, during the life of his wife, should stand possessed of the residue of the moiety arising from such sales, and after the decease of his wife of the whole of such moneys, upon trust to pay and divide the same unto and equally between and amongst all and every his children as and when they should respectively attain the age of twenty-one years, and to their several and respective executors, administrators, and assigns; but in regard to such of his children as had already attained the age of twenty-one years, he directed that the share or shares of such children should be paid to them respectively at the expiration of twelve months after the decease of his wife; but in the event of the decease of any or either of his said children before he, she, or they should have received or become possessed of their shares, leaving issue, that the share of the child so dying should go to the children of such child on their attaining twenty-one; and on failure of issue of any of his (the testator's) sons or daughters, then the share of such his sons or daughters should go to such of his (the testator's) children as should be then living:—Held, that the children of the testator who had attained twenty-one at the date of the will took vested interests in their shares, liable to be divested in the event of their dying before the widow, but that they were entitled to receive the interest of their shares in the meantime, and that the children who had attained twenty-one since the date of the will were entitled to an immediate transfer of their shares, except as to the fund appropriated to the widow's annuity. *Rammell* v. *Gillow*, 15 L. J., N. S., Ch., 35; 9 Jur. 704.

Construction of word "Entitled" in clauses excluding younger children.] See YOUNGER CHILDREN, VIII.

LXI. Gift Over on Death before Actual Receipt of Legacy or Distribution of Estate.

See also LVIII. II. *ante.*

6. Legacy out of a fund in the Indies given over in case of death of legatee before he might have received it, vested from death of testator. *Hutcheon* v. *Mannington*, 1 Ves. J. 366.

7. Where there was a gift over in the event of a legatee dying "before receiving his legacy," and a legatee died after the period contemplated for payment had arrived, but without

receiving the legacy, by reason of a suit having been instituted, and the money paid into court:—Held, that the gift over did not take effect. *Whiting* v. *Force*, 2 Beav. 571; 9 L. J., N. S., Ch., 345.

1. A testator bequeathed personal estate in trust to pay the proceeds to his widow for life, and after her death to divide the capital between his brothers A. and B. and his sisters C. and D. He declared, that in case any of them should die in his lifetime, and before they should have received any benefit from the bequest, then the share of him or her so dying should be divided among his or her respective children. A. survived the testator, and died in the lifetime of the tenant for life, having bequeathed his share:—Held, that "and" could not be read "or," and that on the death of the testator the share of A. was absolutely vested in him, and transmissible by his will. *Re Kirkbride*, 2 L. R., Eq., 400; 14 W. R. 728; 15 L. T., N. S., 51.

2. A residuary bequest upon the whole will vests only as the property is received:—Held, therefore, that the representatives of a deceased residuary legatee are entitled only to that part which was got in before his death. *Gaskell* v. *Harman*, 6 Ves. 159. From this decree, plaintiff appealed, when the Lord Chancellor reversed that part of it which declares that the residuary property vested only as it was converted into money, his lordship holding, that such an intention, though, if clearly expressed, must, notwithstanding its inconvenience, be executed, was not the true construction of the whole will, and it is not to be collected unless clearly expressed. S. C. 11 Ves. 489. And see *Innes* v. *Mitchell*, 6 Ves. 461.

3. Devise to the testator's wife for life, and as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell and divide the produce between five nephews, at such time as the sale should be completed, if then living, if any should die in her life, or before the sale should be completed, his share to his children, if none, to the survivors: the interests not vested till the sale. *Elwin* v. *Elwin*, 8 Ves. 547.

4. Devise upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall then be paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled in the event of the portion not having become vested in her lifetime, an inquiry was directed as to the time when the debts were, or might have been paid. *Bernard* v. *Montague*, 1 Meriv. 422. See 11 Ves. 508.

5. A gift over of a legacy, in case the legatee should die before the actual receipt of it, is bad in law, if the bequest is immediate. *Martin* v. *Martin*, 12 Jur., N. S., 889; 35 L. J., Ch., 281; 14 L. T., N. S., 129.

A testator gave a mixed fund, to be equally divided between his nephews and nieces; and he directed that the property which he left to his nephews and nieces should on their decease severally be divided equally between such of their children as might survive them, and if either or any of his nephews and nieces died before him, or before they should have actually received what was to go to them, their share should be divided equally between their children, and, in default of children, between his nephews and nieces:—Held, that the nephews and nieces who survived the testator took absolute interests. S. C. 2 L. R., Eq., 404; 12 Jur., N. S., 889; 35 L. J., Ch., 679; 14 W. R. 986; 15 L. T., N. S., 99.

6. Where a testator directed the trustees of his will to pay a sum of money, and a share of his residue, to a legatee, but in case the legatee should die before the property was "actually paid or payable," then to hold it for other parties.—Held, that on the death of the legatee three months after the testator without any actual payment having been made to him, the gift over took effect. *Whitman* v. *Aitken*, 2 L. R., Eq., 414; 12 Jur., N. S., 350; 14 L. T., N. S., 248.

7. Testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children; provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realised and the produce divided:—Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment; and that the representatives of the deceased child took a share. *Re Dodgson's Trust*, 1 Drew. 440.

8. A testator bequeathed to his executors the residue of his ready money, and money at interest that should be due and owing to him at his decease, upon trust, to receive and get in all his said moneys, and after paying certain legacies, to divide the remainder unto and between all his nephews and nieces who should be then living; and in case of the death of any of his nephews and nieces before receiving their respective shares, then the share of him or her so dying to go to the survivors. The testator, by a codicil which he directed should be annexed to and form part of his will, bequeathed to his wife all his real and personal estate and effects, of what nature or kind soever, which he should be possessed of at his decease, to hold and enjoy the same during her life:—Held, that the gift to the testator's nephews and nieces was a specific bequest, and no life interest in that fund was given to the widow; that the legacies vested in the nephews and nieces at the decease of the testator, subject to be divested upon the death of any of them before the expiration of twelve months, the usual period allowed for payment of legacies; and that the daughter of a niece who died within a year was not entitled to her mother's share. *Re Arrowsmith's Trusts*, 29 L. J., Ch., 774; 6 Jur., N. S., 1231; 8 W. R. 555. And see S. C. on appeal 2 De G. F. & J. 474; 30 L. J., Ch., 148; 7 Jur., N. S., 9; 9 W. R. 258.

9. A testator gave his real estate and the residue of his personal estate to trustees, upon trust with all convenient speed after his death to sell and convert the same, and to hold the proceeds on trust to pay his debts and funeral

and testamentary expenses, and subject thereto and to the payment of an annuity, to divide the residue of the trust moneys into six equal parts, among two nephews and four nieces of the testator named in the will. He directed that the shares of the nephews should be paid to them as soon after his death as possible. He directed that the trustees should invest the shares of the nieces and pay the income thereof to them for their separate use. He directed that, in case any of his nephews should die before him, or before the division of his estate as before directed, his share should go over. And there was a similar direction with regard to the share of any of the nieces who should die before him, or before the division of his estate as before directed:—Held, that the "division" of the testator's estate meant the expiration of twelve months from his death, and that the share of one of the nieces, who survived him but died within that period, went over. *Re Collison, Collison* v. *Barber*, 12 L. R., Ch. D., 834; 48 L. J., Ch., 720; 28 W. R. 391.

1. Bequest of share of residue to K. and G., "but in case K. shall die before he shall actually have received the whole of his share and without leaving issue living at his decease, then and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to G." K. died unmarried, without having received any share of the residue:—Held, that the gift over was not void for uncertainty, but took effect. *Johnson* v. *Crook*, 12 L. R., Ch. D., 639; 48 L. J., Ch., 777; 41 L. T. 400; 28 W. R. 12.

2. Where a legacy is absolutely vested it cannot be divested by a subsequent gift over in the event of the legatee dying before he has received the legacy. *Bubb* v. *Padwick*, 13 L. R., Ch. D., 517; 49 L. J., Ch., 178; 42 L. T. 116; 28 W. R. 382.

A testator gave his residuary estate in trust for all his children who should attain the age of twenty-one years, as tenants in common, but so that they should not be entitled to receive their respective shares until the youngest child attained the age of twenty-one years, unless the trustees of the will should in their discretion consider it proper that the shares, or any of them, should be paid; and the testator directed that in case any child should die before the youngest attained the age of twenty-one years and without having actually received his share, then that share should go over to the other children:—Held, that each child on attaining the age of twenty-one years acquired an indefeasibly vested interest in his share. *Ib.*

Re Arrowsmith's Trusts (2 De G. F. & J. 474) observed upon, and *Johnson* v. *Crook* (12 L. R., Ch. D., 639) not followed. *Ib.*

3. Bequest of proceeds of real and personal estate (directed to be converted with power of postponement) on trust for the testator's three sons and daughter equally, the daughter's share to be retained for her separate use for life, and after her decease for her children; with a direction in the event of any child of the testator dying before the testator, or before the execution of all or any of the trusts of the will, leaving issue, to pay to the issue of such deceased child the share which their parent would have taken if living. The three sons having survived the testator were held to be absolutely entitled, the gift over on death before execution of the trusts being void for uncertainty. *Johnson* v. *Crook* (12 L. R., Ch. D., 639) disapproved. *Roberts* v. *Youle*, 49 L. J., Ch. 744.

4. A testator gave each of four persons a fourth of the proceeds of his residue, and in case of the death of any legatee before the "final division" of his estate he gave that legatee's share over. One legatee died more than a year after the testator but before the estate had been distributed:—Held, that his personal representatives were entitled to his fourth share. *Re Wilkins, Spencer* v. *Duckworth*, 18 L. R., Ch. D., 634; 50 L. J., Ch., 774; 45 L. T. 244; 29 W. R. 911.

Johnson v. *Crook* (12 L. R., Ch. D., 639) approved. *Ib.*

5. A testator, in case of the death of any of his children without leaving issue, before payment of any part of reversionary legacies, directed such parts to be divided among the others and other of them, and in case of the death of a child leaving issue before such payment, he directed such parts to be divided among the children of such child:—Held, first, that "payment" referred to the time when the shares given over became payable, and the gift over was not void for uncertainty; secondly, that "others" meant children other than those who had died without leaving issue; thirdly, that the gift over applied to accrued as well as original shares. *Re Arrowsmith's Trusts* (29 L. J., Ch., 774; 2 De G. F. & J. 474) approved and followed. *Hutcheon* v. *Mannington* (1 Ves. 366) and *Martin* v. *Martin* (2 L. R., Eq., 401) distinguished. *Bubb* v. *Padwick* (13 L. R., Ch. D., 517) disapproved. *Johnson* v. *Crook* (12 L. R., Ch. D., 639) approved. *Re Chaston, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

6. Frederick Hobson, the elder, by his will, gave to three trustees (one of whom was his eldest son William) all his real and personal property, which included the proprietorship of a newspaper, on trust, to carry on the newspaper during the life of his wife, and they were annually to set apart and invest one-fourth of the profit of the paper as a reserve fund to meet emergencies, and to divide the remaining three-fourth parts of the profits of the same, and the income from his real and personal estate, into six equal parts for his wife and five children (all specially named), and in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children. And, after the decease ("or during her life if she and the majority of my children, and my trustees, shall deem it proper and expedient so to do), at the sole discretion of my trustees," to sell the real and personal estate and the newspaper, and divide the proceeds among the wife and children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use and benefit immediately after such division. He declared that, "in case, under the above clause, it shall

be agreed, or my trustees shall decide to sell" the paper, and if any of his sons should wish to carry on the same, such one should be entitled to purchase it at 500*l.* less than the market price. Till all the property was sold the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real and personal estate. The will also contained a provision that "in case any of my children shall survive my wife and die before he or she shall have received his or her share of my trust estate and without leaving lawful issue," then that such share should go over:—Held, that these words imposed on the trustees an absolute trust for sale, not merely a power of sale, and that the discretion given to them referred only to the time and manner of selling to the best advantage. *Minors* v. *Battison*, 35 L. T., N. S., 1; 25 W. R. 27; 1 L. R., App. Cas., 428; 46 L. J., Ch., 2.

Held, also, that the word "received" in the divesting clause must be taken to mean "became *de jure* receivable," and that the shares vested indefeasibly immediately on the death of the widow, and (there being but three children of the testator then surviving) that William Hobson took an absolute vested interest in an equal third part of the testator's real and personal estate, including the newspaper. *Ib.*

1. A testator gave to his wife the rents and interest of all property for her life, but still giving her liberty to sell and dispose of the whole or any part of the property if she should think proper so to do; and he directed that all his property remaining at her death should be divided into two equal parts, one moiety among six persons, and the other moiety among three, but that if any of the nine legatees should die before receiving their share, having no child, such legatee's share should be equally divided between the other legatees:—Held, that the widow took only a life interest in the property. *Rose* v. *Rowe*, 21 L. T., N. S., 349; 17 W. R. 1077.

Held, also, that none of the legatees to whom one moiety of the property was bequeathed were entitled to share in the other moiety. *Ib.*

LXII. Gift Over on Death before Legacy is Vested.

2. In a gift over on the death of A. before the estate became vested in him, the word "vested" means vested in interest and not vested in possession. *Re Arnold*, 33 Beav. 163.

The word "vested," used in a gift over, must be construed "vested in interest," and not "vested in possession," unless the rest of the will and the context require that it should receive the latter construction. S. C. 9 Jur., N. S., 1186; 12 W. R. 4; 9 L. T., N. S., 530.

3. Where residuary real and personal estate was directed to be all converted into personalty, and to be applied in payment of debts, etc., and the residue to be divided among testator's children, J., M., and C., and grandchild R., the share of M. to be paid as soon after his decease as convenient, and the shares of C. and R. at the ages of twenty-two and twenty-one respectively; and in case any of his children should die before their shares became so vested as aforesaid, the shares to go to the survivors equally; and if but one, the whole to that one. J. and C. died in testator's lifetime, C. under twenty-two, and R. survived testator, but died under twenty-one:—Held, first, that "vested" must mean "payable," and that the original shares of the deceased children survived to the survivors; and, secondly, that "whole" meant the whole residue, and, therefore, that the accruing as well as original shares devolved to M. as sole survivor. *Sillick* v. *Booth*, 1 Y. & Coll. C. C. 121; 6 Jur. 142.

4. Devise before 1837 to the testator's daughter K. for life; remainder to the use of all and every the daughter and daughters of the body of M., as tenants in common; and in default of such issue, to A. in fee. By a codicil the testator recited that he had devised the reversion in fee in several estates expectant on the decease of his several daughters (including H.), to his son A.; and also that he had devised other estates to trustees, to the use of A., his heirs and assigns, until he attained twenty-five, and thereupon to him, his heirs and assigns for ever; and declared, that in case A. should die without issue, "and before the several estates should become vested in him by virtue of the said several limitations," then over. A. died after the testator's death, and without issue, and subsequently H. also died unmarried:—Held, that the word "vested" must be construed "vested in interest," and not "vested in possession." *Richardson* v. *Power*, 19 C. B., N. S., 780; 11 Jur., N. S., 739; 35 L. J., C. P., 44; 13 W. R. 1104.

5. Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, etc., as tenants in common, with cross remainders and benefit of survivorship in case any of them should die before their shares in the trust property should become vested in them, which he desired might not be shared until his youngest nephew should attain twenty-four; and he directed his trustees to maintain and educate them out of the income of the property during their minorities; the nephews were infants at the testator's death:—Held, nevertheless, that they took vested interests under the will. *Parkin* v. *Hodgkinson*, 15 Sim. 293.

6. A testator gave to A. a legacy to be vested in him when and as he should attain the age of twenty-one, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. *Re Gaitskell*, 15 L. R., Eq., 386; 21 W. R. 768; 21 L. T., N. S., 760.

7. A testator gave his residuary personal estate to trustees to pay the interest to his wife for life, and after her decease he gave four-sixths of the capital to each of his four brothers and sisters, and in case of the death of any or either of the legatees in his lifetime, the sixth part of him or her so dying to go to his or her children. He then gave the remain-

ing two-sixths to the children of a deceased brother and sister: provided always, that in case of the death of any or either of his legatees before their respective shares should have become vested, the share or shares of him or her so dying were to sink into the residue, and go to the survivors as if the legatees so dying had not been named, or had never existed. One of the legatees survived the testator, but died in the lifetime of his widow, the tenant for life:—Held, the period of vesting was the death of the tenant for life, and that her representatives were not entitled to her share, but that it sank into the residue as if she had not existed. *Re Morris*, 26 L. J., Ch., 688; 5 W. R. 423.

1. A testator gave all his real and personal estate to trustees to sell and divide the proceeds into four parts, and as to each of three of the fourths upon trust for one of the testator's children for life, with remainders to such of his or her children as being a son attained twenty-two, or died under age leaving issue, or being a daughter attained that age or married, equally, with benefit of survivorship. As to the other fourth, the son being dead, the life estate was omitted; and there was a direction, that if all those constituting a set or class of beneficiaries died without acquiring a vested interest in the capital, the share, extinguished or lapsed, should go equally amongst the surviving sets or classes. A son died intestate and without issue:—Held, that the gift over took effect. *Beardsley* v. *Beynon*, 13 W. R. 831; 12 L. T., N. S., 698.

2. A testator, by his will, directed a fund to be set apart to answer an annuity which he directed to be paid to his widow. After her death he directed the fund to form part of his residuary estate; and he bequeathed his residuary estate to all his children equally, to be divided between them; with a proviso that if any child should die, either in his lifetime or after his decease, and before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors: but in case any child should die leaving issue, then such issue should take their parents' share:—Held, that the second branch of the proviso must be read in connection with the first, and that in both the death contemplated was a death before the share vested in possession. *King* v. *Cullen*, 2 De G. & Sm. 252.

3. Where a testator gives a life estate in his funds, and at the expiration thereof gives the principal to be divided among several, and if any die then to the survivors, without specifying the time of survivorship, he is held to mean the contingency to extend over the whole period which elapses before the time of distribution or expiration of the life estate, unless the context points out time; in other words, the legacy does not vest till the death of the tenant for life. *Richardson* v. *Robertson*, 6 L. T., N. S., 75. S. C. *nom. Young* v. *Robertson*, 8 Jur., N. S., 825.

Therefore where A. gave a life estate to B., and at B.'s death to six persons equally, declaring that "if any die without issue before his share vests, the same shall belong equally to the survivors." There was nothing in the word "vest" to prevent the application of the rule. *Ib.*

The word "vest" means *primâ facie* "come into possession," and not "accrue in point of interest." *Ib.*

4. A testatrix directed that her trustees should stand possessed of the residue of her estate as to one moiety, and the dividends, to pay the same to her daughter A. for life, and then as to this moiety and the dividends and accumulations, until it should be distributable, to pay the same to the children of A. who should survive her, at twenty-one, with benefit of accruer and survivorship; and she gave the other moiety in similar terms to her daughter B.; and in case, at the decease of either of her daughters, there should be no children of such daughter who should have lived to attain a vested interest, then the moiety of such daughter so dying and the dividends and accumulations to be held for the other daughter for life, and her children afterwards. And if upon the death of the survivor of the two daughters there should be no child or children of either who should have lived to attain a vested interest in the two moieties, then the entirety of the two moieties and the dividends and accumulations to be held for the testatrix's six nephews and nieces on attaining twenty-one. A. died before the testatrix, and she then made a codicil, directing that her moiety should go to B. in the same manner as it would have gone to A. if she had lived; and she gave an annuity for the maintenance of the only daughter of A. until she should attain twenty-one. B. died, leaving six children infants:—Held, that the interest of the six grandchildren of the testatrix was not vested until they attained twenty-one, and the dividends must be accumulated, and that the nephews and nieces were not entitled under the gift over until default in the attainment of twenty-one by the grandchildren. *Bull* v. *Jones*, 31 L. J., Ch., 858; 10 W. R. 820.

Meaning of word "Vest" when used by Testator. In general.] See VESTED, CONTINGENT, AND FUTURE INTERESTS, V.

LXIII. Gift Over on Death without, or without having, Children or Issue.

— *Children construed as a Word of Limitation.* See XVIII. II. 4 *ante*.

5. Bequest to H. D. for his own use, and in case he should die in the testator's lifetime or afterwards, without having any child or children, then over. H. D. survived the testator, and died without having had a child:—Held, that the gift over took effect. *Stone* v. *Maule*, 2 Sim. 490.

6. One having two nephews, A. and B., devises his personal estate to them; and if either die without children, then to the survivor; this is good. 1 *Hughes* v. *Sayer*, P. W. 534.

7. A testator bequeathed to his daughter an annuity of 100*l.*, while she remained single, but on her marriage, and on some adequate provision made, and which he directed to be

made by settlement for her life, and to the use of her issue, he bequeathed to and for her use 2,500*l.*, and in default of such issue, he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married, but no settlement was made, and the annuity continued to be paid to her. She had an only child, who died in her lifetime under age:—Held, that the gift over did not take effect, and that her personal representative was entitled to the 2,500*l.* *Findon* v. *Findon*, 1 De G. & J. 380; 26 L. J., Ch., 561; 5 W. R. 794. Affirming 24 Beav. 83; 5 W. R. 485.

1. Residuary bequest to A., in case she should have legitimate children, in failure of which to go over. A., having only one child born alive, who died before her, entitled absolutely. *Wall* v. *Tomlinson*, 16 Ves. 413.

2. S. gives the residue of his estate to his daughter E. for life, and after her death to be equally divided among her children, when the youngest should attain twenty-one. But if his daughter should die without any child, or the youngest should not arrive at twenty-one, and none of them should have left lawful issue, then he gave the residue to other persons. E. had only one daughter, who married and had four children, but both she and all the children died in the lifetime of E.:—Held, that upon the death of E., without any child then living, the devise took effect. *Thicknesse* v. *Liege*, 3 Bro. P. C. 365.

3. Bequest to testator's three children, to be equally divided between them, share and share alike; but in case of the death of any, without being married and having children, the share of such child so dying to be divided between the surviving children; and so, if one should only survive One having been married, and having had a child, her share vested. *Bell* v. *Phyn*, 7 Ves. 453.

4. One devises a term for years to A., and if A. dies without a child, then to B.: this is a good devise to B. upon such contingency. *Studholme* v. *Hodgson*, 3 P. W. 304.

Though the freeholds of lands cannot be kept in abeyance, but must vest in somebody, yet there is no such rule with regard to personal estates which may remain in suspense and wait till a contingency happens. *Id.* 305.

Testator devised a term for years, and all his personal estate, to A., an infant, and if A. died during his infancy, and his mother should die without any other child, then to B. A. died during his infancy; though the mother was living, and might have a child, yet the Court aided B., the devisee over, by directing an account and discovery of the estate, in order to secure it, in case the contingency should happen. *Id.* 300.

5. A testator directed the interest of his residuary estate "to be divided between his four sons, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children":—Held, that each of the four sons took an absolute interest, subject to being divested in the event of his death without issue. *Dowling* v. *Dowling*, 1 L. R., Ch., 612; 12 Jur., N. S., 720; 14 W. R. 1003; 15 L. T., N. S., 152. S. C. 11 Jur., N. S., 1033; 14 W. R. 47; 1 L. R., Eq., 442.

6. A devise of real and personal property to the testator's unborn child, and in case of its death under age, to be equally divided between the children, male and female, of testator's two married daughters, L. W. and E. H., when they should arrive at their respective ages; and the interest of that part to the children of E. H. during such nonage to go to the sole and private use of B.; and in case she should not have children, such share to the children of L. W. share and share alike in manner aforesaid. The posthumous child died about a year after its birth, at which time L. W. had several children, and E. H. had not any. L. W. and her husband filed a bill, claiming the whole of testator's fortune which had vested in his posthumous child:—Held, that E. H. was entitled to the interest of a moiety of her father's estate, and that on her death without issue the moiety should go to her sister's children. *Williams* v. *Hopkins*, Wal. Lyn. 285.

7. The words "if A. die without having any child or children," construed "without having had any child;" and the words "should A. die without any child or children" construed "any child surviving him." *Jeffreys* v. *Conner*, 28 Beav. 328; 6 Jur., N. S., 986; 8 W. R. 572.

The duty of the Court is, if possible, to give effect to every part of a will; and, therefore, where a testator gave property to his son and niece, and directed that if his son should die without having any child or children, the whole property should go to his daughter and niece equally; and that if his son and daughter should die without any child or children, then the whole property should go to his niece:—Held, that the words in the first clause, "die without having any child or children," must be construed as equivalent to "die without having had any child or children," so that the testator's son having had several children, but who were all dead, the gift over did not take effect; and that the words in the second clause, "die without any child or children," meant without any children living at the death, so that the gift over to the niece would only take effect if the son should die without leaving a child living at his death. *Ib.*

LXIV. Gift Over on Death without Leaving Children or Issue.

8. Bequest to A. for life and to her child, etc., at twenty-one, is a vested interest at twenty-one, and not divested if child should attain twenty-one, and die in life of A., by subsequent expression in will, that in case A. should die not leaving child, etc., or leaving child, such child should die before twenty-one, gift over. *Maitland* v. *Chalie*, 6 Madd. 243.

9. Devise to A. for life, remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her; one died leaving a child, who survived A.; the other died without issue:—Held, that the word "leaving" meant "having," and that

the two children of A. took vested interests as tenants in common in fee. *Exp. Hooper*, 1 Drew. 264; 21 L. J., Ch., 402.

1. Bequest to trustees, upon trust for the six children (by name) of L. F., deceased, for their respective lives, and the capital equally among the children of each tenant for life, *per stirpes*, to be paid at twenty-one or marriage; and if any of said six children should die without leaving any children or child, then over:—Held, a vested indefeasible interest in each child of a tenant for life, on attaining twenty-one. *Casamajor* v. *Strode*, 8 Jur. 14.

2. Testatrix bequeathed her residuary estate to trustees in trust, to pay and divide the interest between her two nieces equally during their lives, and after their deaths to pay and divide the principal unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue equally, *per stirpes*, and not *per capita*; and in default of such issue, to pay the interest to certain other persons for their lives, etc. One of the nieces died, having had seven children, five only of whom survived her:—Held, that those five became entitled on their mother's death to her moiety of the residue. *Cross* v. *Cross*, 7 Sim. 201; 4 L. J., N. S., Ch., 38.

3. Bequest upon trust to pay and divide equally to and amongst all the children of testator's daughter when the youngest should attain twenty-one, followed by a gift over in case of the death of his daughter "without leaving any child or children":—Held, the youngest child having attained twenty-one, that the fund was divisible equally amongst all the children, and that such interests were not defeasible in the event of the death of the testator's daughter without leaving any child or children. *Kennedy* v. *Sedgwick*, 3 Kay & J. 540.

In such a case the gift over being contradictory if the word "leaving" be construed literally, that word will be read as equivalent to "having." *Ib.*

4. A. devised freehold property to trustees to the use of his daughter for life, and after her decease for such one or more of her children, or his, her, or their issue as she should appoint by will, and in default of appointment, "in trust for all and every of her children, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions; and in case of the death of my daughter without leaving any child her surviving, and in the event of such child or children her surviving dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." The daughter had one son, who died in her lifetime:—Held, that her son took a vested estate tail under the will, and not an estate tail contingent upon his surviving his mother. *Richards* v. *Davies*, 32 L. J., C. P., 3; 11 W. R. 38; 7 L. T., N. S., 357.

5. In a will by her father, giving a life interest in a fund to his daughter, with words importing the gift of a vested interest in remainder after her decease to her child and children, followed by these words: "In case the said [the daughter] shall leave no child or children, or having such, all of them shall happen to die under age without issue," then a gift over in that event:—Held, that it requires very strong words to take away the effect of a prior clear vested gift, and notwithstanding the ordinary sense of "leave," that it was the testator's intention to give the fund over only in case the previous limitations should fail, and that the fund vested absolutely in the only child of the daughter, who died in the lifetime of its mother. *Re Thompson's Trust*, 5 De G. & Sm. 667; 17 Jur. 16; 22 L. J., Ch., 273.

6. Gift of residue, on trust, to pay the dividends to the testatrix's son for life (except what was required for education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but should all his children die before himself, at his death, then over:—Held, that a child who died an infant, in the lifetime of the son, had not acquired a transmissible interest. *Chadwick* v. *Greenall*, 3 Giff. 221; 7 Jur., N. S., 950; 5 L. T., N. S., 232.

7. A testator devised specific real estate to trustees and their heirs upon trust for his daughter R. for life, and after her decease he gave the same unto and equally between all and every her children, if more than one, as tenants in common, their heirs and assigns; and if but one such child, to his or her heirs and assigns; and in case his daughter should depart this life under twenty-one, or afterwards, "without leaving any child or children," the testator gave the hereditaments and premises to his son C., his heirs and assigns:—Held, that the children of R. took at their births indefeasible interests in fee, in remainder expectant on the death of their mother. *White* v. *Hill*, 4 L. R. 265; 16 L. T., N. S., 821.

8. A testatrix devised and bequeathed the residue of her real and personal estate to trustees, with a direction that they should receive the rents, and invest the same until a daughter should attain her age of twenty-one, and then "to pay the same to and for her sole and separate use and benefit. But, if my daughter should die without leaving any lawful child or children, then I direct the same to be paid to the lawful children or child of my brother, if more than one, in equal shares":—Held, that the gift was an absolute gift of the real and personal estate to the daughter, defeasible in the event of her dying without children. *Drake* v. *Collins*, 20 L. T., N. S., 970.

9. A father gave a fund to trustees to pay the dividends to his daughter for life, and after her death to transfer the principal equally amongst all the children of his daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their executors, administrators, and assigns. But in case his daughter should die leaving no issue, then to the testator's other children. Long before the date of the will the daughter was, with the testator's knowledge, living with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his

grandson. The daughter being sixty-seven years of age, and having had no other child, and her husband being dead:—Held, that the illegitimate son was entitled absolutely to the capital, and the word "leaving" being construed "having," and he being over twenty-one, the money was ordered to be paid to the mother and son, who petitioned for payment to them jointly. *Re Brown*, 16 L. R., Eq., 239; 21 W. R. 721; 28 L. T., N. S., 616; 43 L. J., Ch., 84.

1. A testator gave the residue of his estate to trustees, to invest and pay one fourth of the income to each of his four sisters for life, and when and so soon as any of them should die, without leaving issue, then he directed that the share in the trust moneys of her or them so dying without issue should be divisible among his surviving sisters, and the issue of any who might then be dead, in equal shares, but such issue to take only their respective parent's share; and when and so soon as any of his sisters should die and leave issue, then upon trust to call in the share of her or them so dying leaving issue, and pay the same unto such respective issue, if more than one child, equally —Held, that issue here meant children, and that leaving issue meant having had issue. *Bryden* v. *Willett*, 7 L. R., Eq., 472; 20 L. T., N. S., 518. Affirmed 17 W. R. 336; 20 L. T., N. S., 502.

One of the testator's sisters died, having had two children, one of whom survived her mother, and the other died in her mother's lifetime, leaving a family:—Held, that a moiety of her mother's share vested in the daughter who died in her lifetime, and consequently passed to her family. *Ib.*

2. Testator devised real estate to his granddaughter absolutely, and "after her decease without leaving any issue," over. The granddaughter married and had a child —Held, that upon the birth of a child the granddaughter's interest became indefeasible. *White* v. *Hight*, 12 L. R., Ch. D., 751; 41 L. T. 17.

3. Bequest upon trust for A. B. for life, and in case he should leave any child or children, upon trust for such child or children, to be payable at twenty-one, and the share of each child to be a vested interest; and in case A. B. should not leave any child, then upon trust for C. D. for life; and after the death of C. D. and of A. B. without issue as aforesaid, then over. A. B. survived the testator, and had one child only, who attained twenty-one, and died in the lifetime of A. B., leaving a child, who survived A. B.:—Held, that upon the death of A. B., the gift over took effect. *Bythesea* v. *Bythesea*, 1 W. R. 257; 17 Jur. 645; Affirmed 23 L. J., Ch., 1001; 2 W. R. 667.

4. A testator devised dwelling-houses to trustees for the life of his niece M., to permit her to take the rents and profits of the same during her life; and from and immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one, or days of marriage, and to the heirs and assigns of such issue; and if any of such issue should be under twenty-one at the decease of his niece he directed an equal share of the rents and profits to be appropriated towards the education and maintenance of such issue as should not have attained twenty-one at the decease of his niece; and if his niece should die leaving only one child, then to such only child, and his or her heirs, as soon as he or she should attain twenty-one. But in case his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under twenty-one and unmarried, then to his brother's children. The niece married, and had one daughter, who attained twenty-one, but died in the lifetime of her mother, unmarried:—Held, that, if an estate in fee in remainder vested in her daughter, upon her attaining twenty-one, such estate was divested upon her death in the lifetime of her mother. *Young* v. *Turner*, 1 B. & S. 550; 8 Jur., N. S., 52; 30 L. J., Q. B., 268; 5 L. T., N. S., 56.

5. Bequest of 4,000*l.* to A. for life, and afterwards if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one; and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share," and a gift over, if the daughter should "have" no child who should arrive at twenty-one:—Held, that a daughter of A. who attained twenty-one and married, but died in the life of A., took no share. *Sheffield* v. *Kennett*, 27 Beav. 207; 4 De G. & J. 593.

6. By a marriage settlement a fund was settled, after the death of the survivor of the husband and wife, in trust for the "children then living, to be paid at twenty-one, and in case the parents should die "without leaving any lawful issue," then as the husband should appoint; and in default, "in case there should be no child or child or children as aforesaid," over. Children attained twenty-one, but they all died in the life of their parents, leaving issue, who survived the parents.—Held, that the gift over took effect. *Re Heath*, 23 Beav. 193.

7. Bequest to A. for life, and after the death of A., then if A. shall leave issue, upon trust to transfer the share of A. to such issue equally if more than one, when and so often as they shall severally and respectively attain twenty-one, with a trust for maintenance in the meantime; and in case of the death of A. leaving no issue, or if A. should happen to leave issue, then upon the death of "such" issue under twenty-one, over:—Held, that the contingency of surviving A. was part of the gift to A.'s issue, and that therefore three children of A. who attained twenty-one, but died in her lifetime, took nothing; but that one child, who alone survived A., took the whole. *Re Watson*, 10 L. R., Eq., 36; 39 L. J., Ch., 770; 18 W. R. 642.

8. A testator bequeathed to each of his five daughters 400*l.* per annum, to be payable half-yearly during the term of their natural lives; and after their respective decease, he gave the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of these daughters should die without issue, he directed such annuity to cease, and to fall into the residue of his estate:—Held, upon the whole context of the

will, that a daughter's children, who died in the lifetime of their mother, were not entitled to any share, and that, on the death of a daughter who had issue, but left none living at her death, the capital of the fund producing her annuity fell into the residue. *Hedges* v. *Harpur*, *Hedges* v. *Blicke* or *Blick*, 3 De G & J. 129; 4 Jur., N. S., 1209; 27 L. J., Ch., 742.

WINDMILL.

See EASEMENT—LIGHT AND AIR.

WINDOWS.

See LIGHT AND AIR.

WITNESS.

— *Attesting Deeds*. See DEEDS.
— *Attesting Wills*. See WILL, II. VIII.—III. V.
— *Costs of*. See SOLICITOR, XVI. XVIII. 12.

See also PRACTICE (EVIDENCE).

WOODS AND FORESTS, COMMISSIONERS OF.

— *Compulsory Purchases of Land*. See LANDS CLAUSES ACT.

See also FOREST OF DEAN.

1. The Commissioners of Woods and Forests are not, under the 7 Geo. 4, c. 77, entitled to sue or liable to be sued, for the specific performance of contracts entered into with and by them. *Nurse* v. *Seymour* (*Lord*), 13 Beav. 254.

The commissioners were authorised, with the consent of the Lords of the Treasury, to demise, or previous to any demise, to contract to demise. The bill alleged that the commissioners having first obtained the consent required, determined to demise, and afterwards contracted to demise to the plaintiff, and prayed a specific performance:—Held, on demurrer, that the bill could not be sustained. *Ib.*

2. An Act of Parliament empowered the Commissioners of Woods and Forests to make certain new streets according to a particular plan therein referred to, and to lease and enter into agreement for leasing the grounds in the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses, in the line of one of the new streets. Each of the leases described the plot of ground which it demised, as being "on the north side of a new street then forming there, called," etc., "and as fronting towards the south on the said new street." The plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses, but that plan was not mentioned in either of the leases. The intended streets were completed, and the space in front of the houses was left open. The Commissioners of Woods and Forests and the paving committee of the parish afterwards gave permission to certain persons to erect an equestrian statue in the open space, and those persons proceeded to place it upon a part of that open space, but without interfering with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that upon the treaty for the leases, the lessees were shown the plan of the intended new street, and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged that the proposed erection would diminish the value of their property, and be a public and a private nuisance:—Held, that these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue. *Squire* v. *Campbell*, 1 Myl. & C. 459; 6 L. J., N. S., Ch., 41.

3. The Commissioners of Woods and Forests having no power under the statute 57 Geo. 3, c. 97 to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the Crown, within the ordering and survey of the Exchequer, contracted for the sale of the Crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereto belonging":—Held, that this being in effect a contract for sale by the Crown, the advowson of E., which was appended to the manor, did not pass under the contract, and consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. *Att.-Gen.* v. *Sitwell*, 1 Y. & Coll. 559; 5 L. J., N. S., Exch. Eq., 86.

Semble, that if the contract had been between subject and subject, the advowson would have passed, although, at the time of the contract, it was not known by either party to be appendant to the manor, and, therefore, the sale of it was not in contemplation. *Ib.*

4. Injunction granted to restrain the Commissioners of Woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 4 Sim. 13.

WORDS, CONSTRUCTION OF.

See DEEDS — SETTLEMENT — STATUTE — WILL — and other SPECIFIC TITLES.

WORDS PRECATORY, RECOMMENDATORY, AND OF DESIRE.

See GIFT - POWER, II.—WILL, XLV. IV.

WORK AND LABOUR.

— *Effect of Architect's Certificate and Specifications.* See ARCHITECT AND ENGINEER, I. and II.
— *Liability of Employer for Contractor's Acts.* See NEGLIGENCE, III.
— *Secret Commissions.* See PRINCIPAL AND AGENT, VII. III.
— *Remuneration for by Gifts of Shares.* See COMPANY, XIII., II. & VI.
Accommodation Works on Construction of Railways and Working Agreements. See RAILWAY, I., III., and V.

See also SPECIFIC TITLES.

I. CONTRACTS FOR.

1. Tender.

1. A contractor sent in a tender to a railway company for the execution of part of the works either with a double or single line of rails. He was informed, in writing, by the engineer of the company, that his tender was accepted; and that intimation was confirmed by the directors, upon his attendance at one of their board meetings, but no document accepting the tender was executed by the company, in such a manner as to be binding at law; nor was any conclusion ever come to whether there should be a single or a double line. The railway was afterwards abandoned, and the contractor then filed a bill, seeking to have a binding contract executed by the company, or to recover from them the loss which he had sustained in preparing for the works:—Held, upon demurrer, that he had no claim to relief in equity upon the general merits of the case; and that an allegation, unsupported by any additional facts, that the company held money in their hands for the purpose of paying the plaintiff, and were trustees of it for his benefit, under an instrument in writing, was not sufficient to sustain the bill. *Jackson* v. *North Wales Railway Co.*, 1 H. & Tw. 75; 6 Rail. Ca. 112; 18 L. J., N. S., Ch., 91; 13 Jur. 69.

2. Tenders for the supply of stone were invited by a corporation. Four neighbouring quarry owners entered into an agreement to supply the stone in certain proportions *inter se*, and that the plaintiffs should make the lowest tender to the corporation. The plaintiffs entered into contracts with the other quarry owners to purchase the proportion of stone agreed upon from each. Notwithstanding the agreement, one of the quarry owners sent in a tender, which was accepted by the corporation. The plaintiffs then filed a bill for an injunction to restrain the defendants from supplying the stone during 1875. They demurred:—Held, overruling the demurrer, that the corporation were not necessary parties, and that the agreement was not void either as against public policy, or for want of equity. *Jones* v. *North*, 19 L. R., Eq., 426; 44 L. J., Ch., 388; 32 L. T. 149; 23 W. R. 468.

3. When plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification. *Thorn* v. *London (Mayor)*, 1 L. R., App. Cas., 120; 45 L. J., Exch., 487; 24 W. R. 932; 34 L. T., N. S., 545.

The contractor for the work cannot, therefore, sustain an action for damages as upon a warranty should it turn out that he could not execute it according to such plans and specification. *Ib.*

T. contracted with a corporation to take down an old bridge and build a new one. Plans and a specification prepared by the engineer of the corporation were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be believed to be correct, but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labour and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labour occasioned by the failure of the caissons, and in his declaration alleged that the corporation had warranted that the bridge could be erec-

pensively built according to the plans and specification. There was no express warranty to that effect in the contract:—Held, that none could be implied. *Ib.*

Semble, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit*. *Ib.*

2. Assignment.

1. Two persons contracted with a railway company to execute certain works, and after some progress had been made with the works, a judgment creditor of one of the contractors took in execution his share of the plant and effects, which the sheriff sold and assigned to the other contractor; the other contractor assigned the interest of the firm in the contract and all the effects and moneys due or to become due in respect of the same, to a third person by way of security, with power to such assignee to enter on the works and take possession and execute the contract. The assignee afterwards took possession of the works, and proceeded to complete them. The company had notice of the execution and sale by the sheriff of the property of one contractor, and of the assignment to the other, and by the other to the assignee; and the company allowed the works to be continued by the two latter persons respectively, and made payments to them on account. The assignee having, after the insolvency of his assignor, filed a bill in equity against the company for an account of what was due from the company in respect of the contract:—Held, that the subsequent prosecution of the works by the other contractor or his assignee did not necessarily involve any new contract with the company, but was consistent with that theretofore made; and that the contractor, or his assignee, who, without objection from the company, prosecuted the works, could sustain a suit against the company for payment of what had become due from them in respect of the works done under the contract. *Aspinall* v. *London & North-Western Railway Co.*, 11 Hare 325.

2. A contractor entered into an agreement for the completion of a building at a certain time, in a certain specified manner, and the contractor was to set out the works and be responsible for errors, to provide and employ workmen, to provide and keep at the building a competent general foreman, to provide materials, labour, etc.: also if the contractor should, from any cause, not comply with the terms of the contract within three days after being requested to do so in writing, the architect should have power to prevent his further execution of the works, and cause the same to be finished by others. After he had received notice from the employer that he was neglecting and delaying to complete and finish the building, the contractor, on the following day, entered into a composition deed for the benefit of his creditors under s. 192 of the Bankruptcy Act of 1861, and in the form prescribed:—Held, that the trustees of the deed were not at liberty to adopt the contract, containing, as it did, obligations of a personal character. *Knight* v. *Burgess*, 33 L. J., Ch., 727; 10 L. T., N. S., 90.

3 Enforcing.

3. Where there is an agreement to do certain works, such works to be done to the satisfaction of a referee named, without specifying the nature, materials, or extent of such works, no decree for specific performance can be made upon such agreement. *Semble*, a court of equity makes a decree in the sense that a court of law awards damages, and will not make a decree which it cannot enforce. *London & South Western Railway Co.* v. *Humphrey*, 6 W. R. 781.

4. The Court has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the plaintiff is the execution of certain works which the Court is unable to superintend. *Peto* v. *Brighton, Uckfield, & Tunbridge Wells Railway Co.*, 1 Hem. & M. 468; 11 W. R. 874; 9 L. T., N. S., 227.

Therefore, where a bill stated an agreement to employ the plaintiffs as contractors for making a railway, and to pay for the works in debentures and shares of the company, a motion for an injunction to restrain the company from dealing with the debentures, and transferring the share to others, in derogation of the plaintiffs' rights, was refused. *Ib.*

5. Specific performance will be decreed of a contract to employ a person to construct works which the Court is unable to superintend. *Greenhill* v. *Isle of Wight (Newport Junction) Railway Co.*, 23 L. T., N. S., 885; 19 W. R. 345.

Therefore, where directors of a railway company entered into a written agreement to give G. "a contract for the construction of the line for 55,000*l.*, subject to a specification of the works on the line included in the sum to be agreed upon between G. and the engineer of the company, in case of dispute the matter to be referred" to an arbitrator, and a bill was filed for specific performance:—Held, that the terms of this agreement were too indefinite to be enforced in a specific performance suit; but that even had the terms been sufficiently definite, the agreement was of such a nature that specific performance could not have been decreed. *Ib.*

6. A court of equity has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Storer* v. *Great Western Railway Co.*, 2 Y. & Coll. C. C. 48; 3 Rail. Ca. 106; 12 L. J., N. S., Ch., 65.

7. The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiffs' engineer for the performance of their contract. The plaintiffs had, at the date of the agreement, a bill pending to enable them to make the branch, and holding them to complete within a specified time, on pain of a suspension of dividends on the capital of their entire line. The specification was prepared by the company's engineer, but, prices having risen, the defendants repudiated their agreement. The plaintiffs then filed their bill for a specific performance of the agreement according to the terms of the specification, and

to have the bond executed, charging that they would have withdrawn the bill before Parliament by reason of the liabilities incurred on the passing thereof, had not the defendants (to whom, as owners of a large estate adjacent to the proposed branch, it was of great importance that the plaintiffs should be bound to make the branch) assented to the terms of the agreement and the plaintiffs believed that they would *bonâ fide* carry out the same; that the defendants by their agreement induced the plaintiffs to come under the obligation to make and complete the lines, and the Act was passed upon the faith of the agreement. The bill also charged that the not carrying out the agreement was a fraud on the plaintiffs, there having been a part performance on their part:—Held, on demurrer (assuming the agreement to be valid within the Statute of Frauds, and in other respects one upon which the plaintiffs could recover), first, that the agreement could not be enforced as regards the construction of the railway, because, from the nature of the works the subject of the agreement, it was an agreement the execution of which the Court could not superintend consistently with public convenience, inasmuch as the motions would be incessant for committal or otherwise for non-performance of orders with regard to the making of particular works, besides the difficulty, on the ground of reciprocity, in enforcing that part of the agreement by which the plaintiffs were to provide the land, and because the plaintiffs, having by their Act power to acquire the land, could make the railway for themselves, and, having so ascertained the expense the defendants had put them to, would have an adequate and the better remedy in damages, and that the circumstances of fraud alleged in the bill did not prevent the application of the foregoing reasons. Secondly, that as the Court could not superintend the general execution of the whole works, or enable the defendants to earn the whole of the money to which they would be entitled for the works when made, the execution of the bond would be a piecemeal performance of the agreement, which the Court would not direct, and the demurrer was allowed. *South Wales Railway Co.* v. *Wythes*, 1 Kay & J. 186; 24 L. J., Ch., 1; 3 W. R. 3; 3 Eq. Rep. 70. Affirmed 24 L. J., Ch., 87; 3 W. R. 133; 3 Eq. Rep. 153.

Whether, in the simple case of an advance of money with an agreement to execute a bond for its repayment, such an agreement would be executed in this court. *Quære. Ib.*

1. A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice:—Held, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-compliance with impracticable requisitions. *Quære*, whether such an agreement is consistent with public policy. Observations on the application of the principle of specific performance to contracts respecting personal services. *Johnson* v. *Shrewsbury & Birmingham Railway Co.*, 3 De G. M. & G. 914; 17 Jur. 1015; 22 L. J., Ch., 921.

See also SPECIFIC PERFORMANCE.

4. Rescission and Entry by Employer.

See also II. *post.*

2. Disputes having arisen between a railway company and a contractor employed in making the railway, the company insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works itself. The contractor resisted such claim, imputing the backward state of the works to the acts of the company, and held forcible possession. Collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other, and the completion and opening of the railway for traffic being in the meantime delayed, the Court, on the application of the company, restrained the contractor from continuing on the line, or interfering with the operations of the company; directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and without an issue to try whether the company, at the time it proceeded to enter upon the works and remove the contractor, was lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *East Lancashire Railway Co.* v. *Hattersley*, 8 Hare 72.

3. The plaintiff covenanted with the defendant (a railway company) to do certain works within a given time to the satisfaction of the engineer of the company, and that if the works should not be so done the company might enter into possession of the plaintiff's plant and complete the works. The company covenanted to pay for the works from time to time during their progress, according to the certificate of the engineer. All disputes were to be referred to the latter. The works were not completed within the period originally limited, and some time afterwards the company gave notice of its intention to enter, under the agreement, and complete the works. The plaintiffs filed a bill, stating that they had done all which they contracted to do, except what the company had prevented them from doing, and that they had not been fully paid for the work done; alleging that the engineer fraudulently and collusively with the company certified a less amount than what was due to the plaintiffs, and praying for an injunction and account. A demurrer for want of equity was overruled, on the ground that the plaintiffs would be entitled to some relief at the hearing, and that the species of fraud alleged in the bill gave jurisdiction to the Court, although the plaintiffs had not completed the whole of their work. *Waring* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 7 Hare 482; 18 L. J., N. S., Ch., 450; 14 Jur. 613. Affirmed 2 H. & Tw. 239.

4. A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that

the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice. *Quære*, whether such an agreement is consistent with public policy. *Johnson* v. *Shrewsbury & Birmingham Railway Co.*, 3 De G. M. & G. 914; 17 Jur. 1015; 22 L. J., Ch., 921.

By the contract between a railway company and its contractors it was agreed between the parties that the contractors should, in consideration of certain money payments, proportional to the traffic upon the lines, at all times during the term of the contract run and work all the trains of the company, and provide for the purposes of the contract a sufficient number of efficient foremen, mechanics, engine-drivers, etc., and the requisite coke, firewood, stores, etc., and also at all times during the term of the contract, keep on foot and in repair all the rolling stock of the company, except where any damage thereto should be occasioned by defect or want of repair or maintenance of the permanent way; and further, to deliver up the same in good and substantial repair to the company at the termination of the contract. It was further provided that the contractors should not be liable or answerable for any loss, damage, or compensation recovered or recoverable from the company in respect of the death of, or any damage or injury to, any passengers or live stock or goods conveyed on the line during the term of the contract, except where occasioned by the neglect of the contractors, and even then not to a greater amount than 100*l.* Lastly, the contract provided, that if the contractors should not, within forty-eight hours after notice in writing from the company should have been left at their principal office, obey the instructions contained in such notice, it should be lawful for the company, by another notice similarly served, to determine the contract, and assume the custody of the sheds, buildings, and rolling stock intrusted to the contractors in consequence of the contract. The company served the first notice under the contract, instructing the contractors to make certain repairs in the building and rolling stock; whereupon the contractors filed their bill against the company, alleging that the repairs mentioned in the instructions were not such as could be made in forty-eight hours, and that the necessity therefore had been occasioned by the defect or want of repair of the permanent way; and praying that the Court would declare, that, according to the true construction of the contract, the instructions to be contained in the first notice to be given thereunder referred to such matters or things as might be reasonably done and performed by the contractors within forty-eight hours after service of such notice upon them; and that it would grant an injunction, consequent upon such declaration, to restrain the defendants from proceeding to take possession of the buildings and rolling stock intrusted to the plaintiffs, by means of a second notice under the contract or otherwise. Upon a motion, by way of appeal, for an injunction, being made by the plaintiffs, the Court refused to interfere. *Ib.*

2. A contractor agreed to execute the works of a railway within a certain time, and on being paid in a certain manner, and under a condition that if he failed to proceed with the works as required by the engineer of the company, the contract should be void, and the implements and materials belonging to the contractor should be forfeited. The contractor did not satisfy the engineer of the company, and the company proceeded to take possession of the works. The contractor alleged that the proper payments had not been made to him:—Held, that the Court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. *Munro* v. *Wivenhoe & Brightlingsea Railway Co.*, 11 Jur., N. S., 612; 13 W. R. 880; 12 L. T., N. S., 655; 4 De G. J. & S. 723.

3. A contractor agreeing to execute the public works of a company, and binding himself for the due performance of his contract, by forfeitures subjecting himself to the arbitrary decision of a person nominated by the company as to his liability thereto, is not entitled to relief in equity against the forfeiture. *Ranger* v. *Great Western Railway Co.*, 2 Jur. 787.

4. In a contract with a railway company for the execution of works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work; the company acted on this clause:—Held, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages. *Ranger* v *Great Western Railway Co.*, 5 H. L. Ca. 72.

The plaintiff entered into three contracts in writing with a railway company, whereby it was agreed *inter alia*, that the engineer of the company should, every fortnight, ascertain the value of the work done according to its quantity and relative proportion to the whole works, and that the plaintiff should thereupon receive 80 per cent. of such value, the remaining 20 per cent. being reserved by the company until such reserve amounted to 4,000*l.*; that, if the engineer of the company should not be satisfied with the works, the company should be enabled, after notice given to the contractor, and his default of a satisfactory compliance with its terms for the space of seven days, to take possession of the works, and thereupon not only the plant and materials of the contractor, but also the value of the work done and not paid for, and the reserve fund should become forfeited to the company. For the performance of two of the contracts, the plaintiff with two sureties, and for the performance of the third with such two and an additional surety, executed joint and several bonds to the company. A further contract, not in writing, was entered into by the plaintiff and the company for executing certain other parts of the works at stipulated prices. In the course of the work the company advanced several sums of money to the plaintiff upon the security of his plant and machinery, upon the works comprised in the written contract, and of the reserve fund. The company, having given a notice as above mentioned, and having, at the expiration of seven days therefrom, taken possession of the works, plant, and machinery comprised in all the contracts, the

plaintiff filed his bill, insisting that the engineer had not so estimated the works as to give to the plaintiff the 80 per cent. to which he was entitled, and that upwards of 30,000*l.* was due to him under the several contracts for works actually completed, insisting that no forfeiture had been incurred by him, and that, by the terms of the deed of mortgage, the use and possession of the plant and machinery thereby assigned to the company were expressly reserved to the plaintiff: and praying that the company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end; and praying, in either alternative, for the taking of accounts between the plaintiff and the company:—Held, that a demurrer to the bill on the ground of multifariousness could not be sustained. S. C. 1 Rail. Ca. 1.

1. By a contract between a contractor and a railway company, under which the former was to execute the company's works, it was provided (amongst other things) that surplus chalk should be the contractor's property, and that if the contractor should in the judgment of the company's engineer fail in the due performance of the contract, the engineer might, by order of the board of directors, take the further performance of the contract out of the contractor's hands, and employ for the purposes of the contract such persons and on such terms and conditions as the engineer should think fit. In alleged exercise of the power conferred by the latter provision the company resumed possession, and took the further performance of the contract out of the contractor's hands, who thereupon filed a bill for an injunction, alleging impropriety of conduct and duress on the part of the engineer, and that the chalk taken would, upon the completion of the works, become the plaintiff's property as surplus, allegations the truth of which were *bonâ fide* disputed by the company:—Held, that the contract being one where, if the company was wrong, the contractor could be amply compensated in damages, whereas if the contractor were allowed to resume work the Court could not enforce specific performance of the contract in order to compel the completion of the works, the contractor was not entitled to an interlocutory injunction. *Garrett* v. *Banstead & Epsom Downs Railway Co.*, 4 De G. J. & S. 462; 11 Jur., N. S., 591. And see *Jennings* v. *Brighton Intercepting & Outfall Sewers Board*, 4 De G. J. & S. 735. n.

II. CONTRACTOR'S PLANT.

See also I. IV. *ante.*

2. An agreement between a railway company and a contractor provided that, in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hand, and might use all or any of his plant, materials, or implements; and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant, and implements which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company. The company took the execution of the works out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which, with all matters in difference between the parties, was referred to arbitration:—Held, that the plant and materials did not become the absolute property of the company, unless loss or expense had been occasioned to it; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration. *Garrett* v. *Salisbury & Dorset Junction Railway Co.*, 2 L. R., Eq., 358; 14 W. R. 816.

3. A railway company consenting to the removal of its plant by the plaintiffs, the contractors for works, and the latter not having on affidavits made out a case of *mala fides* on the part of the engineer or the company in determining the contract, a motion for injunction against the company was refused, and the latter was left to assert at law its rights under the agreement. *Waring* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 2 H. & Tw. 239; 18 L. J., N. S., Ch., 450; 14 Jur. 613.

4. A contractor supplied materials to a railway company for the purpose of carrying out his contract. By the terms of the contract it was provided that the materials brought upon the railway should immediately become the absolute property of the company, except that they were to remain under the dominion of the contractor; that, if he should duly complete his contract, the company would give to the contractor, as part of his payment, the unconsumed materials; and that if, instead of the contractor, the company should use the materials, the company should compensate him in respect of them:—Held, that the materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under an execution upon a judgment. *Beeston* v. *Marriott*, 9 Jur., N. S., 960; 11 W. R. 896; 8 L. T., N. S., 690; 2 N. R. 437.

5. A railway company entered into a contract (dated December 27th, 1836) with certain builders for building a bridge, all necessary implements and materials to be found by the builders, with power to the company if, in the opinion of its architect, the contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works on giving them seven days' notice, and in such case to use the cranes, machines, implements, and materials used on or about the works by the contractors, who were to defray the extra expenses incurred. The contract provided that the company should have a lien upon such machines, implements, and materials as should, for the time being, be in and upon the land, as a security for the completion of the bridge. On the 26th July 1837 the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods,

timbers, etc., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds:—1. Those actually on the line of the railway. 2. Those upon land adjoining the line (not the property of the company, but enclosed and taken possession of by them under the Act). 3. Those deposited upon the line of a temporary railway made by the bankrupts, over land not belonging to the company, for the convenience of conveying materials. 4. A crane erected by the contractors at the end of the temporary railway. On the 31st July the company took possession of all these goods. On the 1st August it gave the seven days' notice, that other workmen would be employed, and on the 2nd they took upon themselves the completion of the bridge, using some of the goods, and retaining the remainder. In trover brought by the assignees for these goods:—Held, that the company had a lien upon the first and second classes, but not upon the third and fourth, which, nevertheless, at the expiration of the notice, it had a right to retain and use about the work, for the agreement was lawful, not being made in contemplation of bankruptcy. *Hawthorn* v. *Newcastle-upon-Tyne & North Shields Railway Co.*, 2 Rail. Ca. 288.

Held, also, that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. 4, c. 16, s. 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's authority, the lien being a shifting one, and attaching to such articles as were brought, from time to time, and ceasing as to such only as were removed; nor by the implements and materials not being scheduled. *Ib.*

1. A contract by a trader to do certain works contained a clause, that if he should become bankrupt, or delay proceeding with the works, his employer should have power, after seven days' notice to him to proceed, to employ others to do the work, the advances made to the trader before his default should be taken as full payment, and that all tools and materials being upon the works should become the property of the employer. The trader, having delayed to proceed with the works, was served on the 11th April by his employer with notice to proceed. On the 17th April the trader committed an act of bankruptcy; on the 19th April the notice to proceed not having been complied with, his employer took possession of the tools and materials. In June a fiat issued against the trader. In trover by his assignees, against the employer for tools and materials left upon the works by the bankrupt:—Held, that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on the 17th April, before the notice had expired. *Rouch* or *Roach* v. *Great Western Railway Co.*, 2 Rail. Ca. 505; 5 Jur. 821.

2. A contract for executing sewage works made between a contractor and Improvement Commissioners provided that all plant brought by the contractor on to the works should be deemed to be the property of the commissioners and should not be removed during the progress of the work without the written order of their engineer; in case of suspension of the works by their engineer for any default of the contractor, or of the work being taken out of the contractor's hands, the same should be subject to be used as should be ordered by the engineer in and about the completion of the works. The engineer suspended the works, and the commissioners took possession of the plant and completed the works. The contractor having become bankrupt, and a sum of 2,876*l.* 7*s.* 5*d.* having been certified to be due to the commissioners from him for default under the contract, the commissioners claimed to retain the plant, which was sold by consent for 685*l.*:—Held, first, that the contract gave the commissioners no property in the plant but only a right of user. *Exp. Bolland, Re Winter*, 47 L. J., Bky., 52; 8 L. R., Ch. D, 225; 26 W. R. 512; 38 L. T., N. S., 362.

Held, secondly, that this right of user was not such a dealing within s 39 of the Bankruptcy Act 1869, as to give them a right to set off the value of the plant against the sum due to them from the contractors. *Ib.*

3. Disputes arose between a contractor for the construction of a railway, and the company for which the railway was to be constructed, as to the time which the works done had taken for their execution; as to the probable time within which the railway could be finished; as to defaults in the execution of the works and in payment, which were alleged on the one side and denied on the other, and as to which there was a considerable conflict of evidence. The contract and specification provided, that if the contractor failed to proceed with the works in the manner and at the rate of progress required by the company's engineer, the contract should be, at the option of the company, but not otherwise, considered void so far as related to the work remaining to be done, and that all sums of money which might be due to the contractor, together with the materials and implements in his possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the company, and the amount considered as ascertained damages for breach of contract. The company seeking to avail itself of these provisions in the contract on the ground of alleged default on the part of the contractor, claimed the right of completing the works itself. The contractor thereupon filed a bill against the company, seeking an injunction to restrain it from declaring the contract void as to work remaining to be done, and from declaring the amount remaining due to him for work already done under the contract forfeited, and from taking possession of the materials and implements in his possession or belonging to him. He then moved interlocutorily for an injunction in the terms of the prayer of his bill, and also for an injunction to restrain the company from entering upon the line of railway mentioned in the contract:—Held, that the case was not one for an interlocutory injunction. *Munro* v. *Wivenhoe & Brightlingsea Railway Co.*, 4 De G. J. & S. 723; 11 Jur., N. S., 612; 13 W. R. 880; 12 L. T., N. S., 655.

4. An agreement dated 17th September 1878 between an owner of land and a builder provided, that in consideration of the rent thereby reserved and certain agreements on the part of the builder the landowner would, as the

builder should erect and completely cover in the messuages thereinafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of 300*l*. And the builder agreed to erect and completely finish forty houses, each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels, and effects, and to re-let or sell the same, or otherwise to use and enjoy the same, as fully as if the agreement had never been made. In January 1879 the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement:—Held, that the provision for forfeiture of the materials to the landlord on the bankruptcy of the builder was void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation. *Brown* v. *Bateman* (2 L. R., C. P., 272), and *Exp. Dickin, Re Waugh* (4 L. R., Ch. D., 524), distinguished. *Exp. Jay, Re Harrison*, 14 L. R., Ch. D., 19; 42 L. T. 600; 28 W. R. 449. Reversing S. C. *sub nom. Exp. Meads, Re Harrison*, 49 L. J., Bky., 47; 41 L. T. 560; 28 W. R. 308.

1. A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements provided that the contractor should have drawn money on account of his contract. The contractor commenced the works, and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2nd of June the architect of the club gave notice to the contractor that as he had neglected to proceed with the works, he should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:—Held, that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within s. 94 of the Bankruptcy Act 1869. *Exp. Dickin, Re Waugh*, 4 L. R., Ch. D., 524; 25 W. R. 258; 35 L. T., N. S., 769; 46 L. J., Bky., 26.

2. A contract for the construction of a railway provided that if the contractor should make default the company might enter and complete the works, and make use of the contractor's waggons, machinery, and plant, and also have a lien on the same, with power of sale to reimburse itself any loss or damage it might sustain by reason of such default. The contractor having become embarrassed, the company made a second contract with him, which provided it should take to and complete the works, and for that purpose should be allowed 10,000*l*., and the use of all the contractor's plant, etc., which should on the completion of the works be restored to the contractor in whatever state it might then be. And this second contract provided that, if it should then be found that anything was due to or from the company from or to the contractor, the amount should be paid by the one to the other within three months after the engineer should have certified the amount that should be due. And it provided that, "in all other respects the original contract should stand, except so far as it was altered by or should be inconsistent with the second contract." The contractor had made no default down to the date of the second contract. The company completed the works, and the engineer certified that a large sum was due to it from the contractor. The company thereupon refused to deliver up the plant to the contractor, and claimed power to sell the plant, and to reimburse itself out of the proceeds:—Held, by the House of Lords, that it was not so entitled, for the provisions of the second contract were in substitution of the corresponding provisions in the first contract; the two instruments were not to be read as one, nor were the clauses of the first, conferring the lien and power of sale, to be taken as incorporated into the second contract. *Hunt* v. *South-Eastern Railway Co.*, 45 L. J., C. P., 87.

III. EXTRAS.

See also V. *post.*

3. Account directed of extra works done by a contractor under his contract:—Held, not to authorize an account to be taken of works (other than the specified works) done with the privity of employer without written instructions, but liberty was given to bring an action in respect of works done without such instructions. *Nixon* v. *Taff Vale Railway Co.*, 7 Hare 136. Affirmed *sub. nom.*, *Taff Vale Railway Co.* v. *Nixon*, 1 H. L. Ca. 111.

Quære, whether, if the contractor could not recover for extra works done for the company without written instructions, he might not recover in assumpsit. *Ib.*

By a contract for the execution of railway works after specifying certain works to be done for a gross sum, it was provided that extra

works which the company or the engineer should by any writing under his hand require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate, and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions: —Held, that a suit for an account of the moneys due to the contractor in respect of works done under the contract was a proper subject of jurisdiction in equity. *Ib.*

1. A builder agreed, by a written contract under seal, with a board of guardians, to build a workhouse according to a certain plan for a certain sum; and any deviations from the plan which the board or their architect might order in the course of the work were to be valued in a particular manner, and the value added to or deducted from the stipulated price, as the case might be; but it was expressly provided that no allowance was to be made to the builder for additional work, unless the same should be ordered in writing. After the builder had been paid for all the work done pursuant to the written agreement, he filed a bill against the board, alleging that much additional work had been done with the knowledge and sanction of the board, and on the faith of an assurance from their agent that no written order for it was necessary, and praying an account and payment of what was due in respect of such work. On a general demurrer to the bill:—Held, first, that the subject matter of the claim was not of itself within the jurisdiction of this Court; and, secondly, that the alleged fraud on the part of the board in taking advantage of the want of a written order to avoid paying for work which they had sanctioned, would not give the Court jurisdiction, and that bills to enforce parol contracts within the Statute of Frauds, on the ground of part performance, were different, the Court having jurisdiction in those cases over the original subject matter, viz., the contract, and the question being whether that jurisdiction was ousted by the want of a writing, whereas, here the attempt was to make the want of a writing the ground of jurisdiction. *Kirk* v. *Bromley Union* (*Guardians*), 2 Ph. 640; 17 L. J., N. S., Ch., 127; 12 Jur. 85. Reversing 16 L. J., N. S., Ch., 114; 11 Jur. 49.

2. A contract for the construction of a railway made between a firm of contractors, and the company formed for the purpose of making and working the railway, provided that the company should not, under any circumstances, be liable to pay to the contractors a greater sum than 1,745,000*l.*, and that the contractors should execute and provide, not only all the works and materials mentioned in the first schedule thereto, but also all such other works and materials as in the judgment of the company's engineer-in-chief were necessarily or reasonably implied in and by, or inferred from, such specification, and the plans and sections of the railway and works. The contract also provided that all accounts relating to the contract should be settled by the company's engineer-in-chief, and his certificate of the ultimate balance of the accounts should be final and conclusive on both parties. After the railway had been constructed the contractors filed a bill claiming to be entitled to payment in respect of extra works which they had executed under the directions of the company's engineer-in-chief, alleging that they had done so upon the faith of his promise that they should be paid for the same, but for which he refused to certify:—Held, that the contractors were bound by the contract to complete the railway for a specified sum; that the company's engineer-in-chief had no power to alter the terms of the contract; and that the contractors had agreed to abide by the certificates of the company's engineer-in-chief. *Sharpe* v. *San Paulo Brazilian Railway Co.*, 27 L. T., N. S., 699; 8 L. R., Ch., 605.n.

Held, also, that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not under the circumstances maintain any claim against the company on that ground. *Ib.*

3. A contract for the construction of large iron buildings for a lump sum contained a clause, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers, or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing *interim* payments. On the completion of the work the contractors claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:—Held, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract. *Tharsis Sulphur & Copper Co.* v. *M'Elroy*, 3 L. R., App. Cas., 1040.

4. D. employed an architect to prepare designs for a mansion-house, the architect guaranteeing that the total cost should not exceed 15,000*l.* A builder, forming his estimate partly on certain rough plans prepared by the architect and partly on his verbal explanations, signed a tender to complete the house for 13,690*l.* He afterwards signed a formal contract and specifications, being at the time when he signed it in weak health, and being unaware of the existence of the architect's guarantee as to the cost of the buildings. The contract contained a clause making the architect the arbitrator in case of any dispute, and giving him power to determine whether any work was extra work or not, and what sum should be paid for any extra work. The builder proceeded with the works, the cost of which vastly exceeded the estimate, owing, as he alleged, to the fact that the quantities in the working drawings prepared by the architect exceeded the quantities which he had given to the builder as the basis of his estimate. The architect having refused to certify for anything beyond the contract price, the builder filed a bill praying for a rectification of the contract, and for a declaration that he was entitled to be paid by measure and value for all quantities of work executed by him in

excess of the quantities included in his estimate:—Held, that he must be bound by the general terms of the contract, as it was owing to his own negligence that he entered into it without due deliberation, but that the arbitration clause could not be enforced owing to the architect's interest to disallow any claims for extra work; and that he was, therefore, entitled to be paid for all works not included in the specifications by measure and value. *Kimberley* v. *Dick*, 25 L. T., N. S., 476; 20 W. R. 49; 41 L. J., Ch., 38; 13 L. R., Eq., 1.

1. In rebuilding a church, the architect employed by the defendants, after giving them an assurance that the whole of the works should not exceed the sum named, prepared a statement or bill of particulars showing the quantities of the works to be performed by the contractors, and also prepared plans and a specification. The plaintiffs tendered for portions of the works, and their tender was accepted at a fixed sum. The architect then prepared a form of contract, whereby the plaintiffs agreed to do certain things mentioned "according to the plans and the quantities there given by the architect"; and they signed the specification, the conditions of which stated, that if any doubt should arise during the execution of the works, in making out the accounts "the admission or allowance of claims should be judged of, determined, and adjudged by the architect, without reference to any other person," and that "in all matters the decision of the architect should be final." Although no time for completion of the contract was named, it being left in blank, they were to be subject to a penalty if the works should remain unfinished. The plaintiffs performed quantities of work in excess of the quantities stated by the architect in his bill of particulars, and claimed to be paid over and above the fixed sum; but the architect rejected the greater portion of such claims, and debited the plaintiffs with a sum (to which, however, they would not consent) for delay in completing their contract. On a bill for a declaration that the plaintiffs were not bound by the conditions in reference to their claims being adjusted and all matters decided by the architect, that an account might be taken of what was due to the plaintiffs, and that they were not chargeable with any sum in respect of penalty for delay:—Held, first, that there was no ground for imposing the penalty for delay, and secondly, that the plaintiffs were entitled to be paid, in addition to the fixed sum, for all quantities of work done by them beyond the quantities mentioned in the bill of particulars. *Kemp* v. *Rose*, 4 Jur., N. S., 919.

2. A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation, that if the company should think proper at any time to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating, that with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement:—Held, that he could not afterwards reject the terms of the contract and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken, independently of the contract. *Ranger* v. *Great Western Railway Co.*, 5 H. L. Ca. 72.

IV. REMUNERATION.

3. Where excessive prices are charged for work, on account of slow and precarious payment, no interest ought to be allowed, for interest is only allowed to supply the want of prompt payment. *Marlborough (Duke)* v. *Strong*, 4 Bro. P. C. 539.

4. The employing of a professional person implies an undertaking to remunerate him, but the inference may be rebutted by circumstances. *Manson* v. *Baillie*, 2 Macq. H. L. Ca. 80.

5. A., a contractor for works on a railway, employed B., as his agent, to get a sub-contractor to do a portion of the works. B., as agent, accordingly entered into a contract with C. An allowance of 5*l.* per cent. was made by C. to B. After the work had been finished, A. filed a bill against B. and C. to recover back the commission:—Held, that the bill could not be sustained as against C., and it was also dismissed against B., without costs on the ground that such an allowance was usual, and that the plaintiff was proved to have acted on it, and must have known what had occurred. *Holden* v. *Webber*, 29 Beav. 117.

6. A contractor with a company was by his contract bound, at the option of the company, to accept payment to a certain amount in shares:—Held, that after the company had been ordered to be wound up, the contractor could not be called upon to accept payment in shares, the option not having been exercised till after the winding up. *Exp. Sharon, Re Alexandra Park Co.*, 12 Jur., N. S., 482; 14 W. R. 855.

7. A contractor contracted to do certain works for a railway company, and the price was to be paid on the engineer of the company certifying the due performance of the work. The works were completed, but the engineer refused his certificate at the alleged instigation of the company. The contractor filed his bill, charging collusion between the company and the engineer; praying discovery, relief, and payment against the company; and seeking discovery from their engineer and their secretary. All the defendants demurred, but the demurrers were overruled. *M'Intosh* v. *Great Western Railway Co.*, 18 L. J., N. S., Ch., 94; 13 Jur. 92; 2 Macn. & G. 74; 2 H. & Tw. 250; 19 L. J., N. S., Ch., 374; 14 Jur. 819.

V. ACCOUNT.

8. N. and S. contracted with a railway company jointly and severally to execute railway works according to specifications and prices contained in a former contract between N. and the company. S. was to advance the money necessary for the execution of the works and to receive from the company all moneys

accruing due from it in respect of the works, and apply them in the discharge of N.'s liabilities under his contracts. S. became a bankrupt at the completion of the works, and the company, after paying him and his assignees part of the moneys due from it, refused to account with N. for the balance, whereupon he filed a bill for an account against it and S.'s assignees:—Held, that although the case against the company consisted of matters cognizable at law, yet, as there were complicated accounts between it and the other parties respectively, a court of equity was more competent to take them and to dispose of the whole case than a court of law, and the bill was sustained accordingly. *Taff Vale Railway Co.* v. *Nixon*, 1 H. L. Ca. 111. See *Nixon* v. *Taff Vale Railway Co.*, 7 Hare 136.

1. A builder entered into a contract to build an union workhouse on certain specified terms, but became bankrupt before it was completed, and it was finished by the guardians. A bill by the assignees to have an account taken of what had been done was dismissed with costs, on the ground that it was not a proper subject for a suit in equity. *Ambrose* v. *Dunmow Union*, 9 Beav. 508.

2. By the terms of the articles of agreement usually entered into between the postmaster-general and the persons supplying horses for the mail coaches, the postmaster-general cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement who have the option of performing the neglected duty themselves. A bill for an account by a substituted party of whose nomination the postmaster-general had given no notice to one of the defendants, an original contracting party, who was entitled to the option of performing the neglected duty himself, was therefore dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that although no notice had been given by the postmaster-general, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Lovegrove* v. *Nelson*, 3 Myl. & K. 1.

3. A bill will not be entertained for an account and payment of moneys, due for expenses incurred in fitting out and supporting certain troops called the Irish Legion, in the service of the republic of Colombia. *Macnamara* v. *D'Evereux*, 3 L. J., Ch., 156.

4. Bill for an account of certain works constructed by A. for a corporation, the contract providing that if the contractors should fail in performing their contract, or, in the opinion of the engineer, not make due progress, it should be lawful for the corporation to seize the plant; and in case of any dispute, the decision of the engineer should be final at law and in equity. Dismissed with costs, no case of fraud, misconduct, incapacity, or refusal to act being established against the engineer. *Scott* v. *Liverpool (Corporation)*, 1 Giff. 216. Affirmed 3 De G. & J. 334.

5. The Court will not, in the absence of fraud or special circumstances, investigate an ordinary account between a builder and his employer. *Flockton* v. *Peake*, 12 W. R. 562.

6. A railway contractor, on the completion of the works, brought an action against the company to recover the balance. By an order of Court, all matters in difference were referred to arbitration, with full powers; and the Court was empowered to refer back the award from time to time. The award was made in July 1848, and in January 1850 the company filed this bill, alleging fraud in the performance of the works practised in collusion with its engineer, and discovered since the award, and seeking to set aside the award, and have the accounts taken. A general demurrer was allowed, on the ground that the matter was already before another jurisdiction competent to reconsider the matter and decide all questions. *Londonderry & Enniskillen Railway Co.* v. *Leishman*, 12 Beav. 423.

7. A railway company filed a bill against surveyors who had brought an action at law against it in respect of surveys made by them for the company, and other matters connected with those surveys, and for moneys expended by them for the company. The bill alleged that, with the discovery thereby asked for, the company could successfully defend the action. The company afterwards, when the action was nearly ready for trial, applied for an injunction, on the ground that the accounts were too complicated to be taken in an action at law. The application was refused. *South-Eastern Railway Co.* v. *Martin*, 2 Ph. 758; 1 H. & Tw. 69; 5 Rail. Ca. 484; 18 L. J., N. S., Ch., 103; 13 Jur. 1. Affirming 5 Rail. Ca. 478; 12 Jur. 1062.

8. The Court will endeavour to assume jurisdiction in matters of account where doing so will promote substantial justice between the parties. *Dabbs* v. *Nugent*, 11 Jur., N. S., 943; 14 W. R. 94; 13 L. T., N. S., 396.

On contracts made by a builder to execute works, three actions had been commenced by the builder against his employer for the payment of moneys alleged to be due under the contracts. These actions had been consolidated at the instance of the employer, who then commenced two actions against the builder for breaches of contract. The builder alleged that he was unable to prosecute the actions commenced by him because the inspecting architect had been prevented, by the act of the employer, from giving a conclusive certificate as to the work done. Upon a bill, by the builder, for an injunction to restrain the actions, for an account of what was due, and for payment:—Held, that the case was one in which the Court would exercise its jurisdiction in matters of account, and accounts and inquiries were ordered accordingly. *Ib.*

9. Where a suit had been instituted in this Court to compel a settlement of accounts, and to recover the balance due upon them, and had been pending for nearly eight years:—Held, that this Court ought not, at the hearing of the cause, to renounce the jurisdiction, and leave the plaintiff to his action at law, especially as practical difficulty is experienced in proceeding at law, and as there are the means now under the improved course of procedure in this Court of securing a fair investigation of the items of account, and of ascertaining the true result of the whole; and decree made for an account accordingly. Remarks upon the insertion of special directions in decrees under the present course of practice. *McIntosh* v.

Great Western Railway Co., 3 W. R. 472; 24 L. J., Ch., 469; 3 Eq. Rep. 628.

1. A contractor having executed works for a railway company under two contracts, distinguished respectively as contract No. 1 and contract No. 3, brought an action against the company for the works executed under contract No. 1. The company filed a bill to restrain this action, alleging that the plaintiff's demand depended on the result of complicated accounts, the company being entitled to various items of set-off, and that the account under contract No. 1 was so blended with that under contract No. 3, that what was due to the contractor could not be ascertained without taking both accounts. The contractor, by his answer, denied any complication in the accounts, and that the accounts were blended; he admitted the receipt of various sums in payment of works done under each of the contracts; and also of a large sum which, not being appropriated by the company, he had appropriated partly to one contract, partly to the other: he also showed that the several heads of set-off were free from all uncertainty; he then stated that there was work done, the amount of which had not been ascertained, and other matters in respect of which he had claims on the company: —Held, on appeal from an order of the Master of the Rolls granting an injunction, first, that, taking into account the explanations given in the answer, there would be no difficulty in the company proving at law the claims of set-off under contract No. 1, and that no case for equitable interference was established on this ground; secondly, that before the contractor could recover anything under contract No. 1, he would be obliged to prove that he had a demand, exclusive of that contract, which justified his appropriation of that part of the sum received from the company which he had not appropriated to contract No. 1; that thus the accounts under contract No. 3 would have to be taken, and that in this way the accounts of the two contracts were blended; thirdly, that, it being equally possible to take at law, with justice to both parties, the accounts under contract No. 3 as those under contract No. 1, the blending of the two accounts formed no reason for withdrawing the case from the jurisdiction of a court of law; fourthly, that the other claims set up by the contractor in his answer were such as could not be properly decided in the action, and that therefore the injunction granted was proper; fifthly, that the delay of the company in filing their bill was no ground for refusing to interfere in a case where it was clear that the court of law could not possibly deal with the subject-matter. *South-Eastern Railway Co.* v. *Brogden*, 3 Macn. & G. 8; 14 Jur. 795.

The authorities show that there are many cases in which a court of equity will entertain jurisdiction in matters of account, where, if the party making the claim had proceeded at law, the Court would not, if applied to for that purpose, withdraw the matter from the legal jurisdiction. *Ib.*

Besides the claims which were covered by the declaration in the action, and which the Court considered proper subjects of action, the contractor claimed, in the schedule to his answer, divers sums of money for "general expedition in the works," for "losses occasioned by delays," for "loss of profit by reduction of quantities of works," and "for other breaches of and deviations from the contracts." *Semble*, that these were such claims as a court of law, sitting at *nisi prius*, could not properly dispose of. *Ib.*

2. The plaintiff entered into certain contracts with a railway company, whereby it was agreed (*inter alia*) that the engineer of the company should, every fortnight, ascertain the value of the work done, according to its quantity and relative proportion to the whole works, and that the plaintiff should, on production of the certificate of the engineer, receive 80 per cent. of such value, the remaining 20 per cent. being reserved by the company until such reserve should amount to 4,000*l.*; that, if the engineer should not be satisfied with the works, the company should be enabled after notice given to the contractor, and his default in complying therewith for seven days, to take possession of the works, and thereupon the plant and materials of the contractor, the value of the work done and not paid for, and the reserve fund should become forfeited to the company. In the course of the work, the company advanced several sums of money to the plaintiff, upon the security of an assignment of his plant and machinery, upon the works comprised in the contracts, and of the reserve fund. The company, having given the required notice, and, at the expiration of the seven days, having taken possession of the works, plant, and machinery, the plaintiff filed his bill, insisting that the engineer had not so estimated the works, as to give to the plaintiff the 80 per cent. to which he was entitled, and that upwards of 30,000*l.* was due to him, under the several contracts for works actually completed; insisting also that no forfeiture had been incurred by him; and praying, that the company might elect to permit the plaintiff to complete the works, or otherwise that the contracts might be considered at an end: and praying in either alternative for the taking of accounts between the plaintiff and the company. The plaintiff amended the original, and filed two supplemental bills, and thereby stated that masonry, and other works of the most expensive kind, had been paid for at the price of inferior masonry and works, and claimed large sums in respect thereof; and also alleged fraud against the company, both in respect to the contracts, and also in respect to the certificates, and prayed relief therefrom, etc.:— Held, that the investigation as to the sufficiency of the payments to the plaintiff must be made in a court of equity, and cannot be made at law: that the evidence in support of an allegation of fraud must be very clear; and that it is not sufficient for the contractor to show that the statements of a company with regard to the nature of the work to be contracted for gave imperfect information; but he must also show, that he could not with reasonable diligence have acquired all necessary information: that clauses contained in contracts conferring on the engineer any power or authority over the contractor will not be considered by the Court as fraudulent or void, on account of the engineer being a shareholder in the company on whose behalf such contracts were entered into; that the engineer can decide as to the quality of work done, but

cannot decide as to the quantity and amount of such work: the question of measurement and calculation will be entertained and decided by a court of equity: that where the plaintiff has entered into a subsequent contract with a company, the Court will not direct inquiries as to the amount of unliquidated damages claimed in respect of antecedent grievances, but will consider the new contracts as a condonation, unless, at the time of making them, the plaintiff insisted on his adverse claims,—the parties being at liberty to proceed at law. *Ranger* v. *Great Western Railway Co.*, 3 Rail. Ca. 298. And see 5 H. L. Ca. 72.

The company, by its answer, having stated that the plaintiff was not entitled to a settlement of the accounts until all the works should have been completed:—Held, that the plaintiff, having, at the hearing, asked for a settlement of accounts, was entitled, from the admission in the answer (although the works were completed by the company, and not by the contractor) to have a final account taken. *Ib.*

Held, also, that, under the clause of forfeiture, there was no forfeiture of the sums necessary to make up the deficiency in the payments under the certificates of four-fifths of the value of the work done; and the Court directed an inquiry to ascertain whether they were the full sums or not. *Ib.*

Where the evidence as to the nature of masonry is conflicting, a reference will be directed to the Master to inquire, state, and accurately define the sorts of masonry with respect to which the question arises. *Ib.*

Stipulations as to penalties in contracts for railway works are binding on the contractor. *Ib.*

Where no fraud can be shown, no relief will be granted against a forfeiture provided for by a clause in the contract. *Ib.*

Where it had been agreed that the provisions of a written contract should in all respects, as far as applicable, apply to an unwritten contract:—Held, that stipulations as to forfeiture contained in the written contract should extend to, and form part of, the unwritten contract. *Ib.*

Semble, the Court will draw a distinction between a supplemental bill adducing facts which had happened prior to the filing of the original bill in support of the case made by that bill, and a supplemental bill adducing facts which happened prior to the original bill, but not put in issue by such original bill; but that the objection to such supplemental bill should be taken by demurrer, or by an application to take the bill off the file, and could not be properly taken at the hearing. *Ib.*

1. D. employed an architect to prepare designs for a mansion-house, the architect guaranteeing that the total cost should not exceed 15,000*l*. A builder, forming his estimate partly on certain rough plans prepared by the architect and partly on his verbal explanations, signed a tender to complete the house for 13,690*l*. He afterwards signed a formal contract and specifications, being at the time when he signed it in weak health, and being unaware of the existence of the architect's guarantee as to the cost of the buildings. The contract contained a clause making the architect the arbitrator in case of any dispute, and giving him power to determine whether any work was extra work or not, and what sum should be paid for any extra work. The builder proceeded with the works, the cost of which vastly exceeded the estimate, owing, as he alleged, to the fact that the quantities in the working drawings prepared by the architect exceeded the quantities which he had given to the builder as the basis of his estimate. The architect having refused to certify for anything beyond the contract price, the builder filed a bill praying for a rectification of the contract, and for a declaration that he was entitled to be paid by measure and value for all quantities of work executed by him in excess of the quantities included in his estimate:—Held, that the account was too complicated to be taken at law, and ought to be taken in chancery. *Kimberley* v. *Dick*, 13 L. R., Eq., 1; 41 L. J., Ch., 38; 25 L. T. 476; 20 W. R. 49.

VI. LIEN.

2. A contract for the building of a ship provided that the purchase money was to be paid by instalments, partly in cash and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on the vendor drew bills upon the purchaser, which he accepted, for the instalments of the purchase money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt, and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—Held, that the principle of *Exp. Waring* (19 Ves. 345) was not applicable, and that the bill-holders had no lien on the ship. *Exp. Lambton, Re Lindsay*, 10 L. R., Ch., 405; 23 W. R. 662; 32 L. T., N. S., 380; 44 L. J., Bky., 81. Affirming S. C. *sub nom. Exp. Greener, Re Lindsay*, 32 L. T., N. S., 205.

3. A man who enters into a contract to expend a certain sum of money on land and after spending part of it declines to perform the contract, has no lien on the land for the money which he has expended. *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 47 L. T. 389.

4. By an agreement between A. and B., A. agreed to exert himself to prove that B. was entitled to certain property in India, for which A. was to have half the value of what might be recovered. A. succeeded in recovering a certain amount, which was sent home to the correspondents in London of a firm in Calcutta, who acted for A. in the matter. Upon demurrer to

a bill to declare A.'s right to half the amount under the agreement:—Held, that A. had no lien on the fund, and that his right, if any, was purely legal and not equitable. *Alexander* v. *Hammond*, 3 W. R. 145.

WORKS.

— *Literary, Dramatic or Artistic.* See AUTHOR AND PUBLISHER—COPYRIGHT.
— *Metropolitan Board of.* See LOCAL GOVERNMENT.
— *Railway.* See RAILWAY.
— *Performance of Contracts Respecting.* See ARCHITECT AND ENGINEER—SPECIFIC PERFORMANCE X. IX. — WORK AND LABOUR.

WRECK.

See SHIPPING XVII.

WRIT.

— *Of Attachment or Capias.* See PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT).
— *Of Ca. Sa.* See EXECUTION, II.—SHERIFF.
— *Of Elegit.* See BANKRUPTCY, XX. xii.—EXECUTION, I.—JUDGMENT.
— *Of Error.* See PRACTICE (ERROR. PROCEEDINGS IN).
— *Of Exigi Facias.* See OUTLAWRY.
— *Of Fi. Fa.* See EXECUTION, II.—SHERIFF.
— *Of Habeas Corpus.* See HABEAS CORPUS —PRACTICE (HABEAS CORPUS).
— *Of Injunction.* See INJUNCTION.
— *Of Levari Facias.* See EXECUTION—EXTENT.
— *Of Rebellion.* See PRACTICE (REBELLION. COMMISSION OF).
— *Of Revivor and of Scire Facias.* See PRACTICE (SCIRE FACIAS)—RECOGNISANCE.
— *Sequestrari Facias.* See PRACTICE (SEQUESTRATION).
— *Of Subpœna ad Testificandum.* See PRACTICE (EVIDENCE).
— *Of Subpœna Duces Tecum.* See PRACTICE (EVIDENCE).
— *Of Summons.* See PRACTICE (WRIT OF SUMMONS).
— *Other Writs.* See PRACTICE (WRIT).

YEAR.

See TIME.

YORK.

See DISTRIBUTION OF ESTATE, II.

YORKSHIRE.

See REGISTRATION.

YOUNGER CHILDREN.

— *Right to Portions in General.* See PORTION.
— *Gift to a Son or a Child.* See WILL, XXXI. I. 5.

I. Eldest Son.

I. CONSTRUED AS FIRSTBORN.

1. One has two sons, A. and B., and three daughters, and devises his lands to be sold, to

pay his debts, and, as to the moneys arising by sale after debts paid, he gives 200*l.* thereout to his eldest son A., at twenty-one, the residue to his four younger children equally. A., the eldest, died before twenty-one: the 200*l.* shall go to the heir of the testator. *Cruse* v. *Barley*, 3 P. W. 19.

1. Bequest to a daughter's "younger children":—Held, to mean the children other than the eldest in age, and therefore to exclude the eldest child, a daughter, and to include her younger brother, though, under his parents' marriage settlement, the family estates stood settled on him. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066; 2 W. R. 690.

2. The only son of a marriage cannot succeed to an estate which has been limited to A. and his heirs in tail male, except an eldest son, and does not come in under a proviso giving an estate to A., and "all and every other the son of the body of A., save and except an eldest son." *Twite* v. *Bermingham*, 7 L. R., H. L., 634; 24 W. R. 549.

"Eldest" and "firstborn" are to be treated as synonymous terms. *Ib.*

3. Except in cases of portions or of a specially qualifying context "eldest son" means "firstborn son." A testator, by will dated in 1841, devised lands to the use of A. for life, with remainder to the use of "the eldest son" of A. for life, with remainder, after the decease of the eldest son of A., to the use of the eldest son of his body and his heirs for ever; but in case of the death of the eldest son of A. without issue male, to the use of the second, third, fourth, and every other son of A. successively in tail male; and the will contained a proviso that the first, second, third, and every other son of A. should, before receiving the rents of the lands, take and use the name and arms of the testator. The firstborn son of A. was living at the date of the will, but died an infant. C., the second born son of A., was his eldest living son at the time of the death of the testator:—Held, that the word "eldest" must be construed as "firstborn;" and that, subject to his father's life estate, C. was tenant in tail under the will. *Meredith* v. *Treffry*, 12 L. R., Ch. D., 170; 48 L. J., Ch, 337; 27 W. R. 406.

Held, also, that the eldest son of A. took by implication an estate tail in remainder after the estate tail of his eldest son. *Ib.*

4. The eldest son of a man is his firstborn —the primogenitus; and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man. *Bathurst* v. *Errington*, 2 L. R., App. Cas., 698; 46 L. J., Ch., 748; 25 W. R. 908; 37 L. T., N. S., 338. Affirming S. C. *nom. Harvey-Bathurst* v. *Errington*, 4 L. R., Ch. D., 251; 46 L. J., Ch., 162; 25 W. R. 482; 35 L. T., N. S., 709, which reversed 34 L. T., N. S., 639.

5. A testator gave real estate to A. for life, and afterwards to her eldest son on his taking the name of M.; but should he refuse to take the name, or A. depart this life without a son, then over. A. had no son at the date of the will, but afterwards had four sons, all of whom had the name of M. given to them at their baptism:—Held, that A. took an estate for life, with remainder in fee to her firstborn son. *Bennett* v. *Bennett*, 10 Jur., N. S., 1170; 33 L. J., Ch., 34; 13 W. R. 66; 11 L. T., N. S., 362; 2 Dr. & Sm. 266.

II. CONSTRUED AS SON TAKING THE ESTATE.

6. Elder son unprovided for, considered as a younger. *Teynham* (*Lord*) v. *Webb*, 2 Ves. 198.

7. Elder son provided for by collateral relations considered as a younger. *Duke* v. *Doidge*, 2 Ves. 203.n.

8. A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail:—Held, that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates. *Re Bayley*, 6 L. R., Ch., 590; 19 W. R. 789; 25 L. T., N. S., 249; 39 L. J., Ch., 388; 9 L. R., Eq., 491; 18 W. R. 481; 21 L. T., N. S., 195.

9. A second born son, who attained twenty-one, and on his father's death succeeded to his title, but died before the period of distribution, was held to be excluded as an "eldest son" from sharing in certain unappointed trust funds. His younger brother, who succeeded him in the title, and was living at the period of the distribution of the funds, was held entitled to share in them. *Re Rivers*, 40 L. J., Ch., 87; 24 L. T., N. S., 253; 19 W. R. 318.

10. In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund. *Collingwood* v. *Stanhope*, 4 L. R., H. L., 43; 38 L. J., Ch., 421; 17 W. R. 537. Affirming S. C. *nom. Stanhope* v. *Collingwood*, 36 L. J., Ch., 894; 4 L. R., Eq., 286.

In such a case "eldest" is not solely senior in age, for (as stated by Lord Hardwicke in *Duke* v. *Doidge*, 2 Ves. 203.n.), "eldership not carrying the estate along with it is not such an eldership as will exclude." *Ib.*

A. was, under a will, tenant for life of an estate, remainder to his first and other sons in tail. On his marriage a settlement was executed, by which a fund was created and vested in trustees for the husband and wife for life, and after the decease of the survivor for the benefit of the children of the marriage, "other than and except an eldest son entitled under the will to an estate in tail mail in possession, or remainder immediately expectant on the death of A." There was a power of appointment in this husband and wife, and in the survivor of them. There were three children of the marriage, a son and two daughters. No joint appointment was made. The wife died. The son, on attaining twenty-one, joined with his father in barring the entail and re-settling the estate, which was settled on the father for life, on the son for life, and on the sons of the son in tail. The father appointed one moiety of the trust fund to a daughter on her marriage. No appointment was made of the other moiety. On the death of the father the son claimed a share

of the fund:—Held, that though the character of eldest son was to be ascertained at the time of distribution of the fund, the son here was to be treated as the "eldest son entitled under the will," and consequently was not entitled to a share of the trust fund, for that his re-settlement of the estate, and his taking under such re-settlement an estate different from that given by the will, had in no way affected the character of "eldest son entitled under the will" which belonged to him when he came of age. *Ib.*

III. CONSTRUED AS ONLY SON.

1. Hugh Tuite and Sarah his wife had two sons named Hugh Morgan and George Gustavus. In 1826, on the marriage of Hugh Morgan, the paternal estate of Sonna in Westmeath was settled to the father for life, remainder to Hugh Morgan for life, remainder to the first and other sons of Hugh Morgan in tail, remainder to George Gustavus and his issue in tail male. On the marriage of George Gustavus in 1834, the maternal estate of Ballycommon was settled (after life estates to the father and mother) on George Gustavus for life, with successive remainders to his issue in tail male, remainder to Hugh Morgan for life, remainder to the second son of Hugh Morgan and the heirs male of such second son, and in default of such issue male of such second son to the use of the third, fourth, fifth, and of all and every other the son and sons of Hugh Morgan, save and except an eldest son, in remainder one after the other and the heirs male of their bodies, the elder of such son and sons (other than an eldest son as aforesaid) and his said heirs being preferred before the younger and his said heirs, and in default of such issue, in fee to Henry Arabin, a connection of the mother. George Gustavus died without issue. Hugh Morgan afterwards died having had an only son who survived him:—Held, that upon the death of Hugh Morgan Tuite, the heirs of Henry Arabin became entitled to an estate of fee simple in possession in the lands of Ballycommon; the only son of Hugh Morgan being an "eldest son" within the meaning of the settlement of 1834. *Tuite* v. *Birmingham*, 24 W. R. 549; 7 L. R., H. L., 634.

IV. RIGHT OF TO PORTION OR PARENTAL PROVISION WHEN NOT TAKING THE ESTATE.

2. By a settlement for the benefit of younger children, money was to be raised, after the death of T., for all the children of E. other than an eldest or only son for the time being entitled to certain estates. The eldest son of E. died in his father's lifetime, and E. died in T.'s lifetime. At T.'s death W. was the eldest living son of E., and entitled to the estates:—Held, that the representatives of the eldest son of E. took a share in the money. *Ellison* v. *Thomas*, 8 Jur., N. S., 1139; 6 L. T., N. S., 883; 7 L. T., N. S., 342; 1 De G. & Sm. 18; 1 N. R. 37; 32 L. J., Ch., 82; 11 W. R. 56.

The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception attach at that time upon the son who then answers the description, and to exclude him only from the class of persons interested. *Ib.*

3. By a settlement a gross sum was directed to be raised after the decease of the settlor and his wife (tenants for life) for portions for children other than their eldest or only son, equally to be divided:—Held, that the personal representatives of the eldest son, who attained twenty-one, and died in his father's lifetime, were entitled to one share. *Davies* v. *Huguenin*, 1 Hem. & M. 730; 2 N. R. 101; 32 L. J., Ch., 417; 11 W. R. 1040; 8 L. T., N. S., 443.

Held, also, that a daughter who attained twenty-one, and died unmarried in her father's lifetime, was entitled to a share. *Ib.*

Held, also, that the second son, who, during the father's life and after attaining his majority became the eldest son and succeeded to the settled estate, and the personal representatives of a child who died in infancy, were not entitled. *Ib.*

The only person who is properly described as an eldest son, so as to be excluded from a share of portions for younger children, is the son who eventually takes possession of the estate. *Ib.*

4. Grandmother, under a power, creates by deed a term to commence after her death for raising money for younger children, as their father should appoint; if no appointment, equally; if but one besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one granddaughter. The father afterwards had another son, and died without appointment. The eldest son having died under age:—Held, that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son, was excluded. Elder son, unprovided for, considered as a younger. *Teynham (Lord)* v. *Webb*, 2 Ves. 198.

5. By a settlement real estates stood limited to S. for life, and after his death as to part to E., his son, for life, remainder to H., the eldest son of E., for life, and to his first and other sons in tail, remainder to J., the second son of E., for life, and to his first and other sons in tail, with remainders over; and as to the remaining part, to trustees for sale and conversion, the proceeds to be held as personal estate in trust for the children of E., "other than or not being an eldest or only son for the time being entitled under the limitations hereinbefore contained to the manors," etc.—the unsold part of the settled estates—"either in possession or in remainder expectant on the decease of the survivor of S. (the grandfather) and E.," the shares to vest in such of them as should attain twenty-one, or, if daughters, marry under that age, and to be paid at such age or days of marriage, or immediately after the decease of the survivor of S. and E., which should last happen. The father died in the lifetime of the grandfather, and J. (having attained twenty-one) died in the lifetime of both his father and grandfather. S., the second son of E., attained twenty-one in the lifetime of H., and became entitled as tenant for life in possession to the unsold part of the settled estates on the death of his grandfather:—Held, that under these circumstances, and notwithstanding the fact that the settlement contained a separate pro-

vision for H. by way of rent-charge, his personal representative was, and J., the second son, was not, entitled to share the personal estate with the younger children. *Swinburne* v. *Swinburne*, 17 W. R. 47.

V. OTHER CASES.

1. Bequest to younger sons, as tenants in common; and, if any of them should die before the period of distribution, not leaving any wife or children, his share to go to his next eldest brother, and so on to the youngest. The fifth son having died without leaving a wife or child, his share was held to go to the sixth. *Fitzgerald* v. *Fitzgerald*, 12 Ir. Ch. R. 442.

2. Gift to the eldest sons for the time being of testator's four brothers in remainder after a life estate:—Held, a vested interest in them as tenants in common. *Harvey* v. *Towell*, 7 Hare 231; 17 L. J., N. S., Ch., 217; 12 Jur 241.

3. Bequest of 5,000*l.* out of an estate, equally to testator's children, with remainder in the same estate to his first and other sons; the eldest son shall have a share. *Incledon* v. *Northcote*, 3 Atk. 438.

4. A testator who had been twice married, and had three sons by the first marriage, and a son and a daughter by the second, gave his residuary estate to his five children, share and share alike, the shares of his sons to be payable at twenty-one, and of his daughter at that age or upon marriage, with a gift over in case of death before the shares became payable; and he directed that in case his three children by his first wife should receive any moneys which should become payable to them as the children of their mother, such moneys should be considered as deduction from the shares of such children, it being his desire that all his children should share and share alike. After the eldest child attained twenty-one, but before any of the rest attained that age, the children of the first marriage became entitled to a fund as children of their mother:—Held, that, as the share of this fund coming to the eldest son could not be deducted from his share of the residue, and it was the intention of the testator that the proviso in his will should operate on all the children alike, no deduction could be made from the shares of the other children of the said marriage. *Stares* v. *Penton*, 4 L. R., Eq., 40.

5. A. devised to B. for life, remainder to his first and other sons in tail male, remainder over, in trust to convey the premises, or any part thereof, to such child or children of testator's daughter, and her then husband, other than and except their eldest son for the time being, and the issue male or female of such child or children (except as before excepted), for such estates and in such shares, and subject in such limitations, as she, by deed or will, should appoint: and for want of appointment by her, or for so much as shall not have been appointed by her, then, as her husband should, by deed or will, appoint: and for want of such appointment, or for so much, etc., then as their eldest son for the time being shall appoint. The husband by his will (his wife having died without appointing) appointed to his younger sons, by name, in tail, with cross-remainders in tail; and if all his said younger sons should die without issue, then to his daughters. He died, leaving his sons, the appointees, still younger sons; afterwards one of them became the only surviving son, the rent being dead, without issue; and then the trust estate vested in possession by the death of B., without issue male. The daughters of the appointor claimed the estate, considering the appointment to their surviving brother as defeated, by his being, as they said, an eldest son for the time being, and so excluded by the will of A., and the other brothers, the appointees, being dead, without issue. But it was decreed by Chancellor Lifford, that the appointment to him continued undisturbed; that "time being" meant the time of the appointment being made; that the appointees were as if named in the will of A.; and that the daughters could only claim under the appointment of their father, who limited it to them in the event of all his sons, the appointees, dying without issue, which did not happen. *Jones* v. *Cope*, Vern. & Scriv. 29.

6. A. makes two of his daughters executrixes, and directs then to distribute a sum of 400*l.*, and also the residue of his personal estate, among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The Court restrained the exercise of this power by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton* v. *Warburton*, 4 Bro. P. C. 1.

7. K., by will, directed his trustees, on R., the eldest son of K., and failing him the next eldest son, attaining twenty-one, to convey certain real estates to K., but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then such children were to have life estates only. K., by codicil, directed his trustees to postpone the conveyance to R. till he attained twenty-five. R. at twenty-three married, with the approbation of the trustees, though they were not parties to his marriage settlement, which settlement disposed of his interest under his father's will as if it were an estate in fee. When R. attained twenty-five, the trustees, not being satisfied with R.'s conduct, conveyed to him only a life estate in the premises:—Held, first, that the eldest son was included under the term children; secondly, that the trustees were not bound to declare their dissatisfaction until R. attained twenty-five, and that they could not by having assented to R.'s marriage preclude themselves from discharging the duty of reviewing his conduct when he attained twenty-five. *Weller* v. *Ure*, 15 L. T., N. S., 97.

8. One gave legacies to each of his younger children, payable at twenty-one, and the residue of his personal estate to his eldest son at twenty-one; and if he die before twenty-one, then to his younger children in succession; and if any of his younger children should die before twenty-one, their respective legacies to go equally to all the survivors; and if all his children should die before twenty-one, then the whole to go to a charity. One of the younger sons died under twenty-one; the other children attained twenty-one:—Held,

the eldest son should take his legacy equally with the other younger children. *Hiern* v. *Ley* Ambl. 569.

II. Younger Son.

I. CONSTRUED AS SON NOT TAKING THE ESTATE.

1. Elder son provided for by collateral relations considered as younger. *Duke* v. *Doidge*, 2 Ves. 203.n.

2. Every one but the heir is a younger child in equity. Younger children are those who do not take the estate. The character of younger children must continue until the time of payment. *Savage* v. *Carroll*, 1 Ball & B. 278.

3. Younger child is never considered as an eldest but between parent and children, or one *in loco parentis*, not in the case of a provision by a stranger. *Hall* v. *Hever*, Ambl. 203.

4. If money is bequeathed to younger children, where there are several daughters and a son, who by birth is the youngest, but heir to a fair inheritance, he shall not be considered as a younger child to take the legacy. *Bretton* v. *Britton*, 3 Ch. Rep. 1. S. P. *Mead* v. *Cure*, 1 Ch. Rep. 224.

5. When a real estate is so settled, that it must, on the death of a parent, go to his eldest son, and provision is made by that parent or by any person *in loco parentis*, whether by settlement in contemplation of marriage or by will for the younger children of such parent, courts of equity have considered the presumption that it was intended to make provision for all the children so strong as to warrant them in holding, that by the word "younger" must have been intended all except the one child who succeeds to the estate. But this does not apply to the case of a will in which the primary intentions of the testator appear to have been to found certain families or to do something beyond merely making a provision for children. And the circumstance that the will is not of an executory nature will make no difference. *Scarisbrick* v. *Skelmersdale* (*Lord*), 4 Y. & Coll. 78.

6. In the will of a grandmother, "younger children" does not necessarily mean children unprovided for. *Lyddon* v. *Ellison*, 2 W. R. 690; 19 Beav. 565; 18 Jur. 1066.

7. The rule, that a limitation in favour of younger children will not operate in favour of a younger child who becomes an elder son and succeeds to the estates, is confined to cases where the provision is made by a parent or a person *in loco parentis*. *Sandeman* v. *Mackenzie*, 1 John. & H. 613; 7 Jur., N. S., 1231; 30 L. J., Ch, 838; 5 L. T., N. S, 175.

Where, in a marriage settlement, a husband covenanted to pay 10,000*l.* for the children of the marriage, and, for want of such children, for the children of the wife by a former marriage (other than A., her eldest son) as the husband should appoint; and in default, for all who should attain twenty-one, equally, or, if only one, then for such one younger child: —Held, that the wife could not be considered as purchasing the provision in such a sense as to make her the settlor, and that the settlement was not by a person *in loco parentis*. *Ib.*

8. Lands were settled to the use of A. for life, remainder to his eldest son B. for life, remainder to C. (eldest son of B.) for life, with remainder to C.'s first and other sons successively in tail, remainder to D. (the second son of B.) for life, remainder to D.'s first and other sons in tail, with remainder over; with a power of limiting portions in favour of the children of B., "not being and besides an eldest or other son, who on the decease of B. and A. shall be entitled to the settled estates;" the portions to vest in the case of sons at twenty-one, but not to be raisable in the lifetime of A. and B. or either of them without consent. B. died first, then C., without issue, but having attained twenty-one; then A.; whereupon D. succeeded to the estates. He attained twenty-one in C.'s lifetime. No portion had been barred or limited: —Held, that neither D. nor C.'s representatives had any title under the portion trusts. *Gray* v. *Limerick* (*Earl*), 2 De J. & Sm. 370; 17 L. J., N. S., Ch., 443; 12 Jur. 817.

See also I. IV. *ante* and following Subdivisions.

II. RIGHT OF TO PORTION OR PARENTAL PROVISION WHEN BECOMING ELDEST.

1. In General.

9. Where there is a sum of money provided for younger children, and one of the younger becomes eldest, he shall have no part of this money but where the money was, by a private Act of Parliament, to be appointed among A., B., and C. (naming them), and A. afterwards becomes eldest, he is capable of an appointment in his favour. *Jermyn* v. *Fellows*, Forrest. 93.

10. The rule, that a younger son becoming an elder cannot have the benefit of a provision made for younger children, is applicable only in a case where the settlor is a parent or *in loco parentis*. *Sandeman* v. *Mackenzie*, 1 John. & H. 613; 7 Jur., N. S., 1231; 30 L. J., Ch., 838; 5 L. T., N. S., 175.

11. A., by marriage settlement, is tenant for life, remainder to trustees, to raise 4,000*l.* for younger children's portions, as A. should appoint; remainder to his first and other sons in tail. A. appoints the 4,000*l.* amongst his younger children, and particularly 2,600*l.*

thereof to B., his second son. The eldest son dies six years afterwards, whereby B. became eldest son, and entitled to the whole estate after his father's death; and thereupon A. makes a new appointment of the 2,600*l.* to one of his daughters. Decreed, the last appointment to take place, the first being made to B. upon a tacit or implied condition, that he should not become the eldest son. *Chadwick* v. *Doleman*, 2 Vern. 528.

1. Grandmother, under a power, creates by deed a term, to commence after her death, for raising money for younger children, as their father should appoint; if no appointment, equally; if but one besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one granddaughter. The father afterwards had another son and died without appointment: the eldest son having died under age:—Held, that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son, was excluded; eldest son unprovided for, considered as a younger. *Teynham* (*Lord*) v. *Webb*, 2 Ves. 198.

2. Under a power to appoint a sum of money among children; but that the eldest son, or the son possessing the estate, shall have no part of the money; a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power, whilst he was a younger son. *Broadmead* v. *Wood*, 1 Bro. C. C. 77.

3. A son who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which are directed to vest in the younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements by which the portions were provided, to show that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham* v. *Graham*, 1 Russ. 331. And see *Loder* v. *Loder*, 2 Ves. 531.

4. A. devised to B., for life, remainder to his first and other sons in tail male, remainder over, in trust to convey the premises, or any part thereof, to such child or children of testator's daughter, and her then husband, other than and except their eldest son for the time being, and the issue male or female of such child or children (except as before excepted), for such estates, and in such shares, and subject to such limitations as she, by deed or will, should appoint; and for want of appointment by her, or for so much as shall not have been appointed by her, then as her husband should, by deed or will, appoint; and for want of such appointment, or for so much, etc., then as their eldest son for the time being shall appoint. The husband, by his will (his wife having died without appointing), appointed to his younger sons, by name, in tail with cross-remainders in tail; and if all his said younger sons should die without issue, then to his daughters. He died, leaving his sons, the appointees, still younger sons; afterwards one of them became the only surviving son, the rest being dead without issue, and then the trust estate vested in possession by the death of B. without issue male. The daughters of the appointor claimed the estate, considering the appointment to their surviving brother as defeated by his being, as they said, an eldest son for the time being, and so excluded by the will of A.; and the other brothers, the appointees, being dead without issue. But it was decreed by Lifford, Ch., that the appointment to him continued undisturbed; that "time being" meant the time of the appointment being made; that the appointees were as if named in the will of A., and that the daughters could only claim under the appointment of their father, who limited it to them in the event of all his sons, the appointees, dying without issue, which did not happen. *Jones* v. *Cope*, Vern. & Scriv. 29.

5. Portions by settlements for younger children, living at the death of the survivor of the parents, with a proviso that advancements should be in satisfaction, unless the contrary is declared. The father by will, desiring the settlement may be punctually complied with, made a residuary disposition of real and personal estates among the younger children, directing that what they may have received in his life shall be brought into the account so as to make them all equal; construction upon the whole, that advancement in marriage or otherwise, though not the grammatical construction, is within the proviso; and, equality being the object, an arrangement was made upon that principle. One of the younger children having become the eldest, and therefore owner of the estate, between the death of the parents, after advances received in satisfaction of the portion in the former character, is to be considered a younger child in the account. *Leake* v. *Leake*, 10 Ves. 477.

6. A testator bequeathed 20,000*l.* to his son A. for life, with remainder, "in case F., the eldest son of A., shall be living," to F. for life, with remainder to his children, and in default of children to the other sons of A. successively, in strict settlement. He also bequeathed a share of the residue to A. for life, with remainder to "all the children of A., except F." F. died in the lifetime of A., unmarried when B. became the eldest son of A., and, entitled on A.'s death to a life interest in the legacy of 20,000*l.*:—Held, that, notwithstanding B. having become the eldest son, he was entitled to a share in the residue, and that the representatives of F. were excluded. *Wood* v. *Wood*, 4 L. R., Eq., 48; 15 W. R. 389.

2. Where not taking the Estate.

7. By a settlement executed in 1800, on his first marriage, A. was seised of an estate for life in certain lands, with remainder to his first and other sons in tail, with power to charge the lands with 2,000*l.* for such purposes as he should think fit, and with 1,000*l.* for his children by any after-taken wife. He also became entitled, by subsequent rents, to two sums of 500*l.* and 1,000*l.* charged on the lands by the same deed. There was no issue of the

first marriage By a settlement executed in 1809, on his second marriage, he charged the lands with 2,000*l.* and 1,000*l.* under the powers, and assigned that 2,000*l.*, and 500*l.* and 1,000*l.*, to trustees in trust, if there should be two or more younger children or daughters, to be divided amongst them after the death of their mother, as he should by deed or will appoint, and in default of appointment equally; and if there should be no issue of the marriage, or issue only one son, or there should be issue one or more daughter or daughters, or one or more younger children who should die before the time of payment of the portions, then, as to the 2,000*l.*, 1,000*l.*, and 500*l.*, in trust for A., his executors, etc. There was issue of the second marriage two sons and a daughter (B., C., and D.). The eldest son, B., joined A. in suffering a recovery of the estate, and, by a deed of 1834, it was conveyed, subject to a term, to the use of A. for life, remainder to the use of B. for life, remainder to the first and other sons of B. in tail, remainder over. The trusts of the term were to raise, by sale or mortgage, 12,500*l.*; to be disposed of as A. and B., or the survivor, should appoint, which was raised. A. appointed 250*l.* of the sums of 500*l.*, 1,000*l.*, and 2,000*l.* to D., and the residue to C., and afterwards B., the eldest son, died without issue, whereupon C. became entitled, subject to the charge of 12,500*l.*, to a life-estate in part of the lands, the remainder having been sold for payment of incumbrances:—Held, that the appointment of the 500*l.*, 1,000*l.*, and 2,000*l.* did not become void by C. becoming an eldest son, entitled to the lands under the deed of 1834. *Tennison* v. *Moore*, 13 Ir. Eq. R. 121.

1. Construction of a clause of accruer "in case of any younger son becoming an eldest or only son." *Peacocke* v. *Pares*, 2 Keen 689; 6 L. J., N. S., Ch., 375; 1 Jur. 575.

An estate was limited to A. for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A.; and it was provided, that "in case any of the younger sons should become an eldest or only son," his portion should accrue to the other children. A. had two sons, B. and C., and one daughter; B. attained twenty-one, and suffered a recovery, whereby he destroyed C.'s estate in remainder. B. died in 1807, leaving C., an infant, to whom he devised the estate, for his life. A. died in 1833.—Held, that C. was not entitled to participate in the portion. *Ib.*

2. Where estates were limited in a settlement for a term, to raise a certain sum for portions of all the children of the marriage (except an eldest or only son), to be vested and paid at such times as the husband should appoint, and, in default of his appointment, at twenty-one, but not to be paid until after his death, with a proviso, if any son should become an eldest or only son before the time appointed for payment of his portion, that then, and in default of any such appointment, his share should go to the others; the eldest son attained twenty-one, and afterwards, with the father, suffered a recovery, and re-settled the estates to the use of the father for life, remainder to the son in fee; the other children, a son and three daughters all attained twenty-one, and the eldest died intestate and without issue, and the father appointed the sum amongst the surviving son and three daughters, directing that the shares should vest on the execution of the deed, but not to be paid until after his death; and the second son also died before his father:—Held, that the share so appointed to him did not go over to the sisters. *Spencer* v. *Spencer*, 8 Sim. 87; 5 L. J., N. S., Ch., 310.

3. A second son, becoming the eldest son in the lifetime of his father, who was tenant for life, with remainder, subject to trusts for younger children's portions, in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother:—Held, that he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer, in the event of a younger son becoming an eldest son; the Court being of opinion, that, in being excluded by the disentailing deed, he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate. *Macoubrey* v. *Jones*, 2 Kay & J. 684.

The case of *Peacocke* v. *Pares* (2 Keen 689) observed upon. It is in conflict with *Spencer* v. *Spencer* (8 Sim. 87), and not to be followed as an authority. *Ib.*

Where the bulk of an estate is limited in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement can take any benefit from the portions, whether the settlement does or does not contain an express provision to exclude him from a share in the portions. But where a younger child becomes the eldest without taking any part of the estate, whether or not he is entitled to share in the portions, is a question of intention. *Ib*

4. A., on his marriage, settled real estates on himself for life, then to parties for a term to raise portions for his younger children, and subject thereto to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the death of the husband and wife. G., the second son, attained twenty-one, after which W., the eldest son, having barred the entail, died without issue, and subsequently the portions became payable:—Held, that G., although the eldest at the period of distribution, was entitled to a share of portions for younger children. *Adams* v. *Beck*, 25 Beav. 648.

5. A younger child becoming the eldest son, but not living to enter into possession of the estates, remains a younger child for the purpose of receiving a portion. *Sing* v. *Leslie*, 4 N. R. 17; 10 Jur., N. S., 794; 32 L. J., Ch., 549; 11 L. T., N. S., 332; 2 Hem. & M. 68.

6. When, under a power in a marriage settlement, uses are revoked and new uses declared, whereby a younger child, who had since become an eldest son, takes through the mere bounty of the donor property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to the portion of a younger

child under the settlement. *Wandesforde* v. *Carrick*, 5 Ir. R., Eq., 486.

III. SHIFTING CLAUSES.

1. In construing a will, the words "younger son," used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense. *Wilbraham* v. *Scarisbrick*, 1 H. L. Ca. 167.

2. A testator, after directing two estates, A. and B, to be settled upon his children in strict settlement, except that as to estate B. the first limitation was to his second son and his issue, T., the eldest (who was to take under the first limitation as to estate A.), being named last, directed that the settlement should provide that if W. and C. (naming the other children except T.), or any subsequently born sons or daughters, should become entitled to the A. estate, and any "younger son or daughter" of the testator or any issue of such younger son or daughter should be then living, the uses in the estate at B. to the child who, or whose issue, should so become entitled, should cease:—Held, that the words "younger son or daughter," in the shifting clauses, were to be construed distributively, viz., a son younger than a son, or a daughter younger than a daughter, and the estates to shift from sons to sons and from daughters to daughters, and not from sons to daughters according to seniority. *Scarisbrick* v. *Eccleston*, 5 Cl. & F. 399, reversing the judgment below.

3. E. devised his estates to R. the second, J. the third, and C. the fourth sons of his brother-in law Sir T. S. (entirely passing over W., the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of E. He then introduced a shifting clause, that in case R., or J., or C. "should become the eldest son" of Sir T. S., the E. estates should go over to the next in remainder under his will. The testator died in 1819. Sir T. S. survived the testator. W., the eldest son, succeeded his father in the S. baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue R. succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the E. estates. R. died without male issue, and J., the third son, then claimed the E. estates:—Held, that he was entitled to them, for that under the true construction of the will he had not "become the eldest son" of Sir T. S., and the shifting clause had therefore not taken effect. *Bathurst* v. *Errington*, 2 L. R., App. Cas., 698; 46 L. J., Ch., 748; 25 W. R. 908; 37 L. T., N. S., 338. Affirming S. C. *nom. Harvey-Bathurst* v. *Errington*, 4 L. R., Ch. D., 251; 46 L. J., Ch., 162; 25 W. R. 482; 35 L. T., N. S., 709, which reversed 34 L. T., N. S., 639.

IV. OTHER CASES.

4. Younger son becoming an eldest, entitled to take *eo nomine*. *Bridgewater* v. *Egerton*, 2 Ves. 122.

5. Construction of an obscure will; first, that the income only, not the capital, was disposed of; secondly, that the disposition was in favour of the younger children, excluding the eldest. *Sansbury* v. *Read*, 12 Ves. 75.

6. A. made a voluntary settlement of lands (subject to an annuity of 100*l.* to his youngest son), in trust for his eldest son and his heirs, which settlement did not contain any power of revocation; the eldest son being dead, the father made another voluntary settlement of the same lands to the use of himself for life, remainder to his youngest son for life, remainder to trustees to preserve, etc., remainder to first and other sons of youngest son in tail. The first deeds came into the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first. Both sons having been otherwise provided for, it was held, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first deed. *Clavering* v. *Clavering*, 7 Bro. P. C. 410.

III. Daughters.

7. The eldest daughter, where there is a son or where the estate by a settlement goes all to a remainderman, is a younger child in equity. *Beale* v. *Beale*, 1 P. W. 244.

8. A daughter, though eldest, held a younger child, to take a legacy by description. *Pierson* v. *Garnett*, 2 Bro. C. C. 38; Pre. Ch. 201. And see S. C. *id.* 226.

9. An elder daughter, where there is a son, is accounted a younger child in a court of equity. *Heneage* v. *Hunloke*, 2 Atk. 456.

Where, by articles before marriage, it was agreed, that principal sum should be paid to trustee for benefit of younger children, and that certain freehold houses should be conveyed, after previous particular estates, to the younger child or children, in tail general; and, by indenture of same date, the houses were settled to uses of the articles: the husband and wife left a daughter, their eldest child, and a son:—Held, that the daughter was entitled to the principal sum, and the freehold houses; for an elder daughter, where there is a son, is accounted a younger child. In an ejectment the daughter could not have recovered; for, being the eldest, she would not, at law, be construed a younger child; but, in a court of equity, as the articles are executory, they must be carried into execution agreeably to the intention of the parties. *Ib.*

10. A settlement was made on the marriage of I. S., of two shares in the New River water, to I. S. for life, to his wife for life, and after their decease one share was limited to such of the younger children as should not be heir-at-law, or for want of such issue to the sisters of I. S., and their children, as I. S. should appoint; but in the case of no issue of I. S., or if he should make no appointment, the same was limited to the sisters, and the children of one of the sisters, under whom plaintiffs claimed, in such manner as they were entitled

to one whole share. If there had been only one child, it would have been excluded by the words, "other than such as shall be heir-at-law;" or if there had been several daughters, as they would have made but one united heir, they would have been excluded; or if both sons and daughters, and reduced to only one child, that child could not have taken. *Townshend* v. *Ashe*, 3 Atk. 336, 338.

1. Grandmother, under a power, creates by deed a term to commence after death for raising money for younger children, as their father should appoint; if no appointment, equally; if but one besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson, and one granddaughter. The father afterwards had another son, and died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son, was excluded. Elder son, unprovided for, considered as a younger. *Teynham* (*Lord*) v. *Webb*, 2 Ves. 198.

2. Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children; the son left four daughters (one of whom was his eldest child) and a son:—Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an elder son only. *Hall* v. *Luckup*, 4 Sim. 5.

3. Under a gift of the residue, for such child of testator's daughter as should first attain the age of twenty-one years, for his or her absolute use and benefit, the eldest child, a daughter, was held to take, notwithstanding many passages of the will created a doubt as to that being the testator's intention, he having given that daughter a legacy, and, by a codicil, declared that the furniture in a certain house which he had given (subject to a previous life estate) to the eldest son, should, after the death of the tenant for life, be held upon and for the same trusts and purposes as he had declared concerning his residuary personal estate. *Shipperdson* v. *Tower*, 1 Y. & Coll C. C. 441; 6 Jur. 658.

4. Devise in default of issue male of A., to the first daughter living at the death of the testator who should attain twenty-five for life, with remainder to her first and other sons in tail male; remainders over, subject to a trust for debts and accumulation of the surplus rents and profits, until a son or daughter should first come to the actual possession of the estates, or receipt of the rents after that period, such person to take the surplus rents; and the surplus of the accumulation, after payment of the debts, to be paid to such person or persons who by the limitation should first come to the actual possession of the estates or receipt of the rents and profits. A daughter living at the death of the testator, and having attained twenty-five, entitled to possession of the estate and to the accumulated fund. *Barker* v. *Barker*, 12 Ves. 409.

5. A testatrix bequeathed her residuary estate to trustees upon trust for her daughter for life, with remainder to the "younger children" of her said daughter, the shares of sons to be paid at twenty-one, and those of daughters at twenty-one or marriage; with a direction to invest the shares of daughters, and pay them the income for their separate use from the time of marriage or upon their attaining twenty-one, so that the capital of each daughter's share should pass to the children of such daughters; with such trusts or remainders, in the event of there being no such issue, as the trustees should think proper:—Held, in the absence of evidence showing an intention on the part of the testatrix to place herself *in loco parentis* towards her grandchildren, that the eldest child, a daughter, was excluded, and a younger child, a son, who succeeded to the family estates, was entitled to a share. *Lyddon* v. *Ellison*, 18 Jur. 1066; 19 Beav. 565; 2 W. R. 690.

6. By marriage settlement, certain lands were conveyed to A. (the intended husband), his heirs and assigns; and in case A. should die, leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons, and the heirs male of his body, being always preferred to take place before the younger, with full liberty for A. "to make such reasonable provision as he should think fit for such younger child or children;" and in case A. should die leaving no son, and that there should be one or more daughters, then to such daughter or daughters (if more than one) on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters; and A. by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the lands with the sum of 1,500*l.*, to be divided amongst the younger children of the marriage in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise her portion of the 1,500*l.*:—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children, as well daughters as sons, that the Court would effect that intention, and support the appointment, by transposing the clause creating the power, and that containing the limitation to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66.

IV. Gifts to First, Second, or Other Sons.

7. Second born son may take under a limitation "to the first son," he being so at the time. *Lomax* v. *Holmden*, 1 Ves. 290.

8. A. devised the whole of his fortune equally to be divided between any second or younger sons of his brother S., and his sister T. The sister has one younger son, but the brother has none:—Held, that the youngest

son of the sister was entitled to the whole. *Wicker* v. *Mitford*, 3 Bro. P. C. 442.

1. A. devises in trust for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son, with remainders over. There were two sons, B. and C.; B. died, and, after his death, C. was born. C., though an only son, shall take, he being the second son in order of birth, and, as the will is worded, not to be excluded. *Trafford* v. *Ashton*, 2 Vern. 660

2. Upon a will devising lands in trust to be conveyed and settled to the use of L., the devisor's eldest son, for his life, remainder to his second, third, fourth, fifth, and all and every other the son and sons of the body of L., lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age, and priority of birth, and the heirs male of their bodies respectively:—Held, upon the words and context of the will, making provisions inconsistent with the intention that a first son of L. should be excluded, that such first son took an estate in the lands in tail male. *Langston* v. *Langston*, 8 Bli. N. S. 167; 2 Cl. & F. 194. And see *Grattan* v. *Langdale*, 11 L. R., Ir., 473.

3. Bequest of the dividends of stock, in trust for the testator's nephew, son of his youngest brother B. for life; unless under will he should become entitled to the testator's real estate in America, devised to B. and his first and other sons in strict settlement, in remainder after similar estates to the testator's next brother A., and his issue male; and in that event, and so from time to time afterwards, or if any future possessor should bar the entail by recovery or other means, as to the capital for such person as shall be heir apparent, or expectant, next to the person then in possession, or if he should have joined in barring the entail, for the persons next in succession to him. After the death of A. the title of his eldest son to the estate being, in consequence of the American Revolution, confiscated in 1779, upon the death of the son of B., the second son of A., his eldest son having no issue, was held entitled to the dividends of the stock, while his elder brother should have no issue male. *Penn* v. *Barclay*, 14 Ves. 122.

4. Testator by his will directed that the fourth part of the net annual income of his property, which was personal, should be paid in quarterly payments to the eldest son of E.; and that on his decease the quarterly payment of his annuity should be continued to his heir-at-law; and failing the latter by death, so on in like manner as long as there should be an heir:—Held, that this was an absolute gift of one-fourth of the property to the eldest son of E. Testator by his will directed the income of one-half of his personal estate to be paid in equal shares to the eldest sons of his sisters E. and M. At the date of the will, an eldest born son of M. was living, but he afterwards died in testator's lifetime, leaving a second born son of M. surviving him. After his death, and with knowledge of it, the testator, by a codicil, directed the trustees of his will to divide a certain sum among all the children then living of his sisters E. and M., with the exception of the two provided for in his will:—Held, that the second-born son of M. took the share given by the will to her eldest son. *Thompson* v. *Thompson*, 1 Colly. 388; 8 Jur. 889.

5. A father, after bequeathing his personal estate to trustees upon trust for sale, and after devising a freehold estate to his eldest son G., and providing for his maintenance during minority out of the rents and profits, directed his trustees to invest the proceeds of the sale of his personal estate, and to apply the income arising therefrom, and the rents and profits of his residuary real estate, towards the maintenance and education of "all his children living at his death or born in due time afterwards;" and directed that when his youngest child should attain the age of twenty-one his trustees should "sell all his real estate, except the estate devised to his son G. . . . and divide the proceeds equally between his daughters E., M., F., S., and A., and his sons F. and W., and such other child or children as might be living at his decease, or born in due time afterwards":—Held, that the eldest son G. was entitled to share in the proceeds of sale of the real estate. *Tavernor* v. *Grindley*, 32 L. T., N. S., 424.

6. Legacy to the seventh or youngest child of A. A. had six children at the testator's death, and had another, who died at the age of two months; afterwards the plaintiff was born, and was the seventh child living, but the eighth in order of birth; other children were born afterwards. Under these circumstances the youngest child is entitled to the legacy, and not the plaintiff. *West* v. *Lord Primate of Ireland*, 2 Cox 258; 3 Bro. C. C. 148.

7. A testator, by codicil, after appointing two persons trustees, as also their heirs and assigns, to his will and codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W. and stock, of which she should only receive the interest and rent during her life, and afterwards to his sister's eldest son, on his taking the name of M.; but should he refuse to take the name of M., or his sister depart this life without a son, then the tenement at W. and the stock should go to P. on his taking the name of M., and so on to his heirs, each taking the name of M., none of them being allowed to touch the principal; and no one should after his sister A. inherit the said property or enjoy the interest who did not take or possess the name of M.:—Held, that the trustees took an estate in fee by virtue of their appointment, and that A. was entitled to an estate for life in the tenement and stock, with a remainder in fee in the tenement, and an absolute interest in the stock, to the first born of A. vested, in his birth and baptism, by the name of M. *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; 10 Jur., N. S., 1170; 33 L. J., Ch., 34; 13 W. R. 66; 11 L. T., N. S., 362.

8. By a marriage settlement lands were limited to the use of the first son of the body of B. on the body of P. (his future wife) lawfully to be begotten, and the heirs male of the body of such son, with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of B. to be begotten severally and successively,

one after another, as they and every of them should be in seniority of age and priority of birth, in tail male:—Held, that the eldest son of B. by his second marriage (there being no issue of his marriage with P.) was entitled to the lands as a tenant in tail in preference to the second son of such marriage. *Re Blake*, 19 W. R. 765.

1. The only son of a marriage cannot succeed to an estate which had been limited to A. and his heirs in tail male, except an eldest son, and does not come in under a proviso giving an estate to A., and "all and every other the son of the body of A., save and except an eldest son." *Tuite* v. *Bermingham*, 7 L. R., H. L., 634.

2. The limitation in remainder in a settlement was to the second son of a person who was living at the date of the settlement.—Held, that the second son living at that date was entitled. *Saunders* v. *Richardson*, 18 Jur. 714.

V. Gift to Next Surviving Son.

3. A testator directed his trustees to receive the rents of all his real estate for maintenance of all his children during the minority of H., his youngest child, and on her attaining twenty-one, he gave to five of his sons, whom he named in descending order of birth, estates tail in five several portions of his real estate respectively. And he provided that in case any of these five sons died "during the minority of H. as aforesaid, or in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share should be divisible," then the share of the deceased sharer should accrue to his "next surviving son according to seniority of age and priority of birth:"—Held, first, that on the death of one of the five sons during the minority of H., though leaving issue inheritable, the gift over took effect. *Eastwood* v. *Lockwood*, 36 L. J., Ch., 573; 3 L. R., Eq., 487; 15 W. R. 611.

Held, secondly, that having regard to the order in which the sons were named, next surviving son meant next in order according to the testator's arrangement. *Ib.*

VI. Youngest construed as Only.

4. Bequest to the youngest child of A., if she should have any child or children within a certain period; if no child or children within that period, over: her eldest child, being the only one within that period, is entitled. *Emery* v. *England*, 3 Ves. 232.

VII. Class when Ascertained and Period of Vesting.

See also preceding Subdivisions.

5. Bequest of 3,000*l.* to Jane, the wife of C., for the use of her younger children, to be distributed as she should appoint, in default equally to all Jane's children by C., being born at the time of the will and death of the testator. It was held, vested as a present legacy to them, subject to variation as between them, but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at the testator's death, and became an elder afterwards, was held entitled. *Coleman* v. *Seymour*, 1 Ves 209.

6. Under a trust for A. for life, "and after her death, to be divided equally between her younger children".—Held, first, that the children took vested interests at their births, and secondly, that the character of youngest child was to be determined at the period of vesting, and not that of distribution. *Adams* v. *Roberts*, 25 Beav. 638.

7 Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son, younger son, having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother did not descend to him. *Matthews* v. *Paul*, 3 Swan. 328; 2 Wils. 64.

8. Held, that under a bequest to the younger children of A., an only surviving younger child was upon the whole will entitled; and the second having become the eldest was excluded. *Lincoln* (*Lady*) v. *Pelham*, 10 Ves. 166.

9. Legacy of 300*l.* to E, to be paid at twenty-one or marriage; but if she died before, then to the younger children of F. E having died unmarried, under twenty-one:—Held, to vest in such of the younger children as were living at that time. *Ellison* v. *Airey*, 1 Ves. 111.

10. Devise and bequest to A., and after her decease, leaving any child or children her surviving, who should attain twenty-one, to pay her share "to her eldest child, his executors, administrators, and assigns," with a gift over in default of such child:—Held, that A.'s eldest child, who died in A.'s life, did not take, but that the second child, who survived her mother, was entitled. *Stevens* v. *Pyle*, 30 Beav. 284.

11. A testatrix, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of A. B., to be paid at twenty-one, and if none, to the eldest daughter of C. D., payable in like manner. A. B. never had a daughter, and died in 1851. C. D. had a daughter G., born in 1821, and who died in 1827, and other daughters:—Held, that the representative of G. was entitled to the legacy, and to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852. *Bryan* v. *Collins*, 16 Beav. 14.

12. Where there is a devise of real estate to A. for life, with remainder to his eldest son, and A. has B., his eldest son, at the time of

the date of the will, who afterwards dies, and A. leaves another child, C., his eldest son. *Quære*, as to the construction of such a devise; but *semble*, that C. would take. *Spurrell* v. *Spurrell*, 17 Jur. 755; 22 L. J., Ch., 1076.

1. A limitation by settlement of a fund vested in trustees, upon trust to pay the income to M. for life, and after her death, "to pay or transfer the capital to all her children, (except her eldest or only son), in equal shares, at their respective ages of twenty-one years," confers a vested interest on all the children of M. who attain twenty-one, although they may die before the period of division. *Re Theed*, 3 Kay & J. 375; 26 L. J., Ch., 514.

A younger son attained twenty-one, and then became the eldest by the death of his elder brother before the period of division:—Held, that as there was no reason shown by the settlement for excluding the eldest son, such as his accession to another estate, the share that was vested in the younger son was not devested by his becoming the eldest. *Ib.*

2. In cases of provisions made by strangers, the time for ascertaining the class of younger children is in general the period of vesting, not the period of distribution, as in settlements by parents. *Sandeman* v. *Mackenzie*, 1 John. & H. 613; 7 Jur., N. S., 1231; 30 L. J., Ch., 838; 5 L. T., N. S., 175.

3. The character of eldest son is, in ordinary cases, to be ascertained at the period of vesting, and not of payment. *Adams* v. *Adams*, 25 Beav. 652.

Bequests to A. for life, and afterwards in trust for her children who, not being an eldest or only son, should attain twenty-one. In 1854, after G., the second son, had attained twenty-one, the eldest son died, and the second son thereupon became eldest. The tenant for life died in 1857:—Held, that G., though an eldest son at the time the fund became payable to the children, took a share. *Ib.*

4. Construction of will, that under bequest to the children of A., a second son of three at the death of testator, and the tenant for life, who became the eldest before the age of twenty-one, till which it was subject to survivorship, was, upon the whole will, not entitled. *Bowles* v. *Bowles*, 10 Ves. 177.

5. A testatrix gave to the eldest son of her daughter Eliza, and of her husband, E. L., who should be living at the time of her own decease, ten guineas, adding, that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive); and she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the ten guineas, but died without issue before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son:—Held, notwithstanding, that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue. *Livesey* v. *Livesey*, 2 H. L. Ca. 419; 13 Jur. 371. Affirming 13 Sim. 33; 6 Jur. 752; 15 L. J., N. S., Ch., 357.

6. A testator gave personal property, upon the death of the survivor of several tenants for life, "to be divided equally between the two eldest children born in wedlock of each of his sons and daughters; but if there should be only "one child living" to any of his married sons or daughters, that child to receive only the proportion divided equally according to the number there may be:"—Held, that "the two eldest born" meant the two actual eldest living at the date of distribution, and the representatives of a deceased eldest, and a deceased second eldest, were excluded. *Madden* v. *Ilin*, 2 Dr. & Sm. 207; 8 Jur., N. S., 1168; 32 L. J., Ch., 3; 11 W. R. 2; 7 L. T., N. S., 264; 1 N. R. 11.

7. Legacy to the "eldest child of A.," who was alive at the date of the will, but died before the testator:—Held, to mean the eldest child living at the testator's decease. *Re Harris' Trusts*, 2 Eq. Rep. 1110; 2 W. R. 689.

8. A son who, when he attained twenty-one, was a younger child, but by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which are directed to vest in the younger sons at twenty-one, though not payable till after the death of the parents, there being enough, in the settlements by which the portions were provided, to show that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham* v. *Graham*, 1 Russ. 331. And see *Exp. Smyth*, 12 Ir. Ch. R. 487.

9. By a marriage settlement, real estate of the husband's father was limited (subject to life estates to the father and to the husband, and to a jointure to the wife) to the first and other sons of the marriage successively, in tail male. By another deed, in which the settlement was recited, real estate of wife was limited, subject to her life estate, to the use of all and every the son and sons, other than an eldest or only son, and daughter and daughters of the marriage, equally, as tenants in comon in tail, and if any such younger son or daughter should die, and there should be failure of issue of his or her body, or in case any such younger son or sons should become an eldest or only son before attaining twenty-one, then the share of such son or daughter, as well original as accruing, should go over to the survivors or survivor or others or other of the younger sons or daughters, to be divided between them (if more than one) equally, as tenants in common in tail, and, if but one such son or daughter, the whole was to go to him or her in tail:—Held, that the period of distribution of the wife's estate was the time at which the class to participate in it was to be ascertained, and that, consequently, a younger son of the marriage, who succeeded to the paternal settled estates after he attained

twenty-one, but who died in his mother's lifetime, was not entitled to any share in his mother's settled estate. *Re Bayley*, 19 W. R. 789; 25 L. T., N. S., 219; 6 L. R., Ch., 590; 9 L. R., Eq., 491; 18 W. R. 481; 21 L. T., N. S., 195; 39 L. J., Ch., 388.

1. A second born son, who attained twenty-one, and on his father's death succeeded to his title, but died before the period of distribution, was held to be excluded as an "eldest son" from sharing in certain unappointed trust funds. His younger brother, who succeeded him to the title, and was living at the period of the distribution of the funds, was held entitled to share in them. *Re Rivers*, 40 L. J., Ch., 87; 24 L. T., N. S., 253; 19 W. R. 318.

2. Under a marriage settlement, trust funds, in default of appointment, were to go, upon the death of the survivor of the husband and wife, for the children of the marriage, "except an eldest, second, or only son for the time being entitled in tail male in possession or remainder, expectant on the death" of the husband, under a will, to certain estates at D: the shares to be vested in sons at twenty-one. E., the eldest son of the marriage, attained twenty-one, and became entitled to the estates at D. for an estate in tail male in remainder expectant on his father's decease. With the concurrence of his father, he barred the entail and re-settled the estates, giving to his father and himself estates for life, with remainder to his first and other sons in tail general, and letting in a rent-charge in his own favour. His father survived his mother, and died in E.'s lifetime:—Held, that the period of the distribution of the trust funds, and not the period of vesting, was the time for ascertaining who was to be excluded, and therefore E. was entitled to participate in the unappointed part of the trust funds. *Stanhope* v. *Collingwood*, 36 L. J., Ch., 894; 4 L. R., Eq., 286. Affirmed *sub nom. Collingwood* v. *Stanhope*, 4 L. R., H. L., 43; 38 L. J., Ch., 121; 17 W. R. 537.

Gifts to a Class when Youngest attains Twenty-one.] See WILL, XXXII. H. 5 (*c*).

VIII. Clauses excluding Child "Entitled," or Eldest Son from a Class of Children.

3. A testator bequeathed a legacy of 2,000*l.* upon trust for a married daughter, F., for life, then for her husband for life, and after the death of the survivor for such persons related by blood to F. as she should appoint; and in default of appointment to transfer the same to such persons as would be the personal representatives of F. in case she had died sole and unmarried. By a codicil, the testator, in reciting the bequest, referred to these trusts as being trusts for the benefit of his daughter's relations and next of kin. F. died in the testator's lifetime:—Held, that by the personal representatives of F. were meant the persons who were her statutory next of kin at the testator's death. *Re Grylls*, 6 L. R., Eq., 589.

By the codicil the testator declared that 1,000*l.*, part of the 2,000*l.* should be held for the absolute use and benefit of his son H., but if he should be dead when the 1,000*l.* should "descend and come" to him under the trusts therein contained, then that the same should be paid to all the children of H. "except the one entitled to any real property upon his father's decease," share and share alike. Upon the death of H., in 1862, after the testator's death, his eldest son became next tenant for life in remainder of the settled estates, expectant on the death without issue of the then tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867:—Held, that the eldest son of H. was excluded from participation in the 1,000*l.* *Ib.*

4. A testator devised his real estate in trust for his nephew A. for life, with remainder to A.'s first and other sons successively in tail male; and failing such issue in trust for the testator's brothers B. and C. successively for their lives, and their sons successively in tail male; and failing such issue (in the events which happened) in trust for the testator's nephew D. in tail male. The testator bequeathed his residuary personalty equally among his nephews and nieces, except A. or other the person or persons entitled to the testator's real estates by virtue of the limitations thereinbefore contained. A. died unmarried in the testator's lifetime; C. survived the testator, but died unmarried; B. was sixty-eight years old at the time of the proceedings being taken, and had never been married:—Held, that D.'s expectation of a succession to the testator's real estate being contingent only, was not sufficient under the provisions of the will to disentitle D. to a share in the residuary personalty. *Umbers* v. *Jaggard*, 18 W. R. 283; 9 L. R., Eq., 200.

5. A testator gave Blackacre to his son F. for life, remainder to his eldest grandson, R., for life, remainder to his (R.'s) first and other sons in tail, and in default of such issue to his second grandson, W., for life, remainder to his first and other sons in tail, and in default of such issue to his third grandson, F., for life, remainder to his first and other sons in tail, remainders over. The testator charged Blackacre with legacies of unequal amounts, in favour of his grandsons, W. and F., to be paid as and when they attained twenty-one, with power to the trustees to advance the whole or part of the legacies for their benefit. The will contained a proviso that if either W. or F. should become entitled to an estate for life in Blackacre, then the legacies should not be paid, but should sink into Blackacre. R. died a bachelor, in the lifetime of F., the father, whereupon W. became tenant for life in remainder of Blackacre. He attained twenty-one:—Held, that the words in the proviso, "become entitled," meant "become entitled in possession," and that as at the time when he attained twenty-one his father was living, W. was entitled to have his legacy raised and paid. *Chorley* v. *Loveland*, 12 W. R. 187; 33 Beav. 189; 9 L. T., N. S., 596.

6. F. devised real estate in strict settlement, with a proviso that if any person entitled in possession for an estate for life or in tail to the hereditaments so devised should fail to reside for six successive calendar months in every year in the mansion house on the estate, the estate of him and his issue should cease, and the

hereditaments immediately thereupon go over to the person next entitled in remainder as if the person so failing to reside were then dead without leaving any issue inheritable under such entail. She bequeathed the residue of her personal estate in trust, in case the tenants for life should be or become at her death beneficially entitled in possession to the hereditaments so devised, other than an eldest son or a daughter beneficially entitled under the limitations aforesaid for an estate tail in remainder immediately expectant on the decease of his or her parent, for such children as the tenant for life should appoint; and in default of such appointment, for "all and every the children or child of such tenant for life, other than and beside an eldest or only son or an eldest daughter entitled as aforesaid." The first tenant for life, under the limitations of the will, incurred the forfeiture consequent on failure to reside for the term prescribed by the will. After the forfeiture he married and left one child:—Held, that this child was entitled to the residuary personal estate, as he was not "an eldest child entitled as aforesaid," his remainder having been destroyed by the forfeiture incurred by his father prior to his birth. *Johnson* v. *Foulds*, 37 L. J., Ch., 260; 5 L. R., Eq., 268.

1. By a will made in 1802, a testator gave his residuary personal estate to A., B., and C., successively for life, and after the death of the survivor in trust for all the children of B. who should live to attain twenty-one (other than and except the eldest and second sons if any, and any other child who should by virtue of the limitations thereinafter contained, be entitled in possession to his, the said testator's manors, etc., thereinafter mentioned, or the rents and profits thereof); and by his will the testator appointed the said manors, etc., in case D. should die without issue, to B. and C. successively for life, with remainder to first and other sons (except an eldest son) of B. successively in tail male, with remainder to the first and other daughters of B. successively, in tail male. In the events which happened, E., a daughter of B., became entitled to the manors, etc., as tenant in tail in remainder expectant on the death of D. and C., and joined them in suffering a recovery in 1823, and in making a re-settlement of the estate, reserving the life interests to D. and C., with remainder to trustees, for the benefit of B. for life, with remainder to her intended husband, with remainders over for the benefit of the issue of the marriage. E. died in the lifetime of C.:—Held, that E.'s personal representative was entitled to a share of the residuary personal estate of the testator. *Wyndham* v. *Fane*, 1 W. R. 467; 11 Hare 287.

2. G. directed that of the rest of his personal property his wife should have the use and interest until their child or children came of age, and then, over and above what was settled upon her, one-third to be hers for life, with reversion, after her decease, to their children; and the other two-thirds to belong to and to be given up to such child or children on their coming to the age of twenty-five years, in certain proportions; provided, that if the eldest son (A.) should thereafter come to the inheritance of his grandfather's or his (G.'s) eldest brother's landed property, in such case his share of the two-thirds to be made over to his brothers and sisters equally. G. subsequently purchased a freehold house, which by a codicil he directed should be vested in his wife for life, and after her death devolve to all his children equally; with the proviso, that in the event of his eldest son A. succeeding to the entailed property in Dorsetshire, his share to devolve to his brothers and sisters. G. and his wife were dead. A. attained twenty-five in 1866, and subsequently presented a petition, praying that he might be declared entitled to have his share of all the trust funds transferred to him absolutely. The petition stated that G.'s eldest brother was in possession of the landed property referred to in the will, partly as tenant for life, partly as tenant in tail, and partly as tenant in fee-simple:—Held, that A. having attained twenty-five, was entitled to the fund, and that the words of the proviso applied only to the event of his succeeding to the property before the time when the fund actually got into his hands. *Glyn* v. *Glyn*, 3 Jur., N. S., 179; 26 L. J., Ch., 409; 5 W. R. 241.

3. A settlement was made on the marriage of S., of two shares in the New River water, to S. for life, to his wife for life, and after their decease one share was limited to such of the younger children as should not be heir at law, or for want of such issue to the sisters of S., and their children, as S. should appoint; but in case of no issue of S., or if he should make no appointment, the same was limited to the sisters, and the children of one of the sisters, under whom plaintiffs claimed, in such manner as they were entitled to one whole share. If there had been only one child, it would have been excluded by the words, "other than such as shall be heir at law;" or if there had been several daughters, as they would have made but one united heir, they would have been excluded; or if both sons and daughters, and reduced to only one child, that child could not have taken. *Townsend* v. *Ashe*, 3 Atk. 336, 338.

ADDENDA.[a]

NOTE.—*The black figures thus,* [3 (12), *annexed to each case, refer to the page in the text on which it is to be inserted, and the paragraph there after which it is to be placed.*

ACCESS.

P. 3, col. 1, after line 35, add
See LEGITIMACY.

ACCIDENT.

P. 3, col. 1, after line 36, add
— *Covenants to settle Stock.* See SETTLEMENT, III. VI.
— *Appropriation to meet Annuities or Legacies.* See ANNUITY, XV. I—LEGACY, XI. III.
— *Stock Mortgages.* See MORTGAGE, II. V.
— *Investment of Purchase Money. Increment and Risk.* See VENDOR AND PURCHASER, XIV. III.

P. 3, col. 1, after line 38, add NEGLIGENCE.

1. Where money is given to be laid out in lands, and when bought, to be settled on such and such persons; in a bill brought here, the course is to direct a purchase, and the profits of the money to go as the land itself till purchased. *Coventry* v. *Coventry*, 2 Atk. 369. [3 (12).

Suppose a direction by will to purchase an estate which is afterwards swallowed up by an inundation, the money so devised shall not go to an executor, but as the rents would have done when the land was purchased. *Ib.*

ACCOUNT.

2. An ordinary builder's account is not of such a complicated nature as to justify the Court in taking it. Neither a mistake in the principle on which an account is made out, nor defects in the mode in which it is rendered, constitute fraud, so as to give a right to open a settled account, where relief in respect of it might be had at law. *Flockton* v. *Peake*, 3 N. R. 453, 626. [16 (5).

3. Plaintiff always pays costs where an account turns against him, or where he prevails in nothing but what he might have insisted on at law. *Lyre* v. *Parnel*, 6 Vin. Abr. 367, pl. 23. [26 (5).

4. It is the constant course of the Court, where mutual account is decreed, to reserve costs till after the report, that the Court may have it in its power to punish the wrong-doer. *Rider* v. *Bayley*, 6 Vin. Abr. 332, pl. 32. [26 (5).

5. A decree for costs necessarily follows a decree for payment of principal and interest. *East India Co.* v. *Ekins*, 6 Vin. Abr 365, pl. 13; 2 Bro. P. C. 382. [26 (5).

ACCOUNTANT.

— *Evidence of.* See PRACTICE (INQUIRIES AND ACCOUNTS).
— *Allowance of Costs of on Taxation.* See SOLICITOR, XVI. XVIII. 3.
See also BANKRUPTCY, XXXV. IV.

ACCRETION AND BONUS.

P. 27, col 2, line 8, for APPOINTMENT read APPORTIONMENT.

P. 27, col. 2, after line 8, add
— *Increase in Fund appropriated to secure Legacy.* See LEGACY, XI. IV.
— *Increment to Specific Legacies.* See WILL, LIII.
— *Increment to Purchase Money on Sale of Land.* See VENDOR AND PURCHASER, XIV. III.
— *Increment to Property in Settlement.* See SETTLEMENT, V.—IX. V.
See also LIFE ESTATE, VI. VI.

(*a*). Most of these cases have been collected from the following sources:—*The Bankruptcy and Insolvency Reports, The Equity and Common Law Reports, The New Reports,* and *The Weekly Reporter*, vols. i.—vi. inclusive, and the digests thereto annexed. They do not appear in the Reports contemporaneous with the above, or in the annual digests, or in the last edition, or if they do it is on some other point than that which is here digested. The present editor did not discover the omission of these cases until the work was too far advanced to admit of their insertion in the text of the earlier volumes; but in the fifth and succeeding volumes they have been digested with the other matter in their proper places in the body of the work. The Addenda also contains the cases which bring the first volume down to the end of the year 1883, thus completing the scheme of this edition as settled in the advertisement to Volume III.

1. Tenant for life of bank stock held entitled to a dividend of 5 per cent. interest and profits for the half-year. *Barclay* v. *Wainwright*, 13 Ves. 66. [28 (10).

2. In 1832 a testator bequeathed ten Carron shares to his widow for life, with remainder over. She died in 1847, and in 1854 the executor sold the shares for 10,000*l.* to the manager. After this large sums were recovered from the estate of a former manager, and thereout, in 1858, a bonus of 470*l.* per share was declared, whereupon the executor insisted on setting aside the sale, and obtained an additional 8,000*l.* by way of compromise. A bill by the executor of the widow, claiming to be entitled to participate in the 8,000*l*, was dismissed with costs, the Court holding, first, that the widow's interests (if any) were not comprised in the compromise, and secondly, that the whole bonus belonged to the persons entitled to the shares at the time it was declared. *Edmondson* v. *Crosthwaite*, 34 Beav. 30. [28 (10).

3. A testator bequeathed East and West India Dock stock to life tenants and others in succession. Some time after his death bonuses were declared upon the stock. On the 8th February 1865, by an order made in a suit for the administration of the estate, the bonuses were invested in 3*l.* per cent. annuities, and the dividends directed to be paid to the tenants for life. On the 12th January 1871 that investment order was discharged:—Held, that the bonuses were income, and not capital of the estate, and belonged to the life tenants. *Dale* v. *Hayes*, 40 L. J., Ch., 244; 24 L. T., N. S., 12; 19 W. R. 299. [28 (10).

4. An insurance company, by a deed of settlement, was directed to create a reserve fund, and pay no dividend till a specified amount was realised. This provision was departed from by the consent of a majority of the shareholders, and a bonus was distributed every three years. The company afterwards amalgamated with another company, and it was agreed that 50*l.* per share should be paid upon all shares, and also a proportionate part of the surplus assets. A tenant for life of ten shares in the company, claimed the share of the surplus assets which had been paid over to her trustee as part of her annual income:—Held, that these surplus assets, which must be considered as the reserve fund, were capital, and not income. *Nicholson* v *Nicholson*, 30 L. J., Ch., 617; 9 W. R. 676. [28 (10).

5. Three bonuses upon certain bank shares having been paid as part of the dividend:—Held, that having been made by way of annual payment, they were interest and not capital. *Semble*, a bonus is impressed with that character which the mode of payment imparts to it. *Hebert* v. *Bateman*, 1 W. R. 191. [28 (10).

6. By the terms of the deed of settlement in the company, their net profits were to be divided ratably to such an amount as should be declared at their half-yearly meeting, and were to be paid within twenty-one days afterwards; and it was provided, that the shareholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares; but the dividends on such shares were to continue in suspense until some other person should have become proprietor of them. A shareholder died sixty-nine days after the half-yearly meeting, at which a dividend was payable, having, by his will, bequeathed the interest and annual income arising from all his shares to one for life, and then to others:—Held, that the dividend belonged to the legatee for life, and not to the general personal estate of the testator. *Clive* v. *Clive*, 1 Kay 600; 23 L. J., Ch., 981; 2 Eq. Rep. 913. [28 (10).

7. A testator gave all his estates and effects to trustees upon trust, after paying debts and legacies, to employ the residue for the use and behoof of his grandson G. C. and the heirs of the body of G. C., till he or they arrived at majority, when the trustees were to denude thereof in his or their favours; and failing G. C. or his lawful issue, before either of their attaining to majority, then such residue was to pertain to any posthumous heir male of testator's son T. C. (the father of G. C.), who had just died, at his or the heirs of his body attaining to majority; and failing of him without lawful issue, then to the daughters of T. C. equally. By a codicil he declared that, failing heirs of T C's body, then in place of the residue pertaining to the daughters of T. C. equally it should solely pertain to the eldest heirs female of T. C. and their issue, the eldest heir female through the whole course of succession succeeding always without division, and secluding heirs-portioners. By another codicil, failing G. C. and the heirs of his body, he gave 4,000*l.* to each of his granddaughters (except the eldest at the time) who should survive him, and the heirs of their bodies. G. C. came of age in 1799, and died unmarried in 1811; and there was no posthumous child of T. C.:—Held, that the accumulations of interest and profits from the death of the testator until G. C. attained majority belonged to G. C.; as did also some bonuses on bank stock, part of the testator's property, which had been declared a few weeks before G. C. attained majority, but were payable at a day subsequent to that date. *Cuming* v. *Boswell*, 4 W. R. 752; 2 Jur., N. S., 1005. [28 (10).

8. A holder of shares in both departments of the Sun Fire and Life Office bequeathed his personal estate to trustees to permit his wife to receive the dividends, interest, and income for her life, remainder over. He died in December 1870. In January 1873 an extraordinary dividend was declared on the life shares for five years previously; and in July 1873 a "special dividend was declared on the fire shares for the half-year previously":—Held, that these dividends were income, and belonged to the tenant for life. *Re Hopkins*, 18 L. R., Eq., 696; 30 L. T. N. S., 627; 22 W. R. 687; 43 L. J., Ch., 722. [29 (10).

9. Money lodged in court by plaintiff, afterwards, on the application of the defendant, invested in debentures, defendant entitled to the benefit of a rise on the price, though it exceed the amount of his claim against the plaintiff, the application by defendant amounting to an undertaking to abide the result of a rise or fall of the debentures. *Garnett* v. *Nugent*, 2 Ball & B. 434. [30 (4).

ACCUMULATION.

1. A testator bequeathed his real and personal property to a trustee, in trust, to sell, and after payment of his debts, to invest the produce in bank shares, and to pay certain annuities; and he bequeathed the residue of his property upon trust to pay the interest to A. for life. A decree in a suit to administer the assets directed that the trustee should hold the bank shares (subject to the payment of the annuities), upon trust, from time to time to invest the dividends in the purchase of other bank shares or of government stock, and accumulate the same from time to time in the nature of compound interest, until a fund was created which (with other property specified) would be sufficient for payment of the outstanding liabilities and debts of the testator, and should yield an annual sum sufficient to pay a contingent liability which the assets might be subject to, by reason of a breach of trust committed by the testator; and that the trustee should be possessed of the residue, and such accumulation, upon trust, to pay the annuities, etc., and subject thereto to pay the dividends to A.:—Held, that the decree was erroneous in directing the accumulation of the dividends of the residue. *Abrahall* v. *Hamilton*, 10 Ir. Ch. R. 51. [40 (1).

2. A settlor assigned mortgages and "all interest thereon due and payable, and thereafter to accrue and become due and payable," unto trustees for the equal benefit of his two infant granddaughters. The trusts, as to one moiety, were, that when one of the granddaughters attained twenty-one, the trustees were to pay the rents, interest, and annual produce of such moiety of the principal moneys, interest, and securities to her for life; the moiety after her death to be in trust for her children, if any. There was no express provision for either accumulation or maintenance during the granddaughter's minority; but there was a power of maintenance during the minority of her possible children. In default of children, after her decease the moiety of "the principal sums, securities, and premises" was to go over to M. The trustees accumulated and invested the produce of her moiety during her minority; and after she had attained her majority, they paid her the interest of the invested accumulations, together with that of her moiety of the principal sums until her death. She died without having been married:—Held, that the accumulated sum formed part of the principal of her moiety, and went over to her under the trust in his favour declared in the settlement. *Re Manifold*, 14 W. R. 729. [40 (1).

3. A testatrix, by her will, directed her executors to pay to F. S. G. and G. A. G., both then unmarried women, 5,000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of testatrix's death. The executors set apart sums for the above legacies and accumulated the dividends. F. S. G. remained unmarried for more than twenty-one years after the death of the testatrix:—Held, that the accumulation of interest beyond the twenty-one years was within the prohibition of the Thellusson Act, and did not come within the exception contained in the 2nd section. *Morgan* v. *Morgan*, 20 L. J., N. S., Ch., 109; 15 Jur. 319. [44 (1).

4. A testator directed the rents of his freehold estates, and the income of his residuary real personal estate, to be accumulated, in order to provide for the younger children of his niece and of E. S., each of whom took an interest under his will; and, in the clauses for the maintenance and advancement of the children, he termed the provision which he had so made for them sometimes "their portions," and sometimes their "portions or shares":—Held, that the provision was not a provision for raising portions within the meaning of the proviso in the 2nd section of the Thellusson Act, and, therefore, was not exempted from the operation of the 1st section. *Halford* v. *Stains*, 16 Sim. 488; 13 Jur. 73; 1 H. & Tw. 250. [44 (5).

ADMINISTRATION SUIT OR ACTION.

See EXECUTOR AND ADMINISTRATOR, XXXII.

ADVANCEMENT.

5. Parol evidence is admissible on the part of an advanced son, or his heir, to rebut a claim of trust, though improper against the legal operation of a deed. *Redington* v. *Redington*, 3 Ridgw. P. C. 182. S. P. *Taylor* v. *Taylor*, 1 Atk. 387; *Lamplugh* v. *Lamplugh*, 1 P. W. 111. [56 (4).

6. Evidence of declarations, coupled with acts, admitted in a question whether a purchase by a father in his son's name was intended to be advancement or not. *Scawin* v. *Scawin*, 1 Y. & Coll. C. C. 65. [56 (4).

Parol evidence as to the intentions of a testator by the attorney who made the will also admitted on the same question. *Ib.*

7. In a question of a father's intention in purchasing in the name of a child, his will is not evidence. *Sheats* v. *Sheats*, 2 Y. & Coll. C. C. 9; 12 L. J., N. S., Ch., 22; 6 Jur. 942. [56 (4).

AGE.

8. Evidence which is sufficient to enable a master to report as to an allowance of a suitable maintenance to an infant out of a contingent legacy may not be sufficient to establish the time of the infant's birth so clearly as to sustain an application for the payment of the legacy. *Anon.*, 1 L. J., Ch., 77. [58 (5).

ALE AND BEER HOUSE.

P. 58, col. 2, after line 7, add GOODWILL —LANDLORD AND TENANT, XII. XI. 3.

AMBASSADOR.

1. Ambassador cannot sue here as procurator-general, for all or any of his Majesty's subjects. *De Acuna* v. *Bingley*, Hob. 113. [61 (1).

ANIMALS.

P. 61, col. 2, line 59, after GAME, add CHARTY, IV. v. 1—HORSE AND HORSE DEALER—POACHING.

ANNUITY.

2. Where A. and his sons carried on business as proctors, but A. had never been enrolled as a proctor, and afterwards a deed was executed whereby the sons granted to A. an annuity of 1,000*l.* in consideration of his retiring from the business:—Held, that the annuity was granted, not for an illegal consideration, but for no consideration. *Eddison* v. *Rothery*, 4 N. R. 538. [64 (2).

3. Devise of an annuity of 50*l.* to be purchased by executor, who, till the purchase, was to pay annuitant 40*l.* a year; executor, instead of purchasing, paid 50*l.* a year from testator's rents: annuitant held entitled to 40*l.* the first year, and 50*l.* a year afterwards. *Browne* v. *Spooner*, 1 Ves. J. 291. [81 (8).

4. A testator gave to each of his five daughters 400*l.* per annum, for their lives; and after their respective deceases, he gave the same to their children respectively; and in case any of the daughters died without issue, the annuity to cease:—Held, that the children of the daughters took for life only a proportion of the annuity. *Hedges* v. *Harpur*, 9 Beav. 479; 10 Jur. 578. [81 (8).

5. Two annuities of equal amount in the same will to the same person, held not accumulative. *Holford* v. *Wood*, 4 Ves. 76. [84 (11).

6. Testator, after devising his real estate to his natural son, T. A., bequeathed as follows: "I give and bequeath to my sister E., to be paid out of the rents and profits of the aforesaid lands, the sum of 250*l.* per annum, and to live free from rent in the house I now occupy in H., with the land and buildings I now occupy, containing about nine Lancashire acres, with the use of my household furniture, plate, linen, books, wines, spirits, carriages and horses, cows, hay and farming utensils and stock, for her sole use during her natural life, or so long as she shall remain unmarried; in either event, then to go to T. A.; but should she marry, then my mind and will is, that my executors shall pay her 100*l.* per annum for her own use during her natural life, out of the rents and profits of my said estate." The sister married in the testator's lifetime:—Held, that the annuities of 250*l.* per annum and 100*l.* per annum were not cumulative. *Andrew* v. *Andrew*, 1 Colly. 690. [84 (11).

7. A marriage settlement recited an agreement by the father of the intended wife to grant to the husband, as a marriage portion, certain annuities to be issuing out of distinct lands held upon terminable leases; and witnessed that, in consideration of the marriage, and to grant a marriage portion to the husband, and in order to secure a jointure for the wife in case she should survive, the settlor conveyed the lands to trustees upon trust to permit and suffer the husband, during the life of himself and his wife, to take and receive to his use out of the lands, *nominatim*, the several annuities mentioned in the recital and after the decease of the husband, to permit and suffer the children of the marriage to take and receive the said several annuities, in such shares as the husband or wife should appoint; and, in default of appointment, equally; and in case the wife should survive the husband, and there should not be any issue of the marriage then living, to permit her, during her life, to receive the said annuities, with power to distrain for same: provided, that if the wife should survive the husband, and there should be children of the marriage living at his death, then that the trustees should pay her during her life, out of all the lands, or suffer her to receive out of the rents of said several lands, an annuity of 150*l.* in bar of dower; with power to distrain for same:—Held, upon the construction of the whole instrument, that the annuity of 150*l.* was in addition to the annuities granted to the trustees, and mentioned in the recital, and was not payable out of those annuities. *Blair* v. *Nugent*, 3 J. & L. 668. [84 (11).

8. An annuity was given to A. by will; a codicil to the will gave an annuity of the same amount to A., with variation only as to the company from which it was to be purchased:—Held, that these gifts were not cumulative, but substitutional. *Bourne* v. *Hartley*, 2 W. R. 452; 18 Jur. 532. [84 (11).

The identity of amount and of motive, coupled with the fact that the state of investment or condition of enjoyment is varied in the codicil, are strong circumstances to overrule the *primâ facie* presumption in favour of the legatee taking both gifts. *Ib.*

Direction in a will made in Ireland to trustees to purchase an annuity of 20*l.* a year in an assurance office in Ireland for A. A similar direction in a codicil made in England to purchase an annuity of 20*l.* in an office in England or Ireland for A. S. C. *nom. Bourne* v. *Hartley*, *Bourne* v. *Mahon*, 2 Eq. Rep. 910.

9. Testator devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to his daughter, and, after her death, with the payment of an annuity to her husband. He then made a codicil, which, in effect, revoked the husband's

life estate in remainder. By a subsequent codicil, he gave to the husband a life estate in possession in the first estate, and also an annuity in possession to the same amount, and charged upon the same estates as the former annuity:—Held, that the second annuity was substituted for the first. *Graves* v. *Hicks*, 6 Sim. 391; 4 L. J., N. S., Ch., 289. [84 (11).

Testator by his will gave an annuity to his daughter, out of certain estates, for her separate use. By a codicil, he gave her a life estate, for her separate use, in the same estates:—Held, that the daughter was entitled to the life estate only. *Ib.*

1. Bequest of an annuity of 800*l.* to the testator's wife, followed by a bequest among others of an annuity of 200*l.* to the testator's daughter, and subsequent direction in the same instrument, that, at the death of the testator's wife, the daughter was to have 400*l.* a year:—Held, that the annuity of 400*l.*, given to the daughter, was in substitution for, and not in addition to, the prior annuity of 200*l.*, given to the same legatee. *Yockney* v. *Hansard*, 3 Hare 620; 8 Jur. 822. [84 (11).

2. Gift of residue to pay income to widow for life, subject to the payment thereout of an annuity of 10*l.* to A. for his life. After the decease of his widow, a disposition was made of the property, and, amongst other gifts, there was one of the dividends of 1,000*l.* stock to A. for life:—Held, that the annuity to A. ceased upon the death of the widow, and that A. then took the dividends on the 1,000*l.* in substitution. *Adnam* v. *Cole*, 6 Beav. 353. [84 (11).

3. A testatrix devises leaseholds to A., subject to the yearly sum of 12*l.* for the sole use of Mrs. B., to be paid half-yearly; and this annuity was payable on the 27th January and 27th July; many years afterwards, A. devises to R. all his lands (in which these leaseholds were included), paying Mrs. B. 12*l.* per annum, by half-yearly payments, to be made on the 27th January and the 27th July: Mrs. B. is entitled under A.'s will to a second annuity, distinct from and in addition to the annuity given her by the will of the testatrix. *Bartlett* v. *Gillard*, 3 Russ. 149; 6 L. J., Ch., 19. [84 (11).

4. Upon the construction of testator's will:—Held, that an annuity was charged as a "debt" upon his real estate in exoneration of his personalty. *Moneypenny* v. *Mascall*, 2 Colly. 213. [86 (2).

5. An annuity provided by marriage articles to be paid to the wife, if she survived, out of the husband's real estate; if that fund fail, decreed a charge upon his personal property. *Griffith* v. *Anvil*, Colles's P. C. 52. [86 (2).

6. A testator by his will directs that with the money arising from the personal estate bequeathed to his trustees (which is to be first applied), and from the sale or mortgage of certain real estates devised to the same trustees for a term of years, the annuities and legacies thereinafter given are to be paid; and he afterwards gives, among other things, an annuity secured by powers of distress and entry on the real estates; by a codicil he bequeaths his personalty and the residue of his real estate for a term of years to other trustees, upon the trusts in his will and codicil mentioned, and he then gives to A. M. an annuity which he charges on the residue of his real estate, and secures it by a power of distress:—Held, that the personalty is the primary fund for the payment of A. M.'s annuity, and that the real estate is charged only as an auxiliary fund. *Fitzgerald* v. *Field*, 1 Russ. 428; 4 L. J., Ch., 171. [86 (2).

7. Testatrix devised fee-simple lands and leaseholds for years to one person and his issue; and other fee-simple lands to H. and her issue; and charged all the lands so devised with the payment of annuities bequeathed by her will. The freeholds and leaseholds are liable to contribute in proportion to their respective values at the decease of the testatrix, to the payment of the annuities; and the leaseholds are not liable in the first instance. *Young* v. *Hassard*, 1 J. & L. 466; 7 Ir. Eq. R. 309. [86 (2).

8. Annuities bequeathed to the testator's brothers and nephew during their respective lives, payable out of lands held for a term of years, "provided my interest therein shall so long continue," and in case they should die before the expiration of the lease of said lands, to go to the plaintiff —Held, to be charges on the lands, and on the lease subsisting at testator's death, and on any future renewals obtained by the executors. *Stubbs* v. *Roth*, 2 Ball & B. 548. [86 (2).

9. Testator, after giving an annuity to his wife, devised his real estates to trustees in trust to pay the annuity thereout, and gave his wife powers of distress and entry on his estates. He then devised his estates in strict settlement, subject expressly to the annuity and to the powers of distress and entry:—Held, nevertheless, taking the whole of the will together, that the testator's personal estate was primarily liable to pay the annuity. *Roberts* v. *Roberts*, 13 Sim. 336; 7 Jur. 315. [86 (2).

10. A testator gave all his messuages, lands, tenements, and hereditaments, and his personal estate, to trustees, to hold to them, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust to receive the rents, issues, and profits thereof, and to retain thereout yearly 10*l.* for their trouble in the execution of the will, and then to pay legacies and annuities, with a direction that certain charitable legacies should be paid out of his personal estate:—Held, that the whole of the property, both real and personal, was to be considered as one mass, for the purpose of paying ratably the annuities, except the legacies expressly made payable out of the personal estate. *Boughton* v. *James*, 1 Colly. 26; 8 Jur. 329. But this decree was varied in S. C. *nom. Boughton* v. *Boughton*, 1 H. L. Ca. 406; where the personal estate was held to be the primary fund. [86 (2).

11. A testator gave to trustees his real and personal estate upon trust to permit his wife to enjoy his dwelling-house *durante viduitate*, and "out of the rents, issues, and profits, dividends, interest, and income," to raise and pay his widow an annuity; and out of the same rents, etc., to pay another annuity; and he gave "the rest, residue, and remainder of his real and personal estate" to his eldest son,

with remainder over:—Held, that the personal estate is the primary fund liable to the payment of the annuities, there being no direction to discharge it or to sell the real estate. L. C. and Turner, L. J. (Knight Bruce, L. J., *dubitante*), considered this case identical in substance with *Boughton* v. *Boughton* (1 H. L. Ca. 406). *Tench* v. *Cheese*, 3 W. R. 582; 1 Jur., N. S., 689; 3 Eq. Rep. 971. And see the previous reports of this case, 3 W. R. 42; 19 Beav. 3; 24 L. J., Ch., 49; 18 Jur. 1087; 24 L. T. 151; 3 Eq. Rep. 47. And on appeal, 3 W. R. 500; 1 Jur., N. S., 689. [86 (2).

1. A testator devised to his son, to be disposed of as after mentioned, all his estate in W., and to the survivor, etc., of his sons, and all his estate in P. subject to his proportion of the head rent, and also subject to, and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid 500*l*. Then followed a bequest of an annuity of 40*l*. charged on parts of W., and there was a residuary devise to the three sons:—Held, that the bequests to the daughter were charged only on P., and not on any part of W. *Borough* v. *Williamson*, 11 Ir. Eq. R. 1. [86 (2).

2. D. by his will directed payment of his just debts out of his Irish estate, and exonerated his personalty therefrom. He then devised the Irish estate to trustees to sell, and by sale or mortgage or out of the rents and profits to pay two annuitants, with devises over in strict settlement, and all the residue to E. I. Upon the question, out of what property the annuities and costs were payable:—Held, that they were payable ratably. *Barnard* v. *Roberts*, 1 W. R. 222. [86 (2).

3. A. mortgaged an estate in 1774; he left by his will in 1775 an annuity to his widow in lieu of dower. W., the original mortgagee, subsequently mortgaged his interest in this estate to R. & Co. In 1786, R. & Co. filed a bill against W. and the real and personal representatives of A., for the purpose of obtaining a foreclosure. By a decree in this suit in 1791 a declaration was made that the widow, having relinquished her title to dower, became a *bonâ fide* purchaser of the annuity, and was entitled to be paid it out of the mortgaged estate. This suit not having been prosecuted, and the widow having died in 1794, her representatives in 1822 filed a bill against the heir of W., and other persons claiming under him, and the heirs and devisees of A., for the payment of the arrears of the annuity during her lifetime, or that the estate should be sold, and the arrears paid out of the proceeds:—Held, on appeal, that the annuity, not having been expressly charged on the real estate of A., was a mere pecuniary legacy, and that the decree of 1791 was erroneous, in declaring that the widow was entitled to be paid it out of the mortgaged estate. *White* v. *Purnther*, 1 Knapp 179. [86 (2).

4. In an ante-nuptial settlement, conferring considerable benefit upon the husband in the property of the wife, to which it chiefly related, which settlement contained a recital that it was made by the wife in consideration of the marriage and of the provision thereinafter made and provided for her by the husband, he covenanted that whatever estates and property, whether real or personal, and wherever situate or either, or both, should, in the event of his decease, if the wife should survive him, be charged and chargeable with and subject to the payment of an annuity or yearly rent-charge of 250*l*, to be paid and payable to her and her assigns, during so many years as she should live, besides and in addition to the provision hereby made and intended for her. With the exception of a contingent reversionary interest in a policy of assurance for 3,000*l*. on the life of the husband, which policy was subject to a debt of 2,000*l*. and interest thereon at 4 per cent., there was not any provision made out of his property for her beside the annuity of 250*l*. At the period of the marriage he was engaged in trade, and was seised of real estate; subsequently he acquired other real estate, and afterwards became a bankrupt:—Held, that the annuity of 250*l*. was well charged, both upon the real estate of which he was seised at the marriage, and upon the real estate which he subsequently acquired. *White* v. *Anderson*, 1 Ir. Ch. R. 419. [86 (2).

5. A testator, by his will, devises all his real estate to his executors, for the purposes thereinafter stated; and, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life, and at her decease he devises and bequeathes to her heirs all his estates, real and personal, as tenants in common; if his daughter has but one child, such child is to possess the whole, but if she should die without issue then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l*. a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out, and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue:—Held, that the annuity of 150*l*. was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557. [86 (2).

6. A testator gave his real and personal estate to trustees, out of the rent and produce, or by sale or other disposition, to raise an annuity to his wife and certain legacies, and to invest the surplus. He directed a sale of his real estate after the death of his wife, and gave the residue to his children:—Held, that the personal estate was not primarily charged with the annuity, but that the real and personal estate formed one common fund for its payment. *Bedford* v. *Bedford*, 25 Beav. 584. [86 (2).

7. A testator gave and bequeathed as follows: "To S. 100*l*. per annum for ever, to F., the child of S., 200*l*. per annum for ever,

the above charges to be payable out of my whole property; the remainder I leave, share and share alike, between my sister E. and my nieces;" and after giving several legacies, the testator's will proceeded: "I leave my personal property in L. to the above-named S. I leave all the rest of my personal property to my above-named sister and nieces":—Held, following *Taylor* v. *Martindale* (12 Sim. 15), that the annuities were charged on all the testator's real and personal estate, and were perpetual annuities, and that the annuity of 200*l.* was payable after the death of F. to her administrator out of the personal estate. *Joynt* v. *Richards*, 11 L. R., Ir., 278. [86 (2).

1. P. by his will gave all his property to trustees to the use of certain persons for successive estates tail with a direction that parties becoming first entitled to the rents should allow various specified sums to other parties. Then followed a charge on his realty of all the "annuities" thereinbefore mentioned with a trust to convert and invest. The testator made five codicils, by which he gave various annuities, and directed that an annuity to F. B., and all the pecuniary and specific legacies given by his will, should be payable to the legatees (including a certain contingent annuity, if payable) free of legacy duty. On the question whether annuities as well as legacies were given free of duty:—Held, that they were. *Pearse* v. *Pearse*, 2 W. R. 129. [90 (8).

2. A testator devised real estate to A., subject to the payment of "one clear yearly rent-charge or annuity of 100*l.*" to B.:—Held, that B. took the annuity free of legacy duty. *Bailey* v. *Boult*, 14 Beav. 595; 15 Jur. 1019; 21 L. J., Ch., 277. *See also* LEGACY, XIV. [90 (8).

3. A. devises to his nephew 5*l* per annum (without saying, to his executors or administrators), to be paid him during his (the testator's) wife's life, whom he made executrix, on condition that he demeaned himself civilly to her. By the nephew's death, the 5*l.* per annum is determined. *Neal* v. *Hanbury*, Pre. Ch. 173. [91 (8).

4. J. M., by his will, gives to each of his grandchildren by name an annuity of 50*l.* during the life of their mother S. U., such annuities to be paid half-yearly, and as to such as are under age, to be applied for their benefit at the discretion of his trustees, provided that the annuities bequeathed to his granddaughters should be to their separate use, without power of anticipation; and in case his said grandchildren should incumber or anticipate such annuities, the same to be void. The mother S. U. is still living, but one of the granddaughters attained twenty-one, married, and died; and the question was, whether her husband, as her representative, was entitled to the annuity:—Held, that he was. *Maddy* v. *Hale*, 4 W. R. 769. [91 (8).

5. Testator, by his will, gave and bequeathed to A. 40*l.* per annum in the long annuities:—Held, that A. was entitled to have a sum of 40*l.* per annum long annuities transferred to her absolutely. *Eamer* v. *Birch*, 7 Jur. 810. [91 (8).

6. A testator gave all his real and personal estate to trustees, to invest the proceeds and pay "the clear yearly sum of 180*l.*, part of the interest, to A., and the clear yearly sum of 180*l.*, further part, etc., to the daughter of A. during the life of the mother, and after her death to pay the sum of 20*l.* further part, etc., in addition to the 180*l.* to the said daughter. The testator then gave certain legacies, and directed the trustees to divide the residue of the interest equally among the daughters of A. during their respective lives; and if all or any of them should die, leaving issue, then in trust to divide his residuary estate among such issue; and if only one should leave issue, then to divide his whole residuary estate among such issue:—Held, that the gift to A. was a gift of a life annuity only. *Baynes* v. *Ridge*, 1 Eq. Rep. 157. [91 (8).

7. A testator by his will gave all his real and personal estates to trustees, upon trust to pay S. an annuity of 400*l.* for her life; and after her death he gave that sum amongst the children of S.; and upon trust to pay H. an annuity with a similar remainder. He also gave an annuity to J., and charged all his freehold and leasehold estates with the payment of these annuities; and as soon as J. attained twenty-four, he directed the trustees to pay J. the rents of his freeholds, etc., and the interest of all his stock, etc.; and upon the death of J. without issue (which happened), he gave to S. all his freehold and leasehold estates, and to H. all his funded property and personal estate not specifically bequeathed:—Held, that the annuities were to be perpetual. *Fielding* v. *Preston*, 5 W. R. 851; 1 De G. & J. 438. [91 (8).

8. A bequest of 400*l.* a year for five years to each executor is payable out of income. *Scholefield* v. *Redfern*, 1 N. R. 165. *See also* EXECUTOR AND ADMINISTRATOR, VIII. [98 (1).

9. A testator gave three annuities; the first "free from income or property tax, or any other deduction," the second "free from all deductions, the third "free from deductions":—Held, that all the annuities were free from income tax. *Turner* v. *Mullineux*, 1 John. & H. 334. [99 (4).

10. A testator, by his will, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500*l.*, "free from legacy duty and other deductions":—Held, that the annuity was subject to income tax under the 16 & 17 Vict., c. 34, to be paid out of the annuity itself. *Sadler* v. *Richards*, 6 W. R. 532; 4 Kay & J. 302. [99 (4).

11. Testator declared that his trustees should stand possessed of his residuary estate, and directed them out of the income to pay to his wife "the clear yearly sum of 600*l.*" for life if she should remain his widow, but if she should marry an annuity of 100*l.* in lieu of the annuity of 600*l.*, "the said annuities of 600*l.* and 100*l.*, as the case may be, to be paid free from all deductions and abatements whatsoever." By a codicil an annuity of 1,000*l.* was given in lieu of 600*l.*:—Held, that the annuity was not given free from income tax. *Gleadow* v. *Leetham*, 22 L. R., Ch. D., 269; 52 L. J., Ch., 102; 48 L. T. 264; 31 W. R. 269. [99 (4).

P. 99, after par. 6, add

See also LEGACY, XII. VII.

12. Where deed grants annuity generally

without stating any time for its commencement, it shall be payable from day of the execution. *Weston* v. *Bowes*, 9 Mod. 309. [99 (12).

1. Bequest of a weekly sum, the first payment is payable to the legatee at the end of a week from testator's death. Final decree made at the first hearing, the registrar, by consent of the parties, computing the account. *Byrne* v. *Healy*, 2 Moll. 94. [99 (12).

2. By will the testator gave to A. B. all he had in the world, he paying to C. D. 50*l.* a year for life, and at her death to pay E. F. 500*l.*, and to G. H. 100*l.*, and I. K. 20*l.* a year for life, and 100*l.* in money twelve months after the testator's death; and L. M. to have 100*l.* paid to him twelve months after the testator's death, and 20*l.* a year for life:—Held, that the annuity of 20*l.* a year to I. K. was to be deferred until the death of C. D. *Roebuck* v. *Habershon*, 10 Jur. 279. [99 (12).

3. A. charged his rents with payment of certain charges and an annuity of 500*l.* to B., the annuity to be increased to 2,000*l.* after the charges should have been liquidated out of the rents:—Held, that B. was entitled to the increased annuity from the day on which the amount of the rents legally due, if paid, would be held sufficient to liquidate the charges. *Hemsworth* v. *Campbell*, 1 N. R. 503. [100 (3).

4. A testatrix, bequeathing legacies and annuities, by her will directed that the first year's rent of certain lands, and, if necessary, the second half-year's rent accruing next after her decease, should be applied in payment of so much of her debts and funeral expenses and of her legacies as her personal estate should be insufficient to pay. She then gave certain annuities, but not to commence till all (*i.e.*, debts and legacies) should be paid. By a codicil, giving certain other annuities and legacies, and devising the lands subject to the annuities, the testatrix directed that all her legacies should be paid out of the rents before any of the annuities should become due, except two annuities to A. and B., which were to become payable immediately after her decease. The lands having been sold, and their proceeds proving insufficient to pay the debts, legacies, and annuities in full:—Held, first, that the direction in the codicil as to the annuities to A. and B. did not alter the priority of the several annuities *inter se*, but only the time at which these two annuities were to commence; and that, upon payment of the legacies, all the annuities, including those to A. and B., became payable in equal priority, and should therefore abater atably; secondly, that the annuities, other than those given to A. and B., commenced from the time at which the legacies ought to have been paid, as distinguished from the time of their actual payment. *Ingham* v. *Daly*, 9 L. R., Ir., 484. [100 (6).

5. Annuity by will to a wife otherwise unprovided for, and sums for children's maintenance; on a deficiency of assets:—Held, on the intention of the testator, that they should not abate in proportion with the general legacies. *Lewin* v. *Lewin*, 2 Ves. 415. [101 (10).

6. Testator gave legacies to different persons, and an annuity for the personal maintenance and support of his brother, and directed the payment of it to commence on the first half-yearly day after his death, and the legacies to be paid at the expiration of two years after that event, or as much sooner as the circumstances of his estate would permit, but without interest in the meantime. The testator's property was insufficient to pay the legacies and annuity in full:—Held, that the annuity was not entitled to priority over the legacies, but must abate proportionably with them. *Ashburnham* v. *Ashburnham*, 16 Sim. 186; 12 Jur. 299. [101 (10).

7. Testator directed his trustees to stand possessed of the residue of his estate, upon trust, in the first place, to pay what might be due under his covenant to J. S., and then upon trust to set apart and invest a sufficient sum to satisfy certain annuities which he bequeathed by his will, and, in the next place, after making such investment as aforesaid, upon trust to pay the several pecuniary legacies bequeathed by his will. The assets were insufficient to pay all the legacies and annuities in full:—Held, that the annuitants had no priority over the legatees in respect of payment. *Thwaites* v. *Foreman*, 1 Colly. 409. Affirmed 10 Jur. 483. [101 (10).

8. The testator by his will bequeathed an annuity to his wife for her life, and made it a primary charge in preference to all other legacies on a leasehold estate, which was (together with certain policies of insurance on the life of the testator) subject to two mortgages, and he directed that if the rents and profits of such leasehold estate should be insufficient to pay the wife's annuity, then the same should be paid out of his other personal estate. The mortgagees were paid off by the executors out of the produce of the policies and the general personal estate:—Held, that the wife's annuity, so far as it fell upon the personal estate other than the leasehold estate specially charged, was not entitled to priority over other legacies. *Johnson* v. *Child*, 4 Hare 87. [101 (10).

9. Where a testatrix bequeathed pecuniary legacies, and directed that the residue of the moneys to arise from her real and personal estate should be held in trust for the children of W., and that her trustees should, in the first instance, out of such residue, pay an annuity to A., and the assets were insufficient for all purposes:—Held, that the pecuniary legatees were entitled to be paid in priority to the annuitant, and that she was entitled to her annuity out of the residue. *Re Wiltshire*, 6 Jur., N. S., 190. [101 (10).

10. Held, in the circumstances, that rent-charges specifically charged on lands had priority over legacies charged by a residuary clause. *Weir* v. *Chamley*, 1 Ir. Ch. R. 295. [101 (10).

11. A testator is presumed to consider that there will be a sufficiency of assets to provide for annuities and legacies, and *primâ facie* to intend that they should be paid equally. *Street* v. *Street*, 2 N. R. 56; 8 L. T., N. S., 306. [101 (10).

It is not sufficient to rebut this presumption that legacies are given to several persons successively, with reference to successive residues interposed between the gifts, or that the

legacies were to be "free from any deduction whatsoever." *Ib.*

Therefore, the ordinary rule must apply, that on a deficiency of assets all annuities and legacies abate ratably. *Ib.*

When there is such a deficiency of assets, annuities will be valued as from the time at which the deficiency began. *Ib.*

1. Testator charged his estates with an annuity in favour of his wife, and subject thereto he devised the estates in strict settlement. Afterwards, by his will and codicils, he charged the estates with several other annuities to his wife and other persons:—Held, that the first-mentioned annuity was the primary charge on the estates. *Graves* v. *Hicks*, 6 Sim. 391; 4 L. J., N. S., Ch., 239.

[101 (10).

2. A testator covenanted, upon his marriage, that in case he should die in the lifetime of his wife without issue, his wife should be entitled to one-half of his real and personal property which he should die possessed of. He died without issue in the lifetime of his wife, having by his will devised his real estate, subject to annuities. The widow elected to take against the will. *Semble*, the annuitants should abate one-half of their annuities. *Jackson* v. *Hamilton*, 3 J. & L. 702; 9 Ir. Eq. R. 430. [101 (10).

3. *Foster* v. *Smith* was reversed on appeal. See 1 Ph. 629; 15 L. J., N. S., Ch., 183.

[105 (8).

4. A testator gives to his wife an annuity of 100*l.* and the sum of 1,000*l.*, which he considers will, with the property which she is entitled to after his death, make up an income of 2,500*l.* a year; in fact, those gifts make up her income only to 1,800*l.* a year; she is entitled to have the deficiency supplied out of his residuary estate. *Trevor* v. *Trevor*, 5 Russ. 24; 6 L. J., Ch., 182.

[105 (8).

5. Testator gave the yearly sum of 2,000*l* sterling to his wife for her life, and after her decease to his trustees, upon the same trusts as after declared concerning the yearly sum of 3,000*l.* He then gave to his trustees the yearly sum of 3,000*l.* sterling to issue out of a sufficient sum of stock in the 5 per cents., to be invested in the names of his trustees for that purpose, in trust for his daughter for life, and after her decease for her children. The trustees invested 100,000*l.* 5 per cents. to answer the two yearly sums. The stock was afterwards converted into 4 per cents., whereby the dividends became insufficient to pay the yearly sums:—Held, that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate. *Kendall* v. *Russell*, 3 Sim. 424; 8 L. J., Ch., 108. [105 (8).

6. The testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the principal to devolve eventually to his residuary legatees. He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue; the testator's estate was not sufficient to pay the legacies in full:—Held, upon the death of one of the tenants for life, that an appropriation of the legacy of 800*l.*, set apart to answer her life interest, fell into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund. *Arnold* v. *Arnold*, 2 Myl. & K. 365; 4 L. J., N. S., Ch., 79.

[105 (8).

7. A testator, by a codicil to his will, directed his executor to pay 15*s.* per week to his widow, so long as two leasehold houses should be let; and if one or both should become vacant, he left it to the discretion of his executor to sell the houses and invest the proceeds for the purpose of paying such weekly allowance, or a proportion according to the amount the said houses might produce; and he revoked a gift in his will of the profits of the said houses to his widow, having considered that the 15*s.* per week was quite sufficient to maintain her and make her comfortable; and his will contained a gift over of his property. The testator's property, including the houses, having been sold and realised, produced a fund insufficient to pay 15*s.* weekly to the widow:—Held, that such allowance could not be made good out of the capital. *Hawke* v. *Kemp*, 7 Jur. 294.

[105 (8).

8. Legacy to an executor held liable to make good his breach of trust by preventing the appropriation of stock to answer a gift to a legatee for his life. *Morris* v. *Livie*, 1 Y. & Coll. C. C. 380; 11 L. J., N. S., Ch., 172.

[105 (8).

9. Testator directed the investment of 5,100*l.* in such Government securities as his wife, whom he made his executrix and residuary legatee, should think proper, and gave the income to her for life, and the capital to various parties, to be vested on certain contingencies. He also directed the investment of such sum as would produce an annuity of 125*l.* per annum, which he gave to plaintiff for life, and the capital after her death to his residuary legatee. His wife invested 3,125*l.* in the 4 per cents. to meet this annuity, and gave this capital to one of the defendants subject to the annuity, and her residuary estate to the plaintiff, who thereby became entitled to the testator's residuary estate. The testator first directed that if, before the expiration of the trusts, the funds on which the trust moneys were invested should be paid off or reduced, so that any deficiency or loss arose, the persons interested should ratably bear the loss out of their respective interest, on becoming entitled thereto on the contingencies in the will expressed. The 4 per cents. being reduced:—Held, that the annuitant was not entitled to have the deficiency made good out of the capital sum of 3,125*l.* *Bague* v. *Dumergue*, 1 W. R. 197; 10 Hare 462.

[105 (8).

10. Annuity payable out of dividends of 3,000*l.* 3½ per cent. stock. By stat. 7 & 8 Vict., c. 5, the rate of interest on the stock was lowered to 3¼ per cent.:—Held, that the trustees might make up any deficiency out of the property directed by the will to be accumu-

lated. *Fitzpatrick* v. *Knaresborough*, 13 Ir. Eq. Rep. 338. [105 (8).

1. A testator directed his trustees, out of the proceeds of the sale of his estate. to appropriate 15,000*l.*, and to invest the same and pay the income to his wife for her life, and after her death he gave the 15,000*l.* in trust for his children equally, and the residue of his estate amongst his children in unequal proportions. The widow and the trustees entered into a written agreement to appropriate railway preference stock and other securities of the value at the time of the appropriation of about 15,000*l.* to represent this fund. At the death of the widow the securities comprised in this agreement had considerably fallen in value:—Held, that the residuary estate must make good the deficiency in the fund thus set apart. *Stewart* v. *Sanderson*, 22 L. T., N. S., 10. [105 (8).

2. A testatrix, by her will, bequeathed pecuniary legacies and annuities; and, subject to the bequests thereinbefore contained, she gave the residue to A. for life, with remainders over. The estate was not sufficient to satisfy the annuities and pay the pecuniary legacies; but if Government annuities were purchased for the annuitants out of the corpus, there would be enough left to pay the pecuniary legacies and leave a small surplus:—Held, as between the tenant for life and the remaindermen, that the tenant for life was not entitled to have Government annuities purchased to satisfy the annuitants; but that the income must be applied, so far as it would extend, in paying the annuities, recourse being had from time to time to the capital to make up the deficiency. *Re Grant, Walker* v. *Martineau*, 52 L. J., Ch., 552; 48 L. T. 937; 31 W R. 703. [105 (8).

3. A testator directed his trustees to sell his personal estate, and after payment of his debts, etc., to invest the residue, and out of the produce thereof, or if need be by the sale and conversion, from time to time, of a sufficient part of the principal, to pay two annuities; and he directed his trustees, if occasion should be, from time to time to pay out of the rents and profits of his freehold and copyhold estates so much of the annuities as his said personal trust estate should be insufficient for discharging. The personal estate being exhausted, and the annual rents of the real estate being insufficient to keep down the annuities, it was held, that the arears were to be raised by sale or mortgage. *Fentiman* v. *Fentiman*, 16 L. J., N. S., Ch., 436. [105 (8).

4. A testator, by his will, charged a freehold estate with the payment of the yearly sum of 10*l.*, to be paid half-yearly to his daughter A. for her life; and, on her death, he directed such half-yearly payments to be continued for the maintenance of her children until they should attain twenty-one, and then directed his trustees to pay the sum of 120*l.* equally amongst them. The estate was sold under a decree of the Court, and there remained out of the proceeds, after payment of the testator's debts, only the sum of 74*l.* 19*s.* 4*d.*:—Held, that the two charges of the yearly sum of 10*l.*, and the sum of 120*l.*, were equally entitled to the benefit of the corpus, which was directed to be invested, and the income paid to the testator's daughter, but without prejudice to any question that might eventually arise as to the right of it. *Taylor* v. *Taylor*, 8 Jur. 15. [105 (8).

5. A testator gives four annuities for life charged upon certain estates specified; and there is a gift of those estates to trustees, upon trust to pay the rents to his wife for life, and then absolutely to convey certain of the estates to his brother freed from the annuities, but which under the will had either ceased or been otherwise secured; and after the decease of the testator's wife, there were gifts of the estates in certain portions, exempted from the annuities as therein mentioned, with a gift of the residue to the widow. The testator mortgaged his estates, and the personalty being insufficient, the realty was sold. The wife and annuitants being still living, it became necessary to ascertain the effect of the will:—Held, that the aggregate of the estates were charged with the annuities only during the wife's life, and that there was no right at present to come on the corpus. Annuities to be paid out of the income of the fund when ascertained *pro ratâ*, with liberty to apply. *Maltby* v. *Grey*, 6 W. R. 5. [105 (8).

6. As a general rule, arrears of an annuity do not carry interest. Exceptions are where the annuitant might, but for the interference of the Court, have obtained payment of interest out of a legal security held by him, or where there has been misconduct by the party bound to pay the annuity. A wife or child being the annuitant is no ground for exception. *Newman* v. *Auling* (3 Atk. 579), having been overruled. Arrears of annuities do not bear interest except where the annuitant holds some enforceable security, or the accumulation of arrears has been occasioned by the misconduct of the person bound to pay. Therefore, where there was merely delay, though long and unexplained, interest was refused. *Torre* v. *Brown*, 24 L. J., Ch., 757; 5 H. L. Ca. 555. [113 (3).

7. An annuity, being a legal rent-charge on lands:—Held, to be barred by the Statute of Limitations, no payment in respect thereof having been made for twenty years and upwards. *Langton* v. *Langton*, 18 Jur. 928. [115 (1).

8. Testator directed his trustees to stand possessed of the proceeds of his real estate, and also of his residuary personal estate, upon trust to raise a sum of money, the income of which would produce a clear annual sum of 100*l.*, and to invest it upon Government or real securities, and pay the same to a legatee; and he directed that if at any time the income of the fund so to be raised and invested should from any cause or circumstance whatsoever prove insufficient to answer the annuity, the deficiency should be made good out of the residue. The trustees, of whom the legatee was one, a year and a half after the testator's death invested a sum of 3,500*l.*, part of his estate, on mortgage at 5*l.* per cent., and shortly afterwards the annuitant assigned the annuity to a purchaser, by a deed, reciting that the 3,500*l.* had been appropriated to answer it. The assignor, having been afterwards permitted by his co-trustees to take possession of the mortgage fund, misapplied

it:—Held, that the investment of the 3,500*l.* was a sufficient appropriation of a fund to answer the annuity, and that the purchaser thereof had no claim to have it made good out of the residue. *Barnett* v. *Sheffield*, 16 Jur. 942; 1 De G. M. & G. 371; 21 L. J., N. S., Ch., 692. [120 (4).

Where, according to the terms of a trust, the fund to be provided to secure an annuity may be invested on real security, the security will not be an improper one because it produces annually somewhat more than the annuity requires. *Ib.*

1. If annuitant is entitled to any part of relief prayed, he is entitled to whole relief. *French* v. *Morgan*, 1 Moll. 488. [122 (5).

2. In a suit for the arrears of an annuity secured by a bond given by a deceased person to a trustee for the annuitant, the House of Lords held that as the claim was a legal demand against the assets of the deceased, all a court of equity could do in the first instance was to remove impediments against any action, and accordingly retained the bill for twelve months, giving the plaintiff leave to sue in the name of the trustee. *Haworth* v. *Boston*, 9 Cl. & F. 59. Varying 4 Y. & Coll. 1. [122 (5).

3. An annuitant, whose annuity is charged by his testator upon all his freehold and copyhold estates, has no equity, so long as the annuity is regularly paid, to file his bill against the heir at law or devisee, to compel a discovery of the estates so charged, or the execution of a deed purporting to charge the estates. Bill for that purpose dismissed with costs. *Franklin* v. *Drake*, 5 Jur. 1078. [122 (5).

4. Lands are sold to A., subject to an annuity of 15*l.* a year to the sister of the vendor; the lands are afterwards mortgaged, and otherwise charged by A., and, thus charged, descend to his heir at law. A court of equity will make a personal decree against the heir for the arrears and growing payments of this annuity. *Champernowne* v. *Hillersdon*, 4 Bro. P. C. 330. [122 (5).

5. A man makes a deed poll for payment of an annuity, and after by will subjects his estate to the payment of it; he shall have further security, and not rest on the deed poll. *Grenon* v. *Rawson*, Sel. Ch. Ca. 37. [122 (5).

6. A devisee for life of a rent-charge having granted several annuities thereout, and which were in arrear, assigns it to his creditors. The tenant for life of the estate, with intent to redeem it for the annuitant, gave bonds to the creditors, on condition of giving up their securities to be cancelled. The obligor's executor paid all the bonds. The annuitant is entitled against the executors to the annuity disencumbered, but not to have paid the arrears on the annuities to creditors incurred in the life of the obligor, and as against the tenant of the estate to the arrears since the death of the obligor; but the future payment must be left to agreement. *Graham* v. *Graham*, 1 Ves. J. 272. [122 (5).

APPORTIONMENT.

P. **123**, col. **1**, line **40** For LEASE read VENDOR AND PURCHASER.

P. **123**, col. **1**, after line **42**, add

— *Of Purchase Money.* See VENDOR AND PURCHASER, XIV. VII.

7. A testator gave an annuity for life, and an annuity for twenty-one years from his death, both payable by four equal quarterly payments on the usual quarter-days:—Held, that a proportional part only of each annuity was payable on the first quarter-day after his decease. *Williams* v. *Wilson*, 5 N. R. 267. [124 (4).

8. A testator bequeathed stock to his widow for life, with remainder to his son; and died in 1817. The son bequeathed the residue of his personal estate, which included the stock, to his wife for life, with remainder to his children; and he died in 1852. The widow, his mother, died on the 1st January 1865. A dividend accruing due on the stock on the 5th of the same month:—Held, that as between the son's wife and his children, such dividend represented capital of the son's estate, and not income. *Roberts* v. *Roberts*, 5 N. R. 423. [125 (7).

9. Where under orders given in Chambers a sum of stock was sold shortly before a dividend was due:—Held, that the tenant for life of such sum was entitled to receive, out of the proceeds of the sale, a sum equal to the apportioned part of such dividend from the last dividend day up to the day of sale. *Bulkeley* v. *Stephens*, 3 N. R. 105, 106. [125 (7).

Construction of Statutes. General Principles.] 10. The instrument referred to in the Apportionment Act is not the instrument creating the periodical payments, but that creating a life interest therein. *Knight* v. *Boughton*, 12 Beav. 312; 19 L. J., N. S., Ch., 66. [131 (4)

11. The stat. 4 & 5 Will. 4, c. 22, requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of gift, that apportionment is clearly impossible, consistently with it. Inference from the whole tenor and context of the will is not sufficient to exclude the operation of the statute. *Tyrrell* v. *Clark*, 2 Drew. 86; 18 Jur. 323; 23 L. J., Ch., 283; 2 W. R. 152; 2 Eq. Rep. 333. [131 (4).

APPURTENANCES.

12. As to general words "appertaining and belonging" in conveyance of a manor, see *Townsend* v. *Champernown*, 1 Y & J. 538.

See also DEEDS, III. IV., pag1973, pars. (2, *et sqq.*).

When Passing under a Descriptive Gift by Will.] See WILL, XXXVIII. II. [133 (5).

ARBITRATION.

1. Arbitration clauses in deeds are not binding on the parties so as to oust the jurisdiction of the Court. *Mexborough (Earl)* v. *Bower*, 7 Beav. 127. [138 (3).

2. Courts of equity have no jurisdiction, under 3 & 4 Will. 4, c. 42, to order witnesses to attend arbitrators. *Hall* v. *Ellis*, 9 Sim. 530; 8 L. J., N. S., Ch., 158; 3 Jur. 167. [146 (8).

3. The 12th section of the Common Law Procedure Act 1854 authorises the Court to appoint an umpire in an arbitration which was commenced before the passing of the Act. The 3rd clause of that section applies to references to arbitration not only made by any "document," but also otherwise, as by Act of Parliament or by parol. *Re Lord*, 1 Kay & J. 90; 24 L. J., Ch., 145. S. C. *nom. Re Lord and the Governor and Company of the Copper Miners*, 3 Eq. Rep. 197; 3 W. R. 86. [147 (9).

4 Award or report of arbitrator must be filed before any order can be grounded thereon. *Vernon* v. *Wells*, Dick. 452. [151 (16).

5. An award was made upon a submission not under the statute of Will. 3, between two parties in difference, on which one of the parties obtained judgment against the other party in an action at law. The unsuccessful party filed a bill in equity against the successful party and the arbitrator, to set aside the award:—Held, that, whether the award was or was not impeachable on equitable grounds, yet, inasmuch as there was no evidence to raise suspicion that the arbitrator had acted corruptly, partially, or unfairly, he ought not to have been made a party to the suit; and the bill was dismissed as against him with costs, before the Court had come to any opinion for or against his award. *Hamilton* v. *Bankin*, 3 De G. & Sm. 782; 15 Jur. 70; 19 L. J., Ch., 307. [158 (2).

Under a submission, not made under the statute of Will. 3, the parties in difference and their arbitrators, who had not agreed, met before the umpire; one of the parties in difference then left, having authorised his arbitrator to act for him in the conduct of the proceedings before the umpire, and the hearing finally terminated, except that it was agreed that one of the parties in difference should, on the following day, go alone to the umpire, and produce a voucher for certain charges; which that party accordingly did; the umpire made his award for a certain sum, which the latter party recovered in an action at law against the other party, thus establishing the legal validity of the award. Upon a bill by the defendant at law to restrain the action, and to set aside the award:—Held, that the arbitrator of the plaintiff in equity had been sufficiently constituted to act in the umpirage for him; and that he had power to, and did sufficiently, waive all objection to the irregularity; and the award, being valid in law, was not set aside. *Ib.*

ARMY AND NAVY.

Off-Reckonings.] 6. A., being colonel of a regiment, contracts with B. for the clothing it by a limited time, and assigns to B. the off-reckonings of the regiment to pay for such clothing. Before the time appointed for the delivery of the clothing expired, A. sold his commission to C. The treaty for this sale, and the king's approbation of it, happened before the contract with B., but C.'s commission was not dated till some months afterwards. Upon a question, whether under these circumstances A. had a right to contract for the clothing of the regiment, it was held that he had; and to do every act as colonel thereof, so long as he continued on the muster-roll, which was till the date of C.'s commission. *Harrison* v. *Dormer*, 1 Bro. P. C. 153. [167 (6).

ARRANGEMENT WITH CREDITORS.

P. 168, col. 1, line 6, after BANKRUPTCY, add CREDITORS' TRUST DEEDS.

ARTIZANS' DWELLINGS ACT.

7. The effect of s. 20 of the Artizans' and Labourers' Dwellings Improvement Act 1875, is that upon the purchase of land by a local authority for the purpose of carrying into effect a scheme under the Act, all easements whatsoever affecting the land become thenceforth extinguished, subject only to this, that compensation is to be paid by the local authority to persons injured in manner provided by the section. *Swainston* v. *Metropolitan Board of Works*, 52 L. J., Ch., 235; 48 L. T. 634; 31 W. R. 498. [168 (2).

A local authority, under the powers of the above Act, purchased and took a certain house for the purposes of an improvement scheme. The plaintiffs, the owners of adjoining land, claimed to be entitled to a right to support to a building thereon from the house so purchased, and brought an action to restrain the local authority from removing the house in such a way as to interfere with the plaintiff's right to support. The local authority had taken no proceedings to purchase the alleged easement of the plaintiffs:—Held, that the only right the plaintiffs could have was to receive compensation under the above section, and that their action must therefore fail. *Ib.*

8. When an arbitrator has been appointed under the Artizans' and Labourers' Dwellings Improvement Act 1875, to assess compensation for lands proposed to be taken compulsorily under that Act, it is his duty to assess the compensation for such lands upon the footing that the interest in respect of which a claim is made is an existing interest, and it is not his duty to decide whether the interest does or does not exist. *Wilkins* v. *Birmingham*

(*Mayor*), 25 L. R. Ch. D., 78; 49 L. T. 468; 32 W. R. 118. [168 (2).

From the date when the local authority shall have published once in three successive weeks, the particulars mentioned in s. 6 of the schedule to the Artizans' Dwellings Act, the relation of vendor and purchaser is created for the purpose of fixing the subject-matter of compensation, and the effect of the publication of such particulars is analogous to the effect of a notice to treat under the Lands Clauses Consolidation Act 1845. S 121 of the Lands Clauses Consolidation Act 1845 is incorporated in the Artizans' Dwellings Act. *Ib.*

ASSENT.

P. **168**, col. **1**, line **45**, for EXECUTOR AND ADMINISTRATOR read LEGACY, X.

ATTACHMENT OF DEBTS.

1. A judgment creditor obtained under the Common Law Procedure Act 1854, s 61, an order attaching all debts owing or accruing from the garnishee to the judgment debtor, and a subsequent order upon the garnishee to pay to the judgment creditor the debt due from him (the garnishee) to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt. Afterwards an order was made by this Court ordering certain payments to be made by the garnishee to the judgment debtor —Held, that the equitable debt thus constituted, not having been ascertained in amount at the time of the Common Law Orders being made, was not a debt within the meaning of the Common Law Procedure Act 1854; and that therefore this Court would not aid the judgment creditor by restraining the garnishee from making the payments to the judgment debtor in pursuance of the order of this Court. *Clark* v. *Perry*, 3 W. R. 366, 387. [169 (1).

ATTORNEY-GENERAL.

P. **172**, col. **1**, line **42**, after PETITION OF RIGHT, add PRACTICE (ATTORNEY-GENERAL) and cross-references there.

AUCTION AND AUCTIONEER.

P. 173, col. 1, line 2, delete CONTRACT,

AUTHOR AND PUBLISHER.

2. Agreement by newspaper proprietor with writer to this effect: "I agree that you shall write me two tales, extending over the period of one year, for which I agree to pay you 10*l.* per week for each number; and I agree to receive the first number on, etc., and to continue to receive one number weekly during the term of one year":—Held, an agreement for one year certain on both sides. *Stiff* v. *Cassell*, 2 Jur., N. S., 348. [175 (8).

3. An agreement between an author and publisher stipulated, that the work was to be sold to the public at one shilling a number; 2,000 copies were sold to a bookseller at a reduced price, in respect of which the author claimed to be compensated, out of the estate of the publisher, who had become bankrupt:—Held, that this was no breach of the agreement. *Re Curry*, 12 Ir. Eq. R. 382. [175 (8).

4. Where an author agrees with bookseller to publish his work, and to allow him interest for money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright for his disbursements, *semble* *Brooks* v. *Wentworth*, 3 Anst. 881. [175 (8).

P. 177, after par. (3), add

5. *Post* v. *Marsh*, 16 L. R., Ch. D., 395; 50 L. J., Ch., 287; 43 L. T. 628; 29 W. R. 198, page 2652 (6), and 6560 (2).

BANK OF ENGLAND.

P. **177**, col. **2**, after line **27**, for DISTRINGAS, read STOCK AND SHARES

P. **179**, after par (1), add

See also STOCK AND SHARES.

BANKER.

Rights of Manager of Bank who is also a Customer.] 6. An Indian bank being about to open a branch in London appointed C. the London agent, with permission to carry on his own business as a merchant. C. in his independent character opened an account with the bank, and, in his capacity as a customer, deposited with and obtained an advance from the bank upon bills of which he was possessed. The bills were not indorsed to the bank, and, when they came to maturity, a loss occurred owing to the drawers and acceptors becoming bankrupt:—Held, that such loss must fall upon C. *Gwatkin* v. *Campbell*, 1 Jur., N. S., 113. [180 (1).

General rules as to the conduct of a manager of a bank who is himself also a customer of the bank in respect of accommodation granted to him in his character of a customer. *Ib.*

7. S. bequeathed her personal estate to trustees upon trust to invest a moiety thereof and pay the dividends thereof to M. for life, and after her death to divide the *corpus* thereof

between J. T., and R. The trustees invested part of the funds in bank shares in the name of M., who died intestate. After M.'s death the executor of S. and the administrator of M. applied to the banking company to transfer the shares to him, and tendered an affidavit under 48 Geo. 3, c. 149, s. 36, showing that M. had no interest in the shares. The company still refusing to transfer them unless the stamp upon the letters of administration of M.'s estate was sufficient to cover the value of these shares —Held, that the banking company was bound to make the transfer, and on a bill filed to compel them, decree made against them with costs. *Hennell* v. *Strong*, 25 L. J, Ch., 407. [185 (5).

1. Interest on a banker's note from circumstances, though no evidence of an agreement for it. *Jacomb* v. *Harwood*, 2 Ves. 265. [198 (4).

BANKRUPTCY.

2. *Semble*, the Court of Bankruptcy has no jurisdiction to marshal assets, as between mortgagees, without the consent of all parties. *Exp. Lacon, Youell & Co., Re Colk*, 1 Bank. & Ins. R. 107. [205 (3).

3. H., having borrowed 120*l.* from P., for the repayment of which sum and interest T. was surety, an agreement was entered into in September 1875, between H. and T, that H. should execute a mortgage of certain premises to P., to secure the repayment of the loan and interest. The agreement contained a proviso that if T. should at any time be called upon and compelled to pay the 120*l.* and interest, or if H. should become bankrupt or file a petition for liquidation, it should be lawful for T. immediately to enter upon the premises so agreed to be mortgaged. T. having been served with a writ, jointly with H., to pay the 120*l.* and interest, paid the money in August 1876, and immediately entered upon the premises agreed to be mortgaged, which were in the occupation of H, and upon which H. had expended considerable sums. In September 1876 H. filed a liquidation petition, and in June 1882 the trustees in the liquidation sought to have the agreement set aside as fraudulent and void, and that T. might be ordered to withdraw from possession upon payment into court by the trustee of 125*l.* in respect of the debt and interest—Held, that the provision for re-entry upon the bankruptcy of H. not having come into operation, the Court of Bankruptcy had no jurisdiction to decide the matter. *Exp. Hutchinson, Re Holt*, 47 L. T. 483. [207 (3).

Semble, the Court of Bankruptcy ought not after the lapse of six years to entertain such an application. *Ib.*

4. A trader opened with a railway company a credit account for freight, by which it was agreed that the company should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property and manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, and sent them to the company consigned to the trader. The company claimed the benefit of the agreement, and refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver, in order to obtain the goods, paid the company 50*l.* under protest, and then applied to the Court of Bankruptcy to order the company to repay him the 50*l.*, and order was made accordingly:—Held, that the Court of Bankruptcy had no jurisdiction to make the order *Re Northfield Iron and Steel Co.* (14 L. T. 695) distinguished *Exp. Great Western Railway Co., Re Bushell*, 22 L. R., Ch. D., 470; 52 L. J., Ch., 734; 48 L. T. 196; 31 W. R. 419. [207 (3).

5. *Semble*, that, in a case where the receipts by the official assignee consisted principally of a large sum transferred into his name upon the declaration of bankruptcy, an allowance at the rate of 1*l.* 4*s.* per cent. upon such sum is just and reasonable. *Exp. Glyn, Re Ashlin*, 2 W R. 321 [213 (13).

6. The 160th section of the Bankruptcy Act 1849, which empowers the commissioners to make an allowance to some person for assisting the bankrupt in the preparation of his balance-sheet, does not authorise an allowance to the official assignee for performing that office. *Exp. Russell, Re Mynnitt*, 2 W. R. 405; 1 Bank. & Ins. R. 230. [213 (13).

7. Where the plaintiff is adjudicated bankrupt after action brought, and his trustee declines to proceed with the action, it may be stayed by an order in chambers, and the defendant need not plead the bankruptcy in bar. *Warder* v *Saunders*, 10 L. R., Q B. D., 114; 47 L. T. 475. [228 (1).

8. Under r. 5 of the Bankruptcy Rules 1871, the charges of a receiver and manager of a business for disbursements out of pocket (*e g*, travelling expenses and salaries of assistants) are liable to taxation. *Exp. Izard, Re Bushell*, (No. 1), 23 L R, Ch D, 75; 52 L. J., Ch, 678; 48 L T 751; 31 W. R. 418. [230 (2).

A receiver and manager of a business who desires to advance money of his own for the purposes of the business may, before doing so, apply to the Court for its authority, and the Court will, as a general rule, allow him interest at 5 per cent. on the amount which it authorises him to advance, and will give him a charge on the debtor's assets for the advance and the interest. If the receiver and manager advances money without such a previous authority, he is entitled to an indemnity out of the assets, but he cannot obtain a personal order against the trustee for payment. *Ib.*

9. An application to enforce an undertaking to be answerable in damages, given by a receiver in bankruptcy on the granting of an injunction to restrain proceedings in relation to property alleged to form part of the bankrupt's estate, ought to be made within a reasonable time after it is ascertained that the injunction has been improperly granted. *Exp Hall, Re Wood*, 23 L. R, Ch. D., 644; 52 L. J., Ch, 907; 49 L. T. 275; 32 W. R. 179. [230 (2).

Unexplained and unreasonable delay in making such an application will be a sufficient

ground for refusing it, even if the bankruptcy proceedings are still pending and the receiver has not obtained his discharge:—Held, that an unexplained delay of nearly four years in making such an application was a sufficient answer to it, though the applicant had shown a *primâ facie* case. *Ib.*

1. Any proceeding against a receiver appointed by the Court of Bankruptcy in respect of acts done *virtute officii* must be taken into that court. Where, therefore, a liquidating debtor had commenced an action in the High Court of Justice against the receiver in the liquidation, claiming damages done to his goods when in the possession of the receiver:—Held, that the debtor will be personally restrained from instituting any proceedings against the receiver elsewhere than in bankruptcy. *Exp. Day, Re Potter*, 48 L. T. 912. [230 (2).

2. The bankrupt had opened a lairage for cattle, and had sold hay to the drovers using the lairage with a view to profit, first on his own account, and afterwards in connection with others, as a company, in their endeavours to establish a market, but in which they failed:—Held, to be a trading as a hay dealer within the operation of the bankrupt laws. *Exp. Adams, Re Kirk, Exp. Adams, Re Westbrook*, 1 Bank. & Ins. R. 127. [234 (6).

3. Where a farmer takes in horses for friends and trains them, and thereby receives a profit, this is not sufficient to constitute the farmer a trader. *Exp. Slater, Exp. Denison, Re Wilkinson*, 48 L. T. 648. [234 (6).

4. Leave given to the committee of the estate of a lunatic trader to consent to an adjudication in bankruptcy against the lunatic. *Re Lee*, 23 L. R., Ch. D., 216; 48 L. T. 193; 31 W. R. 802. [236 (7).

5. A surgeon who dispenses his own medicines is a trader within the Bankruptcy Act 1849. *Nicholson* v. *Cooper*, 1 L. T., N. S., 184. [237 (2).

6. Members of Parliament are within the operation of the 72nd section of the Bankrupt Law Consolidation Act 1849. *Exp. Mostyn*, 1 W. R. 375. [237 (11).

7. A sculptor is not a trader within the meaning of the Bankrupt Law Consolidation Act 1849, but he can be made a bankrupt as a dealer in marble, and as a worker of goods and commodities. *Re Bailey*, 2 Bank. & Ins. R. 65. [237 (17).

8. An assistant master in a school, at a fixed salary, is within s. 168 of the Bankrupt Law Consolidation Act 1849. *Exp. Collinet, Re Winter*, 1 Bank. & Ins. R. 82. [238 (13).

9. Definition of a scrivener and of a bill broker. A few money transactions, incidental to some other business, are not within the meaning of the Bankrupt Law. But the number and extent of such transactions, where they are carried on with the intention of gaining a profit in the regular way of business, will not affect the operation of the Bankrupt Laws, where it is contended that such transactions were incidental to some other business not within the scope of the Bankrupt Laws. The intention in carrying them on must be gathered by their extent as compared with that of the other business, and the mode in which they were transacted. *Re Lane*, 2 Bank. & Ins. R. 146 [238 (14).

10. F., a fisherman, was the owner of twelve fishing smacks, which he used for the purposes of that pursuit, and occasionally, when there was room to spare, he brought home the fish of other persons, and was paid for the conveyance:—Held, that the ownership of the smacks, and the occasional conveyance of fish for a profit, did not constitute a trading within the meaning of the Bankrupt Laws as a shipowner or a carrier. *Re Forge*, 2 Bank. & Ins. R. 98. [239 (1).

11. E. and F. being in partnership as wine merchants, F. brought an action in the Chancery Division for a dissolution of the partnership, and an order was made by the Court for a dissolution and the appointment of a receiver, under which a receiver took possession of the partnership effects and carried on the business, F. ceasing to take any part in the business, and having no other occupation than that of book-keeper to a trading company. An action having been commenced against E. and F. upon bills accepted by the firm before the receiver took possession, judgment was signed against F. and his separate property taken in execution for a sum exceeding 50*l.*:—Held, that F. was not at the time of the execution a "trader" within the meaning of s. 87 of the Bankruptcy Act 1869, 32 & 33 Vict., c. 71. *Dawe* v. *Vergara*, 11 L. R., Q. B. D., 241; 49 L. T. 41; 47 J. P. 583. [240 (11).

12. If a petitioning creditor alleges that the debtor has committed an act of bankruptcy which can be committed only by a trader, the onus is on him to prove that the debtor was, within the meaning of the Bankruptcy Act, a trader at the time when the act was committed. *Exp. Salaman, Re Taylor*, 21 L. R., Ch. D., 394; 47 L. T. 495; 31 W. R. 282.—Per Jessel, M. R. [241 (9).

13. Bill of sale by a lodging-house keeper of all her household furniture in consideration of a bygone debt, secured by a promissory note:—Held, void as an act of bankruptcy after possession taken and sale prior to the adjudication. *Re Smith*, 1 Bank. & Ins. R. 264. [245 (1).

14. In order that a deed, assigning the whole of a debtor's property as security for an existing debt, may not be fraudulent and an act of bankruptcy within sub.-s. 2 of s. 6 of the Bankruptcy Act 1869, on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement should be technically binding at law or in equity; a *bonâ fide* promise is sufficient. *Exp. Wilkinson, Re Berry*, 22 L. R., Ch. D., 788; 52 L. J., Ch., 657; 48 L. T. 495; 31 W. R. 649. [247 (8).

The question in all such cases is whether the arrangement was made *bonâ fide* with the view of enabling the debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt. *Exp. Dann* or *Thorpe, Re Parker* (17 L. R., Ch. D., 26; 51 L. J., Ch., 290; 44 L. T. 760; 29 W. R. 771. Affirming 43 L. T. 704), commented on. *Ib.*

15. A trader in insolvent circumstances executes under pressure a deed of assignment, substantially comprising the whole of his property in trade, to *bonâ fide* creditors:—Held, that on his being adjudicated a bankrupt within three days after the execution of

the deed of assignment, the deed was in itself an act of bankruptcy, and void as against his assignees. *Exp. Bailey, Re Barrell*, 1 W. R. 343. [249 (3).

A trader, on the 20th December 1851, assigned to some of his creditors all his debts, bills of exchange, promissory notes, and other securities, and all books of account in which such debts or sums were entered, as a security for their debt; and at the same time, although not personally known by the trader, writs on two judgments, obtained some time previously, were in the hands of the sheriff, who on the 22nd December levied execution on the trader's stock-in-trade and furniture. On the 24th December the trader was adjudged bankrupt, on a petition presented on the 23rd:—Held, that the assignment was void as against the assignees under the bankruptcy. S. C. 1 Bank. & Ins. R. 48.

1. C. assigned all his estate and effects to H., in consideration of H. having previously become surety for him for 100*l*., and also of a present advance of 55*l*. The deed contained a proviso, permitting C. to retain possession of the property until default by him in paying the 100*l*. when due, and the 55*l*. when required. No default was made up to the time of the bankruptcy of C.; and the property was in the possession of C. at the time of the bankruptcy, and was sold by the assignees by consent of H., he submitting his right to the same to the judgment of the Court:—Held, that the assignment was an act of bankruptcy, and that the proceeds of the sale passed to the assignees of H. *Exp. Harvey, Re Collins*, 1 Bank. & Ins. R. 194. [249 (11).

2. H., by deed, assigned all his shop and dwelling-house, stock-in-trade, etc., and property at W. or elsewhere, in consideration of an old debt and a present advance, subject to a proviso for redemption. The mortgagee ultimately took possession, and proceeded to sell. A few days before possession was taken, H. departed from his house, but left his address behind, and promised to return on a certain day. He did return for a few hours, but disappointed a creditor he had promised to pay:—Held, that the deed and departure were both acts of bankruptcy. *Re Holloway*, 1 Bank. & Ins. R. 244. [249 (11).

3. A lace manufacturer being pressed by a creditor, assigned to him by bill of sale four lace machines to secure the then balance of 465*l*., and any future balance that might arise. The value of the machines was about two-thirds of his entire property, and the remaining assets were insufficient to meet his unsecured debts:—Held, that the transfer of the machines was not an act of bankruptcy, and that it was good as against creditors. *Harris* v. *Wanklen*, 4 W. R. 51. [249 (11).

4. A bill of sale to secure an existing debt and a present advance, which assigns the whole of the grantor's property, including that which he may purchase by means of the advance, is not necessarily void as an act of bankruptcy. *Graham* v. *Chapman* (12 C. B. 85) on this point overruled. *Exp. Hauxwell, Re Hemingway*, 23 L. R., Ch. D., 626; 52 L. J., Ch., 737; 48 L. T. 742; 31 W. R. 711. [250 (5).

5. Conveyance of bankrupt's property with intent to defeat or delay creditors. *Pennell* v. *Dawson*, 18 C. B. 355. [250 (5).

6. A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intent to defeat and delay his creditors, is bound to show that the debtor is alive and in some other place. *Exp. Geisel, Re Stanger*, 22 L. R., Ch. D., 436; 48 L. T. 405; 31 W. R. 264; 53 L. J., Ch., 349. [265 (1).

7. The 87th section of the 6 Will. 4, c. 14 (s. 73 of the English Bankrupt Act, 6 Geo. 4, c. 16), is retrospective, as to conveyances made before the act. *Semble*, it is not so as to commissions before the act. *Clements* v. *Eccles*, 11 Ir Eq. R. 229. [269 (1).

8. Where the debt alleged to be due in the summons is founded on a covenant in a deed executed by the intended bankrupt, the affidavit of debt must state all the parties to the deed. *Anon.*, 1 Bank. & Ins. R. 122. [292 (7).

9. By s. 78 of the Bankrupt Law Consolidation Act 1849, the affidavit of debt and notice must state "the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand" Where the affidavit did not state where the service was effected, the summons was dismissed, with costs. *Anon.*, 1 Bank. & Ins. R. 115. [292 (7).

10. On a trader debtor summons, the affidavit of debt stated that the claim was for the value of goods deposited with the defendant for the purpose of being worked upon. Affidavit held to be insufficient, and summons dismissed, with costs. *Anon.*, 2 Bank. & Ins. R. 91. [292 (7).

11. A debtor's summons and the proceedings upon it are proceedings in bankruptcy within s. 82 of the Bankruptcy Act 1869, and therefore will not be invalidated by any mere formal defect or irregularity where no injustice is done thereby. A debtor was served with a debtor's summons, on the face of which the amount of the debt was stated as 24*l*., but the cause of debt was stated, and the annexed particulars were referred to, which showed the debt to be 74*l*. The creditor took out the summons in person and not by a solicitor, but it was served not by himself but by his clerk;—Held, that as the debtor in the circumstances must have known the amount of the debt and could not have been deceived or misled, the defect in the summons and also that in the mode of service was cured by the 82nd section of the Bankruptcy Act 1869. *Exp. & Re Johnson*, 32 W. R. 175; 25 L. R., Ch. D., 112; 53 L. J., Ch., 309; 50 L. T. 157. [293 (10).

12. When a debtor's summons is founded on a judgment debt it is not necessary to state the consideration for the judgment in the summons, and a misstatement of the consideration will not vitiate the summons. *Exp. & Re Ritso*, 22 L. R., Ch. D. 529; 52 L. J., Ch., 535; 48 L. T. 376; 31 W. R. 373. [293 (10).

13. A trader debtor summons, under s. 78 of the Bankruptcy Act 1849, must be served four days at least before the time for appearance, exclusive of the first, and exclusive of the last day. *Anon.*, 2 Bank. & Ins. 53. [297 (3).

1. In serving a summons issued under s. 78 of the Bankruptcy Act 1849, it is not necessary to leave with the person served an original of the summons, but it is sufficient to show him the original, and leave with him a true copy. If the copy so left does not contain the signature of the Commissioner it is not a true copy, and the service is irregular. *Exp. Tindal*, 2 Bank. & Ins. R. 129. [297 (3).

2. Substituted service of summons on a debtor keeping out of the way, directed to be made both at his last-known place of abode and on his solicitor. Debtor ordered to pay the costs. *Re* ——, 3 N. R. 248. [297 (3).

Rule granted under s. 79 of Bankruptcy Act 1869, and s. 121 of Consolidation Act 1849, against judgment-debtor, to show cause why substituted service of a judgment-debtor summons should not be made. *Id.* 197.

3. Where a party, summoned to pay a debt under s. 78 of the Bankruptcy Act 1849, files an admission as to part of such debt, and makes an affidavit pursuant to s. 82 of the same statute, that he has a good defence upon the merits as to the residue thereof, and the Court dispenses with his entering into the bond referred to in the same section, such party does not commit an act of bankruptcy by not paying, within seven days after the filing of such admission, the portion of the debt so admitted. *Re Oldfield*, 1 Bank. & Ins. R. 1. [298 (9).

4. Where the admission of a debt, under a trader debtor summons, was taken by a solicitor in the country on unstamped paper, and was not stamped until after the day on which the summons was returnable, the Court declined to receive it as an admission under the 84th section of the Bankrupt Law Consolidation Act 1849; but, *semble*, the point will be reserved, if necessary, as an equitable defence to the adjudication. *Anon.*, 1 Bank. & Ins. R. 116. [298 (9).

5. The amount of the differences due by a defaulter on the London Stock Exchange (as fixed by the official assignee of that body under its rules) to a Stock Exchange creditor, is a "liquidated sum" within the meaning of s. 6. of the Bankruptcy Act 1869, and will support a bankruptcy petition by the creditor against the defaulter. *Exp. & Re Ward*, 22 L. R., Ch. D., 132; 52 L. J., Ch., 73; 48 L. T. 332; 31 W. R. 112. [299 (2).

6. In order to justify the issuing of a debtor's summons under s. 7 of the Bankruptcy Act 1869, the alleged debt must be an exigible debt; if the debtor would have any defence, legal or equitable, to an action for the debt, the summons ought to be dismissed. *Exp. Foster*, or *Exp. Heilbert, Re Foster*, 23 L. R., Ch. D., 797; 52 L. J., Ch., 577; 48 L. T. 497; 31 W. R. 774. Affirming 47 L. T. 738. [299 (2).

Two partners in trade whose affairs were embarrassed without filing a liquidation petition, summoned a meeting of their creditors. Nineteen out of twenty-seven creditors attended the meeting, their debts amounting to 2,400*l.* out of a total of 2,628*l.*, and a resolution was passed that a deed of assignment of the debtor's estate and effects should be made to three persons named, as trustees for the benefit of the creditors, with power for them to carry on the business for such time as they should think fit, and to sell the concern as a going concern, or otherwise. One of the debtors was to have his discharge on payment of 200*l.*, or otherwise, as the creditors might direct. The resolution was signed by the chairman of the meeting, but by no one else. The day after the meeting the debtors gave up possession of their assets to the persons named in the resolution as trustees, and those persons carried on the business for a few weeks, and proceeded to collect the book debts. A draft deed of assignment was prepared in accordance with the resolution, but it was never executed, the other creditors not having assented to the arrangement embodied in the resolution:—Held, that, inasmuch as all the creditors did not come in and assent to the arrangement, there was no binding agreement between the debtors and their creditors, and that, consequently, a creditor who was present at the meeting, even if he had assented to the resolution, which appeared to be doubtful, was entitled to issue a debtor's summons for his debt. *Ib.*

7. The sufficiency of the affidavit of debt may be disputed at the time of showing cause against the adjudication, although no objection to it was taken at the return of the summons. *Anon.*, 1 Bank. & Ins. R. 192. [301 (10).

8. Under a trader debtor summons under the Bankruptcy Act 1849, the commissioners can inquire whether the person summoned is a "trader" subject to bankruptcy. *Anon.*, 1 Fonb. N. R. 251. [301 (10).

A coal-owner is not such a trader. *Ib.*

9. Proceedings on a debtor's summons, pending the trial of an action for the debt, will not necessarily be stayed without security, though the alleged debtor is solvent, and there is a *bonâ fide* dispute as to the debt. The probability of success in the action is one element to be considered. *Exp. Sewell* (13 L. R., Ch. D., 266; 49 L. J., Bky., 15; 28 W. R. 286) explained. *Exp. Jacobson, Re Pincoffs*, 22 L. R., Ch. D., 312; 52 L. J., Ch., 561; 48 L. T. 197; 31 W. R. 554. [303 (8).

10. Where the proceedings under a debtor's summons are stayed pending an action to try the validity of an alleged debt, and in the opinion of the Court there is more than a reasonable probability that the alleged debtor has a good defence to the action, the Court will not require the debtor to give security. *Exp. & Re Smith*, 48 L. T. 320. [303 (8).

11. A trader who, on being served with a trader debtor summons, has appeared and admitted the debt, cannot, within the seven days limited by the 81st section of the Bankruptcy Act 1849, defeat the creditor's proceedings by obtaining an order for protection from process under the arrangement clauses. The creditor, however, must prosecute his proceedings with due diligence; and, *semble*, an unexplained delay of eighteen days from the expiration of the seven days to the filing the petition for adjudication, would be a bar to his proceeding to adjudication. *Exp. Walker, Re Haywood*, 2 Bank. & Ins. R. 145. [304 (4).

12. A trader debtor summons, taken out previously to the registration of a deed of

composition, executed under s. 192 of the Bankruptcy Act 1861, allowed, notwithstanding that it is made returnable after the registration of such deed. *Re* ——, 2 N. R. 17. [304 (4).

1. Where the bankrupt was described, in the petition for adjudication, as of two places, in neither of which he carried on the business alleged, and the place where he did carry on business was not adverted to, and it did not appear that any one had been misled, or that the misdescription was made with any fraudulent intent:—Held, a sufficient description within the 89th section of the Bankruptcy Act 1849. *Exp. Adams, Re Westbrook, Exp. Adams, Re Kirk*, 1 Bank. & Ins. R. 127. [305 (6).

2. The Court will require some evidence as to where debts were contracted, before making an order to allow a debtor to file his petition in London under the provisions of s. 94 of the Bankruptcy Act 1861. *Re Walker*, 1 N. R. 355. [309 (15).

3. Where, on the *ex parte* application of a creditor, an order for the transfer of a petition for adjudication, and the proceedings thereunder, from a country District Court to the London District Court, was made by one of the Registrars as deputy for one of the London Commissioners during the absence of such Commissioner, and also of the Senior Commissioner; *quære*, whether in the absence of circumstances showing urgency, such an order would be sustained if questioned without delay, and before any steps are taken under it. *Exp. Bilson, Re Steele*, 2 Bank. & Ins. R. 113. [311 (1).

4. The Court will order the transfer of a petition for adjudication in bankruptcy, and the proceedings thereunder, to a district Court, where there are grounds for believing that the proceedings were instituted by the bankrupt in the London Court, with an intent to elude his creditors. *Re Barnard*, 1 N. R. 231. [311 (4).

5. The Court will not order the transfer of proceedings in bankruptcy to a district Court merely on the ground that such a transfer might be for the convenience of, and is desired by, a large majority in number and value of creditors. Any such application ought to be made by petition, on the part of the creditors. *Re Pixey*, 1 N. R. 355. [311 (4).

6. Section 94 of the Bankruptcy Act 1861, is not a general, but a special provision, applicable to the case of the debtor petitioning against himself. *Exp. Harrison*, 1 N. R. 442. [312 (3).

7. Action for maliciously procuring evidence against the plaintiff whereby he was imprisoned for sixteen months by order of Commissioner of Insolvent Court:—Held, that such order is the act of the Court, and therefore the plaintiff cannot maintain his action six years after the date of such order for imprisonment. *Violet* v. *Simpson*, 6 W. R. 12; 27 L. J., Q. B., 138; 21 Jur. 1217; 30 L. T. 114. [313 (2).

8. A. sued B., a trader, on a bill of exchange, and also took out a summons in bankruptcy against him in respect of the same debt. On application a judge at chambers stayed proceedings on B.'s paying the debt and costs. B. refused to pay the costs of the summons in bankruptcy, and obtained an order of a judge at chambers on A. to deliver up the bill of exchange:—Held, that the order was right. *Corns* v. *Taylor*, 3 W. R. 14; 10 Exch. 441; 18 Jur. 963. [313 (6).

9. A petitioning creditor did not proceed with the adjudication within three days. Another creditor sought to proceed with the adjudication, and proved his debt, etc., but did not attend the Court, having obtained an order, under rule 12, dispensing with his personal attendance. The original petitioner subsequently filed an affidavit of debt, but did not attend the Court, or obtain an order under rule 12. His affidavit was ordered to be taken off the file. *Quære*, can a petitioning creditor proceed with the adjudication after three days, not having obtained an extension of time. *Re Bridges*, 2 Bank. & Ins. R. 85. [314 (10).

10. A second petition against an uncertificated bankrupt is not absolutely void at law. *Exp. & Re Parkes*, 1 Bank. & Ins. R. 113. [320 (8).

Prior Scotch Sequestration—Jurisdiction to make Adjudication.] 11. Though the Court has jurisdiction to adjudge bankrupt a debtor against whom there is existing a prior unclosed Scotch sequestration in which he has not obtained a discharge, the Court has a discretion in the matter, and it will decline to make an adjudication if it does not appear that the debtor has any assets in England, or any debts contracted since the commencement of the sequestration. *Exp. & Re Robinson*, 22 L. R., Ch. D., 816; 48 L. T. 501; 31 W. R. 553. [320 (17).

Per Jessel, M. R.:—*Primâ facie* the existence of a Scotch sequestration is a reason for declining to make an injunction. *Ib.*

12. Where the notice to show cause against the adjudication on the part of the bankrupt was served within the seven days allowed by the 104th section of the Bankruptcy Law Consolidation Act, and on the day appointed for the hearing the case went off upon a technical objection to the form of the notice:—Held, on the authority of *Exp. Castelli* (1 De G. M. & G. 437; 21 L. J., N. S., Bky., 5) that the bankrupt was in time within the meaning of this section; and, on application, the time for showing cause was enlarged, to allow the bankrupt to amend his notice. *Exp. & Re Harding*, 1 Bank. & Ins. R. 151. [320 (19).

13. The notice to dispute an adjudication must specify distinctly the grounds upon which it is intended to proceed; and it is not sufficient in such notice to state generally the bankrupt's intention to show cause, etc., notwithstanding he intends to dispute the adjudication on every point. *Exp. & Re Harding*, 1 Bank. & Ins. R. 151. [322 (4).

14. Practice as to staying publication of the adjudication of bankruptcy in the *Gazette*, where question pending before Court of Common Law. *Exp. & Re Mostyn*, 1 W. R. 375; 17 Jur. 655. [324 (15).

15. The Court will remove the proceedings under a country fiat to London, if it is for the general benefit of the creditors. *Exp. Sham*, 1 W. R. 205. [329 (6).

16. Order necessary to enable same party to issue a new fiat, where, from mistake in

former, it had not been prosecuted in time. *Re Edwards*, 1 Dea. & Ch. 531. [330 (9)

1. A trustee took the benefit of the Insolvent Debtors Act:—Held, that this was a good ground for his removal. *Harris* v. *Harris*, 29 Beav. 107; 7 Jur., N. S., 955; 9 W. R. 444. [334 (3).

2. A devisee in trust of real estate having become bankrupt, and having absconded, and the will creating the trust containing no power for the appointment of a new trustee, on a petition presented in a suit which had been instituted for the administration of the testator's estate, and entitled in the suit, and in the matter of the Bankrupt Law Consolidation Act 1849, and the Trustee Act 1850, a new trustee appointed in the place of the bankrupt, and the assignees directed to convey to him. *Breed* v. *Caffall*, 3 W. R. 238.

See also p. 928, par. (1), *et seqq.*

[334 (3).

3. Where all the creditors who have proved under the bankruptcy except one, on whose behalf, the creditor being since dead, there is no one able to give a sufficient legal discharge, have been paid in full, and have signed the petition to supersede the fiat, the petition will be superseded accordingly, notwithstanding the bankrupt is an outlaw for not surrendering at his last examination, on payment of the debt due to the deceased creditor into court. *Exp. & Re Barley*, 1 Bank. & Ins. R. 117. [340 (22).

4. Application to annul bankruptcy before advertisement must be made strictly in accordance with s. 110 of the Bankruptcy Act of 1861. *Anon.*, 2 N. R. 389. [341 (7).

5. Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the Commissioner within the period prescribed by s. 104 of the Bankruptcy Act 1849, "or commence an action, suit, or other proceeding to dispute or annul the fiat," etc., within the period prescribed by s. 233 of the same statute, the Court will not annul the adjudication on a petition of the bankrupt, notwithstanding it appears that at the time of such adjudication the bankrupt was a minor under twenty years of age. *Exp. & Re West*, 1 Bank. & Ins. R. 20, 58. [344 (2).

Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the Commissioner within the period prescribed by s. 104, a petition to annul such adjudication may be presented within the period prescribed by s. 233; but such last-mentioned petition should be presented to the Lord Chancellor, and not to the Commissioner. *Ib.*

6. *Semble*, the Court of Bankruptcy has no jurisdiction to annul with consent of creditors, save under ss. 130, 131 of the Bankrupt Law Consolidation Act 1849. *Exp. Harris*, 1 F. N. E. 262. [346 (5).

Where the bankrupt may have to be prosecuted for offences under the Bankrupt Law, the Court will not so annul, even if there be jurisdiction. *Ib.*

7. Whether a trader under sentence of outlawry, and whose property is therefore forfeited to the Crown, has available assets sufficient to support an adjudication of bankruptcy on his own petition under the 20th section of the Bankruptcy Act 1849. *Quære. Exp. Adams, Re Hawkes*, 6 W. R. 694; 1 L. T., N. S., 243. [351 (3).

8. The 6 Geo. 4, c. 16, s. 18, is applicable to a case not only of deficiency in the amount, but to any original defect in the nature of the petitioning creditor's debt. *Exp. Hall*, Mont. & M. 39. S. P. *Exp. Robinson*, 7 L. J., Ch., 75. [352 (7).

9. Fraud, if clearly proved, is a sufficient ground for annulling an adjudication in bankruptcy; but mere conceit is insufficient since the passing of the Bankruptcy Act of 1849. *Exp. Adams, Re Westbrook, Exp. Adams, Re Kirk*, 1 Bank. & Ins. R. 127. [357 (19).

So also, absence of assets is not *per se* sufficient. *Ib.*

10. A substantially correct description of the trade carried on by a bankrupt, in the adjudication of bankruptcy, is sufficient. *Exp. Hennett*, 1 W. R. 278; 1 Eq. Rep. 182. [363 (14).

11. Petition for adjudication by a bankrupt, who in such petition had described himself as of a different place from that of which he was described in a bill of sale executed by him shortly before his bankruptcy, dismissed. *Re Sanders*, 3 N. R. 196. [361 (6).

12. Adjudication of bankruptcy made on a judgment, valid at the time of commencement of proceedings in bankruptcy, will not be annulled without payment by bankrupt of costs in bankruptcy, although such judgment has in the meantime been satisfied. *Anon.*, 2 N. R. 516. [370 (8).

13. Where, in a petition to annul, fraud and collusion are charged, and the charge is wholly unsupported by affidavit, and not substantiated by the evidence, and the adjudication is upheld, the petitioner will be ordered to pay the costs. *Exp. Adams, Re Westbrook, Exp. Adams, Re Kirk*, 1 Bank. & Ins. R. 127. [371 (12).

14. A mortgagee of chattels belonging to a bankrupt, which had been sold by the assignees as being in the reputed ownership of the bankrupt, applied to annul the adjudication, the time having elapsed after which the bankrupt himself could not apply for that purpose, and the Commissioner granted the application, on the ground that the bankrupt was not a trader within the meaning of the Bankrupt Laws. The Court of Appeal, being satisfied on the evidence that the application to annul was made at the instigation and for the benefit of the bankrupt, reversed the decision of the Commissioner, and restored the adjudication, without deciding whether the bankrupt was or was not a trader. *Exp. Emery, Re Bradbury*, 1 Bank. & Ins. R. 265. [373 (2).

15. The Court will not, unless under very special circumstances, appoint a female to the office of creditor's assignee. *Re Kent*, 2 Bank. & Ins. R. 77. [374 (11).

16. The Commissioner will not interfere with the choice of the major part in value of the creditors, unless they choose an improper person; but a trustee who has to account to the bankrupt's estate is not a proper person to be appointed assignee, and if objected to, such appointment will not be

sanctioned by the Commissioner. *Exp. Bates, Re Meadows*, 1 Bank. & Ins. R. 285. [374 (11).

1. On a petition to remove an assignee for entering into an agreement with the bankrupt to compromise his debt, it being shown by the respondent that he acted under a *bonâ fide* belief that all the other creditors were to be equally compounded with, the petition was dismissed, with costs. *Exp. Davison, Re Beresford*, 2 Bank. & Ins. R. 89. [380 (2).

2. The trustee of an estate in bankruptcy had a large claim against an insolvent estate. Before the claim was admitted he joined in the purchase of assets of the latter estate:—Held, that the sale must be set aside. *Boswell* v. *Coaks*, 27 L. R., Ch. D., 424; 51 L. T. 242. Reversing 23 L. R., Ch. D, 302; 52 L. J., Ch., 465; 48 L. T. 929; 31 W. R. 540. [384 (4).

P. 384, after par. (14) add

3. See *Exp. Cocks, Re Poole*, 21 L. R., Ch. D., 397; 52 L. J., Ch., 63; 47 L. T. 496; 31 W. R. 105,—p. 990 (4).

4. The Court will order the apprehension of an assignee, who, having been summoned by the Court to answer matters touching a bankrupt's estate, fails to appear. *Exp. Haynes, Re Brown*, 1 N. R. 308. [387 (1).

5. The 6 Geo. 4, c. 16, s. 104, directing payment of 20 per cent. by assignees retaining part of the estate in their hands, means 20 per cent. per annum. *Exp. Cunliffe*, 1 De G. 408. [388 (14).

6. Where assignees in bankruptcy die before accounting, and leave only real estate, the creditors of bankrupt have a lien on it *Primrose* v. *Bromley*, 1 Atk. 89. [388 (8).

7. The costs of managers unnecessarily employed by assignees in bankruptcy will not be allowed *Exp. Roberts, Re Holden*, 3 N. R. 230. [391 (12).

8. An official assignee under the Court of Bankruptcy received certain sums of money on account of bankrupt's estates, and paid them into a general account standing in his own name at the banker's, where they were mixed with his own moneys:—Held, in a suit for the administration of his estate, that the balance at the banker's was not "earmarked" for the benefit of the bankrupt's estate, but they must come in *pari passu* with the other creditors. *Pennell* v. *Deffell*, 1 W. R. 239; 1 Eq. Rep. 579; 4 De G. M. & G. 372; 18 Jur. 273; 23 L. J., Ch., 115. [395 (11).

9. Assignees in bankruptcy are entitled to all such fixtures, set up for purposes of trade, as come within the principle of *Hellawell* v. *Eastwood* (6 Exch. Rep. 295), and which the trader might remove. Stock-in-trade in the possession of the bankrupt at the time of the bankruptcy passes to the assignees. *Exp. Humphreys, Re Gibbs*, 1 Bank. & Ins. R. 68. [417 (1).

10. Mortgage for a term of years of a brewery, tap, malt lofts, and premises, together with plant, fixtures, and machinery, and assignment to mortgagee of plant, goods, utensils, implements, and things on or about the premises. Proviso for redemption on payment of the mortgage debt on a day certain, or at such earlier day as the mortgagee should appoint; and that until default, the mortgagor should retain possession of the premises, etc. The mortgagor remained in possession of the premises, etc., up to his bankruptcy:—Held (on submission to the jurisdiction), that certain plant and fixtures enumerated below of a movable nature passed to the assignees. *Exp. Langton, Re Clarkson*, 1 Bank. & Ins. R. 241. [417 (10).

11. Where consignors claim cargo in the possession of the assignees of the consignee (who became bankrupt during the voyage) in respect of an alleged stoppage *in transitu*, the time and manner of the stoppage must be shown. A statement in the petition that the stoppage took place, verified by an affidavit in general terms that the contents of the petition are true, is not sufficient. *Exp. Andersen, Re Manico*, 2 Bank. & Ins. R. 66 [421 (2).

12. L., being entitled to a reversionary interest, dies, leaving a husband surviving, who cannot reduce it into possession, it being reversionary. The husband becomes bankrupt and dies, and administration is taken out to husband and wife, and the reversionary interest falls in Upon bill filed by assignee of husband against administrator of husband and wife:—Held, that the husband was entitled to the chose in action as if he had bought a reversionary interest of a stranger The assignees, therefore, were absolutely entitled. That the 12th and 13th Vict. was not retrospective, and a notice of the bankruptcy, being disputed, could only be effectual where there was a right to dispute, a proper notice conferring no right. The plaintiffs were therefore entitled to a decree. *Drew* v. *Long*, 1 W. R. 207, 318; 17 Jur. 173; 1 Eq. Rep. 58. [423 (3).

13. A testator gave the residue of his property to his children, sons and daughters, in a specified manner; and his widow left all her property to her four daughters as tenants in common, and died. One daughter married, her husband became bankrupt, and she died; and another daughter died unmarried, whereby those two shares became undisposed of, and formed part of the testator's estate; and the bankruptcy intervening between the death of the widow and the death of the daughter, wife of the bankrupt, upon the question whether such share belonged to the bankrupt or to the assignees:—Held, it belonged to the assignees. *Gompertz* v. *Hollander*, 2 W. R. 695; 2 Eq. Rep. 1280. [423 (3).

14. A landlord who has levied a distress for rent prior to any act of bankruptcy on the part of the tenant, is entitled to retain six years' unpaid rent out of the proceeds of the sale of the goods distrained, although the tenant was adjudicated a bankrupt before the sale. *Exp. Lougher*, 1 W. R. 93. [429 (11).

P. 430, after par. (4) add references—

Affirmed 22 L. R., Ch. D., 410; 52 L. J., Ch., 570; 48 L. T. 303; 31 W. R. 278.

15. An eleemosynary allowance made by the bankrupt's family, and paid into the hands of his wife, does not come within the terms of rule 3 of the 159th section of the Bankruptcy Act, 1861. *Anon.*, 1 N. R. 181. [441 (2).

16. An undischarged bankrupt died intestate within three years after the close of his bankruptcy, having in the interval acquired fresh property and contracted fresh debts. Only a small dividend had been paid in the bankruptcy, and the bankrupt had not, after

the close of the bankruptcy, made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer the bankrupt's estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, and to leave a surplus. This surplus was claimed by the old creditors:—Held, that the administratrix was entitled to the surplus, and that the old creditors had no right to it. *Re Smith, Green* v. *Smith* (No. 2), 24 L. R., Ch. D., 672; 52 L. J., Ch., 921; 49 L. T. 297. [448 (4).

The creditors of an undischarged bankrupt, under the Act of 1869, have no rights against property acquired by him after the close of the bankruptcy, except such rights as are given to them by s. 54, and those rights cannot be enforced after the death of the bankrupt. Section 12 applies to property acquired by an undischarged bankrupt after the close of the bankruptcy, as well as to property divisible among the creditors in the bankruptcy. *Exp. Kelly, Re Simmons* (7 L. R., Ch. D., 161), explained. *Ib.*

1. Where an uncertificated bankrupt has been suffered to trade without interruption or claim on the part of the assignees of the first bankruptcy, they are not entitled to any after-acquired property in the bankrupt's possession at the time of the second bankruptcy, as against the assignees under that bankruptcy. *Exp. & Re Parkes*, 1 Bank. & Ins. R. 113. [451 (1).

And, *semble*, the ignorance of such trading on the part of the assignees of the first bankruptcy, without evidence of diligence or activity on their parts to enforce their rights, will not alter the case. *Ib.*

2. Traders executed an assignment of all their effects in trust for their creditors, and afterwards sued out a fiat against themselves, but did not apply for adjudication. Two creditors who could have sued out a fiat against the bankrupts, and who could, under it, have impeached the deed, applied for and obtained an adjudication:—Held, that the assignees could successfully impeach the deed. *Exp. Jackson*, 1 De G. 609; 12 Jur. 770; 17 L. J., Bky., 19. [454 (2).

3. Whether or not the assignees of a bankrupt can set aside a deed of assignment of his estate and effects as fraudulent and void against creditors without showing that there continues to exist a debt provable in the bankruptcy which existed at the time of the execution of the deed. *Quære. Exp. & Re Taylor*, 5 De G. M. & G. 392. [454 (2).

4. An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will, when completed, constitute an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away. The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, *i.e.*, not until after the money had left the agent's hands. *Exp. Helder, Re Lewis*, 24 L. R., Ch. D., 339; 53 L. J., Ch., 109; 49 L. T. 612. [454 (2).

5. The Court will not take a trust deed out of the possession of the bankrupt's trustees. *Exp. Holder*, 3 Dea. & Ch. 276; 2 L. J., N. S., Bky., 64. [454 (7).

6. Lord Manners would not on petition make a person, who had taken from bankrupt an assignment, which he admitted before the commissioners was in his possession, and that at the time of taking it he knew their situation, produce it to the assignees to take advantage of it. No costs. *Re Usher*, 2 Moll. 444. [455 (3).

7. Application for an order to deliver papers, etc., under the 65th section of the Bankruptcy Act 1861, must be made within a reasonable time, and it is in the discretion of the Court to grant or refuse such application. *Re Woodley*, 2 N. R. 17. [455 (3).

8. Where legal interest in copyhold is in one, and equitable interest is in another, Court can order, in bankruptcy, trustee to surrender without consent of the *cestui que trust*. *Exp. Butler*, 1 Atk. 215. [455 (6).

9. The lessee of certain premises having agreed prior to the filing of a liquidation petition to assign the lease to a third party, the trustee in the liquidation will not be permitted to execute a disclaimer of the lease except upon the terms of executing such assignment, but upon executing the assignment he will be entitled to an indemnity against any liability which he may incur thereby. *Exp. Edmonds, Re Tipping*, 48 L. T. 77. [460 (3).

10. The assignee of a lease became bankrupt, and his trustee disclaimed under the 23rd section of the Bankruptcy Act 1869. In an action brought by the lessor against the original lessee upon the covenant in his lease, for rent accrued since the commencement of the bankruptcy.—Held, that the disclaimer by the trustee of the assignee did not affect the rights and liabilities of the lessor and the original lessee, and that the lessee was still liable under his covenant. *East & West India Dock Co.* v. *Hill*, 22 L. R., Ch. D., 14; 52 L. J., Ch., 44; 47 L. T. 270; 31 W. R. 55. [464 (3).

11. Although a trustee in bankruptcy, who has taken actual possession of leasehold property of the bankrupt, receives notice from the landlord to disclaim the lease under the Bankruptcy Act 1869 (32 & 33 Vict., c. 71), but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, and the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment. *Hopkinson* v. *Lovering*, 11 L. R., Q. B. D., 92; 52 L. J., Q. B., 391. [466 (4).

12. The trustee in a bankruptcy may disclaim a lease of the bankrupt even though the lease has been determined by effluxion of time or by forfeiture between the appointment of the trustee and the execution of the disclaimer. And in such a case the effect of the disclaimer, when executed, is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which

were to come into operation at the expiration or sooner determination of the term. *Exp. Paterson, Re Throckmorton* (11 L. R., Ch. D., 908) followed and approved. *Exp. Dyke, Re Morrish*, 22 L. R., Ch. D., 410; 52 L. J., Ch., 570; 48 L. T. 303; 31 W. R. 278. Affirming 47 L. T. 26; 30 W. R. 952. [468 (7).

Semble, that the trustee may also disclaim a lease which has been determined before his appointment. *Ib.*

1. On giving leave, under r. 28 of the Bankruptcy Rules 1871, to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the Court will not order the trustee to pay the landlord any compensation for his use and occupation of the demised property, except under special circumstances, one instance being where the trustee's occupation has been beneficial to the bankrupt's estate. *Exp. Isherwood, Re Knight*, 22 L. R., Ch. D., 384; 52 L. J., Ch., 370; 48 L. T. 398; 31 W. R. 442. [468 (9).

Rule 28 does not mean that in every case in which leave to disclaim a lease is given, the lessor is to be placed in the same position as regards the interval before execution of the disclaimer as if there had been no disclaimer. *Exp. Ladbury, Re Turner* (17 L. R., Ch. D., 532; 50 L. J., Ch., 838; 45 L. T. 5), explained and distinguished. *Ib.*

Notwithstanding the insertion of an attornment clause in a mortgage deed, the real relation between the parties is that, not of landlord and tenant, but of mortgagee and mortgagor, and this fact, as well as the nature of the rent reserved by the clause, must be taken into account in considering whether, on giving leave to the trustee in the bankruptcy of the mortgagor to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mortgagee. *Ib.*

2. When the trustee in a bankruptcy applies for leave to disclaim a lease of the bankrupt, the Court will not order any compensation to be paid to the landlord unless the trustee has kept him out of possession of the property, and his occupation has resulted in a benefit to the bankrupt's estate. *Exp. Izard, Re Bushell* (No. 2), 23 L. R., Ch. D., 115; 48 L. T. 502. [468 (9).

The principle on which the Court exercises its discretion under r. 28 is that the trustee ought not to be allowed to increase the bankrupt's estate at the expense of the landlord. *Exp. Isherwood, Re Knight* (22 L. R., Ch. D., 384) explained. *Ib.*

3. In determining whether, on giving leave to the trustee in a bankruptcy to disclaim a lease of the bankrupt, the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the Court will have regard not merely to the question whether the occupation has actually produced a profit to the bankrupt's estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit. *Exp. Arnal, Re Witton*, 24 L. R., Ch. D., 26; 49 L. T. 221; 53 L. J., Ch., 134. [468 (9).

The rule as laid down by Cotton, L. J., in *Exp. Isherwood, Re Knight* (22 L. R., Ch. D., 484), adopted in preference to that expressed by Jessel, M. R., in *Exp. Izard, Re Bushell* (23 L. R., Ch. D., 115). *Ib.*

The Court ordered compensation to be paid by the trustee in a bankruptcy as a condition of giving him leave to disclaim the lease of the bankrupt's place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of the bankrupt's goods under a distress for rent, and the landlord had been allowed to place bills on the premises stating that they were to be let, and that application for that purpose was to be made to him. *Ib.*

The imposing of conditions on the trustee is a matter of judicial discretion, and the Court of Appeal will not readily interfere with the exercise of discretion by the judge of first instance. *Ib.*

4. The discretion of the county court judge in giving leave to disclaim is not properly the subject of appeal. *Exp. Edmonds, Re Tipping*, 48 L. T. 77. [469 (2).

5. Though debts, in general, were within the 21 Jac. 1, c. 19. s. 11, mortgages of real estate, whether original or by assignment, and though also secured by bond or covenant, were not. *Jones* v. *Gibbons*, 9 Ves. 407. [471 (8).

6. When a trader is in possession at his place of business of articles not in their nature connected with his business, and the trustee in his bankruptcy claims the articles on the ground that the bankrupt was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the articles being that they are not connected with the business. *Exp. Lovering, Re Murrell*, 24 L. R., Ch. D., 31; 52 L. J., Ch., 951; 49 L. T. 242; 32 W. R. 217. [475 (4).

7. Where goods are in the order and disposition of a bankrupt at the time of the act of bankruptcy, but after that time come into the owner's possession, the person in possession may maintain trover against another converting the goods to his own use, relying upon a valid sale of the goods to him before the act of bankruptcy, and such person cannot by way of defence set up the title of the assignees under whom he does not claim. *Jefferies* v. *South Western Railway Co.*, 4 W. R. 201; 25 L. J., Q. B., 107; 2 Jur., N. S., 230; 26 L. T. 214. [475 (9).

8. M., in consideration of money lent and advanced to W., by deed covenanted with W., that if default were made by him in payment, W. should be at liberty to enter and take possession of the premises and effects of M., and to sell the same, and apply the purchase money in payment of expenses, and of the debt due to him, and account to M. for the surplus. M. made default in payment; and W., by his agent, entered on and took possession of the premises and effects, but did not sell. A few days after W. had taken possession, etc., M. was adjudicated a bankrupt:—Held, that the premises and effects passed to the assignees. *Exp. Wayman, Re Mellor*, 1 Bank. & Ins. R. 213. [476 (4).

9. *Semble*, this Court ought not to make an order for sale under the 125th section of the

Bankrupt Law Consolidation Act 1849, upon an *ex parte* application; and that the Court should not entertain an *ex parte* application for the order. *Exp. & Re Plimmer*, 1 Bank. & Ins. R. 83. [478 (9).

1. The order for sale by the Court of Bankruptcy of goods in the order and disposition of the bankrupt, with the consent of the true owner, need not state who the true owner was. *Freshney* v. *Wells*, 1 H. & N. 653; 26 L. J., Exch., 129. [478 (9).

2. Where an assignee of furniture, etc., under a bill of sale allowed the goods to remain in the possession of the bankrupt, until after a petition for adjudication had been filed in this Court:—Held, the assignees were entitled to an order to sell the same for the benefit of the creditors under s. 125 of the Bankrupt Law Consolidation Act 1849, as being "in the order and disposition of the bankrupt, with the consent and permission of the true owner." *Exp. & Re Brock*, 1 Bank. & Ins. R. 102. [479 (6).

3. Goods assigned by a trader, with a condition for redemption on payment of a debt on demand and a stipulation that he shall retain possession of them until default, are in his order and disposition, with the consent of the true owner, within the meaning of the bankrupt laws. And where the goods before such assignment had been assigned to another party, the assignees in bankruptcy, in an action by the party claiming under the second assignment, may set up that the goods were in the order and disposition of the bankrupt with the consent of the first assignee. *Freshney* v. *Wells*, 1 H. & N. 653; 26 L. J., Exch., 129. [480 (6).

4. A trustee for sale of a testator's estates sold part of them, and paid the proceeds into court. A party entitled to a share of the testator's property assigned his interest to S. by way of mortgage, and S. gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold, and the proceeds paid into court under the decree in the suit. Subsequently the assignor took the benefit of the Insolvent Debtors Act:—Held, that the notice given to the trustee was sufficient to take the assigned share out of the order and disposition of the assignor. *Matthews* v. *Gabb*, 15 Sim. 51; 9 Jur. 619. [485 (9).

5. The fact that it is the custom of furniture dealers to let out furniture on a three years' hiring and purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house. *Exp. Brooks*, or *Exp. Pickering, Re Fowler*, 23 L. R., Ch. D., 261; 48 L. T. 453; 31 W. R. 833. Affirming 48 L. T. 32. [561 (5).

The furniture in the dwelling-house of a trader having been seized under an execution, a friend of his bought it from the sheriff at a valuation, and then verbally agreed that the debtor should continue in possession of it and use it as before, paying, by way of rent, interest at 5 per cent. per annum on the purchase money, until he should be able to repurchase it at the price given for it. This arrangement was carried out, and the debtor remained in possession of the furniture as before, until he filed a liquidation petition. He had not repurchased it. The trustee in the liquidation claimed it under the reputed ownership clause. It was admitted that there is a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture:—Held, that the trustee was entitled to the furniture. *Ib.*

6. On the 7th October 1874 B. mortgaged a policy effected on his own life with the L. Company to P., who on the 9th October 1874 gave notice of the mortgage to the insurance company. P., being indebted to the M. Bank on foot of a promissory note in which he joined for the accommodation of B., deposited the policy and mortgage deed with the bank on the 21st February 1878, but notice of the deposit was not given to the insurance company until July 1880. B. filed a petition for arrangement on the 12th September 1877, and under a resolution of the 12th March 1878, all his estates and effects were vested in the official assignees and a trustee, for the benefit of his creditors. P. also filed a petition for arrangement on the 13th June 1879, and under a resolution all his estates and effects were vested in the official assignees and a trustee, in trust for his creditors. On the 19th November 1879, P. and C., who were partners, were adjudicated bankrupts on a creditors' petition:—Held, that the policy of insurance was, at the date of the adjudication, in the order and disposition of P. with the consent of the true owners. *Re Power*, 11 L. R., Ir., 93. [501 (10).

7. Notice to an assurance office of a deposit of a life policy need not be in writing: a verbal notice is sufficient. The taking possession by the equitable mortgagee may be at any time before actual bankruptcy. *Exp. Tanner, Re Brock*, 1 Bank. & Ins. R. 156. [503 (10).

8. C. and S. carried on business in partnership under the style of C. & Co. C. afterwards retired from the firm with the knowledge of the joint creditors; the dissolution was advertised, and S. continued the business in his own name. He was afterwards adjudicated a bankrupt:—Held, that the partnership property was in the order and disposition of the bankrupt, and belonged to his separate estate. The petition of joint creditors to be at liberty to prove against the partnership property dismissed. *Exp. Fisher, Re Stewart*, 2 Bank. & Ins. R. 87. [508 (7).

9. Contract for the purchase of fifty shares in a mining company. Purchaser accepted bills of exchange for the amount of the purchase money. It ultimately turned out that the vendor only possessed nineteen shares. On the purchaser producing the transfer for fifty shares, the officer of the company refused to register on account of the discrepancy between the number of shares named in the transfer and the number standing in the company's books in the name of the vendor. The contract remained uncompleted at the time of the bankruptcy of the vendor. The purchaser satisfied the bills of exchange at maturity:—Held, that the nineteen shares were not in the order and disposition of the bankrupt. *Exp. Raymer, Re Hammersham*, 1 Bank. & Ins. R. 256. [510 (11).

10. The bankrupt, being the assignee of the

reversion of a sum of stock, in 1846 assigned to A., but no notice was given to the trustee of such assignment: the tenant for life died subsequent to the bankruptcy, which took place in March 1853:—Held, that the stock was goods and chattels within the meaning of sec. 125 of the Act of 1849, and that, at the time of the bankruptcy, it was in the order and disposition of the bankrupt as reputed owner thereof, with the consent of the true owner, and consequently passed to his assignees. *Exp. & Re Plimmer*, 1 Bank. & Ins. R. 83. [511 (6).

1. Messrs. S. & Co., auctioneers, having overdrawn their account at their bankers', Messrs. C. & Co, a short time before their bankruptcy, came to a parol understanding with them that the old account should be closed, and that a new account should be opened, which was to be kept sacred against the claims of C. & Co. for the balance due to them. S. & Co. were in the habit of drawing on the new account for general disbursements, and having received considerable sums from the proceeds of sales made on behalf of the petitioner and other customers, paid portions thereof into the new account:—Held, that the moneys included in the new account passed to the assignees. A sum received by S. & Co. after the bankruptcy, in respect of a sale for a customer, and paid to the official assignee, was ordered to be repaid to the customer. *Exp. Parsons, Re Shuttleworth*, 2 Bank. & Ins. R. 4. [521 (12).

2. A., some years ago, purchased an estate at an auction, upon conditions, and paid a deposit, but being dissatisfied with the title, he abandoned the contract. The auctioneer retained the deposit:—Held, on the bankruptcy of the vendor, that A.'s right to recover was against the auctioneer, and not against the assignees. *Semble*, the auctioneer was not justified in setting off the deposit received from A. as against a debt due to him from the bankrupt. *Exp. Bradshaw, Re Graves*, 1 Bank. & Ins. R. 180. [521 (12).

3. W. having secretly realised the greater part of his available property and effects, absconded with the proceeds. W. was subsequently adjudicated a bankrupt, and on the 4th October 1882 the plaintiff was appointed a trustee of the estate. On the 10th October W. entered into an agreement in an assumed name with F. for the purchase of certain house property, and paid to the defendant, as stakeholder under the agreement, a certain sum by way of deposit, which it was admitted formed part of the proceeds of the secret realisation. The agreement provided, *inter alia*, that the deposit money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase. W. was shortly afterwards arrested and convicted as an absconding bankrupt, and the purchase of the property was consequently never completed. It was admitted that both the defendant and F. had acted throughout *bonâ fide* in the ordinary course of business, and that the non-completion of the agreement was not caused by any default on the part of F. The plaintiff having claimed to have the deposit money paid over for the benefit of the bankrupt's estate:—Held, that, inasmuch as it was of the essence of the contract that the deposit money should be forfeited if the purchase was not completed, such money belonged to F., and could not be followed by the trustee of the bankrupt's estate. *Collins* v. *Stimson*, 11 L. R., Q. B. D., 142; 52 L. J., Q. B., 440; 48 L. T. 828. [521 (12).

4. T. holds shares in a trading company in trust for W., who, by his will, appoints T. his residuary legatee. T. continues in possession of the shares, and becomes bankrupt. The shares are not within the meaning of the Bankrupt Act, 11 & 12 Geo. 3, c. 8, s. 9, inasmuch as T. is himself the "true owner and proprietor thereof," subject, however, to the debts and legacies of W. T. *Joy* v. *Campbell*, 1 Sch. & Lef. 328. And see, as to this case, 3 Bli. N. S. 111 [522 (1).

5. An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy. *Brice* v. *Bannister* (3 L. R., Q. B. D., 569) distinguished. *Exp. Nichols, Re Jones*, 22 L. R., Ch. D., 782; 52 L. J., Ch, 635; 48 L. T. 492; 31 W. R. 661. [526 (2).

6. An assignment with notice of an act of bankruptcy, is not protected under the old statutes after the lapse of five years. *Mountford* v. *Ponten*, Mont. 79; 7 L. J., Ch., 156. [529 (8).

P. 531, after par. (1), add references 52 L. J., Ch., 204; 47 L. T. 721; 31 W. R. 185.

7. A conveyance or payment made to a creditor by a person in insolvent circumstances, upon such person's own motion, without any pressure or threat on the part of the creditor, or made colourably with a view to divert the property from other creditors, or made with a view to give a preference to a particular creditor, within three months before the imprisonment of the insolvent, is a voluntary conveyance or payment within the meaning of the 7 Geo. 4, c. 37, s. 32. *Stuckey* v. *Drewe*, 2 Myl. & K. 190. [532 (10).

8. Act of bankruptcy by conveyance (by way of assignment for benefit of creditors) of all the trader's estate on the 8th March; adjudication on the 10th; between the 8th and 10th Messrs. D., creditors of the bankrupt, obtained goods, which they applied in part payment of their debt. On the application of the assignees (who were also trustees under the assignment) to have the value of the goods repaid to the estate by Messrs. D.:—Held, that at the time of the delivery of the goods to Messrs. D. the bankrupt was the agent of the trustees, and that the transaction between Messrs. D. and the bankrupt was *bonâ fide*, and protected under the Bankruptcy Act 1849, s. 133. *Exp. & Re Quick*, 1 Bank. & Ins. R. 277. [537 (10).

9. Previous to the adjudication, W. proceeded against T. for the recovery of a debt both at law and in bankruptcy by trader debtor summons, simultaneously, and was requested by T. to withdraw the proceedings in bankruptcy, T. promising to give security for payment of the debt out of the surplus which he expected would come to him out of certain property belonging to him, which he had mortgaged, and which was about to be sold. Arrangements were made for carrying this proposition into effect, but before they

could be concluded, the time for paying and compounding under the Bankruptcy Act 1849, s. 80, had elapsed, and T. filed a declaration of insolvency under s. 70, on which he was adjudicated a bankrupt. W. claimed a lien on the mortgaged property in respect of the agreement:—Held, that W. had notice that T. had committed an act of bankruptcy in respect of the trader debtor summons, and that the lien could not be sustained. *Exp. Weston, Re Taylor*, 1 Bank. & Ins R. 240. [542 (1).

1 M., a sculptor, made designs and casts, which he desired to be executed in gutta-percha, prior to having them coated with metal. For that purpose he delivered them to T, who found the materials and labour. The work was carried on in a portion of the bankrupt's premises, divided from that used by himself. The figures were cast in gutta-percha, and were worked on by men employed by T. and by M. at the same time:—Held, that T. had a lien on those which were unfinished at the time of the bankruptcy. *Exp. Thorne, Re Monti*, 2 Bank. & Ins. R. 54. [542 (1).

2. W. had a lien on a chattel belonging to A. for an amount exceeding the value of the chattel. A. became bankrupt, and his assignees in bankruptcy claimed the property in the chattel:—Held, that the property must be secured to W., the assignees refusing to redeem the lien. *Exp. Watts, Re Attwater*, 1 N. R. 170. [542 (1).

3. Section 87 of the Bankruptcy Act 1869, (32 & 33 Vict., c. 71), enacts that, where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l*., and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader (followed by an adjudication), shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustees. On the 29th December 1882 an execution was issued at the suit of the plaintiff against the defendants, traders, upon a judgment for 87*l*. 19*s*. 4*d*. debt and costs, and lodged with the sheriff, who on the same day seized certain goods of the defendants and sold them on the 10th January 1883, realising by that sale 41*l*. 12*s*. 7*d*. On the 12th January other goods of the defendants which were upon other premises occupied by them were sold under the *fi. fa.*, and realised 74*l*. 10*s*. 10*d*. On the 24th January 1883, a petition in bankruptcy was presented against the defendants, under which they were adjudicated bankrupts on the 19th February. The sheriff had notice of the petition on the 25th January:—Held, that the trustee was entitled to the whole proceeds, as the "sale" contemplated by s. 87 of the Bankruptcy Act 1869 was not completed until the 12th January, within fourteen days from the receipt by the sheriff of notice of the filing of the petition. *Jones* v. *Parcell*, 11 L. R., Q. B. D., 430; 52 L. J., Q. B., 672; 49 L. T. 197. [548 (4).

4. A warrant of attorney to secure an antecedent debt, given *bonâ fide* within two months of the bankruptcy, and at a time when the bankrupt was unable to meet his engagements, and executed by levy and sale previous to the bankruptcy, is void, notwithstanding s. 133 of the Bankruptcy Act 1849. *Exp. Bentall, Re May*, 2 Bank. & Ins. R. 82. [558 (7).

5. A trader is not justified in providing by a judge's order for payment of a creditor, whose debt is not yet due, whereby his whole estate is liable to be swept away from his other creditors; notwithstanding the judge's order is dated several months before his bankruptcy. *Re Barnett*, 1 Bank. & Ins. R. 118. [560 (3).

6. The sheriff is not entitled, by virtue of 24 & 25 Vict., c. 134 (Bankruptcy Act 1861), to deduct from the amount produced by the levy the money he has expended in advertising a sale of the execution debtor's effects. *Braithwaite* v. *Marriott*, 1 N. R. 105. [560 (4).

7. A mortgagee is entitled, as against the assignees of a bankrupt, to the proceeds of a sale of mortgaged premises, into the possession of which he has entered several days prior to the bankruptcy. *Exp. Allum, Re Kerslake*, 1 Bank. & Ins. R. 47. [562 (6).

8. In order that a payment of money or a transfer of property made by a debtor in favour of one of his creditors should be void as a fraudulent preference under s. 92 of the Bankruptcy Act 1869, it is sufficient that the preferring the creditor should have been the substantial, effectual, or dominant view with which the debtor made it; it is not necessary that it should have been his sole view. *Exp. Hill, Re Bird*, 23 L. R., Ch. D., 695; 52 L. J., Ch., 903; 49 L. T. 278; 32 W. R. 177. [573 (3).

9. A judgment creditor, who had issued execution upon the property of his insolvent debtor, agreed to make him a substantial advance for the alleged purpose of enabling him to carry on his business, upon the understanding come to at a meeting at which all the parties to the transaction were present, that the advance should be applied in paying the bankers of the debtor, who had pressed for payment of a debt of 2,000*l*., and threatened to make the debtor a bankrupt if they were not paid, and also in paying off two other debts due to solicitors employed in the transaction. A bill of sale over substantially the whole of the debtor's property was given by the debtor to the execution creditor, on the 9th September 1882, to secure the execution debt and the fresh advance. The fresh advance was applied in payment of the debts to the bankers and the solicitors. On the 11th September possession under the bill of sale was taken by the grantee. On the 13th September the debtor filed a liquidation petition, and the trustees impeached the bill of sale and the above-mentioned payments:—Held, that the effect of the granting of the bill of sale being to prevent the debtor from carrying on his business, the bill of sale and also the payments to the solicitors were fraudulent and void; but that the payment to the bankers, who had acted *bonâ fide*, was protected by the saving clause of s. 92 of the Act. *Exp. Clater, Re Denison, Re Wilkinson*, 48 L. T. 648. [581 (3).

10. The effect of bankruptcy upon a fraudulent preference, is not to put the goods in the same situation as if they were actually

the goods of the bankrupt, so as to vest them at once by the bankruptcy in the assignees, independently of any election on their part, other than their acceptance of the office of assignee, but by transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election, and the title of the transferee is perfect, except so far as it is avoided by the assignee. *Newnham* v. *Stevenson*, 10 C. B. 713. [583 (4).

The commencement of an action of trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot, without more, be taken to an election on the part of the assignees to avoid the transfer. *Ib.*

Where, therefore, goods had been transferred by a trader before his bankruptcy, by an instrument which the jury found to be a fraudulent preference, and the transferee had, after the bankruptcy, and after the appointment of assignees, brought an action for an illegal and excessive distress upon the goods which were the subject of the conveyance:—Held, that the assignees, having not otherwise asserted their right to the goods than by commencing an action of trover to recover them, it was not competent to the defendants to set up their title under "not trespassed." *Ib.*

Statutory Definition—Value of Old Decisions.] 1. In determining whether a transaction amounts to a fraudulent preference the Court ought now to have regard simply to the statutory definition contained in s. 92 of the Bankruptcy Act 1869. The decisions on the subject before the Act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the Act. *Exp. Griffith, Re Wilcoxon*, 23 L. R., Ch. D., 69; 52 L. J., Ch., 717; 48 L. T. 450; 31 W. R. 878. [583 (7).

2. A deed which was executed more than twelve months before the date of fiat and act of bankruptcy, and whereby the bankrupt assigned certain annuities and policies of assurance for the benefit of his mother and infant daughter, set aside in favour of the bankrupt's creditors. *Penhall* v. *Elwin*, 1 W. R. 273. [585 (7).

3. At a meeting of creditors to decide on referring disputes to arbitration, and commencing suits in equity, a creditor may consent by proxy, under the 6 Geo. 4, c. 16, s. 88. *Exp. Belcher*, 3 Dea. 98; 3 Mont. & A. 448. [589 (7).

4. A bankrupt has power to submit to arbitration matters which *primâ facie* have passed to his assignees; and at all events, if he do so professedly on their behalf and his own on an express agreement that they shall not take advantage of the bankruptcy, and they take part in the reference and proceedings under it, he cannot object to the award on the ground of his bankruptcy, especially if it do not appear that they object. *Milnes* v. *Robertson*, 3 C. L. R. 232. [591 (10).

5. Money, the sum being small, ordered to be paid to assignees of a bankrupt on the bankrupt's petition without a supplemental bill. *Setcole* v. *Healey*, 2 Bro. C. C. 322. [595 (18).

6. One of several co-plaintiffs mortgaged his interest, and became insolvent pending the suit; a supplemental bill was filed by the other plaintiffs against the mortgagee and provisional assignees alone:—Held, that the defendants in the original suit, who were accounting parties, ought to have been made parties to the supplemental suit. *Fenry* v. *Stephenson*, 1 Beav. 42. [595 (18).

7. An order for dissolving an injunction *nisi* will be made absolute, notwithstanding the plaintiff is bankrupt, unless he shows cause. *Anon.*, 1 Atk. 263. But see *Waugh* v. *Austen*, 3 T. R. 437. *Monke* v. *Morris*, 1 Mod. 93. [595 (18).

8. By the bankruptcy of the plaintiff, the suit becomes defective if not abated by analogy to law; the assignees ordered to be made parties in a limited time, or the bill to be dismissed; whether with costs, *quære*. *Randall* v. *Mumford*, 18 Ves. 424; 1 Rose 196. [595 (18).

Upon the bankruptcy of the plaintiff in an injunction bill, the assignees to be made parties, or the injunction dissolved. *Ib.*

Practice of the Court of Exchequer holding the bankruptcy of the plaintiff no abatement, and therefore dismissing the bill with costs for want of prosecution. *Id.* 426.

9 The devisee having taken the benefit of an insolvent Act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party; a decree made in such a state of the cause is erroneous. *Rylands* v. *Latouche*, 2 Bligh 567. [595 (18).

10. Petition to supersede presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or those entitled to take out administration, were served. *Exp. Leworthy, Re Roberts*, Monat. 54. [595 (18).

11. Each of two original suits to recover the same sum of money became defective by the insolvency of a party who was plaintiff in the first of the causes and a defendant in the second; the plaintiff in the second suit not being a party to the first suit:—Held, that the defect in the first suit was not remedied by a supplemental bill in the second suit, before a decree was obtained in that suit. *Cattell* v. *Corrall*, 1 Hare 216. [595 (18).

12. Bill for a partnership account and injunction. Order, on motion by consent, to take the accounts. One of plaintiffs afterwards became bankrupt, and the defendant filed a supplemental bill, bringing his assignees before the Court, and moved that the proceedings under the order might be prosecuted as against the new as well as against the original defendants. The Court, with the consent of the assignees, but without the consent of the insolvent plaintiffs in the original suit, made the order. *Hitchcock* v. *Copling*, 4 Hare 161. [595 (18).

13. B. being insolvent, a vesting order was made, founded on a judgment in outlawry, which was afterwards reversed. B. then filed

a bill to redeem a mortgage, but, pending the suit, again became insolvent. The provisional assignee was made a defendant by supplemental order. The Court discharged the supplemental order as irregular, and directed the cause to stand over for a month, with liberty to the provisional assignee to carry on the suit; and in default, the bill to be dismissed without costs. *Bradberry* v. *Brooke*, 5 W. R. 95; 26 L. J., Ch., 74. See S. C. 4 W. R. 658, 699. [595 (18).

1. Order, in the nature of a supplemental decree, for a creditor who had proved his debt to carry on a creditor's suit, where the original plaintiff had become bankrupt. *English* v. *Hayman*, 9 Hare (App.) lxxxviii. [595 (18).

2 After decree a plaintiff became bankrupt; it was ordered that he and his assignees should elect either to file a supplemental bill, or that all proceedings should be stayed. *Clarke* v. *Tipping*, 16 Beav. 12; 16 Jur. 442. [595 (18).

3. A cause was ordered to stand over to make the assignees of a bankrupt defendant parties. They were made parties by amendment. An objection raised by the co-defendants, that they ought to have been made parties to a supplemental bill, was overruled. *London Gas Light Co.* v. *Spottiswoode*, 14 Beav. 264. [595 (18).

4. Motion to discharge the usual order to revive, under the 52nd section of the 15 & 16 Vict., c. 86, obtained by an assignee of a sole plaintiff, who had become bankrupt before answer put in, was refused with costs. *Jackson* v. *Riga Railway Co.*, 6 Jur., N. S., 336; 20 L. J., Ch., 571; 28 Beav. 75. [595 (18).

5. In an administration suit, where the plaintiff, who was an executor and a residuary legatee, had become a bankrupt, the Court, at the application of the plaintiff as executor, ordered the suit to be revived against his trustee in bankruptcy, as representing his beneficial interest. *Laidler* v. *Laidler*, 21 W. R. 822. [595 (18).

6. On abatement by bankruptcy of defendant, an executor, after decree to account, supplemental bill in nature of revivor is necessary. *Russell* v *Sharp*, 1 Ves. & B. 500. [597 (8).

7. Upon the bankruptcy of a defendant in a co-partnership suit, the Court declined to make an order that a supplemental bill should be filed within a given time against the assignees, or the bill stand dismissed. *Manson* v. *Burton*, 1 Y. & Coll. C. C. 626. [597 (8).

8. A bill was filed by shareholders in a company, against the directors for an account. One of the directors having become bankrupt, a supplemental bill was filed against the defendant, alleging that the plaintiffs had discovered, since the filing of the original bill, that the said director, before his bankruptcy, had paid or secured to the defendant the amount for which he was liable to the company:—Held, upon demurrer, that as the case existed prior to the filing of the original bill, and as the plaintiff would have been entitled to that relief, if entitled at all, prior to the bankruptcy, the mode of obtaining it was not by a supplemental bill. Demurrer allowed. *Davis* v. *Walker*, 19 L. J., N. S., Ch., 274. [597 (8).

9. A supplemental bill is necessary to bring before the Court the assignee of an insolvent defendant. *Heath* v. *Lewis*, 2 W. R. 452. [597 (8).

10. Order for the carrying on of the proceedings against the assignees of a defendant becoming bankrupt after answer, but before decree, made under 15 & 16 Vict. c. 86, s. 52, without supplemental bill. *Cochrane* v. *Phillips*, 3 W. R. 461. [597 (8).

11. A supplemental order against assignees of a defendant who had become bankrupt after appearance and before answer was made with adding thereto "without prejudice to the assignees putting in an answer." *Kitchin* v. *Humble*, 8 Jur., N. S., 588; 10 W. R. 686; 6 L. T., N. S., 748. [597 (8).

12. Order made under the 52nd section of the Act (15 & 16 Vict., c. 86), for the prosecution of a suit against the assignees of a defendant become bankrupt after appearance, but before answer, with liberty for the assignees to answer, if they should be so advised. *Lash* v. *Miller*, 4 De G. M. & G. 841; 1 Jur., N. S., 457. S. C. *nom. Lersh* v. *Miller*. 3 W. R. 397; 3 Eq. Rep. 577. [597 (8).

13. When one of two defendants becomes bankrupt, and an application by the plaintiff (who has been appointed his sole assignee) at the Rolls for the common order to revive is refused, the Court will give leave to set down the cause without such order to revive. *Ashman* v. *James*, 17 L. T., N. S., 559. [597 (8).

14. The registered owner of a trade mark having, since notice of an application to strike the trade mark off the register, gone into liquidation, leave was given, under Order L. r 4, to serve notice of the application on the trustees in liquidation. The term "action" in Ord. L. does not confine the operation of that order to proceedings in actions. *Re Rowe's Trade Mark*, 48 L. T. 388 [597 (8).

15. The provisional assignee of the Insolvent Debtors' Court was made a party defendant to the suit, and afterwards died:—Held, that the new provisional assignee might be made a party to the suit by bill of revivor merely. *M'Collum* v. *Crawford*, 6 Ir. Eq. R. 217. [598 (10).

16 A newly-appointed provisional assignee of the Insolvent Court is properly brought before the Court by revivor only. *O'Brien* v. *Mahon*, 7 Ir. Eq. R. 601. [598 (10).

17. On the death of an official assignee (a defendant), a supplemental order, substituting his successor, must be obtained as of course, and on a simple allegation unsupported by affidavit. *Gordon* v. *Jesson*, 16 Beav. 440; 22 L. J., Ch., 328. [598 (10).

18. Where a suit had been instituted by a plaintiff in the character of assignee of an insolvent debtor, and his title to sue in that character is not disputed by the defendant, an assignee of the insolvent subsequently appointed will be taken conclusively, for the purposes of the suit, to be a "new assignee" within the 53rd section of the 1 & 2 Vict., c. 110, and may, upon suggestion of his appointment, be substituted as plaintiff in the place of the former plaintiff under that section, although it may appear that the original plaintiff was never properly appointed assignee. *Sladden* v. *De Lusaux*, *Collins* v. *De Lusaux*, 3 W. R. 439, 469. [598 (10).

19. Where, after the institution of a suit,

the interest of a defendant has been transmitted to a person whose title cannot be disputed in the suit, an order can be made under 15 & 16 Vict., c. 86, s. 52. Accordingly, where a suit had been instituted against assignees in bankruptcy, and the bankruptcy had been annulled before decree:—Held, that such an order could be made. *Mostyn* v. *Emmanuel*, 5 N. R. 464. [558 (10).

1. After issue joined in an action plaintiff became insolvent, and the assignees having refused to interfere, defendant pleaded the insolvency instead of his former pleas, whereupon plaintiff confessed the plea and gave notice to tax his costs:—Held, that plaintiff was entitled to his costs under Rule 23 of New Pleading Rules, but that defendant might withdraw the plea and go on with the action on the old pleas. *Plummer* v. *Hodge*, 24 L. J., Q. B, 24. [601 (11).

2. Where the attorney of a defendant in an action omitted to plead his client's bankruptcy, and the verdict was for the plaintiff, the Court refused to set aside the verdict, to enable the defendant to plead his bankruptcy. *Aston* v. *Lawley*, 1 N. R. 102. [603 (8).

3. In an action for rent the defendant pleaded the bankruptcy of plaintiff, to which plaintiff replied that he let the premises to defendant as trustee for J. S., and had no beneficial interest therein, and was suing as such trustee:—Held, that his being trustee was not material, as he had shown by parol evidence that he had no beneficial interest. *Houghton* v. *Boenig*, 18 C. B. 235. [603 (8).

4. *Quære*, whether a certificate under the 7 & 8 Vict, c. 70, requires confirmation, or whether a plea setting up such a certificate need show that the debt is not of the excepted classes mentioned in s. 2. *Temple* v. *Sleigh*, 9 C. B. 348. [604 (14).

5. A creditor sought, by bill in equity, to establish a title by equitable assignment, as was contended, to moneys belonging to the bankrupt in the hands of a third party. The bill was dismissed without costs; but the costs of the assignees, who were made defendants, were ordered to be paid out of the bankrupt's estate. He afterwards proved for the debt:—Held, that the costs of the assignees should, on a deficiency of assets in their hands, be deducted out of the dividend coming to the creditor in the first instance. *Exp. National Provincial Bank of England, Re Burton*, 1 Bank. & Ins. R. 81. [606 (3).

P. 607, after par. (4), add references—Affirmed 52 L. J., Ch., 543; 48 L. T. 545; 31 W. R. 536.

6. Proof on a bill of exchange accepted by bankrupt's wife rejected. *Re* ——, 2 Bank. & Ins. R. 70. [612 (2).

7. A written engagement to warrant the payment of a bill of exchange, although good to other purposes, is not within the statute of 7 Geo. 1, c. 31 (6 Geo. 4, c. 16, s. 51), which applies only to what arises on the face of the instrument. *Exp. Harrison*, 2 Cox 172; 2 Bro. C. C. 614. [619 (1).

8. K. & Co. became bankrupt in July 1812; B. & Co. in the following August, when there was a cash balance due from them to the estate of K. & Co. K. & Co. were liable to a very large amount upon bills not arrived at maturity, which had been accepted by them for the accommodation of B. & Co. Bills to a large amount had been deposited with K. & Co., and, according to the usual course of business between the firms, the amounts from time to time received on the deposited bills were credited to B. & Co. in a cash account:—Held, that K. & Co.'s assignees were entitled to prove on the cash balance, and appropriate the amounts received on the deposited bills to the discharge of their liabilities to the billholders. *Exp. Johnson, Re Bulmer*, 1 W. R. 341. [624 (8).

The billholders, having proved against both estates, were paid in full, as to 10*s.* in the pound out of B. & Co.'s estate, and afterwards as to the remaining 10*s.* in the pound out of K. & Co.'s estate —Held, that the assignees of K. & Co. were entitled to the benefit of the proof made by the billholders against B. & Co.'s estate until they should be satisfied the excess paid by their estate to the billholders over the sums realised from the deposited bills. *Ib.*

9 An indorsee for value of an accommodation bill without notice was allowed to prove under the bankruptcy of the acceptors, notwithstanding his having released the drawer after notice of its being an accommodation bill. *Exp. Graham, Re Black*, 5 De G. M. & G. 356. [625 (4).

10. F, the holder of an accommodation bill of exchange drawn by W., and accepted by B. with the knowledge of his partner C., and endorsed by W. over to F. for value. F. accepts a composition from W. in respect of this bill. B. and C. become bankrupt:—Held, the bill was not fraudulent as regarded C.:—Held, also, that F. was entitled to prove against the joint estate of B. and C. for the amount, less the composition. *Exp. Frew, Re Black and Cope*, 1 Bank. & Ins. R. 157. [626 (6).

11. Certain bills of exchange, purporting to be drawn at Stettin, were addressed to and accepted by H., a member of, and on account of, the firm of M. & Co., and endorsed by the bankrupt, also a member of the firm, to S., for value. On the bankruptcy of H., S. proved against his estate in respect of these bills:—Held, he was not entitled to prove upon the same bills as against the bankrupt's estate, notwithstanding he had no notice that the bankrupt was a member of the firm of M. & Co. *Exp. Royal British Bank of Scotland, Re O'Kell*, 1 Bank. & Ins. R. 160. [630 (5).

12. The sums to be recovered by intending emigrants against shippers or agents failing to provide them with passages according to contract, provable in bankruptcy. *Exp. Newcombe, Re Griffiths*, 1 Bank. & Ins. R. 282. [636 (1).

A bankrupt cannot be arrested and committed to prison for breach of contract in failing to provide passages after he has obtained protection. *Ib.*

13. An unmarried woman, having a power of appointing a sum of money by will, made a will, appointing it to a mortgagee, and covenanted not to revoke the will. She afterwards became bankrupt, and obtained her discharge. After her discharge she revoked her will, and made another appointing the sum of money to another person:—Held, that the contingent liability under the covenant was incapable of proof under the bankruptcy,

that the covenant was not released by the bankruptcy, and that an action would lie for damages for a breach of the covenant committed after the bankruptcy. *Robinson* v. *Ommanney*, 23 L. R., Ch. D., 285: 52 L. J., Ch., 440; 49 L. T. 19; 31 W. R. 525. Affirming 21 L. R., Ch. D., 780; 51 L. J., Ch, 894; 47 L. T. 78; 30 W. R. 939. Affirmed 52 L. J., Ch., 543; 48 L T. 545; 31 W. R. 536.

640 (1).

1. On the bankruptcy of a tenant the only remedy of the landlord in respect of breaches of covenant committed by the tenant during the occupation is to prove for damages in his liquidation. *Exp. Dyke, Re Morrish*, 22 L. R., Ch. D, 410; 52 L J, Ch, 570; 48 L. T. 303; 31 W. R. 278. Affirming 47 L. T. 26; 30 W. R. 952. [640 (3).

2. The trustee under an assignment for benefit of creditors, which assignment is declared to be an act of bankruptcy, is not a creditor holding security, and may prove his debt under the bankruptcy, notwithstanding the assignment. *Exp. Bates, Re Meadows*, 1 Bank. & Ins. R. 285. [642 (10).

3. The bankrupt, besides his trading, was employed by A. B. to collect and pay moneys. On the death of A. B, his executors discovered that the bankrupt was in default; and, after pointing out to the bankrupt that he had made himself liable to a prosecution, they induced him to convey to them his stock-in-trade, etc., as a security for the default. The security, when realised, was insufficient to pay the whole default, and on a proof being tendered for the residue, the Court would not presume that a felony had been committed, and the proof was admitted. *Exp. Milner, Re Webb*, 2 Bank. & Ins R. 57. [644 (1).

4. Executors had a balance in that character with bankers, who with the executors' consent invested part of it on a security unauthorised by the will On the face of the will the executors were absolutely entitled as residuary legatees, though they were in reality trustees:—Held, that there was no such breach of trust on the part of the trustees as to entitle the *cestuis que trustent* to prove against their separate estates. *Exp. Barnewell, Re Biddulph, Front's Executors Case*, 6 De G M. & G. 801. [665 (6).

5. W., the continuing partner, on the faith of a statement made by P., the retiring partner, and really believed by P. at the time, viz., that A. owed 2,500*l.* to the firm, covenanted to pay to P. 2,000*l.* for the purchase of his interest in the partnership property. It afterwards appeared that, instead of A. being the debtor, the firm was indebted to him in about 700*l.*, and also in a sum of 1,319*l.* to P.:—Held, on the bankruptcy of W., not such a misrepresentation as should induce the Court to reject the proof of P. for the whole amount. Held, also, that a solvent partner may prove against the separate estate of his co-partner, a bankrupt, in the event of a surplus. *Exp. Price, Re Williams and Marchant*, 1 Bank. & Ins. R. 170. [666 (10).

6. Words in a guarantee, "In consideration of, etc., I guarantee the payment by A. of any loss which may possibly accrue to you on your share of this transaction":—Held, that the liability of the party giving the guarantee terminated upon the sale of the goods at a profit, so as not to include a loss occasioned by the misappropriation by A. of the proceeds of the sale. Proof exchanged. *Exp. De Souza, Re Lacy*, 1 Bank. & Ins. R. 30. [674 (11).

7. Bills of exchange were discounted for B. by A. upon the collateral security of a judgment for 2,000*l.* entered up on a warrant of attorney from B. A. deposited these bills with C., a creditor, for 1,200*l* as a security for that sum, a letter by way of memorandum accompanying the deposit. Up to his bankruptcy in 1855 A. had regularly paid C. interest at 12½ per cent upon the 1,200*l.* B.'s real estates had been sold, and upwards of 2,000*l.* was received (after litigation) by A.'s assignees in respect of the judgment:—Held, that the memorandum being silent as to interest, a contract for a rate of interest contrary to law would not be implied, and that it must be taken to refer to the principal sum of 1,200*l.* only, to which extent C was entitled as against A.'s estate. *Exp. Hodge, Re Lane*, 26 L. J., Bky., 77. [687 (7).

8. A mortgagee agreed to accept a composition in respect of his mortgage debt, upon condition that if any instalment should be unpaid for ten days after it had become due the mortgagee should be remitted to his original rights and remedies. He proved under the bankruptcy for the amount remaining due upon the composition, no instalment being then in arrear:—Held, he had made his election to come in under the bankruptcy, and could not take advantage of the condition to increase his proof upon default subsequent to such proof. *Exp. Smith, Re Collier*, 1 Bank. & Ins R. 61. [693 (2).

9. If a creditor be brought before the Court to have his debt expunged, and no good grounds are shown why it should be done, as a general rule he is entitled to his costs. But where the assignees had a fair cause of bringing him before the Court, and the affidavit he made on his proof was calculated to mislead, the Court refused him his costs. *Exp. Hustler*, Buck. 171, 177. [699 (10).

10. A petition of annuity creditors, by praying in the alternative to be admitted for the value of the annuities as for the money paid for them, ordered to stand over to be amended by stating the time when the act of bankruptcy happened, in order to see whether or not the bond was then forfeited at law. *Exp. Barrow*, 1 Bro. C. C. 268. [701 (17).

11. Petition to prove for money lent to a trader on the eve of bankruptcy on the security of an assignment, which was declared by the Court of Common Pleas to be void as an act of bankruptcy, and for payment in full of sums expended on the premises assigned, dismissed with costs. *Exp. Furber, Re Barugh*, 1 Bank. & Ins. R. 262. [702 (13).

12. The right of set-off exists under the arrangement clauses of the Bankruptcy Act of 1849, as in bankruptcy. *Re C. and G.*, 2 Bank. & Ins. R. 81. [707 (3).

13. When a bankrupt has not obtained an order of discharge, a creditor who has proved in the bankruptcy, and who is being sued by the bankrupt, or by his executor, after his death, for a debt due to the bankrupt on a contract entered into after the commencement of the

bankruptcy, cannot, during the period of three years from the close of the bankruptcy, set off the unpaid balance of his proved debt against the sum claimed in the action. *Re Smith, Green* v. *Smith*, 22 L. R., Ch. D., 586; 52 L. J., Ch., 411; 48 L. T. 254; 31 W. R. 413. [713 (7).

The scope of the Bankruptcy Act 1869 is that, during the period of three years after the close of the bankruptcy, none of the creditors who could prove in the bankruptcy shall be able to obtain a preference over the others, and that after the expiration of the three years, the unpaid balances of the proved debts shall be enforced against the property of the debtor only under the direction of the Court of Bankruptcy, so that any sums which may be thus recovered may be distributed among the creditors who have proved *pari passu*. *Ib.*

In respect of breaches of covenant committed by the tenant during his occupation, the only remedy of the landlord is to prove for damages in the liquidation, and the landlord has no right of set-off as against moneys due by him to the trustee for severed crops. *Exp. Dyke, Re Morrish*, 22 L. R., Ch. D., 410; 52 L. J., Ch., 570; 48 L. T. 303; 31 W. R. 278. Affirming 47 L. T. 26; 30 W. R. 952. [717 (2).

1. A debtor, who was tenant from year to year of a farm upon the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages and cultivation according to the custom of the country, filed a petition for liquidation of his affairs under the Bankruptcy Act 1869, and a trustee was appointed, who did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors until the tenancy was determined by notice to quit. The debtor's estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages and cultivation by the trustee during his tenancy, according to the custom:—Held, that the landlord was not entitled to set off rent, accrued due from the debtor before the liquidation proceedings, against the trustee's claim. *Alloway* v. *Steere*, 10 L. R., Q. B. D., 22; 52 L. J., Q. B., 38; 47 L. T. 333; 31 W. R. 290. [717 (2).

2. The value of forfeited shares in a banking company is to be estimated at their market price at the time of forfeiture, or at that at which they were re-issued, and not by the amount actually paid upon them in the company's books. *Exp. Commercial Bank of England, Re Lacy*, 1 Bank. & Ins. R. 10. [720 (4).

3. A firm, consisting of two partners, entered into a joint and several covenant for the payment of the balance of their current account with a bank, and one of the partners deposited with the bank, as a collateral security for the account, a sum of 8,750*l.* arising from the sale of part of his separate estate. That amount was deposited upon condition that it should not be applied in payment of the current account of the firm with the bank until after the expiration of twelve months' notice of demand for payment, and subject thereto it was to remain the separate property of the depositor. The firm became bankrupt upon the 18th April 1882, and the bank gave notice of demand on the 19th May. Upon the 19th October the bank tendered a proof for 17,093*l.* 19*s.*, the total amount due from the firm upon their current account, without deducting the sum of 8,750*l.* deposited with them.—Held, that there was no such mutual dealing between the bank and the depositor as to give rise to any right of set-off under the 39th section of the Bankruptcy Act 1869, and that consequently the bank were entitled to prove against the joint estate, and for the full amount due upon the current account. *Exp. Caldicott, Re Hart*, 48 L. T. 910. Affirmed 25 L. R., Ch. D., 716; 53 L. J., Ch., 618; 50 L. T. 651; 32 W. R. 396. [722 (7).

4. A deposit of old title deeds, in which the name of the depositor is not mentioned in any way, for the purpose of giving a lien upon the estates comprised in such deeds, confers a good title, by way of equitable mortgage, as against the general creditors of the bankrupt. *Exp. Lacon, Yowell & Co., Re Colh*, 1 Bank. & Ins. R. 107. [726 (7).

5. The seventh General Order in bankruptcy applies to equitable mortgages. *Re M'Cullagh*, 11 Ir. Eq. R. 466. [736 (7).

6 A creditor advancing money at 6 per cent. on bills of exchange to a trader (who afterwards becomes a bankrupt) with collateral real security, is entitled to prove on the estate of the bankrupt as an unsecured creditor, on giving up all his real securities. *Exp. Warrington, Re Leake*, 1 W. R. 261; 22 L. J., Ch., 33; 17 Jur. 430. [743 (16).

7. A party will not be allowed to prove against the estate and retain his securities. He must waive all right in respect of the latter or abandon his proof. *Exp. Price, Re Williams and Marchant*, 1 Bank. & Ins. R. 74. [743 (16).

8. The official assignee may file a bill against the personal representatives of a deceased assignee for an account, etc., of unclaimed dividends, possessed by the deceased assignee. The non-claiming creditors need not be parties to the suit. *Quære*, whether s. 110 of 6 Geo. 4, c. 16 be retrospective. *Green* v. *Weston*, 3 Mont. & A. 414; 7 L. J., N. S., Ch., 67; 1 Jur. 955. [754 (9).

9. Where an alleged creditor has, without any good reason, neglected to come in under the bankruptcy for eighteen months, and until the estate has been nearly wound up, he will not be allowed to enter a claim, with a view of staying a dividend. *Exp. Price, Re Williams and Marchant*, 1 Bank. & Ins. R. 73. [755 (4).

10. In the case of a surplus remaining after the creditors have received 20*s.* in the pound, they are entitled to be paid interest upon their several debts, as against a secret partner of the bankrupt, who has proved, but received no dividend under the bankruptcy. *Exp. & Re Holland*, 1 Bank. & Ins. R. 153. [758 (7).

11. A trader, who, by absconding, had committed an act of bankruptcy, upon which he was adjudged bankrupt, several days prior to the adjudication, sailed for Australia; but, being pursued, was brought back, and committed to Newgate for not surrendering under s. 251 of the Bankrupt Law Consolidation

Act 1849:—Held, that, pending the criminal proceedings, this Court would not interfere by allowing him now to surrender, the time for so doing having expired. *Exp. Spriggs, Re Ashton*, 1 Bank. & Ins. R. 42. [760 (4).

1. On the examination of a bankrupt, briefs which have been used at a trial, and returned to the client, are privileged as to the matters therein. *Exp. Columbine, Re Allen*, 1 Bank. & Ins. R. 43. [763 (14).

2. A bankrupt is asked by the Commissioner, in his examination, "What were his intentions in going to S.?"—Held, the question might be put, considered in reference to the previous part of his examination. *Re Legge*, 1 C. L. R. 42 [764 (13).

3. Where the public examination of a bankrupt has been adjourned to a day fixed, with liberty to apply for an earlier day upon payment of a sum named, and the bankrupt applies for and has an earlier day appointed upon which to pass his public examination, the notices required by the 111th Rule must be given to each creditor. *Exp. Heavey, Re Woodhouse*, 48 L. T. 912. [766 (3).

4. The Court has jurisdiction to rescind the order allowing a bankrupt to pass his last examination. *Re Townshend*, 1 N. R. 166. [766 (15).

5. The Court has jurisdiction, under a petition for arrangement, to compel a witness to be examined upon oath, if such examination involve the inquiry whether the petitioning debtor has made a full and true disclosure of his debts and effects, as required by s. 223. In determining upon the jurisdiction to examine a party summoned, the form of the summons is immaterial, when the witness is in fact before the Court ready to be examined. *Re* ——, 2 Bank. & Ins. R. 1. [767 (10).

P. 767, after par. (11), add references 52 L. J., Ch., 120; 31 W. R. 189.

P. 767, after par. (13), add references 52 L. J., Ch., 223; 47 L. T. 495; 31 W. R. 187.

6. The trustee in a liquidation sought to impeach a transaction entered into by the liquidating debtor with F., on the ground that it was a fraud upon the creditors, and issued a summons for the examination of F. under s. 96 of the Bankruptcy Act 1869:—Held, that the Court of Bankruptcy had jurisdiction to order the examination for the purpose of discovery, irrespective of any consideration as to whether the Court of Bankruptcy would entertain subsequent proceedings arising out of such examination. *Exp. Eckersley, Re Lewtas*, 48 L. T. 832.

[767 (13).

7. Section 96 of the Bankruptcy Act 1869, does not apply to composition proceedings; and when resolutions for a composition have been registered there is no jurisdiction to examine any one under that section. *Exp. Willey, Re Wright*, 23 L. R., Ch. D., 118; 52 L. J., Ch., 546; 48 L. T. 380; 31 W. R. 553. Reversing 48 L. T. 79; 31 W. R. 383. [767 (13).

8. A person summoned as a witness, and as suspected of having property of the bankrupt in his possession, is entitled to his expenses in the first instance, where it appears he is only the servant or agent of the party suspected. *Exp. & Re Bell*, 1 Bank. & Ins. R. 168. [767 (15).

9. *Semble*, that where a person supposed to have property belonging to the bankrupt in his possession is summoned to be examined touching such property, the object for which he is to be examined ought to appear on the face of the summons. The costs of a witness summoned as above must abide the result of any proceedings relative to the property in question. *Re Cole*, 2 Bank. & Ins. R. 115.

[767 (15).

10. The bankrupt's estate being sufficient to pay 20*s.* in the pound, he is entitled to an allowance of 10*l.* per cent. under the 195th section of the Bankrupt Law Consolidation Act. *Exp. & Re Marriott*, 1 Bank. & Ins. R. 155.

[769 (11).

11. A debtor residing out of the metropolitan district ought to apply for his release from custody to the Court of the district in which he was resident at the time of arrest, and not to the London Court of Bankruptcy. *Re Littlejohns*, 1 N. R. 168. [771 (5).

12. This Court will not interfere, or order the discharge out of custody, of a bankrupt, who, being a prisoner for debt, has incurred a contempt of the Insolvent Debtors' Court, for neglecting to file his schedule in that Court, on the ground that his remaining in custody is entirely of his own seeking. *Exp. & Re Oliver*, 1 Bank. & Ins. R. 164.

[772 (9).

13. The Court will not discharge a bankrupt from custody (for debt) until he has surrendered; but the Court will order the gaoler to bring up the bankrupt to surrender, and will then order the discharge. *Re Fisher and Bassy*, 2 Bank. & Ins. R. 29. [772 (9).

14. A banking company sought to prove against the estate of a bankrupt who had not surrendered a debt on a banking account, which was rejected, on the ground that the company was not a legal trading company. Afterwards the company sued the bankrupt on the same debt, and had him arrested on a Judge's order to hold to bail. On an application for his release, under 1 & 2 Vict., c. 110, s. 6:—Held, that the rejection of the debt in bankruptcy was no bar, and that it was for the applicant to show there was no debt, and no intention to leave this country. *Stuart* v. *Waugh*, 3 N. R. 486. [773 (1).

15. The Court has jurisdiction to discharge from custody a bankrupt detained on a *capias utlagatum* founded on a judgment in an action on bills of exchange. *Exp. Metcalf*, 2 Bank. & Ins. R. 3. [773 (13).

16. The Court of Bankruptcy has no power to discharge from custody a bankrupt committed to prison by the City Small Debts Court for nonpayment of a judgment debt, although the bankrupt had obtained protection previous to the committal. *Re Austin*, 2 Bank. & Ins. R. 22. [777 (18).

17. *Quære*, whether the Court of Bankruptcy has in any case authority to order the release from custody of a bankrupt detained on *mesne* process. *Re Waugh*, 3 N. R. 150, 227.

[775 (3).

18. Whether the Court of Bankruptcy has jurisdiction to order the discharge of a debtor who, having executed a deed of arrangement and obtained the Registrar's certificate, is arrested at the suit of a creditor bound by the deed, *quære*. In any case, if the debtor after arrest applies to the Court out of which the writ

issues, he cannot subsequently make a similar application to the Court of Bankruptcy. *Exp. & Re Smith*, 4 N. R. 307. [777 (9).

1. The Act 8 & 9 Vict., c. 127, s. 3, providing for the discharge of a debtor who has been committed, on payment of the debt and costs remaining due at the time of the order of imprisonment, and "all subsequent costs," means by the last expression the costs incurred by reason of default in payment of the instalments at the times ordered by the commissioner. An order of commitment under the above Act ought not to be made *ex parte*. *Exp. Shuckhard*, 1 De G. 454; 16 L. J., N. S., Bky., 5; 11 Jur. 660. [778 (10).

2. The Court of Bankruptcy has jurisdiction to release from custody a bankrupt who has been taken in execution under the Bankruptcy Act 1849, s. 257, after he has remained in prison for twelve months. *Re Barnshaw*, 2 Bank. & Ins. R. 88. [783 (1).

3. Where a bankrupt's certificate was suspended for two years without protection, with liberty, after he should have been in custody for three months at the suit of any creditor, to apply for his discharge and for protection, and the bankrupt, pending the two years, was taken in execution, and remained in prison for three months at the suit of a creditor, who had not proved under the estate:—Held, that the bankrupt was entitled to his discharge and protection under s. 112 of the Bankrupt Law Consolidation Act 1849. *Exp. & Re Fell*, 1 Bank. & Ins. R. 23. [783 (1).

4. Where, on a suspension of the certificate, protection has been refused to the bankrupt for six months, and he has kept out of the way to avoid an arrest, the Court will take this into consideration, and not discharge him at the expiration of the time limited. *Exp. & Re Miles*, 1 Bank. & Ins. R. 111. [783 (1).

5. Where a bankrupt's certificate is suspended, the commissioners have no such jurisdiction as to grant him protection from fresh debts. *Grave* v. *Bishop*, 11 Exch. 424; 25 L. J., Exch., 58. [783 (1).

6. Where a bankrupt defends an action, but ultimately allows judgment to go against him by default, the Court will not necessarily refuse to grant him an order of discharge. *Re Score*, 1 N. R. 181. [792 (6).

7. Where a trader is pressed to buy goods, and credit is given him on references which the seller accepts as satisfactory, the latter cannot oppose his discharge on the ground that he has incurred a debt without reasonable expectations of payment. *Re Suter*, 1 N. R. 231. [794 (11).

8. Ship and insurance brokers and emigration agents traded without capital, by purchasing ships and mortgaging them to the vendors and others, in expectation of being able to pay for them out of the profits of the voyages, and continued to do so after they had dishonoured bills of exchange. They also received passage money from emigrants, but were unable to dispatch the ships for want of stores and provisions. Certificate suspended for three years, six months to be without protection; the certificate to be of the third class. *Re Griffiths & Newcombe*, 2 Bank. & Ins. R. 116. [799 (8).

9. A trader adjudged bankrupt upon his own petition. It appearing that his estate was insufficient to pay 5*s.* in the pound after payment of all expenses, a condition was annexed to the certificate, charging all future acquired estate with the deficit. No proceedings to be taken in regard to such estate without leave of the Court. *Re Boys*, 1 Bank. & Ins. R. 76. [799 (11).

10. The assignees of a bankrupt are at liberty to oppose the granting of the certificate without giving notice, although their opposition is in respect of a complaint peculiar to themselves as individual creditors. *Re Rowley*, 2 Bank. & Ins. R. 3. [801 (6).

11. Certificate meeting adjourned for further consideration to a day certain:—Held, that a creditor who had proved his debt might, upon good cause shown, be let in to oppose at the adjourned meeting, notwithstanding he had not given the requisite notice of opposition until after the adjournment. *Exp. Ferris, Re Morton*, 1 Bank. & Ins. R. 45. [801 (6).

12. And see *Exp. Enderby*, 5 Madd. 76; *Exp. Bryant*, 1 G. & J. 206. [806 (1).

13. *Semble*, no creditor of a certificated bankrupt can apply for the bankrupt certificate to be recalled under the 203rd section of the Bankrupt Law Consolidation Act 1849, unless the creditor has proved his debt. *Re Evans, Re Cooke*, 1 W. R. 458. [806 (13).

A creditor applying, under the 203rd and 207th sections of the Act, that the certificate of a bankrupt may be recalled, must show, in support of the application, not only an improper suppression of evidence or fact, but that if the evidence or fact had been known to the commissioner, the certificate would have been refused. *Ib.*

14. An order, that a bankrupt, whose order of discharge has been refused, may appeal *in formâ pauperis*, is irregular. *Re Johnson*, 3 N. R. 655. [807 (10).

15. A certificate under the Debtors' Arrangement Act (7 & 8 Vict. c. 70, s. 13) must certify the filing of the petition, and not merely that a resolution or agreement was duly asserted, etc., and approved and filed by the commissioner. *Temple* v. *Sleigh*, 9 C. B. 348. [807 (13).

16. The creditors of A. having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice by means of the examination of the bankrupt and others, that A. was only the agent of B. & Co., proceeded, nevertheless, to sign A.'s certificate:—Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor* v. *Shepherd*, 1 Y. & Coll. 271. [809 (15).

P. 814, after par. (7), add references 23 L. R., Ch. D., 285; 52 L. J., Ch., 440; 49 L. T. 19; 31 W. R. 525.

17. The 49th section of the Bankruptcy Act, 1869 (32 & 33 Vict., c. 71), which enacts that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, is not confined to a fraud or breach of trust committed by the bankrupt personally. Therefore, where a debt has been incurred by one of several partners for which the partnership is liable, and the partnership goes into liquidation under the Bankruptcy Act 1869, a partner who has received his order of

isc harge is not thereby released from such debt if it was incurred by fraud, though he himself was innocent of such fraud. *Cooper v. Prichard*, 11 L. R., Q. B. D., 351; 52 L. J., Q. B., 526; 48 L. T. 848; 31 W. R. 834. [817 (12).

1. To a declaration against husband and wife for a debt due from the wife before coverture, the husband's bankruptcy and certificate is a good plea. *Carr* v. *Duncan*, 6 R. 466; 1 L. T., N. S., 96. [818 (1).

2. In 1836 C. petitioned this Court under 5 Geo. 4, c. 57, and was discharged. In 1854 he was adjudicated a bankrupt, and obtained his certificate:—Held, that the certificate in bankruptcy did not discharge and satisfy the debts owing under the insolvency. *Re Claqett*, 2 Bank. & Ins. R. 101. [818 (1).

3. Service of notice of motion on the solicitor of the party to be affected by the motion, where such person will not be personally affected by the order sought for, is sufficient. *Exp. Digan, Re Reade*, 2 Bank. & Ins. R. 86. [825 (11).

4. A misdescription of a bankrupt, in a petition filed by himself, renders the petition liable to be dismissed. *Re Harvey*, 2 N. R. 17. [826 (7).

5. Service of a petition on debtor residing abroad must be either personal, or the Court must be satisfied of the attempts made to serve it, according to the fourth part of the 70th section of the Bankruptcy Act 1861. It must also be proved by affidavit. A memorandum endorsed, though purporting to be signed by the debtor, of its receipt, will not be sufficient. *Re Vaughan*, 3 N. R. 293. [828 (14).

6. Adjournment of hearing of petition in bankruptcy can only be obtained by petition in bankruptcy. *Re Hardy*, 6 Madd 252 [831 (10).

7. Where a petition, and the affidavits in support of it, had been wrongly entitled, and the petition had been amended under an order, the Court allowed the affidavits to be taken off the file to be amended. *Exp. Burton*, 3 De G. & Sm. 578; 13 Jur. 297, 420; 18 L. J., Bky., 17. [831 (10).

8. *Quære*, whether the re-hearing of a petition in bankruptcy is a matter of right. *Exp. Cockshaw*, 1 W. R. 9. [833 (17).

9. When a bankruptcy petition is amended under an order of the Court the judge has a discretion as to requiring the amendment to be verified by affidavit, and if the alteration is an immaterial one an affidavit will not be required. *Exp. & Re Ritso*, 22 L. R., Ch. D., 529; 52 L. J., Ch., 535; 48 L. T. 376; 31 W. R. 373. [828 (14).

10. An application for leave to appeal from the decision of the Lords Justices in matters of bankruptcy cannot be made *ex parte*. *Exp. Griffith, Re Mostyn*, 1 W. R. 236. [866 (4).

11. The power given to the Court of Appeal to give leave to appeal to the House of Lords should be exercised in proper cases. Where a trustee in bankruptcy wants to appeal at the cost of the estate, and thereby the division of the estate is delayed, an appeal should not be encouraged unless there is a very difficult question of general law which it is desirable that the House of Lords should settle. *Exp. Allen, Re Russell*, 20 L. R., Ch. D., 350; 51 L. J., Ch., 728; 47 L. T. 68. [867 (2).

12. I have often said that the jurisdiction to give leave to appeal is given to be exercised. Leave is to be given if the case is one of such difficulty that the Court think it proper that it should be carried to the House of Lords. We ought to protect the House of Lords from appeals on the construction of an Act of Parliament, where the construction of the Act of Parliament is tolerably plain. *Medley* v. *Medley*, 51 L. J., P. 977; 47 L. T. 559. Per Jessel, M. R., and Lindley, L. J. [867 (2).

13. If nothing new has been decided, leave to appeal will not be given. Per Jessel, M. R. *Exp. Dyke, Re Morrish*, 22 L. R., Ch. D., 429; 52 L. J., Ch., 576; 48 L. T. 303; 31 W. R. 278. [867 (2).

14. In a proper case an adjudication of bankruptcy may be annulled upon an application made after the expiration of the time limited for appealing from it. Section 10 of the Bankruptcy Act 1869 has no application to an appeal from an adjudication, or to an application to annul it. *Exp. Brown, Re Jearons* (9 L. R., Ch., 304; 22 W. R. 602; 30 L.T., N. S., 128; 43 L. J., Bky., 105), explained; *Exp. Wigg, Re Johnson* (12 L. R., Ch. D., 905; 48 L. J. Bky. 119; 27 W. R. 804; 40 L. T. 528) —pg. 871 (103) distinguished. *Exp. Geisel Re Stanger*, 22 L. R., Ch. D., 436; 48 L. T. 405; 31 W. R. 264; 53 L. J., Ch., 349. [869 (2).

15. Though as a general rule a re-hearing of a bankruptcy matter ought not to be allowed after the expiration of the time limited for appealing from the order, yet, there being no time fixed by the Act or the rules for applying for a re-hearing, the Court will on special grounds allow a re-hearing when it is applied for after the expiration of the time for appealing, even when the application is to re-hear a bankruptcy petition which has been dismissed. *Exp. & Re Ritso*, 22 L. R., Ch. D., 529; 52 L. J., Ch., 535; 48 L. T. 376; 31 W. R 373. [869 (2).

Semble, that an application for a rehearing should not be made *ex parte*. *Ib.*

16. A petition to annul an adjudication may be presented by a creditor to the commissioner, and it is sufficient if he appeal from the commissioner's decision upon it within twenty-one days, although much more time may have elapsed since the adjudication. *Exp. Bean*, 1 De G. M. & G. 486; 21 L. J., Bky., 26. [869 (7).

17. When a debtor gives no notice under r. 36 of his intention to show cause against a bankruptcy petition, and the petition is consequently heard in his absence, and the Court refuses to make an adjudication, if the petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on the debtor. *Exp. Warburg, Re Whalley*, 24 L. R., Ch. D., 364; 49 L. T. 243; 53 L. J., Ch., 336. [873 (18).

In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the Rules of Court. *Ib.*

18. An order was made by the Court of Appeal to annul an adjudication of bankruptcy, on the ground that the debtor must be presumed to have been dead when it was made. Probate had been granted of a will executed by the debtor:—Held, that the costs and

charges of the trustee properly incurred, and the costs of all parties of the application to annul and of the appeal, must be paid out of the estate, and that the executors must confirm all acts properly done by the trustee in the bankruptcy. *Exp. Geisel, Re Stanger*, 22 L. R., Ch. D., 436; 48 L. T. 405; 31 W. R. 264; 53 L. J., Ch., 349. [874 (14).

1. Where the county court had refused to approve of resolutions for a scheme of settlement under s. 28 of the Bankruptcy Act 1869, and the trustee appealed to the chief judge who reversed the order, and the Court of Appeal finally restored the order of the county court judge, the trustee was allowed the costs of his application to the county court judge out of the assets, if any, but was ordered to pay the costs of the appeals to the chief judge and to the Court of Appeal. *Exp Strawbridge, Re Hickman*, 32 W. R. 173; 25 L. R., Ch. D., 266; 53 L. J., Ch., 323; 49 L. T. 638 [874 (14).

2. The solicitors of the assignees of a bankrupt had their bills of costs taxed in March 1851 by the Registrar of the District Court of Bankruptcy at Birmingham. The taxation was made *ex parte*, without notice to the assignees. In April 1853 the assignees and several of the creditors applied to the District Court for a re-taxation of the bills which had not been paid:—Held (reversing the decision of the Commission) that such re-taxation ought to be ordered. Whether the Registrar of the District Court had jurisdiction to tax the bills, *quære*. *Exp. Bateman, Re Burbury*, 1 Bky. & Ins. R. 235. [878 (20).

3. On the examination of a bankrupt, he is bound to answer as to matters necessary within his knowledge, and which must, more or less, be in his recollection; as, for instance, the disposal of his money, and the drawing of bills, notes, or cheques. And it is not sufficient for him to answer as to such matters, that he does not recollect, if he gives no reason for his want of recollection, nor any information by which the Court can pursue the investigation, and this applies as to questions upon minute points, or even to matters of intention or motive, if they are necessary to the investigation. And an answer may be direct and full, which is not satisfactory because not reasonable. *Re Bradbury*, 2 C. L. R 585. [891 (8).

On an application by a bankrupt who has been committed for not answering fully, the Court will look to the whole of the examination set out in the warrant; and the proper course is, therefore, to set out therein as much only as is necessary to show the relevancy and materiality of the questions, for not answering which he is committed, especially if they are such as, *per se*, might appear unimportant. And if, on looking to the whole of what is set out, the Court see that the question was material, and the answer was a mere denial of all recollection, without any reason or explanation, it will not be deemed full and satisfactory. *Ib.*

The answer on which the bankrupt was committed being that he could not recollect how he came to draw a certain cheque in a certain name; and the Court, from the whole examination as set out in the warrant, perceiving that the substance of the inquiry was how he had disposed of the money, and that the name inserted in the cheque, and the object of inserting it, were material on that point:—Held, the committal valid. *Ib.*

4. A petition in bankruptcy having been presented against the prisoner in the D. County Court, the Court made an order that the publication of a notice of the petition in the *London Gazette* should be deemed service of the petition on the prisoner. The prisoner did not appear according to this notice, and there was no evidence that it had come to his knowledge. The prisoner was adjudicated bankrupt in his absence, and divers proceedings in the bankruptcy took place Subsequently thereto the prisoner was arrested, and afterwards examined in court touching his affairs by the trustee in the bankruptcy, and the result was that he was indicted and convicted for various offences under the Bankruptcy Act. On the trial, in proof of the publication of the order of the county court in the *Gazette*, the file of the proceedings in the Bankruptcy Court was produced, containing a cutting from the *Gazette* of the advertisement of the order of the county court and notice to appear:—Held, that this cutting from the *Gazette* was improperly received as evidence of the publication of the notice in the *London Gazette*, and that the conviction could not be sustained. *Reg.* v. *Lowe*, 52 L. J., M. C., 122; 48 L. T. 768; 47 J. P. 535; 15 Cox C. C. 286. [907 (3).

5. The Court has no jurisdiction after a prosecution of the bankrupt to order the costs of the prosecution to be paid out of the Chief Registrar's account, even though the bankrupt is convicted. The leave of the Court must be obtained for the prosecution before it is undertaken, or the 223rd section of the Act of 1861 does not take effect. *Exp. Davis, Re Hirschman*, 2 N. R. 561. [908 (12).

6. Under the 223rd section of the Bankruptcy Act 1861, the costs of a prosecution sanctioned by the Commissioner were allowed to the assignees out of the Chief Registrar's account. *Exp. Smythe, Re Tear*, 5 N. R. 498. [908 (12).

7. The adjudication under the Scotch Bankrupt Act, 54 Geo. 3, c. 137, operates as diligence for the creditors of the ancestor, so that it is unnecessary for them to take any proceeding under the stat. of 1661, to give them a preference over the creditors of the bankrupt heir. *Bennet* v. *M'Lachlin*, 4 Bli. N. S. 529. [909 (6).

8. The Court will not annul an adjudication, or order the advertisement in the *Gazette* to be stayed on the mere ground of an arrangement having been entered into with the creditors, subsequent to such adjudication. *Re James*, 1 Bank. & Ins. R. 154. [914 (8).

9. The plaintiffs were creditors of the defendant on three bills of exchange, and, on his petitioning the Court of Bankruptcy for protection under the arrangement clauses of the Bankruptcy Act 1849, proved their debt. The defendant was afterwards adjudicated a bankrupt on the plaintiffs' petition, and the proceedings were adjourned into open court: but the Lords Justices, on appeal, reversed the order and remitted the case to the Commissioner, who thereupon ordered a fresh adjournment of the first sitting under

the petition, at which a proposal of the defendant was accepted by the statutory majority of his creditors, and a certificate of conformity granted under s. 221. Subsequently to proving their debt as above mentioned, the plaintiffs sued on the bills, and, after the granting of the above-mentioned certificate, recovered judgments, on which they brought this action:—Held, that the certificate was as much a bar to an action on the judgments as it would be to an action on the debts for which the judgments were recovered. The proposal, as accepted, stipulated that an instalment of the composition should be paid in cash by a day certain, and the rest by notes secured by a bond. Some of the creditors, however, were paid in full in cash: some were paid the first instalment after the proper day; and the bond was not simply to secure the notes, but was conditional to be void if proceedings in bankruptcy were taken. The composition was tendered to the plaintiffs in exact accordance with the proposal; and all the other creditors received it in full. No proceedings in bankruptcy could have been taken so as to avoid the bond:—Held, that the arrangement had been carried out in conformity with the proposal, and that the informality in the bond did not affect the certificate. *Naylor* v. *Mortimore*, 5 N. R. 186. [917 (4).

Joint Liabilities] 1. A father and son executed a joint and several promissory note, to secure a debt due from the son. Subsequently, the son assigned all his property for the benefit of his creditors, and obtained from them a release, but the deed contained no reservation on the part of the creditor of his right to recover from the father, what the son's estate should be insufficient to pay:—Held, that the creditor having released the son unconditionally, the father was released also. *Exp. Harvey, Re Blakely*, 1 Bank. & Ins. R. 65. [925 (6)

2 A statutory majority of the creditors of a debtor arranging under the 192nd section of the Bankruptcy Act 1861, obtained by including creditors who, unknown to the debtor, have received from a third person additional payments on account of their debts in order to induce them to assent, is not such a majority as will bind a dissentient minority under that section: and the execution of a deed of arrangement, under such circumstances, raises no defence to an action for his debt brought by a dissentient creditor. *Hemming* v. *Pugh*, 1 N. R. 239. [930 (17).

3 The 192nd section of the Bankruptcy Act 1861 (24 & 25 Vict., c. 134), directs that a composition deed must be signed by "three-fourths in value of the creditors." Proceedings in outlawry being taken against a defendant, he moved to set them aside on the ground that he was protected by a deed under this section. The question in dispute was whether the "three-fourths" included secured as well as unsecured debts. The Court, without deciding either way, made the rule absolute to stay the proceedings in outlawry, leaving the parties to contest the validity of the deed as they thought proper. *King* v. *Randall*, 2 N. R. 325. [931 (9).

4. A deed of composition by debtor with scheduled creditors, being merely an agreement to pay a certain sum in the pound at a future time, but passing no property, is not a deed within the 192nd section of the Bankruptcy Act 1861. *Re Tregellas*, 2 N. R. 61. [938 (4).

5. Defendant, a bankrupt, with a view to getting the proceedings in bankruptcy annulled, arranged to pay a composition of 5*s.* in the pound to all his creditors, but promised an additional composition of 5*s.* in the pound to two of them, the plaintiff and another. For the purpose of securing that additional composition a bill was accepted by the defendant's brother, and given to the plaintiff. That bill became overdue, and the plaintiff was about to sue thereon, when the defendant mortgaged to him his policy of assurance, and covenanted to pay the premiums that became due on the policy. The first premium not having been paid the plaintiff declared for the amount, when the defendant pleaded that the mortgage was given to the plaintiff in fraud of the other creditors:—Held, on demurrer, that the plea was an answer to the declaration, and that the plaintiff was not entitled to recover. *Geere* v. *Mare*, 2 N. R. 284. [939 (1).

6. Where a composition deed contains a covenant by a debtor to pay a composition to his creditors by instalments, the non-performance of such covenant, of itself, invalidates the deed, although it be otherwise good under s. 198 of the Bankruptcy Act 1861. *Re Llewellyn*, 1 N. R. 230. [942 (1).

7. Deed of composition under the Bankruptcy Act 1861, s. 192, executed by the statutory majority in number and value of creditors, and made between the debtor of the one part, and "the several persons whose names and seals are hereunto respectively subscribed and set," etc., of the other part. Covenant by the debtor with the "said several persons parties hereto of the other part respectively, their respective executors," etc., for payment of a composition of 5*s* in the pound. Several of the creditors,—the plaintiff amongst the number,—were non-assenting creditors:—Held (affirming the Court of Exchequer), that the deed was bad under s. 192, for that the non-assenting creditors, who were neither themselves, nor by trustees in their behalf, parties to the deed, were unable to sue: wherefore the deed was not, upon the face of it, for the equal benefit of all the creditors of the debtor:—Held, also, that, for the purpose of curing the inequality, it was an untenable proposition that the assenting creditors might be taken to be trustees covenanting with the debtor for the whole body of his creditors. *Benham* v. *Broadhurst*, 5 N. R. 251. [947 (5).

8. A deed of assignment, under s. 192 of the Bankruptcy Act 1861, executed prior to the adjudication of bankruptcy, but registered subsequently, is a sufficient ground for dismissing the petition, though adjudication be already made upon it. *Re Clarke*, 2 N. R. 418. [952 (3).

9. The mere production of the registrar's certificate of the registration of a deed of assignment, with an affidavit of the bankrupt that the conditions of s. 192 of the Bankruptcy Act 1861 have been complied with, is not necessarily sufficient evidence to justify the

Court in dismissing a petition for adjudication. *Re Church*, 1 N. R. 86. [952 (7).

1. An execution having been levied by seizure and sale, and afterwards a deed of composition entered into between the debtor and a trustee for his creditors, and registered, a judge's order barring the trustee from bringing an action against the parties levying the execution was set aside, and an action ordered to be brought. *Nicholl* v. *Hallett*, 1 N. R. 369. [954 (2).

2. Where a bankrupt, who has made a valid deed of arrangement with his creditors, is arrested before he has obtained the certificate of registration of the deed, a superior Court will, after such registration, make an order for his release, where he is in custody under their process. *Penhall* v. *Littlejohns*, 1 N. R. 292. [956 (3).

3. Trustees of a composition deed under the Bankruptcy Act of 1861, refusing to pay a suspicious claim on the debtor's estate, ordered to pay it, but allowed their costs out of the dividend due to the claimant. *Re Wheeler*, 2 N. R. 158. [961 (7).

4. A deed, executed at 10 A.M. on December 3rd, in pursuance of a resolution passed at a meeting of creditors on November 25th, whereby a debtor assigns all his property to trustees for the benefit of his creditors, "being such persons as would have been entitled to rank as creditors in bankruptcy if he had been adjudicated bankrupt on a petition filed November 25th," passes the property to the trustees, as against a judgment creditor, who signs judgment and issues execution at 11 30 A.M. on December 3rd, and is not void for fraud under 13 Eliz., c. 5. *Evans* v. *Jones*, 5 N. R. 95. [967 (3).

5. A deed of trust, in the form prescribed by schedule D. of the Act, is a valid deed within the meaning of s. 192 of the Bankruptcy Act 1861. *Anon.*, 1 N. R. 309. [978 (13).

The certificate of registration is sufficient *primâ facie* evidence that the terms of the Act have been complied with. *Ib.*

6. The power given to the Court by s. 125, sub.-s. 12, of the Bankruptcy Act 1869, to adjudge a debtor who has filed a liquidation petition a bankrupt, may be exercised even though no liquidation or composition resolutions have been passed by the creditors. *Exp. Walker, Re M'Henry*, 22 L. R., Ch. D., 813; 52 L. J., Ch., 653; 48 L. T. 291; 31 W. R. 419. [981 (4).

7. A debtor filed a liquidation petition in August 1879. A receiver of his property was at once appointed, and injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on the 20th October 1879, when it was resolved to adjourn to the 15th December 1879. Similar resolutions for adjournment were passed again and again, the meeting being ultimately, on the 15th November 1882, adjourned to the 28th March 1883. No resolutions for liquidation by arrangement or composition were passed. In January 1883 two of the creditors applied to the Court of Bankruptcy by motion, under sub.-s. 12 of s. 125 of the Bankruptcy Act 1869, for an adjudication of bankruptcy against the debtor. At the adjourned meeting on the 28th March 1883, the creditors resolved that it was inexpedient in the interests of the creditors that any further proceedings should be taken under the petition, and that application should be made to the Court to discharge the receiver, and dismiss the petition, or stay all further proceedings under it. The registrar, on the 3rd May, made an adjudication. The debtor appealed, and on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full and to provide for their costs of the application, the payment to be made by the friend out of his own moneys, and an undertaking being given by him that neither directly nor indirectly should the payment be made out of the debtor's assets:—Held, that, notwithstanding the resolution of the 28th March, and having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, and that if the adjudication order was discharged, no other creditor would be injured, for that the Court would have jurisdiction to adjudicate the debtor a bankrupt on the application of any other creditor. The adjudication was accordingly discharged on the terms of payment proposed, and on the undertaking of the debtor to apply to the Court of Bankruptcy for leave to summon a fresh first meeting of the creditors. *Exp. & Re M'Henry*, 24 L. R., Ch. D., 35; 48 L T. 921; 31 W. R. 873; 53 L. J., Ch., 191. [981 (4).

Held, that the Court had jurisdiction to order a fresh first meeting of the creditors under the petition. *Ib.*

8. In a statement of affairs produced by a debtor, he described some of his assets as the lease of a house No. 15, Motcombe Street, Belgrave Square, but in his petition described himself as of 165, Ferndale Road, in the county of Surrey, and on being examined admitted that he occasionally slept at Motcombe Street:—Held, that the description of the debtor was insufficient. *Exp. Pulbrook, Re Lloyd*, 48 L. T. 128. [983 (6).

9. There is no absolute rule that a debtor who has no assets cannot file a liquidation petition. *Exp. Hudson, Re Walton*, 22 L. R., Ch. D., 773; 52 L. J., Ch., 584; 47 L. T. 674; 31 W. R. 372 [983 (7).

P. 987, after par. (2), add

Examination of Witnesses as to Property.] See Subdivision III. 1., page 767.

10. In a debtor's statement of his affairs presented to the first meeting of his creditors under a liquidation petition under the Bankruptcy Act 1869, he is bound only to show the state of his affairs at the date of the filing of the petition, and is not, therefore, bound to calculate interest on interest-bearing debts beyond that date. *Exp. Fewings, Re Sneyd*, 25 L. R., Ch. D., 338; 53 L. J., Ch., 545; 50 L. T. 109; 32 W. R. 352. Reversing S. C. *nom. Exp. Oxford (Bishop), Re Sneyd*, 52 L. J., Ch., 724; 48 L. T. 616; 31 W. R. 675. [987 (9).

By a mortgage deed of an advowson, the mortgagor covenanted to pay the sum of 2,200*l.*, part of the purchase money remaining on mortgage, at a specified date, with interest at 5 per cent. if the same should remain unpaid at that date. The interest being in arrear, the mortgagee, on the 17th July 1882,

issued a writ for the amount claimed under the mortgage deed, and upon the 29th July signed judgment for 2,285*l.* 13*s.* 4*d.* for debt, interest, and costs. Upon the 14th November the mortgagor filed a liquidation petition under which composition resolutions were passed, and registered on the 6th January 1883. In the statement of affairs the mortgagee was entered as a fully-secured creditor for 2,317*l.* 10*s.* 7*d.*, for debt and interest at 4 per cent., upon the judgment to the date of the petition. A writ of sequestration was issued at the instance of the mortgagee on the 27th January 1883, and on the 15th March following, the bishop was absolutely restrained from taking any further proceedings thereunder:—Held, that the debt was sufficiently set forth. *Ib.*

1. A liquidating debtor, in his statement of affairs, by mistake inserted the amount of the debt due by him to one of his creditors as 17*l.*, the amount being really 17*l.* 15*s.*:—Held, that the creditor was not bound by composition resolutions which were passed by the statutory majority, but to which he did not assent. *Exp. & Re Engelhardt*, 23 L. R., Ch. D., 706; 52 L. J., Ch., 748; 49 L. T. 281; 31 W. R. 802. [987 (9).

P. 988, after par. (2), add references 52 L. J., Ch., 138; 48 L. T. 16; 31 W. R. 282.

2. The statement of affairs produced by a debtor, who had filed a liquidation petition, showed that his debts amounted to 2,500*l.*, and his assets to 70*l.* The creditors at the first meeting resolved to accept a composition of 6*d.* in the pound, to be paid within one month after the registration of the resolutions, but without any security. These resolutions were subsequently confirmed. A judgment creditor having opposed the registration:—Held, that the proceedings were irregular, and that the resolutions not having been *bonâ fide* in the interest of the creditors, ought not to be registered. *Exp. Pulbrook, Re Lloyd*, 48 L. T. 128. [991 (4).

3. Where there is a small amount of assets, and it is doubtful whether the composition resolutions are not an abuse of process of Court, the question to be decided is whether the creditors, in accepting the composition offered, have acted *bonâ fide*, *i.e.*, in the interest of the creditors, and not merely with a view to benefit the debtor. *Exp. Hudson, Re Walton*, 22 L. R., Ch. D., 773; 52 L. J., Ch., 584; 47 L. T. 674; 31 W. R. 372. [991 (4).

There is no hard and fast line as to the amount of composition which may be accepted, except that the sum must not be so small that no reasonable man would accept it, for in such a case the amount would in itself be evidence of want of *bonâ fides*. *Ib.*

4. The creditors of a debtor whose debts amounted to 304*l.* 18*s.*, and whose assets were only 8*l.* 13*s.*, resolved to accept a composition of 3*d.* in the pound, the payment of which was to be secured by one of the creditors. The registration of the resolutions was opposed by a dissentient creditor:—Held, that, having regard to the small amount of the composition, the resolutions must have been passed solely in the interest of the debtor; that they were an abuse of the process of the Court, and that they ought not to be registered. *Exp. Russell, Re Robins*, 22 L. R., Ch. D., 778; 47 L. T. 675; 31 W. R. 442. Reversing 47 L. T. 338 [991 (4).

Held, that resolutions accepting a composition of 1*s.* in the pound ought to be registered, the debtor having no assets, but the payment of the composition being secured by a third person. *Ib.*

5. Upon the hearing of an application to register liquidation resolutions, no one has a *locus standi* to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules. A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the registrar to oppose. If he has not previously proved a debt he cannot be heard. *Exp. & Re Bagster*, 24 L. R., Ch. D., 477; 49 L. T. 272; 32 W. R. 215; 53 L. J., Ch., 124 [993 (2).

6. A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition. *Exp. Fenning, Re Wilson and Armstrong* (3 L. R., Ch. D., 455; 35 L. T. 830; 25 W. R. 185), discussed. *Exp. Credit Co., Re McHenry*, 24 L. R., Ch. D., 353; 49 L. T. 385; 32 W. R. 47; 53 L. J., Ch., 161. [993 (5).

The last clause of sub-s. 7 of s. 125 relates only to the effect of the appointment of a trustee under a liquidation after he has been appointed, and does not impose on the making of the appointment any limitation similar to that which by s. 6 is imposed on the making of an adjudication of bankruptcy, viz., that the act of bankruptcy on which the adjudication is founded must have occurred within six months before the presentation of the petition for adjudication. *Ib.*

7. The effect of Rule 272 of the General Rules 1870, read together with s. 126 of the Bankruptcy Act 1869 (32 & 33 Vict., c. 71), is that in composition proceedings under s. 126 a secured creditor, who proves for the balancing of his debt after deducting the assessed value of his security, and afterwards realises the security, must pay to the debtor any surplus realised above the assessed value, after allowing interest upon the assessed value from the assessment until the realisation. *Société Générale de Paris* v. *Green*, 8 L. R., App. Cas., 606; 32 W. R. 97; 49 L. T. 570; 53 L. J., Ch., 153. [997 (7).

8. A mortgage to a building society provided that the loan, with a premium and interest on the advance, should be paid in equal monthly instalments during a term of twelve years, and that each monthly instalment, when paid, should be applied (1) in payment of the interest due at the time of payment; (2) in payment of the premium till the whole should be discharged; and (3) in payment of the principal. Two years after the execution of the mortgage, the mortgagor filed a liquidation petition, and the society claimed to prove in the liquidation for the total amount of the monthly instalments which remained due under the deed, less the amount at which they valued their security:—Held, that as to so much of the sum claimed as represented interest payable subsequently to the filing of the liquidation petition, the proof must be rejected. *Exp. Bath, Re*

Phillips, 22 L. R., Ch. D., 450; 48 L. T. 293; 31 W. R. 281. [997 (7).

1. In 1868 G. fraudulently obtained money from R. for investment, and appropriated it to his own use. In 1870 he gave R. promissory notes for the amount, upon which he paid interest from 1870 till 1879. In 1879 he filed a liquidation petition, and a trustee was appointed. Pending the liquidation proceedings, R. brought an action to recover the money:—Held, that the acceptance of the promissory notes and the interest had not changed the original character of the debt or substituted for it a simple contract debt. *Ross* v. *Gutteridge*, 52 L. J., Ch., 280; 48 L. T. 117. [998 (9).

A creditor is entitled to take proceedings and recover judgment against a liquidating debtor for a debt incurred by means of fraud while the liquidation proceedings are pending, although the judgment cannot be enforced until the debtor obtains his discharge. *Ib.*

2. The creditors of a bankrupt, at a meeting held pursuant to s. 28 of the Bankruptcy Act 1869, passed resolutions for the payment of the costs incurred in the bankruptcy proceedings; for the acceptance of a composition of 2*s.* 6*d.* in the pound; and for the annulment of the bankruptcy upon such payments being made. The bankrupt's father was the principal creditor. There were no assets. The confirmation of the resolutions was opposed, and the County Court judge refused to sign them, considering that they had been passed out of sympathy with the debtor, and not *bonâ fide* in the interests of the creditors:—Held, upon appeal, that the motive of acceptance was a legitimate one, provided it did not injure any one else, and as there was no probability of the creditors getting more than 2*s.* 6*d.* in the pound out of the estate, the resolutions ought to be confirmed and registered. *Exp. Hickman, Re Tamlyn*, 48 L. T. 913. [1006 (2).

3. In giving its approval to resolutions for a scheme of settlement under s. 28 of the Bankruptcy Act 1869, the Court will consider not only the pecuniary interests of the creditors, but the whole of the circumstances, and if there are any grounds for suspecting that any discreditable transactions have taken place, though there is no proof of fraud, the Court will not approve resolutions which would have the effect of preventing a full investigation. The functions of the Court in this respect are different under s. 28 from those under ss. 125, 126. *Exp. Strawbridge, Re Hickman*, 32 W. R. 173; 25 L. R., Ch. D., 266; 53 L. J., Ch., 323; 49 L. T. 638. [1006 (2).

The notice of meeting for the purpose of approving of a scheme under s. 28 should state clearly and fairly the nature of the proposals to be brought forward. *Ib.*

4. When a bankruptcy has been annulled under the Bankruptcy Act 1869, s. 28, and a scheme of arrangement of the bankrupt's affairs has been approved of by the Court, the bankrupt is discharged from his debts, and no action is maintainable against him in respect of any debt provable under the bankruptcy. *Gilbey* v. *Jeffries*, 11 L. R., Q. B. D., 559; 52 L. J., Q. B., 601; 48 L. T. 699. Affirming 52 L. J., Q. B., 116; 31 W. R. 381. [1006 (6).

Jurisdiction of Insolvency Court or County Court.] 5. Where an insolvent has been heard before the judge of a County Court, and discharged by him under s. 10 of stat 10 & 11 Vict., c. 102, the Court for Relief of Insolvent Debtors has no jurisdiction to make an order for the re-hearing of the case, under s. 96 of stat. 1 & 2 Vict, c. 110. *Re Clabburn*, 16 Jur. 859; 21 L. J., Q. B., 379. [1009 (5).

Semble, that the judge of the County Court has power to re-hear the case, under s. 10 of stat. 10 & 11 Vict., c. 102. *Ib.*

6. The judge of a County Court has power to order the re-hearing of an insolvent's petition, under 1 & 2 Vict., c. 110, s. 96, and 10 & 11 Vict., c. 102, s. 10; and if the insolvent neglects to appear at such re-hearing, he may issue his warrant to apprehend him. *Reg.* v. *Dowling*, 1 C. L. R. 539. [1009 (5).

7. Under 10 & 11 Vict., c. 102, s. 10, the Insolvent Court in London has authority to make an order of reference to a County Court in the matter of an insolvent, where the proceedings in insolvency have originated in a creditor's petition as well as where they have originated in a petition by the insolvent. *Reg.* v. *Judge of the County Court of York, Exp. Greenwoode*, 6 W. R. 102; 27 L. J., Q. B., 28; 22 Jur. 12. [1009 (5).

8. Motion by an assignee for a mandamus to the Insolvent Debtors Court in London, to examine an insolvent, under stat. 1 & 2 Vict., c. 110, s. 98. The insolvency had taken place, and the petition exhibited, in 1839, more than twenty miles from London, and within the district subsequently assigned to the Somerset County Court. The original adjudication had been made by a Commissioner on circuit; and stat 10 & 11 Vict., c. 102, had since passed, which abolishes the circuit, and prospectively gives jurisdiction to the County Courts in cases arising within their respective districts at the distance of more than twenty miles from London:—Held, that the Insolvent Debtors Court in London was the proper jurisdiction. *Re Wilcox*, 13 Q. B. Rep. 666. [1009 (5).

9. T. assigned certain life policies to W., and covenanted to pay the premiums. Shortly afterwards he was adjudicated a bankrupt, and obtained his certificate. He then ceased to trade. Subsequently two premiums became due, and were paid by W., who sued T. for the amount, and obtained judgment. T. then petitioned this Court under the Protection Statutes as a non-trader. *Semble*, the contract to pay being entered into during the trading of T., the debt arising upon the contract constituted him a trader. *Re Tucker*, 2 Bank. & Ins. R. 153. [1009 (10).

Adjudication. In what Cases.] 10. Where the sum for which an insolvent is arrested is partly fictitious, to raise the debt above 20*l.*, the Court has no jurisdiction, although a second creditor has lodged a detainer. *Re Watts*, 1 Bank. & Ins. R. 5. [1009 (10).

11. Where an insolvent is out of custody on bail, until the day of hearing, and a discharge is lodged at the prison, in the interval, by the detaining creditor, the Court has no power to make an adjudication. *Re Smith*, 1 Bank. & Ins. R. 209. [1009 (10).

12. Where an insolvent has been discharged out of custody by his detaining creditor, the

Court has no power to adjudicate. *Re Jeffries*, 1 Bank. & Ins. R. 191. [1009 (10).

1. An insolvent who is in custody for damages recovered in an action brought against himself and wife for slander committed by the wife is in custody within the meaning of the 78th section of 1 & 2 Vict., c. 110, and the plaintiff in such action is entitled to an adverse adjudication thereunder against such insolvent. *Re Buckwell*, 1 Bank. & Ins. R. 270. [1009 (10).

2. Where a petitioner for discharge, whose hearing was fixed for the 23rd January, was discharged by his detaining creditor on the 21st of the same month :—Held, that the Court had no power to adjudicate *Semble*, the Court will adjudicate where the period between the lodging of a discharge and the time appointed for the hearing does not exceed twenty-four hours. *Re Urban* 2 Bank. & Ins. R. 32. [1009 (10).

3. Where an insolvent, who has obtained his final order, contracts fresh debts :—Held, that he cannot afterwards file a second petition, under the Protection Statutes. *Re Shaw, Re Leaver*, 2 Bank. & Ins. R. 126. [1009 (10).

4. The petition of A., a prisoner, purported to be subscribed by him in the prison in which he was confined, and attested there by his attorney. It was proved the petition was subscribed by the insolvent before the arrest was effected, and that his attorney was not then present :—Held, that the Court had no jurisdiction, and the petition was dismissed. *Re Abrey*, 2 Bank. & Ins. R. 136. [1009 (10).

5. T., who had filed a petition under the Protection Statutes, applied for its dismissal, and supported the application by producing a consent in writing, signed by each of his creditors :—Held, that there must be a release, and the application refused. *Re Tarlton*, 2 Bank. & Ins. R. 78. [1009 (10).

6. D. being in custody upon an attachment for contempt for the non-performance of a particular act in a suit between himself and L., the latter lodged a distinct detainer and attachment for costs :—Held, that the costs being a debt, the lodging of a detainer distinct from the attachment for contempt gave to this Court jurisdiction to hear the case, and adjudicate thereon so far as the debts were concerned. Secondly, a case of fraud having been made against the insolvent, he having received 100*l.* as to the consideration for granting a lease, and having afterwards refused to execute the same, and the costs in question having arisen on a claim in Chancery for specific performance, and the attachment in question being for non-performance of the decree, this Court would not adjudicate until it saw what became of such attachment, and adjourned the case generally. *Re Dann*, 2 Bank. & Ins. R. 60. [1009 (10).

Amendment of Adjudication.] 7. A Commissioner in insolvency adjudicated that a prisoner should be discharged forthwith, except as to a debt of 5*l.* 5*s.*, being damages recovered in an action for a libel; and as to that he should be so discharged after he should have been in custody for six months. 5*l.* 5*s.* was the amount awarded by the jury for damages, without the costs :—Held, that the Commissioner had jurisdiction to alter the adjudication by inserting the true amount of damages, being the aggregate of that sum and the plaintiff's costs in the action. *Semble*, that the original adjudication was void. *Re Helier*, 4 W. R. 567. [1009 (10).

Description of Insolvent.] 8. Where an insolvent had disposed of his business shortly before petitioning the Court, but omitted to erase his name from the premises, and the business was carried on as usual by the purchaser :—Held, that the description as "lately of that place" was sufficient. *Re Mower*, 1 Bank. & Ins. R. 38. [1009 (10).

9. Where an insolvent fails to describe himself of all the places where he has resided during the six months next immediately preceding the date of his petition, the petition will be dismissed. *Re Bennett*, 2 Bank. & Ins. R. 95. [1009 (10).

10. The insolvent had described himself in his petition and schedule as Christian Ditford, his real name being Christian Ditfort, in which he had signed the said documents :—Held, that the Court could not entertain the petition. *Re Ditfort*, 2 Bank. & Ins. R. 95. [1009 (10).

11. Where an insolvent, a director of an abortive gold mining company, had been described in the prospectus, by mistake, as of "Sydenham," his real residence being Lacey Terrace, Newington, and where the offices of a friend had been used as an address for business and other letters :—Held, that he must describe himself as of both places, and must re-advertise. *Re Dunbar*, 1 Bank. & Ins. R. 100. [1009 (10).

12. A., a petitioner for protection, had accepted bills, which were directed to him at 19, Newman Street. He had never resided there, and the place was not mentioned in his description. One of the bills became due within six months of the date of his petition :—Held, that the description in the petition was sufficient. Secondly, that the description in the schedule was defective, and the insolvent was ordered to re-advertise. *Re Acret*, 2 Bank. & Ins. R. 135. [1009 (10).

13. Where an insolvent petitions the Court as a trader, but omits to describe himself as such in his petition, it will be dismissed. *Re Wray*, 1 Bank. & Ins. R. 189. [1009 (10).

14. Where an insolvent petitions the Court in a fictitious name, giving his real name as an *alias*, his petition will be dismissed. *Re Jaques*, 1 Bank. & Ins. R. 251. [1009 (10).

15. Where an insolvent fails to describe himself according to his business occupation the Court will dismiss the petition. *Re Forge*, 2 Bank. & Ins. R. 98, 244. [1009 (10).

16. Where an insolvent had described himself in an agreement with his opposing creditor as a "surveyor," and it appeared in evidence that beyond one transaction for a relation he had never been engaged in that capacity, and had never held himself out to the world as such :—Held, that his description as an "auctioneer and appraiser" was sufficient. *Re Myers*, 1 Bank. & Ins. R. 284. [1009 (10).

17. An insolvent must describe himself as of all places where he has resided during the time when his debts were contracted. *Re Cash*, 1 Bank. & Ins. R. 212. [1009 (10).

1 The insolvent described himself as a manager to an insurance company. He had been engaged in that capacity by two insurance companies, but he had not described himself specifically of either:—Held, the description was insufficient, and petition dismissed. *Re Bevan*, 2 Bank. & Ins. R. 76. [1009 (10).

2. Where an insolvent fails to describe himself as of all the places where he has resided during the six months immediately preceding the filing of his petition, the petition will be dismissed. *Re Pearce*, 2 Bank. & Ins. R. 17. [1009 (10).

3. Where an insolvent fails to describe himself as of all the businesses he has followed during his six months' residence within the jurisdiction of the Court, the petition will be dismissed. *Re Green*, 2 Bank. & Ins. R. 155. [1009 (10).

4. The insolvent had described himself as a gasfitter, and as a gasfitter to the Italian Opera, he had acted in the same capacity to the Sadler's Wells Theatre:—Held. that his description which omitted his engagements with the theatre was sufficient. He had let lodgings upon one occasion to one person, and a debt was owing to the estate on that account:—Held, that he was not a lodging-house keeper. He had petitioned as John Drake Palmer the younger, but his signature at the foot of the petition omitted the words "the Younger":—Held, that the signature was sufficient. *Re Palmer*, 2 Bank & Ins. R. 92. [1009 (10).

Residence.] 5. Section 6 of 10 & 11 Vict., c. 102, gives to the Court for Relief of Insolvent Debtors jurisdiction in all cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition, within any parish, the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, shall not exceed the distance of twenty miles. W., a butler to a gentleman who had establishments both within and without the jurisdiction, had resided at each during the six months:—Held, insufficient to constitute a residence under the provisions of the Act, and the petition was dismissed. *Re Whittingham*, 1 Bank. & Ins. R. 44. [1009 (10).

6. M., who had been travelling on the continent for a period of eighteen months, returned to England, and, five weeks afterwards, applied for leave to file a petition under s. 8 of 10 & 11 Vict., c. 102:—Held, that he was not entitled to petition under that section, and the application was refused. *Re Michael*, 2 Bank. & Ins. R. 111. [1009 (10).

7. W., who occupied lodgings without the jurisdiction of this Court, having left them for a fortnight during the six months immediately preceding the date of his petition to visit a daughter, who resided within the jurisdiction, petitioned, under s. 8 of 10 & 11 Vict. c. 102, as a non-resident:—Held, that the visit to the daughter constituted no interruption of residence, and petition dismissed. *Re Williams*, 1 Bank. & Ins. R. 148. [1009 (10).

8. Where an insolvent resides within a parish the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, exceeds twenty miles, this Court has no jurisdiction. *Re Holden*, 1 Bank. & Ins R. 216. [1009 (10)

Amount of Debts.] 9. In estimating the amount of a trader's debts, upon an application for protection, those owing under a former insolvency must be included. *Re Taft*, 1 Bank. & Ins. R. 6 [1009 (10)

10. Where an insolvent has been discharged under the 1 & 2 Vict. c. 110, and subsequently petitions under the Protection Statutes as a trader owing less than 300*l.*, in estimating the amount of his debts, those owing under the first insolvency will not be taken into consideration. *Re Harrod*, 2 Bank. & Ins. R. 71. [1009 (10).

11. In estimating the amount of a trader's debts under the Protection Statutes, debts owing to mortgage creditors must be included *Re Cockle*, 2 Bank. & Ins. R. 93. [1009 (10).

12. In estimating the amount of a trader's debts, those due to mortgage creditors must be included. *Re Harmer*, 1 Bank. & Ins. R. 40. [1009 (10).

13. Where a petitioner for protection is an uncertificated bankrupt, in estimating the amount of his debts, those owing under the bankruptcy must be included. *Re Newcomb*, 1 Bank. & Ins. R. 6. [1009 (10).

14. B., whose petition under the Protection Act had been adjourned *sine die*. contracted fresh debts, and was arrested in consequence:—Held, that he was not entitled to insert in his new petition, under 1 & 2 Vict, c. 110, the debts he had scheduled under his former application. *Re Blyth*, 1 Bank. & Ins. R. 253. [1009 (10).

15. In estimating the amount of a trader's debts under the protection statutes. debts owing in former insolvencies. under 1 & 2 Vict. c. 110, will not be taken into consideration. *Re Archer*, 2 Bank. & Ins. R. 20. [1009 (10).

16. Where an insolvent is a certificated bankrupt, in estimating the amount of his debts under the protection statutes, those owing at the time of the bankruptcy will not be included. *Re Whitfield*, 1 Bank. & Ins. R. 190. [1009 (10).

17. Where an insolvent petitions the Court under the protection statutes, and no final order is granted, the Court will not permit him to insert the debts in a subsequent petition under the prison statutes. *Re Holmes*, 1 Bank. & Ins. R. 252. [1009 (10).

18. Where, in order to give jurisdiction to the County Courts, a portion of a debt has been abandoned, under s 63 of 9 & 10 Vict. c. 95, in estimating the amount of a petitioner's debts under the Protection Statutes, the residue only will be taken into consideration. *Re Richardson*, 2 Bank. & Ins. R. 12. [1009 (10).

19. The acceptation of a smaller sum in satisfaction of a greater sum, constitutes no legal discharge of a debt; therefore, in estimating the amount of an insolvent's liabilities, the difference will be taken into consideration. *Re Strange*, 1 Bank. & Ins. R. 184. [1009 (10).

20. Where several of the creditors of an

insolvent had accepted a composition in satisfaction of their debts, and had signed receipts and an agreement accordingly:—Held, as no release under seal had been executed, the difference between the composition paid and the amount of the debts originally owing must be taken into consideration in estimating the insolvent's liabilities, and, as the whole exceeded 300*l.*, the petition was dismissed. *Re Chance*, 2 Bank. & Ins. R. 17. [1009 (10).

1. A. petitioned the County Court for protection from process under the 5 & 6 Vict., c. 116, as a trader owing debts amounting in the whole to less than 300*l.* It appeared that he had previously presented a similar petition, and obtained a final order for protection, and that the debts specified in the schedule to the former petition were still unpaid. The whole amount of the debts stated in both the schedules exceeded 300*l.* The judge decided that he was entitled to protection as a trader owing debts amounting in the whole to less than 300*l.*:—Held, that (assuming the decision to be erroneous), a prohibition could not be granted, as this was a question which the judge had jurisdiction to determine. *Re Bowen*, 21 L. J., Q. B., 10. [1009 (10).

Quære, whether the decision was erroneous. *Ib.*

Who may Oppose.] 2. Where a creditor endeavours to make terms for himself, and threatens an opposition unless those terms are complied with, the Court will not permit him to oppose. *Re Broad*, 2 Bank. & Ins. R. 13. S. P. *Re Penfold*, 1 Bank. & Ins. R. 220. [1009 (10).

3. Where a creditor threatens an insolvent with an opposition unless his debt be renewed the Court will not permit such creditor to be heard. *Re Batty*, 2 Bank. & Ins. R. 17. [1009 (10).

4. H., a creditor, having visited the insolvent in prison in order to effect a settlement of his debt, and having threatened to oppose unless his terms were complied with, it was objected at the hearing that H. ought not to be permitted to oppose:—Held, that this Court had no right to refuse his evidence, and he having made out a case against the insolvent, the Court ordered a remand at his suit. *Re Watt*, 2 Bank. & Ins. R. 113. [1009 (10).

5. The insolvent, in conjunction with two others, established a loan society, and afterwards received from his partners various sums to advance to borrowers, which he appropriated to his own use. The fraud being discovered, and his partners fearing to be unable to recover outstanding loans without his assistance, an arrangement was come to by which his interest in the funds of the society was to be retained by his partners, and the sum appropriated repaid by instalments. The insolvent was afterwards employed by the society, and paid three instalments, in pursuance of the agreement. Subsequently, some new misconduct being discovered, he was discharged, and, the instalments being in arrear, arrested. Having petitioned this Court, and being opposed by his late partners on the ground of fraud:—Held, that the creditors had not waived their right to complain of the fraud by entering into the arrangement with the insolvent, and that a good debt existed upon which to rest the opposition. *Re Ulph*, 2 Bank. & Ins. R. 156. [1009 (10).

6. A., who had obtained a judgment against the insolvent for 40*l.*, assigned it to B., empowering him in the name of A. to issue execution, proceed to outlawry, or otherwise, as should be necessary for the recovery of the debt. Subsequently A. was declared a bankrupt:—Held, that B. was entitled, in the name of A., to oppose the insolvent. *Re Sorrell*, 1 Bank. & Ins. R. 182. [1009 (10).

7. General instructions to an attorney to defend an action, and to proceed against the plaintiff as far as the law will allow, do not authorise him, without further communication with his client, to oppose the plaintiff on his hearing under 1 & 2 Vict., c. 110. *Re Lidbetter*, 1 Bank. & Ins. R. 283. [1009 (10).

8. The Court will not require a creditor to prove his debt for the purposes of an opposition, where the same is admitted in the schedule, and judgment obtained against the insolvent. *Re Hinds*, 2 Bank. & Ins. R. 8. [1009 (10).

9. Where a creditor fails to give notice of his opposition, according to the rules of court, he will not be admitted to oppose. *Re Giddings*, 1 Bank. & Ins. R. 281. [1009 (10).

10. Where an insolvent had inserted a society in his schedule as debtors who appeared to deny and to complain of such insertion:—Held, that creditors only could be heard, and opposition disallowed. *Re Wear*, 2 Bank. & Ins. R. 13. [1009 (10).

11. In 1853 the insolvent was discharged by the County Court at Maidstone under 1 & 2 Vict., c. 110, upon which occasion M. acted as his attorney, and agreed to take him through the court for a specific sum. In 1855 the insolvent filed a petition under the Protection Statutes, and inserted M. in his schedule as a creditor for a portion of the sum before referred to. Upon the occasion of the first examination M. appeared to oppose, when his opposition was objected to, *inter alia*, that he had not complied with Rule III. of the Court respecting the taxation, etc., of his bill of costs:—Held, that inasmuch as the debt of M. arose out of a non-observance of one of the rules of court, the Court would not permit him to oppose. *Re Standish*, 1 Bank. & Ins. R. 94. [1009 (10).

12. Where an insolvent had inserted in her schedule as creditors the several persons whose names appeared to a bill of exchange of which she was the acceptor:—Held, that the holder only was entitled to oppose. Held, also, that his right to appear did not extend to a day appointed for the adjourned consideration of the final order, he not having appeared before. *Re Cann*, 1 Bank. & Ins. R. 217. [1009 (10).

Grounds of Opposition.] 13. Where an insolvent comes before the Court upon an application for protection under s. 28 of 7 & 8 Vict., c. 96, the Court will take into consideration all the circumstances of the insolvency, the conduct of the petitioner, as well before as after the insolvency, and ad-

judicate accordingly. *Re Miller*, 1 Bank. & Ins. R. 36. [1009 (10).

1. Where an insolvent comes before the Court on a friendly arrest, and there are no assets to be divided amongst creditors, the petition will be dismissed. *Re Calt*, 1 Bank. & Ins. R. 37. S. P. *Re Bain*, 1 Bank. & Ins. R. 64. *Re Stafford*, 1 Bank. & Ins. R. 249. [1009 (10).

2. It is not an inflexible rule that the petition of an insolvent will be dismissed, where the arrest is friendly, and there are no assets to be divided amongst the creditors. *Re Jones*, 1 Bank. & Ins. R. 3. [1009 (10).

3. Where an insolvent is in an evident condition of embarrassment, and no case is proved against him, the Court will not dismiss the petition, although the arrest is friendly, and there are no assets to be divided amongst the creditors. *Re Fisher*, 1 Bank. & Ins. R. 279. [1009 (10).

4. Where it appears to the Court that the allegations of the petition are untrue, it will be dismissed. *Re Hutchinson*, 1 Bank. & Ins. R. 181. [1009 (10).

5. Where a bankrupt, not having surrendered, was afterwards arrested for the costs of the adjudication, and then petitioned the County Court under 1 & 2 Vict., c. 110:—Held, under s. 72, that the judge might adjourn the hearing to some future day, of which notice should be given:—Held, also, that if the petition was presented in order to frustrate the control of the judge in bankruptcy, it might be sufficient ground for dismissal, if the judge thinks fit. *Re Monro*, 6 W. R. 332; 4 Jur., N. S., 259. [1009 (10).

6. The insolvent having contracted debts with two opposing creditors by means of fraud and false representations, the petition was dismissed. *Re King*, 2 Bank. & Ins. R. 31. [1009 (10).

7. C., a petitioner for protection, having made false entries in his special balance sheet respecting the receipt and payment of a sum of money, the petition was dismissed. *Re Coombes*, 2 Bank. & Ins. R. 79. [1009 (10).

8. E., a petitioner for protection, having placed a phæton in the possession of a sister shortly before the filing of his petition, accounted for the fact by stating he had sold the same to her husband two years since. The Court, believing such statement to be a stratagem to defraud the creditors of their just rights, dismissed the petition. *Re Edwards*, 2 Bank. & Ins. R. 74. [1009 (10).

9. Where a petitioner for protection parts with or charges property, except for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, within three months of the date of filing his petition, the petition will be dismissed. *Re Hall*, 2 Bank. & Ins. R. 73. [1009 (10).

10. Where an insolvent disposes of his estate to one creditor, and subsequently applies to the Court for protection against the rest, his case will be adjourned *sine die*. *Re Cremmens*, 2 Bank. & Ins. R. 15. [1009 (10).

11. Where an insolvent distributes his property, and shortly afterwards applies for protection, the Court will adjourn his case *sine die*. *Re Soame*, 2 Bank. & Ins. R. 14. [1009 (10).

12. An insolvent who disposes of property within three months of the filing of his petition, has no *locus standi* under the protection statutes. *Re Thorne*, 1 Bank. & Ins. R. 185. [1009 (10).

13. An insolvent who parts with property within three months of filing his petition, otherwise than for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, has no *locus standi* under the Protection Statutes. *Re Tame*, 1 Bank. & Ins. R. 41. [1009 (10).

14. Where an insolvent becomes security for other persons at a period when he is unable to pay his own debts, the Court will refuse an immediate protection. *Re Rolfe*, 2 Bank. & Ins. R. 16. [1009 (10).

15. K. having borrowed 60*l.* for the purposes of his business, repaid the loan within three months of the date of his petition:—Held, the payment was within the meaning of the words, "in the ordinary course of trade." *Re King*, 2 Bank. & Ins. R. 96. [1009 (10).

16. The Court will not dismiss an insolvent's petition where an omission appears which is supplied by the schedule, unless fraud or collusion be intended. *Re Smith*, 1 Bank. & Ins. R. 219. [1009 (10).

17. Where an insolvent wilfully omits a debt from his schedule, the Court will dismiss the petition, although the creditor omitted does not desire to oppose. *Re Pain*, 1 Bank. & Ins. R. 250. [1009 (10).

18. Where, in the statements set opposite to the debts in a schedule, an insolvent swears to facts which are manifestly untrue, and it appears that the object in doing so was to mislead, the Court will either dismiss the petition or adjourn the case *sine die*. *Re Carr*, 1 Bank. & Ins. R. 210. [1009 (10).

19. Where an insolvent had omitted to insert the holder of a negotiable instrument, given in respect of a debt in the schedule, on a rule obtained after the first examination and before the final order to show cause why the schedule should not be amended by inserting the name of the holder:—Held, that the Court had power to allow the amendment at any time before the making of the final order. *Re Innes*, 1 Bank. & Ins. R. 207. [1009 (10).

20. J. S., one of the partners in a firm, before leaving England for America, placed in the care of the insolvent, the foreman in the business, his share of the partnership property, and agreed, in the event of his dying out of this country, or not being heard of, that the same should be given over to the insolvent. Upon these facts coming to the knowledge of T. S., the other partner, he stated to the insolvent that J. S. had no right thus to dispose of the partnership property, and directed him not to allow anything to be removed from the premises, which direction he promised to observe. On the following day, during the absence of T. S., he sold, as he alleged, two lathes which had been brought into the firm by J. S., for 7*l.* 10*s.*, which sum he subsequently paid over to T. S. On an action being brought by the firm for the value of the lathes, the jury gave 20*l.*, in addition to the 7*l.* 10*s.* already paid:—Held, the debt was contracted by a breach of trust, and the

petition of the insolvent was adjourned. *Re Stanley*, 2 Bank. & Ins. R. 62. [1009 (10).

1. Where there has been a contest before a jury, and a motion afterwards to the Court on a legal point, the Court is disinclined to pronounce a defence vexatious; but where the plaintiff, by such defence, has been put to a considerable expense, and it appears that the plea was founded in falsehood, the Court will adjudge the defence vexatious. *Re Couchman*, 1 Bank. & Ins. R. 248. [1009 (10).

2. Where an insolvent had vexatiously defended an action which had been brought against him by his opposing creditor:—Held, to be no ground of complaint under the Protection Statutes. *Re Long*, 1 Bank. & Ins. R. 75. [1009 (10).

3. A vexatious defence to an action is a ground of opposition to an insolvent under the protection statutes. *Re John*, 1 Bank. & Ins. R. 199. *Re Liddlelow*, 1 Bank. [1009 (10).

4. Where an insolvent is opposed on the ground of a breach of promise of marriage, this Court will not re-hear the case, but will estimate the length of the remand by considering the situation in life of the parties to the action, and the amount of damages recovered. *Re Mole*, 2 Bank. & Ins. R. 72. [1009 (10).

5. Where an insolvent is indebted for costs in consequence of having brought an unsuccessful action, and it appears to the Court that the claim made was known by him to be unfounded, he will be held to have contracted a debt by means of false pretences, within the meaning of s. 78 of 1 & 2 Vict., c. 110. *Re Dunn*, 1 Bank. & Ins. R. 119. [1009 (10).

6. Where an insolvent had sold to his opposing creditor the lease of premises, concealing from him the fact that an action of ejectment was then pending against him by the lessor, and the opposing creditor was subsequently ejected from the premises in consequence, on action brought by the opposing creditor to recover damages for the fraud, judgment was allowed to go by default, and damages were assessed at 130*l*., which constituted the opposing creditor's debt:—Held, that the debt was within the meaning of the 78th section of 1 & 2 Vict., c. 110, as a debt contracted by fraud and false pretences, and the insolvent was remanded accordingly. *Re Turner*, 1 Bank. & Ins. R. 287. [1009 (10).

Practice on Opposition.] 7. Although an insolvent fails to appear on the day appointed for his examination, the creditors are entitled to prove their cases, and to call witnesses. *Re Scholey*, 1 Bank. & Ins. R. 273. [1009(10).

8. This Court has no power to receive affidavits in opposition to a petitioner under the Protection Statutes. *Re Wright*, 2 Bank. & Ins. R. 97. [1009 (10).

9. A creditor having been plaintiff in an action to recover money received on his account, the defendant pleaded by way of set-off payments made in Australia, on account of the plaintiff, and applied for a commission to examine witnesses, whereupon the plaintiff, under a judge's order, admitted such payments to have been made, and went to the jury on the question only whether they could be charged against the plaintiff, under the agreement between the parties. A judgment being recovered for the plaintiff, and the defendant becoming an insolvent:—Held, that the plaintiff, as an opposing creditor, was not, by his admission in the action, precluded from inquiring under the insolvency whether the payments so admitted had been in truth made by the insolvent, as, if not, assets may exist applicable to a dividend. *Re Myers*, 2 Bank. & Ins. R. 8. [1009 (10).

10. C., who had given a judge's order in 1847, for the payment of a sum of money, was arrested in 1853 for a balance then owing upon the same. In 1847 the detaining creditor's attorney was T., but in 1853 L. acted for him, and obtained a vested order against C. T. was inserted in the schedule as the attorney to the detaining creditor, and served with a copy of the order for hearing. The detaining creditor claimed notice for L.:—Held, the notice on T. was sufficient. *Re Carter*, 2 Bank. & Ins. R. 58. [1009 (10).

11. B., at the desire of his opposing creditor, accepted a bill, "J. E. Baker & Son." The son had no interest in the business, and the transaction was a solitary one:—Held, that the description which omitted J. E. Baker & Son was sufficient. *Re Baker*, 1 Bank. & Ins. R. 273. [1009 (10).

Bail.] 12. Where on any application on sureties the record in an action between the insolvent and his opposing creditor shows a clear case for remand, a discharge on bail will be refused; but where the record simply proves the existence of a debt, and other evidence is necessary to bring the case within the penal provisions of the Act, the Court will not go into further evidence, but will grant an insolvent the privilege of bail. *Re Weston*, 1 Bank. & Ins. R. 281. [1009 (10).

13. Where an insolvent omits to file his books, the Court will refuse a discharge on bail, under s. 38 of 1 & 2 Vict., c. 110. *Re Parry*, 1 Bank. & Ins. R. 254. [1009 (10).

14. Where on an application for a discharge on sureties no ground for a remand appears on the face of the proceedings, the Court will not receive evidence of an alleged offence, but will grant the indulgence of a discharge on bail. *Re Brown*, 2 Bank. & Ins. R. 21. [1009 (10).

15. Where an insolvent applies to be discharged on bail until his adjourned hearing, the detaining creditor is entitled to oppose the application, although he did not appear on the occasion of the original hearing. *Re Ruffell*, 1 Bank. & Ins. R. 275. [1009 (10).

16. Where an insolvent makes over his property to a particular creditor to secure his debt, this Court will not accept such creditor as a surety for the insolvent under 1 & 2 Vict., c. 110, s. 38. *Re Hudson*, 2 Bank. & Ins. R. 155. [1009 (10).

17. Where an insolvent is indebted in damages recovered against him in an action for trespass and false imprisonment, and the declaration shows a clear case for remand, the Court will refuse an application to admit to bail until the day of hearing. *Re Lindus*, 1 Bank. & Ins. R. 150. [1009 (10).

1. A discharge on bail being clearly given by s. 38 of 1 & 2 Vict., c. 110, the Court will rather enlarge than curtail the privilege. Where, therefore, matters were shown in evidence against L., which the Court intimated would be taken into consideration in giving judgment, on application the bail was enlarged, and the insolvent discharged until his adjourned hearing. *Re Lyons*, 1 Bank. & Ins. R. 268. [1009 (10).

2. M., having applied to be discharged on bail under s. 38 of 1 & 2 Vict., c. 110, was unable to appear through illness on the day appointed for considering the application:—Held, that the Court could proceed in his absence, and the sureties being approved of, the application was granted. *Re Maugham*, 2 Bank. & Ins. R. 160. [1009 (10).

3. Where an insolvent had been discharged from custody on finding two sufficient sureties, who had entered into a recognisance to the provisional assignee for his appearance according to the order for hearing. On a rule to show cause why the recognisance should not be estreated, the insolvent not having appeared:—Held, that his illness was a good answer to the rule. *Re Simons*, 1 Bank. & Ins. R. 21. And see S. C. *id.* 4. [1009 (10).

Semble, the Court has no power to enforce such a rule after the insolvent has been discharged out of custody by his detaining creditor. *Ib.*

Allowance.] 4. A prisoner for debt who is entitled to be discharged under the Act for the Relief of Insolvent Debtors is not entitled by remaining in prison to allowances under 53 Geo. 3, c. 113. *Comill* v. *Hudson*, 6 W. R. 37; 27 L. J., Q. B., 8; 21 Jur. 1257. [1009 (10).

5. *Semble*, where a clear case of fraud is made against an insolvent, and he is remanded in consequence, the Court will refuse a rule *nisi* on the detaining creditors for an allowance under s. 86 of 1 & 2 Vict., c. 110. *Re Luke*, 1 Bank. & Ins. R. 216. [1009 (10).

6. Where an application is made to the Court for the Relief of Insolvent Debtors to appoint an assignee in a case which has been heard in a County Court, it must be accompanied by a certificate from the judge that no similar application has been made to him by the person nominated, and been refused. *Re Davis*, 1 Bank. & Ins. R. 36. [1010 (2).

7. Where an insolvent gives an attorney a general authority to act for him, and he, without communicating with the insolvent, pleads to an action which has been brought against him, the Court will hold the insolvent responsible for the consequences. *Re Child*, 1 Bank. & Ins. R. 101. [1011 (6).

8. R., in consideration of past and future advances, by bill of sale, dated the 28th November 1850, assigned all his household goods, growing crops, etc., to W., with a proviso of defeasance if he should repay W. the sums advanced, and to be advanced, in all not exceeding 700*l.* and interest thereon, on the 1st January 1851; but it was provided, that if default was made in payment on that day, W. should have possession of all the goods, etc., at his discretion should sell them, and should retain the proceeds in trust to pay himself the sums so due, and to pay the surplus, if any, to R. Default was made on the 1st January 1851, and on the 4th February W. took possession of the goods, etc. On the 25th February R. filed his petition under the 7 & 8 Vict., c. 96, and the plaintiffs were appointed assignees. On the 4th March W. sold the property included in the bill of sale:—Held, in an action brought by the assignees of R, that by this sale W. did not avail himself of the bill of sale within the meaning of the 7 & 8 Vict., c. 96, s. 21, and that the assignees were not entitled to recover the goods. *Simpson* v. *Wood*, 7 Exch. 349; 21 L. J., Exch., 152. [1014 (2).

9. A tenant being indebted to his landlord for rent, and being in insolvent circumstances, proposed to and executed to the defendant, in April 1850, a bill of sale of his farming stock and furniture; and in June 1851 petitioned the Insolvent Court for protection from process. The 7 & 8 Vict., c. 96, s. 19, after making void certain voluntary conveyances by parties in insolvent circumstances, provides that no such conveyance shall be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him:—Held, that this was a misdirection; the question being, not whether the insolvent had a general intention at some future time of petitioning the Insolvent Court, but whether he had the present intention of so doing. *Thoyts* v. *Hobbs*, 21 L. J., Exch., 340. [1014 (2).

10. The plaintiff having seised and taken possession of certain growing crops under a bill of sale, the sheriff seized and sold the crops under a writ of execution on a judgment of defendant against the vendor, and paid the proceeds to the defendant. The debtor having petitioned the Insolvent Debtors Court for protection, his assignees withdrew from contesting the right of the plaintiff:—Held, that the plaintiff was entitled to the proceeds of the crops as against the defendant, and that it would have made no difference if the assignees had not withdrawn. *Congreve* v. *Evetts*, 2 C. L. R. 1253; 18 Jur. 655. [1015 (2).

11. An insolvent, after an adjudication that he was to be finally discharged on the expiration of a certain period of imprisonment, which is still running, gave a warrant of attorney and paid a sum of money to procure his release from custody. The Court ordered the warrant of attorney to be set aside and the money to be refunded, but without costs. *Exp. Smith*, 1 W. R. 167. [1016 (4).

12. The jurisdiction of the Court to administer the assets acquired after the discharge of a deceased insolvent is taken away by the Insolvent Act, 3 & 4 Vict., c. 107, therefore a suit for the administration of such assets may not be maintained by a scheduled creditor of the insolvent, or by his personal representative. *Thomas* v. *Pinnell* (15 Beav. 148) and *Re Moylan* (16 Beav. 220) approved of and followed. *Dunlevie* v. *Hort*, 6 Ir. Ch. R. 99. Reversing *id.* 82. [1016 (8).

13. Section 9 of 7 & 8 Vict., c. 96, enacts, *inter alia*, "that the wearing apparel, bedding, and other necessaries of the petitioner and his

family, and the working tools and implements of the petitioner, not exceeding in the whole the value of 20*l.*, may be excepted by the petitioner from the operation of the Act." A publican having petitioned was allowed by the broker to the Court under this section a beer-engine, counter, and other fixtures, which the auctioneer to the Court subsequently removed for the benefit of creditors:—Held, that the auctioneer was justified in so doing, the articles not being within the meaning of the above section. *Re Castle*, 2 Bank. & Ins. R. 18. [1017 (8).

1. In order to comply with the 7 & 8 Vict., c. 96, s. 9, the petitioner must specify in his schedule each article he claims to except, with its value. An insolvent debtor, on petitioning the Court, claimed to except certain articles under the following description in his schedule: "On the 23rd day of October I deposited with Mr. Roberts sundry articles of furniture worth in my opinion 16*l.*"—Held, that that statute was not complied with, and that the articles were not excepted. *Taylor* v. *Roberts*, 4 W. R. 560. [1017 (8).

2. *Semble*, the wearing apparel, bedding, and tools of an insolvent debtor not exceeding the value of 20*l.*, which are excepted by him in his petition, and are, by the 7 & 8 Vict., c. 96, s. 9, excluded from the operation of the Insolvency Acts, are protected from execution by the 5 & 6 Vict., c. 116, s. 1. *Rideal* v. *Fort*, 4 W. R. 302; 25 L. J., Exch., 204. [1017 (8).

3. An agreement to furnish existing documents and information to enable a person to recover property of his right to which he is not aware, in consideration of receiving a share of the property to be recovered, is not illegal if no suit be depending, and no stipulation be made for the commencement of any suit. But it is illegal to agree for such a consideration to supply documents and information sufficient to enable a person to recover property, in case of its being necessary to resort to legal proceedings for its recovery. Where a person, after agreeing to supply evidence for the recovery of property in consideration of receiving a share, petitions the Insolvent Debtors Court, and a vesting order is made, his right to sue on the agreement vests in the assignee, and the insolvent is not entitled to sue in the event of the assignee not interfering. *Sprye* v. *Porter*, 5 W. R. 81; 26 L. J., Q. B., 64; 1 Jur., N. S., 330. [1017 (10).

4. N., who had described himself in his schedule as the lay impropriator of the tithes of the village of Lindfield, being insolvent and in prison, S., by the license of the bishop, undertook the duties of curate, which he continued to perform for nine years. On a claim being made by S. against the estate of N. for remuneration for his services for four years, part of the nine, at the rate of 30*l.* per annum:—Held, that as N. was the lay impropriator of the tithes, his estate was liable to S. for the amount claimed. *Re Nainby*, 1 Bank. & Ins. R. 24. [1021 (7).

5. Where a prisoner remains in custody for twenty-one days, without making satisfaction to his detaining creditor for the debt and costs for which he is detained, and the detaining creditor applies for an order vesting the estate and effects of such prisoner in the provisional assignee, under s. 56 of 1 & 2 Vict., c. 110, the Court has no power to interfere to stay the issuing of the vesting order. *Re Hutchinson*, 1 Bank. & Ins. R. 63. [1029 (10).

6. The Court has no power to make an order on the provisional assignee to join in making a conveyance or assignment under s. 68 of 1 & 2 Vict., c. 110, until after the day gazetted for the bringing up of the insolvent. *Re Carter*, 1 Bank. & Ins. R. 212. [1029 (10).

Setting aside Income for Creditors.] 7. R., having voluntarily surrendered to the provisional assignee 418*l.* 19*s.* 3*d.*, to which he had become entitled as next of kin, twenty years after his insolvency, it was ordered, on application, that the sum of 30*l.* which had been deducted from his pension, annually, for the benefit of his creditors should be discontinued. *Re Ray*, 1 Bank. & Ins. R. 5. [1029 (10).

8. Where an insolvent proposes to set aside a portion of his income for the benefit of creditors, the Court, in considering the sufficiency of the proposal, will have regard to the circumstances in which he is placed, his condition in life, and the duties imposed upon him. *Re Maxey*, 1 Bank. & Ins. R. 180. [1029 (10).

9. W. having made a proposal of 80*l.* per annum, payable by quarterly instalments of 20*l.* for the benefit of creditors, which was embodied in his final order:—Held, that the non-payment of such instalments, pursuant to the terms of the final order, is a contempt of Court, for which the insolvent may be committed. Held, also, that any creditor of an insolvent is entitled to make the application for the attachment. Held, lastly, that it is not a necessary preliminary to the granting of the attachment, that there should be a personal service on the insolvent, and a demand made to perform the act for which it is sought to commit him. *Re Weymouth*, 1 Bank. & Ins. R. 7. [1029 (10).

Surplus] 10. In an application for a revesting order under 1 & 2 Vict., c. 110, where the insolvent had wantonly created legal expenses by proceedings against the assignee and otherwise:—Held, that those expenses being caused to the assignee involuntarily, he was entitled to charge them against the trust estate, and that the insolvent was not entitled to a revesting order until the assignee's account of the same had been obtained and taxed, and the balance liquidated. *Re Perkins*, 2 Bank. & Ins. R. 137. [1030 (7).

Discharge from Custody. When Granted] 11. Section 28 of 7 & 8 Vict., c. 96, enacts "That if no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or if the final order be refused, the Commissioner shall have the power after the expiration of such time, etc., to make an order to protect such petitioner from being taken or detained under any process whatever," etc. Section 29 provides, "That if such petitioner shall be taken or detained under any process whatever for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the Commissioner to order any officer who shall have such petitioner so in custody, to

discharge such petitioner therefrom." C., who had obtained his final order, being sued for a debt which was set out in his schedule, allowed judgment to go by default, and was taken in execution on a *ca. sa.* —Held, that the provisions of the latter section are applicable to a final order as well as an order for protection. Secondly, that a *ca. sa.* is process within the meaning of the section, from which the Court can order a discharge. Thirdly, that the insolvent's right to a discharge was not prejudiced by his failing to appear and plead the adjudication on being sued, and that he was therefore entitled to be discharged from custody. *Re Coppins*, 1 Bank. & Ins. R. 54. [1031 (1).

1. A. having been committed pursuant to an order of a county court judge, for the nonpayment of a debt set forth in his schedule, from which he was protected from process by an interim order of protection, it was ordered, on application, that he should be discharged. *Re Minnett*, 1 Bank. & Ins. R. 11 [1031 (1).

2. Where an insolvent has been discharged under 1 & 2 Vict., c. 110, and is subsequently committed to prison by the order of a County Court Judge for the nonpayment of a debt which is set out in the schedule. this Court has no power to order a discharge. *Re Howe*, 1 Bank. & Ins. R. 274. [1031 (1).

3. Where an insolvent carries on a business which is capable of being sold, the Court will withhold the discharge until he has placed the assignee in a position to dispose of it for the benefit of creditors. *Exp. Patterson*, 1 Bank. & Ins. R. 39. [1031 (1).

4. Where an insolvent is arrested between the hour of filing his petition and that in which he obtains the protection, signed by the Commissioner, this Court will order a discharge. *Re Rimell*, 2 Bank. & Ins. R. 59. [1031 (1).

5. R., having dealt with his opposing creditors for many months, and paid them a large sum of money, increased the balance owing to them towards the end of the dealings, and two days before his arrest on the 30th June, received from them goods to the amount of 13*l*. On the 1st of the same month he had disposed of his horses and cart by which the business was carried on. and appropriated most of the proceeds in paying a loan to a friend:—Held, that these facts disentitled him to a discharge forthwith, and he was remanded for fourteen weeks under the discretionary clause. *Re Roberts*, 2 Bank. & Ins. R. 159. S. P. *Re Marshall, Id.* 78; *Re Butler, Id.* 150. [1031 (1).

6. C., having been arrested on a *capias*, was discharged on bail. Subsequently the action was tried against him, and a verdict found for the plaintiff, upon which the defendant filed his petition under the Protection Statutes, and subsequently surrendered to prison in discharge of his bail. Upon an application to this Court for his discharge *ad interim*:—Held, that this Court had no power to interfere. C. afterwards obtained his final order:—Held, that this Court had power to order a discharge, having granted the final order:—Held, also, by Mr. Baron Alderson, at chambers, that the final order protected the insolvent, and a discharge ordered. *Re Chabert*, 2 Bank. & Ins. R. 133. [1031 (1).

7. Where an insolvent had been ordered to be discharged except as to a debt of 5*l*. 5*s*. damages in an action of slander, and upon his tendering this money it was discovered that the taxed costs had been accidentally omitted in the order, whereupon the Commissioner amended it, the Court refused to discharge the insolvent out of custody. *Re Helier*, 4 W. R. 567. [1031 (1).

8. After a judgment against a defendant in a County Court, he was discharged by the Insolvent Court, under 1 & 2 Vict., c. 110, and the debt recovered in the County Court was duly inserted in the schedule. After this he was committed under 9 & 10 Vict., c. 95, ss. 98, 99:—Held, that the commitment by the County Court judge was not merely an execution, but savoured also of contempt, and the Court refused a rule calling upon the judge of the County Court, and the plaintiff there, to show cause why the defendant there should not be discharged from the custody to which he had been committed by the County Court judge. *Exp. Summers*, 2 W. R. 487; 3 C. L. R 851 [1031 (1).

9. Where an insolvent has been discharged under 1 & 2 Vict., c. 110, and is subsequently committed on a judgment for the nonpayment of a debt which is set out in the schedule, this Court has no power to grant a discharge. *Re Christy*, 2 Bank. & Ins. R. 70. [1031 (1).

10. Where an insolvent is committed to prison by the order of a County Court for the nonpayment of a debt which is set out in the schedule, and the order for committal is subsequent to the date of the final order, this Court will grant a discharge. *Re Hobbs*, 2 Bank. & Ins. R. 7. [1031 (1).

11. Where an insolvent is arrested by a creditor (whose debt is inserted in the schedule) after the filing of his petition and schedule, and the issue of the interim order, but before it reaches him, this Court will order a discharge. *Re Lee*, 2 Bank. & Ins. R. 19. [1031 (1).

12. Where an insolvent is committed to prison by the order of a County Court upon a judgment summons, between the dates of his interim order and final order, for the nonpayment of a debt which is inserted in the schedule, and in respect to which he is protected from process, this Court will grant a discharge. *Re Messenden*, 2 Bank. & Ins. R. 71. [1031 (1).

13. An insolvent, who has been adjourned *sine die*, without protection, until after twelve months from the date of such adjournment, is entitled to his protection after the twelve months have expired under 7 & 8 Vict., c. 96, s. 28; and to his discharge under s. 29. *Exp. & Re Swain*, 1 Bank. & Ins. R. 61. [1031 (1).

14. Where an insolvent is an uncertificated bankrupt, and applies to the Insolvent Debtors Court for a discharge from debts subsequently contracted, this Court, before proceeding with the case, will require a certificate from the proper officer of that Court, certifying what had been done there on the insolvent's last appearance. *Re Schottlander*, 2 Bank. & Ins. R. 77. [1031 (1).

15. On the 16th May, J., being protected from this process by an order of Court, appeared at a County Court in obedience to a judgment summons, which had been issued against him

at the suit of a creditor whose debt was set out in the schedule. He then exhibited his protection to the judge, who, notwithstanding, ordered him to be committed for thirty-five days. On this order J. was subsequently arrested. The warrant set out "that he was personally served with a summons but did not attend, whereupon he was ordered to be committed for thirty-five days." J. having moved this Court for a discharge, and denied by affidavit the truth of this statement, the Court granted a rule to show cause, and the judgment creditors presenting no facts in answer to the affidavit, the Court ordered a discharge. *Re Jeeks*, 2 Bank. & Ins. R. 151.

[1031 (1).

1. Where an insolvent is committed to prison for the nonpayment of a debt, in respect to which he is protected from process by his interim order, and the order for committal is subsequent in date to the interim order, this Court will grant a discharge. *Re Addis*, 2 Bank. & Ins. R. 60. [1031 (1).

2. A debtor who has been arrested in the country, and who has applied to the Insolvent Debtors Court there for his discharge, may be removed to the Queen's Bench prison by writ of *habeas corpus*. *Gurney* v. *Hallen*, 1 H. & N. 142; 25 L. J., Exch., 277.

[1031 (1).

3. An insolvent, against whom a verdict for damages, in an action of tort, has been returned, but judgment not entered at the time of the filing of his petition under the Insolvent Acts, 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, is not protected by his final order under those statutes from being taken in execution under "process in respect" of such verdict. *Bearan* v. *Walker*, 16 Jur. 517; 21 L. J., C. P., 161. [1033 (9).

4. The power of commitment by a County Court judge under 9 & 10 Vict., c. 95, s. 99, is taken away by the discharge of the defendant under the Insolvent Court. Where C. sued R. in the County Court, and judgment was obtained against R., and subsequently an order for his discharge was granted by the Insolvent Court:—Held, that the judgment debt against R. being inserted in his schedule, the County Court judge had no power to commit R. under 9 & 10 Vict., c. 95; s. 102 being repealed by 19 & 20 Vict., c. 108, s. 2 *Cookman* v. *Rose*, 5 W. R. 576. [1033 (12).

5. Where a debtor, outlawed upon final process, has afterwards obtained his discharge under the Insolvent Debtors Act, this Court will reverse the outlawry, the debtor entering into an agreement to make what assignment may be necessary to the assignees, and upon paying costs of the reversal of the outlawry. *Quære*, whether such discharge under the Insolvent Act enables the debtor to reverse the outlawry as a matter of right. *Baskerville* v. *Spry*, 4 W. R. 529; 2 Jur., N. S., 589.

[1036 (3).

6. Judgment for damages and costs being signed by a plaintiff suing *in formâ pauperis*, a judge on summons ordered satisfaction to be entered, on the defendants acknowledging satisfaction for costs to a like amount, taxed for him against the same plaintiff in a former action. The plaintiff had been taken in execution in the former suit, and discharged under stat. 48 Geo. 3, c. 123, s. 1, after a twelvemonth's imprisonment:—Held, no objection to the judge's order, the plaintiff's estate being still liable under the judgment in that suit. *O'Hare* v. *Reeves*, 13 Q. B. 659

[1036 (3).

Interim Order for Protection.] 7. A trustee who had been ordered to pay a sum of money into court in a suit in Chancery filed a petition in the County Court under the Insolvent Debtors Act, and obtained an interim order for protection. Afterwards a writ of attachment was issued against him out of Chancery, to which the sheriff returned that the debtor was protected:—Held, that the interim order was a valid protection against the process of contempt, and that the return was good. *Wyllie* v. *Green*, 5 W. R. 775.

[1036 (3).

8. Such property only as would pass to the assignees of an insolvent under 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, is protected from process by an interim order under those Acts. Therefore, a writ of *sequestrari facias*, inasmuch as it does not affect such property, may be properly issued to have effect on the surplus of the proceeds of the benefice of a defendant who has obtained such interim order. *Parry* v. *Jones*, 5 W. R. 121; 1 C. B., N. S, 339; 26 L. J., C. P. 36; 2 Jur. N. S., 1190.

[1036 (3).

9. A discharge of the principal under the Insolvent Debtors Act, 1 & 2 Vict., c. 110, does not exonerate him from the claim of a surety on a bond in respect of payments subsequently made under it by the latter. *Emery* v. *Clark*, 2 C. B., N. S, 582. [1036 (11).

10. If a debt be omitted from the schedule of an insolvent debtor who petitions for protection under the 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, with the consent and by the procurement of the creditor, the creditor cannot, after the making of a final order, sue for the debt; and a plea setting up the facts is a good plea in bar, without an allegation of fraud, as the omission of the debt from the schedule is in a fraud of the Insolvency Court and the other creditors, and is in contemplation of law a fraud. *Wilkin* v. *Manning*, 2 W. R. 304; 9 Exch. 575; 23 L. J., Exch., 174; 18 Jur. 44, 271; 2 C. L. R. 563.

[1038 (10).

11. In an action by an indorsee of a promissory note, made payable to John J. L. against the maker, the defendant pleaded his discharge under 1 & 2 Vict., c. 110. The description in the schedule was inaccurate, "John J. L." being described as "James J. L.," and instead of being described as a note, the instrument was described as a bond, and the plaintiff's name, to whom the note was indorsed before due, was mentioned. It appeared that the defendant did at one time know that the plaintiff was the holder:—Held, that the defendant was not entitled to his discharge as to the note, and the plaintiff was entitled to recover on it. *Finny* v. *Brownlow Cecil* (*Lord*), 5 W. R. 19; 1 C. B., N. S., 117; 26 L. J., C. P., 53. [1038 (10).

12. The defendant having become insolvent described the plaintiffs to whom he was indebted, in his schedule, as "bankers, &c.,

Clement's Lane, City, their proper address being 32, Abchurch Lane, City, and notice of the hearing of the petition was addressed to the former but served at the latter place, but plaintiffs denied having received it:—Held, that the description was sufficient. *Brown, Janson, and others* v. *Thompson*, 17 C. B. 245; 25 L. J., C. P., 55. [1038 (10).

1. Where to an action on a bill of exchange the defendant pleaded discharge under the Insolvent Debtors Act, and it was proved that the bill on which the action was brought was not set out in the schedule, nor the name and address properly inserted therein, and the jury found for the plaintiff. The Court refused to disturb the verdict. *Hodgson* v. *Harrison*, 3 W. R. 104. [1038 (10).

2. Where a trader, having given a warrant of attorney for 100*l.*, under which a sum of 35*l.* 3*s.* 6*d.* had been levied, obtained afterwards a protecting order under 5 & 6 Vict., c. 116, and 7 & 8 Vict., c. 96, but inserted in his schedule the plaintiff's debt as 20*l.* only, explaining in the margin that the consideration for the warrant was 70*l.* only, and that goods to the value of 50*l.* were seized under it:—Held, that a second *fi. fa.* on the judgment signed upon the warrant of attorney was wrong, as the protecting order could only be impeached in the Bankruptcy Court, and as, if there were any mistake in the schedule, it might be amended, unless made by fraud or culpable negligence; and, therefore, that the defendant was discharged as to the plaintiff's debt. *Brook* v. *Chaplin*, 3 W. R. 372; 24 L. J., Q. B., 188; 19 Jur. 590. [1038 (10).

3. An insolvent petitioner, who owed to W. & Co. for varnish the amount due on a bill of exchange for 26*l.* 7*s.* 6*d.*, drawn by them and accepted by him as a renewal of a former bill, inserted the amount of the debt in his schedule as 30*l.*, and stated the nature of the debt to be "For varnish: these creditors hold a bill of exchange drawn by self and partner, and afterwards renewed by self." He meant honestly to give an account in his schedule of all his debts and creditors, and did not know that the bill was in the hands of indorsees, who, however, knew that he was passing through the Insolvent Court:—Held, that the bill was not properly described in the schedule, and therefore that the final order under 7 & 8 Vict., c. 96, s. 22 did not protect the petitioner from the claim of the indorsees. *Kemp* v. *Hurry*, 3 C. L. R. 1042; 3 W. R. 420; 24 L. J., Exch., 220. [1038 (10).

4. A., having consented to a judge's order to pay a certain debt to B. by certain instalments, petitioned the Court for the Relief of Insolvent Debtors, and inserted in his schedule the debt of B., together with a memorandum of the terms of the Judge's order. B. opposed A., and his examination was adjourned *sine die*, whereupon B. arrested him on a judgment signed under the judge's order; and on an application for his discharge, on the ground that he was privileged from arrest, a second judge's order was made for the payment of the debt by instalments different from those in the first; whereupon he was discharged. Subseqently, A. obtained an order for protection from the Commissioner in respect of the debts in his schedule; and after that he made default in the instalments in the second order, when he was arrested at the suit of B. under a *ca. sa.* issued on the judgment signed under the second judge's order:—Held, that A. was entitled to be discharged, as the debt in the second order was identical with that in the schedule, and that the application for his discharge was properly made to this Court. *Hookpayton* v. *Bussell*, 2 C. L. R. 510. S. C. *nom. Hockpayton* v. *Bussell*, 9 Exch. 279; 23 L. J., Exch., 87. [1038 (10).

Costs. Other Cases.] 5. The Court has power, under s. 10 of 7 & 8 Vict., c. 96, to make an order for the payment of the costs of petitioning out of an insolvent's estate. *Re James*, 1 Bank. & Ins. R. 270. [1041 (11).

6. Although the Court is not empowered under the protection statutes to give costs *eo nomine*, yet they will be allowed, under the head of expenses of getting in the estate, to creditors, whose opposition results in bringing money into court. *Re Booth*, 1 Bank. & Ins. R. 272. [1041 (11).

BARRISTER.

P. **1043**, col. **1**, in line **15**, read SOLICITOR, XVI. XVIII. 8, for PRACTICE (COSTS).

After line **19**, add

— *Conveyancing Counsel.* See PRACTICE (CONVEYANCING COUNSEL).

In line **21**, after INNS OF COURT, add JUDGE—PRACTICE (HEARING).

BASTARD.

P. **1046**, col. **1**, after line **8**, add

— *Interest on Legacies to.* See LEGACY, XIII. IV. 3.

In line **9**, after DESCENT, add FEE SIMPLE, I.—POWER, XVII. III.—PORTION, XI. II. 3.

BEDFORD LEVEL.

P. **1046**, after par. **2**, add

Registration of Deeds Generally.] See REGISTRATION.

BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

P. **1047**, col. **1**, after line **43**, add

— See VENDOR AND PURCHASER, XIV.

7. Bills purporting to be drawn abroad without stamps, but in fact drawn in England, though holder had given valuable consideration, and had no notice of the above facts:—Held, not provable. *Exp. Manners*, 1 Rose 68. [1051 (7).

1. Where there was a debt due for money had and received, and the same was secured by a promissory note on an improper stamp, the debt was held sufficient to support a sequestration in Scotland. *Exp. Geddes*, 1 G. & J. 414. [1051 (7).

2. A bill of exchange thus drawn: "Pay C. & Co. 7,500*l.* value of same, which place against coffee per *Vigilant*":—Held, not sufficient to give a lien on the coffee for the amount of the bill. *Exp. Carruthers*, 3 De G. & Sm. 570; 13 Jur. 276. [1067 (2).

3. Injunction to restrain defendants from suing at law on a bill of exchange which was accepted by plaintiff without consideration and under misrepresentations granted. *Llewellin* v. *Pace*, 1 W. R. 28. [1080 (8).

BILLS OF SALE.

P. 1084, after par. 5, add

4. *See also Crawcour* v. *Salter*, 18 L. R., Ch. D., 30; 51 L. J., Ch., 495; 45 L. T. 62; 30 W. R. 21; p. 246 (1).

5. Where a debtor assigned all his stock-in-trade, fixtures, debts, and securities to a trustee, in pursuance of an arrangement for the payment of a composition to his creditors, such deed commencing, "To all to whom these presents shall come, we, whose names and seals are hereunto subscribed and set, being severally creditors of V. greeting;" and a majority in number, and three-fourths in value, of the creditors signed the same:—Held, that the deed was substantially for the benefit of all V.'s creditors, and came within the exception contained in s. 7 of the Bills of Sale Act (17 & 18 Vict., c. 36), and need not be registered thereunto. *General Furnishing and Upholstering Co.* v. *Venn*, 2 N. R, 177. [1087 (1).

6. The repeal of s. 20 of the Bills of Sale Act 1878, by s. 15 of the Bills of Sale Act 1882, is limited by the effect of s. 3 of the latter Act to bills of sale given by way of security for the payment of money, and does not operate to affect bills of sale given by way of absolute transfer. *Swift* v. *Pannell*, 24 L. R., Ch. D., 210; 48 L. T. 351; 31 W. R. 543; 53 L. J., Ch., 341. [1088 (13).

7. Where a bill of sale, given by a debtor under pressure by his creditors, passed all the debtor's effects, etc., in his house, and then added, "which are more particularly described in the schedule hereto":—Held, that the large words in the body of the deed were not limited by the schedule, which only described a part of the goods in the house at the time. *Baker* v. *Richardson*, 6 W. R. 663. [1092 (5).

BUILDING SOCIETY.

8. For the form of decree in suit by persons interested in the funds of a benefit society against the trustees claiming a lien on the funds and charging the defendants, the directors, with breaches of duty. See *Evans* v. *Coventry*, 5 W. R. 187. [1123 (3).

8. A shareholder of a benefit building society, who has forfeited his shares by non-payment of fines, etc, although he is neither a director nor member of the executive committee, is liable to be put on the list of contributories on the winding up of the society. A shareholder of a benefit society, who is a director and member of the executive committee, who has paid nothing, but has signed the share-book, is liable as a contributory on the winding-up. A shareholder of a benefit society who has been appointed a director and paid a subscription, but has not signed the share book, is liable as a contributory to the debts and liabilities of the concern. *Exp. Foote, Jennings, and Dearsley, Re St. George's Benefit Building Society*, 6 W. R. 766. [1126 (5).

BURIAL.

P. 1129, col. 2, after line 16, add

See EXECUTOR AND ADMINISTRATOR, X. IV.

CANCELLATION.

P. 1133, col. 2, last line after FRAUD, add RECTIFICATION AND CANCELLATION.

CASE FOR OPINION OF FOREIGN COURTS AND PROOF OF FOREIGN LAW.

See PRACTICE (EVIDENCE).

CHAMBERS AND CHIEF CLERK.

See PRACTICE (CHAMBERS AND CHIEF CLERK).

CHARGE.

P. 1143, col. 1, line 42, after PORTION add POWER, XIX.

CHARITY.

1. Petition for application of purchase money paid into court in respect of charity lands under the Lands Clauses Act, in the purchase of land, entertained without the certificate of the Charity Commissioners. *Re Cheshunt College*, 3 W. R. 638; 1 Jur, N. S., 995. [1154 (1).

2. As to practice on settling scheme for a charity, see *Att.-Gen.* v. *Attwood*, 1 W. R. 64, 91; 9 Hare (App) x. [1151 (8).

3. Petition for a scheme under Sir Samuel Romilly's Act ordered to stand over, and the judge in chambers to be attended with the scheme, serving the attorney-general with the summons. *Re Hanson's Trust*, 9 Hare (App.) x. and liv. [1151 (8).

4. If an intended application to the Court be for a new disposition of charity funds, there must be the previous sanction of the Charity Commissioners. Therefore, where an application had for its object the erection of a new schoolhouse out of the charity funds:—Held, that it must have such previous sanction, though it might be otherwise if the object were merely the addition of new rooms to an existing schoolhouse. *Re Ford's Charity*, 3 Drew. 324. [1155 (7).

P. 1159, col. 2, after VALIDITY OF GIFTS, add

5. A power given to a charitable institution by its special Act to acquire lands by will infers a power to persons to give to it lands by will. *Perring* v. *Trail*, 22 W. R. 512.

See also WILL, XXXI. I. 1.

6. Where trustees have an option to apply funds to purposes which, though liberal or benevolent, are not such as are in this court understood to be charitable, the trust cannot be executed here. Thus, the Court cannot execute a trust for private charity. *Nash* v. *Morley*, 5 Beav. 177; 11 L. J., N. S., Ch., 336; 6 Jur. 520. [1163 (8).

7. *See also Pettingall* v. *Pettingall*, p. 2808 (3). [1165 (6).

8. A bequest of a prize for an essay on the subject of emigration to the United States:—Held, under the circumstances, void for uncertainty. *Briggs* v. *Hartley*, 19 L. J., N. S, Ch., 416; 14 Jur. 683. [1165 (7).

9. Trust by will to pay the income to the testator's wife for life, enjoining her to co-operate with his trustees in carrying his wishes into execution, and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widow or children of poor clergymen or otherwise, as his wife shall judge most worthy and deserving objects, giving a preference always to poor relations. The object is, charity in general with a preference, but not confined to poor relations; the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control of the trustees. *Waldo* v. *Caley*, 16 Ves. 206. [1169 (5).

10. A direction to build a suitable durable and handsome monument:—Held, not void for uncertainty in the amount that might be required for the purpose. *Quære*, whether a direction to bury testator in a monument to be erected in unconsecrated ground is void. *Mitford* v. *Reynolds*, 1 Ph. 185; 12 L. J., N. S., Ch., 40. [1172 (8).

11 A bequest of stock to trustees of a charity to pay for painting and repairing a gravestone for a certain day yearly, and to pay the balance for the purpose of the charity, is a valid bequest, subject to a precatory trust. *Hunter* v. *Bullock*, 41 L. J., Ch., 637; 20 W. R. 460. [1173 (5).

P. 1173, after par. (5), add *See also* PERPETUITY, VIII. XIII.

P. 1175, after par. (8), add *See also* POACHING.

12. A deed purporting to be an immediate gift for a charitable purpose, and in the execution of which any benefit is reserved even tacitly to the grantor, is void by the Statute of Mortmain. *Howard* v. *Fingall (Earl)*, 1 W. R. 515. [1179 (2).

13. Part of an accumulated fund, left originally by will to a company, is proposed by a scheme settled by the Master to be laid out in the purchase of freehold land to build almshouses thereon:—Held, that notwithstanding the provisions of the Statute of Mortmain, the Court would sanction such a scheme. *Re Honnor's Trust*, 3 W. R. 429. [1188 (11).

14. A bequest of a legacy to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary:—Held, to import an intended outlay of the sum in building a schoolhouse at the place referred to, and therefore to be a void bequest within the Statute of Mortmain. *Att.-Gen.* v. *Hull*, 9 Hare 647. [1188 (11).

15. Testator gave 2,000*l.* to pay a master and mistress of a school which he wished to have established after his death, for children of the Established Church, and stated that he intended to have left a house for the purpose of being converted into a schoolroom, but was prevented by the law of Mortmain; he therefore gave the house to the patron of the living, in the hope that he would convert it into a daily school:—Held, following *Att.-Gen.* v. *Williams* (2 Cox 387), that the bequest was good. *Hill* v. *Jones*, 2 W. R. 657. [1188 (11).

16. A testator who gave a legacy for charitable purposes, to be executed in a foreign country, named, as one of the trustees of the charity, an officer created by Act of Parliament, describing him by his office, and not by his name. The Act of Parliament having been repealed, and the office abolished, the Court referred it to the Master to approve of a proper person to be a trustee in his stead. *Att.-Gen.* v. *Stephens*, 3 Myl. & K. 347. [1223 (8).

17. The founder of a charity having named as trustees the occupiers of certain annual offices, other trustees appointed by the Court to hold the funds, the selection of the objects being left to those appointed by the founder. *Exp. Blackburne*, 1 Jac. & Walk. 297. [1223 (8).

18. Prospective order for an application to obtain the appointments of new trustees of a charity, when the number becomes reduced. *Re Town Lands of East Bergholt*, 2 W. R. 4; 2 Eq. Rep. 90. [1223 (8).

19. The provisions of 13 & 14 Vict., c. 28 (Pete's Act), are not applicable to the appointment of new trustees by the congregation of a Wesleyan chapel. The Commissioners under the Charitable Trusts Act having issued their certificate, new trustees were appointed and

a vesting order granted in chambers. *Re Hoghton Chapel*, 2 W. R. 631. [1223 (8).

1. In a college of royal foundation, a practice having, for many years, prevailed of electing two fellows of a county, for which the statutes allowed only one, a dispensation from the Crown authorising that practice was presumed. *Queen's College case*, Jac. 1. [1229 (6).

2. In settling the salaries of a grammar school, the Court will consider exhibitions for scholars of secondary importance to the salary of the master. *Att.-Gen.* v. *York (Archbishop)*, 2 W. R. 7. [1235 (3).

3. An appointment of a person as residuary legatee, with a desire that the testator's residuary estate be afterwards left in the residuary legatee's and his own name to charitable purposes, is not sufficient to create a charitable trust, and to cut down the beneficial interest of the legatee. *M'Culloch* v. *M'Culloch*, 1 N. R. 535. [1197 (7).

4. Where a trustee of a charitable fund kept it secretly in his possession for twelve years, he was charged with 5*l.* per cent. interest on it with annual rests, though he had invested it in 3½ per cents, upon an *ex parte* application under the Trustee Act, in the name of the Accountant-General. *Att.-Gen.* v. *Alford*, 2 W. R. 580; 18 Jur. 592. [1209 (1).

5. A collegiate body compellable to execute a trust as a private person, and though the bill not brought recently. *Green* v. *Rutherforth*, 1 Ves. 468. [1209 (1).

6. *Semble*, that proof of general, though not universal, approbation of parish, is sufficient to justify *bonâ fide* conduct of trustees of parish charity, where they have a discretionary power. *Re Chertsey Market*, 6 Price 261. [1209 (1).

7. A testator gave the rents of real estates to trustees in trust to pay the same to such sufficient, able, and orthodox minister as should be from time to time settled in the cure of S., by and with the consent and approbation of the trustees, and declared that, if any should be placed there without the consent or approbation of the trustees, they should apply the rents in another way. On the occasion of a vacancy in the cure, the patron announced to the trustees his intention of nominating C. to the cure. In reply to this the trustees stated their wish that a residence should be built in the parish for the incumbent, and that arrangements should be made with charging the rents with it. Some negotiations were entered into respecting this matter, but the scheme failed. The trustees having declined to make any payment to C., an information was filed against them at the relation of C. for payment of the rents to C., or for a new scheme. The information was dismissed. *Att.-Gen.* v. *Mosely*, 2 De G. & Sm. 398; 17 L. J., N. S., Ch., 446; 12 Jur. 889. [1209 (1).

8. A royal charter of incorporation does not of itself make a school a public one, so as to deprive the trustees of any discretionary power of removing the schoolmaster, which the rules of the establishment may give them, but which in a public foundation a similar mode of appointment would not give them. *Gibson* v. *Ross*, 7 Cl. & F. 241. [1232 (5).

9. A bequest to the president and trustees of a school, to be applied in instructing youth in specified subjects:—Held, not to fail by reason of the school having been closed before the testator's death, or the date of his will. *Marsh* v. *Att.-Gen.*, 2 John. & H. 61; 7 Jur., N. S., 184; 30 L. J., Ch., 233; 9 W. R. 179; 3 L. T., N. S., 615. [1254 (6).

10. A testator bequeathed 500*l.* to the church-building fund for native churches in India, and made other bequests to other charities for particular purposes, and declared that where the specific purposes should fail the funds should be applied for the general purposes of the society. No society being found having for its exclusive purpose the building of native churches in India:—Held, that the legacies must be divided *pro ratâ* amongst the other societies. *Re Hyde*, 22 W. R. 69. [1254 (6).

CHILD AND CHILDREN.

P. 1263, col. 2, line 37, before SETTLEMENT add PORTION.

P. 1263, col. 2, after line 27, add

—*Limitations and Gifts to.* See LEGACY—SETTLEMENT, X. III.—WILL, XVII.

—*Interest on Legacies to.* See LEGACY, XIII. IV.

—*Illegitimate.* See CROWN, V.—ESCHEAT and FORFEITURE—FEE SIMPLE, I.—LEGACY, XIII. IV. 3.—LEGITIMACY PORTION, XI. II. 3.—POWER, XVII. III.—WILL.

CHILD-BEARING. WOMAN PAST.

See PRACTICE (PAYMENT OUT OF COURT).

CLAIM. PROCEEDINGS BY.

See PRACTICE (CLAIM. PROCEEDINGS BY).

COLLUSION.

See FRAUD AND MISREPRESENTATION, and cross-references there.

COLONIES AND COLONIAL LAW.

11. In any case where a jury is summoned and sworn to award the amount of compensation, it requires express words or an amount

of implication of absolute necessity to take away the claimant's rights to have his witnesses sworn and examined. This right is not taken away by the Act of the local Legislature of Lower Canada, 14 & 15 Vict., c. 128. Justices competent to swear a jury are competent to swear witnesses. Mere respectful acquiescence or submission to the ruling of a Court does not amount to acquiescence or waiver of a right to complain of an illegal decision. To prove acquiescence or waiver, it ought to be shown that something was said or done to give the Court a jurisdiction which it did not possess. As the above Act does not direct any judgment to be given, or make the proceedings final and conclusive, any manifest failure of observing the fundamental forms and principles of justice would vitiate and render null and void the proceedings under the Act before the justices. *Beaudry* v. *Montreal* (*Mayor*), 6 W. R. 346; 1 L. T., N. S., 18; 11 Moo. P. C. 399. [1279 (5).

1. An adopted son, according to the Hindoo law, is entitled to succeed to his collateral as well as his direct relations by adoption. *Chowdry* v. *Dibeh*, 3 Knapp, 55. [1301 (6).

2. The tie that bound an undivided family together is dissolved by the conversion of a member to Christianity, so far as regards such member. A convert may renounce the old law with his former religion, or abide by the old law notwithstanding his changes of faith. *Lex loci* does not apply to parties who have ceased to be Hindus in religion. Customs and usages not enjoined may be as voluntarily changed as they were voluntarily adopted. *Abraham* v. *Abraham*, 2 N. R. 431. [1301 (6).

3. In a suit for the division of the property of an undivided Hindoo family, the whole of the property of each individual is presumed to belong to the common stock, and it lies upon the party who wishes to except any of it from the division, to prove that it comes within one of the exceptions recognised by the Hindoo law. *Sadasew* v. *Bajee*, 2 Knapp, 60. [1301 (6).

4. The Statutes of Wills, *et de donis conditionalibus*, do not extend to the Isle of Man. That island made unalienable by a private Act of Parliament against heirs general on failure of issue male. *Sodor and Man* (*Bishop*) v *Derby* (*Earl*), 2 Ves. 337: 5182 (17). [1309 (1).

5. Non-user for twenty-one years does not deprive the tenants or farmers of the Isle of Man of the right to dig for and raise limestone and other stones in the quarry of a tenant, provided the stones, etc., are for the use of the party obtaining them, or to be employed by him for the improvement of his own or neighbour's estate. By the supplemental Act of Settlement (6th June 1704), a discretionary power is vested in the governor to allow the exercise of this right. *Christian* v. *Gibson*, 3 Moo. P. C. 351. [1308 (6).

6. *Quære*, whether the governor of the colony of New Zealand has, under his general authority as such governor, vested in him so much of the prerogative of the Crown as relates to the making of grants of waste lands within the colony. *Re Clarke*, 7 Moo. P. C. 77. [1315 (2).

A grant of lands made by the governor to a land claimant, founded upon the recommendation contained in the report of a Commissioner, such grant embracing a quantity of land exceeding the amount prescribed by Ordinance Sess. 1, No. 2, of 1841:—Held, in *scire facias*, void, and judgment given for the Crown. *Ib.*

7. A consignee over an estate of infants cannot be appointed without giving security. *Cobham* v. *Cobham*, 5 Jur. 931. [1322 (7).

8. The principle of the *droit de retrait* (as formerly existing in Jersey) is to place the person exercising the right in the same situation as the vendee; but, by the law of Jersey, the heir is not bound to perform the stipulations of an original contract where it is personal; where, therefore, a contract was of a mixed nature, the price of the purchase being to be paid partly in money and partly in services, the Judicial Committee held, affirming the judgment of the Royal Court of Jersey, that such contract could not be enforced against the vendor's heir, so as to give him a right to the redemption of the estate. *Touzel* v. *Filleul*, 3 Moo. P. C. 484. [1306 (2).

COMPANY.

P. 1337, col. 2, line 48, after SOCIETY add MINES AND MINERALS, V.

9. Where every member of an inchoate association executes an instrument, whereby it is declared that the majority of a committee of management shall bind all parties, costs incurred under the authority of such committee are a debt due from the assets of the company in winding up. *Re Warwick & Worcester Railway Co.*, 6 W. R. 433; 1 L. T., N. S., 145. [1341 (5).

10. A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material misstatement of fact. *Denton* v. *Macneill*, 2 L. R., Eq., 352; 14 W. R. 813; 14 L. T., N. S., 721; 35 Beav. 652. [1361 (5).

Where a person joined with other persons in promoting, and took shares in, a company for the working of a patent, expended divers sums of money in the concern, with respect to which, however, no company was ever in fact formed, and afterwards filed a bill for an account and contribution against some only of the parties with whom he was jointly liable, alleging (but not establishing), as his equity to the relief he sought, fraud and misrepresentation in the prospectuses of the projected company, by virtue of and through faith in which he had been induced originally to take shares in the concern:—Held, that he was not entitled to the relief he prayed by his bill, and that it must be dismissed accordingly. *Ib.*

11. At one time I was much struck with the observation, that in the pleading there is an averment that proper accounts had not been taken; consequently it was said that something had been done that was in violation of the Act of Parliament, and therefore *ultra vires*. That, in my opinion, is a misapplica-

tion of the principle of *ultra vires*. The meaning of *ultra vires* is, if a corporation, having been constituted for a particular object, appropriates its funds to something else than that object, it is doing something that impliedly it is forbidden to do by the Act of Parliament. That is *ultra vires*. But to say that it is *ultra* of the company, that the accounts have not been accurately kept, seems to me to be confounding together two grounds of complaint which are altogether distinct. The very object of the suit for calling the directors to account is, to have corrected any irregularities which there may be in the accounts that have been rendered. Per Lord Cranworth, in *Orr* v. *Glasgow, Airdrie, & Monklands Junction Railway Co.*, 6 Jur., N. S., 877. [1372 (8).

1. Parliament having created a company, the power rests in Parliament to vary its constitution, or to control or to annihilate it; and it is not the function of a court of equity to decide on the propriety of an application to Parliament to vary the original object contemplated by the Act. Such an application is not illegal if it be pursued by legal means; but, it appearing in a suit by certain shareholders that a company had resolved to use its funds, and to pledge its credit, and to make contracts for the purpose of such an application to Parliament:—Held, that such appropriation of funds, and pledges, and contracts, were illegal; and, at the instance of the shareholders, an injunction was granted restraining the appropriation of funds, the pledging of the company's credit, and the entering into contracts in support of such an application to Parliament; but the Court declined to restrain the company from introducing or soliciting such bill, or using the name and seal of the company for such purposes. *Great Western Railway Co.* v. *Rushout*, 5 De G. & Sm. 290; 16 Jur. 238. [1373 (4).

Certain of the directors of a railway company, acting on the nomination of another railway company, which was interested in certain shares in it, and which nominated those directors by virtue of the Act constituting the company, were excluded, by a resolution of the board of directors, from the meetings of the directors, and the majority delegated all the powers of the board to a managing committee:—Held, that, although in such a body the majority binds the minority, yet, that it is essential in the validity of their acts that the voice of the minority should have been heard; and such exclusion of directors was restrained. *Ib.*

2. All the original shares of a company, which was constituted under 19 & 20 Vict., c. 47, had not been issued. A meeting was held under 25 & 26 Vict., c. 89, s. 50, to give the directors power to issue preferential shares:—Held, that such alteration was not within the power of a meeting. *Hutton* v. *Berry*, 6 N. R. 376. [1374 (5).

3. Whether a foreigner dealing with a joint stock company may be bound to take notice of the provisions of 7 & 8 Vict., c. 100, *quære*. *Meredith's and Conver's Claim, Re State Fire Insurance Co.*, 1 N. R. 510. [1397 (3).

4. A shareholder in an incorporated company, on his own behalf alone, filed a bill against the company and the directors, but not making in any other manner, by representation or otherwise, any other member of the corporation a party, the object of the suit being to prevent the company from making only a part of the line, and from applying to Parliament for authority so to do.—Held, that the suit was defective for want of parties, the case being analogous to that of a suit by a *cestui que trust* against a trustee complaining of a breach of trust, and not making other *cestuis que trustent* parties; and a demurrer *ore tenus* on this ground was allowed, without costs. *Cooper* v. *Powis* (*Earl*), 3 De G. & Sm. 688. [1411 (3).

5. Where fraudulent representations have been made by the promoters and directors of a proposed company; one who becomes a director subsequent to such representations, with notice thereof, and continues to act, makes himself liable. *Beeching* v. *Lloyd*, 3 Eq. Rep. 737. [1431 (4).

6. Where the directors of a company with limited liability were made defendants in a suit to restrain the infringement of a patent, the bill charging that they had personally interfered and infringed the patent, and praying that the defendants might pay the costs:—Held, that the directors were personally liable. *Betts* v. *De Vitre*, 5 N. R. 165; 37 L. J., Ch., 325; 3 L. R., Ch., 429; 18 L. T., N. S., 165; 16 W. R. 529. [1439 (3).

7. Where money is advanced by the directors of a company, and shares are taken by them as a security for the money so advanced, with an option of returning them, but one of the parties advancing the money retains the shares, he loses his option of returning them, and cannot prove for the debt against the company. *Re Universal Salvage Co., Exp. Winthrop*, 1 W. R. 33. [1453 (1).

8. A company was formed for purchasing certain salt-works and manufacturing and selling salt and other minerals thereupon. The deed of purchase recited that part of the amount arising from the paid-up shares had been paid as purchase money for the saltworks. That sum, however, had been applied for other purposes of the company. M., a director, and the banker of the company, subsequently advanced money to complete the purchase, and for other purposes of the company. By a memorandum signed by five directors out of the six (the number fixed by the provisional agreement), it was agreed on behalf of the company that the advances made by M. should be repaid, and the title deeds deposited as an additional security:—Held, that M. had a lien upon the estate of the company and its proceeds, and that the shareholders could not claim the benefit of the property without having paid for it; that the memorandum signed by the five directors could not be treated as not binding upon the company, as the company had so far adopted the proceedings of the five managing directors as to render it impossible for them, while taking the benefit of the proceedings, at the same time to repudiate the burdens. *Exp. Morrell, Re Imperial Salt and Alkali Co.*, 2 W. R. 122. [1453 (1).

9. The directors of an unregistered banking company, formed by deed giving them large discretionary powers in addition to powers

to conduct the usual business of bankers, raised a large sum of money upon debentures or notes with coupons attached, payable after a long interval of time, they having themselves subscribed for a very great proportion of the shares of the company, without paying up the calls due on them, or any considerable portion of these calls; nor did they make calls upon the other shareholders beyond 15*l.* on every 50*l.* share. The money thus raised was sent out to one of themselves in Australia, who employed it, not in the regular business of banking, but in an exceedingly speculative manner. The company was now being wound up before the Master, who allowed two claims in respect of these debentures as against the company. On a motion to discharge or vary his certificate:—Held, that upon the construction of the deed the directors had power to bind the company; that the promissory notes signed by the directors in the form—

"We, directors of the Royal Bank of Australia, *for ourselves and the other shareholders* of the said company, jointly and severally promise to pay to G. H. Wray or bearer, on the first of August 1851, at the Union Bank of London, the sum of 200*l.*, for value received on account of the company.

"J. W. SUTHERLAND, *Chairman.*
"ADAM DUFF, } *Directors.*
"JOHN MITCHELL, }

"Entered,

"BENJAMIN WOOD, *Secretary.*"

bind the company; and that the speculative trading of the directors in Australia, being disclosed in the annual reports, was ratified by the shareholders. *Re Royal Bank of Australia, Walker's case*, 2 W. R. 383; 23 L. T. 74. [1454 (1).

Foreign Company Commencing Business in the United Kingdom. Payment out of Deposit. Accumulation Fund in Foreign Country.] 1. In the case of a petition presented under the Life insurance Companies Acts 1870 and 1872, and the Board of Trade rules made in pursuance of these acts, praying for payment out "to the depositors of the 20,000*l.* required to be deposited in court by a foreign life assurance company before commencing business in this country," the Court will make the order prayed for, notwithstanding that the Life Assurance Companies Act 1870, s. 3, enacts that the deposit shall be returned to the company. The life assurance fund of 40,000*l.* required by the section to have been accumulated prior to the return of the deposit may consist of accumulations already existing abroad, and arising from the original business of the company. *Re Colonial Mutual Life Assurance Society*, 21 L. R., Ch. D., 837; 46 L. T. 282; 30 W. R. 458. [1485 (3).

2. L. & S. being partners, S., on the faith of statements made to him, tells L. that the liability in a company is limited, and they take shares, S. alone executing the deed in the name of the firm. Calls are paid and dividends received by the firm, and L. & S. dissolve partnership. The shares are transferred to L. by S. The company fails, and a winding-up order is made, and L. is put on the list of contributories in the first degree, and S. in the second. On the question whether they were rightly so placed in the list:—Held, that they were. *Semble*, a person taking shares, paying calls, and receiving dividends is liable as a shareholder, although he never executes the deed. *Exp. Letts and Steer, Re Protestant Assurance Association*, 5 W. R. 399 26 L. J., Ch., 455. [1507 (9).

3. A director of a joint stock banking company assigned to another director a number of shares at a price far above the market price of the shares, which were unsalable. The price was paid, but the transfer was not made with the formalities required by the partnership:—Held, that it was invalid, and that the transferor was rightly placed on the list of contributories in respect of his shares. *Exp. Kennedy*, 6 Ir. Ch. R. 121. [1529 (5).

4. An agent of a company, who had accepted shares on which he paid nothing, afterwards begged to relinquish his agency, and to be allowed to give up the shares. His resignation of the agency was accepted, but not of the shares, though he was told that he might nominate some other person to pay upon them. Nothing further having been done:—Held, that he was a contributory. *Exp. Burton*, 16 Jur. 967; 21 L. J., Ch., 781. [1560 (6).

5. Section 40 of the Joint Stock Companies Act 1856, makes the books of a company evidence only against shareholders, so that they cannot be looked to when the question is, whether a person is or is not a shareholder. *Exp. Fox, Re Moseley Green Coal and Coke Co.*, 2 N. R. 1. [1561 (5).

P. 1567, col. 1, after line 43, add

See also EXECUTOR AND ADMINISTRATOR XXIV. III.

6. E., an allottee of shares after complete registration, went abroad without having executed the company's deed of settlement. Messrs. N., brokers, by his direction sold his shares, and the transfers were executed by the allottee's brother for him under a power of attorney, and by the purchasers. The company, however, declined to register the transfers, on the ground that E., not being a registered shareholder, was not entitled to transfer the shares under the 26th section of the above Act. He afterwards became bankrupt, and the brokers, who had been compelled to purchase other shares for the purchasers, presented a petition praying that the assignees might be directed to complete the transfers:—Held, that such dealing with shares before registration was prohibited by the Act; and the petition was accordingly dismissed with costs. *Exp. Neilson, Re Edmond*, 2 W. R. 121; 18 Jur. 297. [1578 (2).

7. It is not necessary to obtain leave to issue execution on a judgment obtained against a company in order to prove it against the estate of a shareholder. *Walton* v. *Butler*, 5 W. R. 331. [1599 (8).

8. Where, in the course of winding up, the Master makes a call substantially excessive of that advertised, the matter must go back to the Master, as not fair towards the parties. The advertisement under 11 & 12 Vict., c. 45, s. 85, does not determine the sum, but merely states that a call is proposed to be made. *Exp. Curzon (Viscount), Re London & Birmingham & Buckinghamshire Railway Co.*, 6 W. R. 141. [1603 (4).

1. The Court has an absolute discretion to decide in the first instance to grant or refuse petitions, although coming within the meaning of the Winding-up Acts. *Re London Conveyance Co.*, 1 W. R. 252; 1 Drew. 465. [1616 (9).

2. A partner in a joint stock company which has become embarrassed and ceased its operations, and is being wound up by a committee of the directors and shareholders, is not precluded from his right to have the company wound up, under the provisions of the Joint Stock Companies Winding-up Acts, by the circumstance that he has assented to the appointment of the committee to wind up the affairs of the company; and also that there is no more serious charge raised against the directors than that of carelessness. *Re Cheltenham & Gloucestershire Joint Stock Bank*, 4 W. R. 624. [1629 (2).

3. Funds of a company being misapplied and lost through the injudicious conduct of the managing director, who sells his shares with the knowledge of the misapplication, though not of the loss, a shareholder presents the usual petition to wind up, on the ground of such mismanagement. Order made that the petition should stand over for three months, upon the undertaking of the managing director not to interfere with the assets in respect of the purchase money for his shares, and on payment of a sum due to the company from another director. *Re Newcastle Commercial Banking Co.*, 5 W. R. 31. [1617 (5).

4. The Court may adjourn winding-up cases to chambers where the matter is not already before the Master. *Re Bituminous Shale Co.*, 2 W. R. 313. [1634 (13).

5. Where a company had ceased to carry on business, but the governing body were *bonâ fide* putting in execution their powers, under the deed of settlement, to wind up the affairs of the company, the Court refused to make an order under the provisions of the Winding-up Acts, although a creditor of the company to a large amount was in a position to issue execution for his claim against the company, and if not successful by such means, then against the members individually. *Re British Alkali Co.*, 16 Jur. 944. [1644 (4).

6. Whether in the case of two ordinary companies being wound up, one official manager may put the other on the list of contributions, *quære*. *Re Security Mutual Life Assurance Society, Exp Athenæum Life Assurance Society (Official Manager)*, 6 W. R. 431; 1 L. T., N. S., 94. [1665 (7).

7. Before any proceedings by the chief clerk to adjudicate upon the liabilities of individual shareholders in respect of a company being wound up in chambers, the list of contributories must first be settled. *Re Court Grange Silver Lead Mining Co., Sedgwick's case*, 5 W. R. 773; 2 Jur., N. S., 949. [1679 (3).

8. *Semble*, that in proceedings under the Winding-up Acts conducted in chambers, until the list of contributories has been signed by the judge himself, the list is not finally settled within the provisions of the Winding-up Act 1848. Conflict between the Winding-up Acts and the Master in Chancery Abolition Act. *Re Kilbricken Mines Co., Libri's case*, 5 W. R. 773. [1679 (3).

9. In a case where two of the contributories might have been entitled to insist upon a classification, but had neglected to do so before the Master, and now moved to discharge the Master's order including them in a call:—Motion refused with costs. *Exp. Scott's Executors, Re North of England Banking Co.*, 1 W. R. 49. [1679 (3).

10. Where a company is wound up under the Companies Act 1862, and calls have been made on the shareholders, interest after the date of the winding up can be paid up out of the calls only on those debts which carry interest at law. *Re Herefordshire Banking Co.*, 2 L. R., Eq., 250; 36 L. J., Ch., 806; 17 L. T., N. S., 38; 15 W. R. 1056. [1688 (8).

11. Upon claims carried in by creditors against a company in course of winding up, wherever there is a fair question to be tried, the claim must be allowed by the Master as a claim only, and not as a debt until it has been established at law. *Re Counties Union Assurance Co.*, 5 W. R. 389. [1703 (1).

12. The Statute of Limitations ceases to run against a creditor of a company from the time that the Master takes any step in the winding up. *Re Warwick & Worcester Railway Co.*, 6 W. R. 433; 1 L. T., N. S., 145. [1703 (10).

13. A company, incorporated by Act of Parliament, was thereby empowered to purchase lands, to be vested in them for the purposes of the Act. There was no provision for the disposal of the land if the works should be abandoned. The operations of the company had for some time ceased. The Court refused, at the instance of a shareholder, to decree a sale of the land acquired under the powers in the Act, for the benefit of the shareholders. *Hall* v. *Deal Pier Co.*, 2 N. R. 59. [1706 (5).

14. In the proceedings before the Master for winding up an abortive joint stock company, in which 53,015 shares had been subscribed for, a sum of 23,000*l.* was realised. After two advertisements in the daily papers for scripholders, certificates representing 25,675 shares were produced; 24,870 scrip shares were cancelled by arrangement with the holders, leaving 2,470 scrip shares unaccounted for. It appeared that 22,000*l.* assets of the company remained outstanding. On the application of the official manager, the Court authorised him to pay a dividend of 15*s.* per share among the holders of the 25,675 scrip shares, and to pay and distribute future dividends among the holders for the time being of scrip shares, with the sanction of the Master. *Exp. Quilter*, 5 De G. & Sm. 276; 16 Jur. 809. [1707 (2).

15. Two petitions being presented, one by a shareholder, and the other by a creditor, for winding up the same company—the first petition is wrongly entitled, and on objection taken, leave to amend is refused. On the second petition a conditional order is made for payment in a certain time, or in default for winding up; default is made; but pending the creditor's petition and before order made on it, the shareholder presents another petition to wind up. On the question of costs:—Held, that the shareholder must pay the costs of the wrongly entitled petition, and the costs of the parties served upon the second

petition. *Re South Essex Gaslight and Coke Co.*, 6 W. R. 234. [1711 (11).

1. Where more than one petition has been presented in reference to the winding-up of a company, special circumstances justifying such other petitions must be shown to induce the Court to allow the costs of more than one petition. *Re General Indemnity Assurance Co.*, 5 W. R. 465. [1711 (11).

P. 1719, after par. (4), add

See also SOLICITOR, XV. 1. 2 (d).

CONDITION.

P. 1727, col. 2, line 30, after See add VESTED CONTINGENT AND FUTURE INTERESTS.

2. Property cannot be given for life any more than absolutely without the power of alienation, being incident to the gift; and although a life-interest be expressed to be given, it may be well determined by an apt limitation over. *Rochford* v *Hackman*, 9 Hare 480; 21 L. J., N. S., Ch., 511; 16 Jur. 212. [1728 (1).

There is no rule that a life-interest may not be well determined by a proviso for cesser, although it be not accompanied by any limitation over, *semble*. S. C. 9 Hare 481; 21 L. J., N. S., Ch., 511; 16 Jur. 212.

No greater effect can be given to a limitation over, than to an express declaration that the life-interest shall cease. *Ib.*

A life-estate given in the prior part of a will may be well determined by an apt limitation over contained in the subsequent part of the will. *Id.* 475.

The Court must look to the previous part of the will to ascertain what interest the testator intended to give, and to the ulterior part to see in what events that interest is given over. *Ib.*

The distinction between bankruptcy and insolvency, as being voluntary and involuntary modes of alienation, approved of. *Ib.*

3. A testator devised an estate to A., with an injunction that he was not to sell it out of the family; but if sold at all, it must be to one of his brothers:—Held, that the restraint was void. *Attwater* v. *Attwater*, 2 W. R. 81; 18 Jur. 50. [1729 (4).

4. Estate of tenant for life liable to forfeiture on his mortgaging it. He mortgaged it to A. unknown to the parties taking under the forfeiture:—Held, that A. was liable to account to them for the rents, at all events, from the filing of the bill, and beyond that from the time he had notice of the trusts creating the forfeiture. *Hennessey* v. *Bray*, 33 Beav. 96. [1739 (5).

5. On construction of will, legacy, with prohibition to executor not to advance it unless "in case of an establishment or acquisition which may to executors seem advantageous":—Held, a conditional legacy. *Pink* v. *De Thuisey*, 2 Madd. 157. [1746 (1).

6. Testator devised estates to F. S. and M. his wife for their joint lives and the life of the survivor, he assuming the name and arms of testator; remainder to trustees to preserve contingent remainders, and after the decease of F. S. and M., unto all the children of F. S. and M. then already or thereafter to be born of their bodies, male or female, for and during their joint lives and the life of the survivor of them; but all the sons to take the name and arms of the testator in addition to their own; remainder to trustees to preserve contingent remainders, in trust nevertheless to permit all the said children to receive the rents of the property in equal shares during their lives, and from and after their several deceases unto and equally between all their issue, male and female, and for want of such issue over:—Held, that the name and arms clause was a condition subsequent to the vesting of the estates in the sons, and was satisfied by their assuming the name and arms of the testator subsequently to the disentailing deed. *Woodhouse* v. *Herrick*, 3 W. R. 303; 1 Kay & J. 352; 3 Eq. Rep. 817; 24 L. J., Ch., 649. [1763 (3).

7. Where a legacy was given to A. in the event of B. dying unmarried, but upon the express condition that A. should, within three years of testator's death, pay to the executors all moneys due from him to the testator, the Court observing that the legacy might have become payable before the end of the three years, by the death of B. within that period, and that this was a condition for the payment of money:—Held, that the condition was substantially performed by payment after the three years, and that legacy was payable. *Paine* v. *Hyde*, 4 Beav. 468. [1771 (8).

8. A devise to a man and his heirs, or in tail; but in case he commits treason within such term, it shall go over; this is a void clause. A man may by will substitute another executor, if the first should, by treason, forfeit during the life of the testator; but if he means to extend it beyond the term of his own life, it could not take effect, as it would be an evasion of Acts concerning treason. *Carte* v. *Carte*, 3 Atk. 180. [1771 (7).

9. A testatrix by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, and declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and in case of forfeiture the forfeited share was to accrue and go over to the other or others of the children living at the time of the forfeiture. Julius, a son of the appointor, married a Christian in his mother's lifetime, but without her consent. The plaintiff, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both Julius and the plaintiff were born after the death of the creator of the power:—Held, first, the forfeiture clause was not void as against public policy: secondly, that it was effectual as to the shares of children marrying

Christians or becoming Christians during the lifetime of the appointor, and therefore that the share of Julius was forfeited. thirdly, that the forfeiture clause must be read in conjunction with the gift over, and therefore that so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, and consequently that the plaintiff had not forfeited her share. *Hodgson* v. *Halford*, 11 L. R., Ch. D., 959; 48 L. J., Ch., 545; 27 W. R. 545. [1771 (7).

1. A will contained a proviso, that in case any of the testator's sons should intermarry or illegally cohabit with any of their cousins, the share of such son was to go over to the persons who would have taken if he had died under twenty-one; and the testator declared that it should not be lawful for his trustees to transfer any share in the personalty, or permit him to enter upon the realty, until such son should execute a bond to the said trustees in 20,000*l.* to observe this direction:—Held, that one of the sons, who had arrived at twenty-one, could require payment of his one-fourth without entering into such bond. *Poole* v. *Bott*, 17 Jur. 688; 22 L. J., Ch., 1042; 11 Hare 33; 1 W. R. 276; 1 Eq. Rep. 21. [1771 (7).

Semble, that a condition to give such a bond is not to be enforced. *Ib.*

Semble, that the gift over in the principal case did not exactly fit the condition of forfeiture, and therefore that the condition itself would have no result. *Ib.*

2. A bequest was made by a testator to his debtor, on condition of his paying his debt before, or to his (the testator's) executors immediately after, his death; the testator afterwards accepted a composition, and the remainder of the debt continued unpaid:—Held, that the legatee was nevertheless entitled to the legacy. *Gath* v. *Burton*, 1 Beav. 478; 3 Jur. 817. [1773 (8).

3. No notice is requisite where a condition is annexed to a devise of real or personal estate, and the devisee is bound to perform it before he can be entitled, or incur a forfeiture, under a devise over. *Chauncy* v. *Graydon*, 2 Atk. 620. [1774 (10).

4. Notice must be given to the heir-at-law of a condition to work a forfeiture. *Burleton* v. *Humfrey*, Ambl. 259. [1774 (10).

5. Blackacre is devised to J., with a proviso that, if he be evicted, he shall have Whiteacre. J. is evicted of a moiety of Blackacre; he shall only have a satisfaction *pro tanto* out of Whiteacre. *Tyte* v. *Tyte*, 1 Vern. 270. [1774 (14).

Apportionment of Conditions.] 6. A testator directed that a specific sum of 10,000*l.*, to which he was entitled, should be applied in paying off a charge on his B. estate, if established; and that in case it should be so applied, then a charge of 13,000*l.*, to which his D. estate was liable, should not be raised thereout, but out of his B. estate. After his death, the charge on the B. estate having been established, the sum of 10,000*l.* was applied in paying it off. Subsequently, his other personal estate having proved insufficient for payment of his debts, a decree was made for refunding the 10,000*l.* out of the B. estate; but it was disputed whether the whole of it was wanted for payment of debts:—Held, that the disposition in favour of the D. estate was upon a condition which was not apportionable; and that, unless the B. estate got the full benefit of the 10,000*l.*, the owners of the D. estate had no title to throw any part of the 13,000*l.* on the B estate. *Caldwell* v. *Cresswell*, 6 L. R., Ch., 278; 24 L. T. 564. *See also* VESTED CONTINGENT AND FUTURE INTERESTS, XII. 1. [1774 (15).

CONTINGENT INTERESTS.

P. 1779, col. 2, line 5, after WILL, add VESTED CONTINGENT AND FUTURE INTERESTS.

CONTINGENT REMAINDERS.

P. 1779, col. 2, after line 7 add
See also VESTED CONTINGENT AND FUTURE INTERESTS, IX.

CONTRACT.

7. B., a married woman living separate from her husband, entered the service of C. as his housekeeper, and formed an illicit connection with him, during which period C. struck her a violent blow, which compelled her to have medical advice. On her threatening legal proceedings, C. promised compensation, and an agreement was drawn up by which, after reciting that they had lived together, but agreed thenceforth to separate, C. agreed to pay certain sums to B. for her separate use, and it was mutually agreed that each should live separate and apart from, and in no manner molest or annoy, the other. The illicit connection thereupon ceased. B. filed her bill for specific performance of this agreement—Held, on demurrer, that there was no sufficient consideration in the agreement to entitle B. to recover upon it. *Lancaster* v. *Carter*, 2 W. R. 437. [1789 (5).

8. A lessee wrote to his lessor offering to surrender his lease and to take a fresh lease for twenty-one years to a nominee, or to a company which he intended to form, at an increased rent, but otherwise on the same terms as the existing lease; and by a subsequent letter offered to instruct his solicitor to prepare a draft lease. The lessor telegraphed to him in reply to get the lease prepared. Afterwards correspondence took place between the solicitors as to the form of the lease, and the lessee's solicitor prepared a formal agreement. Differences having arisen, the lessor refused to grant the lease, and the lessee

brought an action for specific performance of the agreement to grant a lease and for damages. No company had been formed and no nominee appointed by the plaintiff before the trial of the action:—Held, that assuming there was a binding agreement for a lease, the formation of a company or appointment of a nominee was a condition precedent, and that the plaintiff could not maintain an action for specific performance of the contract, as he had not performed the condition. *Williams* v. *Briscoe*, 32 L. R., Ch. D., 441; 48 L. T. 198; 31 W. R. 907. [1793 (4).

But held, also, on the construction of the correspondence, that there was no binding agreement between the parties, and therefore the action entirely failed. *Ib.*

1. Indictment for misdemeanour may be compromised; but *secus* for felony. *Elworthy* v. *Bird*, 2 Sim. & S. 372; 3 L. J., Ch., 190. See *Westmeath* v. *Westmeath*, Jac. 126. [1789 (1).

Specific performance of agreement for separation of husband and wife decreed, though agreement provided for compromise of indictment for assault. *Ib.*

CONVERSION AND REVERSION.

P. 1794, col. 2, after line 22, add

— *Conversion of Wasting Property or Residue. Rights of Tenant for Life and Remainderman.* See LIFE. ESTATE FOR, VI.

2. *Hudson* v. *Cooke* or *Cook*, 41 L. J., Ch., 306; 13 L. R., Eq., 417; 20 W. R. 407; 26 L. T., N. S., 180—page 7218 (1). [1795 (14).

3. Where a vendor of freehold land died after an award had been made under the compulsory clauses of the 8 & 9 Vict., c. 18, and the amount of the award had been paid into court, the personal representative of the vendor was held entitled to the amount so paid in as part of the personal estate of the testator. *Re Wootton*, 7 L. T., N. S., 620; 1 N. R. 193. [1799 (6).

4. Money paid by certain commissioners under Act of Parliament for land of which A. was seised in fee in remainder, and which money had been invested in 3*l.* per cent. annuities:—Held, to be real not personal estate. *Re Stewart's Trusts, Exp. Cramer*, 1 W. R. 17; 22 L. J., Ch., 369; 16 Jur. 1063; 1 Sm. & G. 32. [1799 (6).

5. Under the compulsory powers of the 5 & 6 Will. 4, c. 69, a poor-law union compulsorily took lands, and paid the purchase money into court. On the petition of the tenant for life, the amount was invested in stock, and the dividends were, under an order of the Court, paid to her for life. On her death, intermediate limitations having failed, her heir at law, to whom the ultimate remainder was limited, petitioned the Court that the stock might be paid out to him:—Held, that the stock continued real estate, and the money was ordered to be paid to him. *Re Horner's Estate*, 5 De G. & S. 483; 16 Jur. 1063; 22 L. J., Ch., 369. [1799 (6).

6. A. mortgaged real estate to B., and gave B. a power of sale, and the trusts of the surplus purchase moneys were declared to be for A., his executors, administrators, and assigns. A. died. After A.'s death the estate was sold under the power of sale:—Held, that A.'s real, and not his personal representatives, were entitled to the surplus purchase money. *Re Clarke's Trusts*, 22 L. J., Ch., 230. [1800 (4).

7. Where a testator, having contracted to purchase an estate, and taken a transfer of a mortgage on it, specifically devised it:—Held, that the devisee was not entitled to the interest on the mortgage between the testator's death and the completion of the purchase. *Pualey* v. *Pualey*, 1 N. R. 509; 8 L. T., N. S., 570. [1800 (4).

8. An estate was appointed by will subject to a charge for raising a sum of money to be applied upon certain trusts. The money was duly raised in the lifetime of the appointee. After his death the trusts failed, and the charge sank for the benefit of the estate:—Held, that the money belonged to the legal personal representatives of the appointee. *Re Newbery*, 46 L. J., Ch., 612; 5 L. R., Ch. D., 746; 25 W. R. 747. [1800 (4).

9. Lands purchased by guardian for infant, during his minority, considered as personalty. *Gibson* v. *Scudamore*, Dick. 45. [1801 (10).

10. A testator directed his trustees to sell his real estates, reserving to them a discretion by the clause "and as and when if they should, from time to time or at any time, think fit, to sell and dispose of his said real and personal estate as they should think proper," one-sixth part or share of the testator's real and personal estate, or the produce thereof, was to be paid, transferred, and assigned to each of his children. No conversion had taken place:—Held, that the share in the realty of one of the children who had died intestate descended upon his heir-at-law in its unconverted state. A conversion qualified by a discretion not the same as an absolute conversion. *Harding* v. *Trotter*, 1 W. R. 502. [1807 (7).

11. A testator gave all his real and personal estate to trustees, upon trust, to permit his wife to have the enjoyment of the rents, issues, and profits thereof for her life, or otherwise, with her consent and approbation in writing, to sell the real and personal estate, and invest the moneys to arise from the sale of his real and personal estate on Government or real security, and pay the interest to her for life; and after her decease to pay two legacies of 50*l.* each, and divide the residue of the moneys to arise from his real and personal estate between his nephews and nieces living at the death of his wife. The real estate was not sold during the life of the widow:—Held, that the nephews and nieces were entitled to the produce of the real estate. *Waddington* v. *Yates*, 15 L. J., N. S., Ch., 223; 10 Jur. 241. [1809 (1).

12. Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease, and as to the proceeds, together with the intermediate rents, after payment of the testator's funeral and testamentary expenses, debts, and legacies, to pay one moiety to his nephew, and to invest the other moiety in the funds, in trust for his

nephew for life, and after his death for his children. The real estates were not sold until some years after the testator's death:—Held, that rents accrued in the meantime ought not to be invested for the benefit of his nephew and his children, but that the nephew was entitled to them. *Vigor* v. *Harwood*, 12 Sim. 172. [1815 (13).

Rights of Tenant for Life where Conversion is Postponed.] See LIFE. ESTATE FOR, VI. [1815 (13).

1. A testator directed the proceeds of the sale of his estate to be invested for the benefit of his three daughters, and the interest thereof to be paid to each of his said daughters during their respective natural lives; and after the decease of each of them, he directed that one-half of the fund or share, the income of which was thereby directed to be paid to the parent respectively for life as aforesaid, should be paid to the children of each of his said daughters:—Held, that the daughters did not take absolute interests, and that the testator's heir was entitled to the undisposed-of portion of the real estate, whether converted or not. *Whitehead* v. *Bennett*, 1 W. R. 406; 1 Eq. Rep. 561; 18 Jur. 140; 22 L. J., Ch., 1020. [1822 (11).

2. Testator gave, devised, and bequeathed all his real and personal estate to trustees, upon trust to sell, and pay and apply the proceeds of such real and personal estates, and also all the rents, interest, and profits thereof until sale, in such manner as thereinafter mentioned; and, after making a provision for his wife for her life out of the said proceeds, he directed that the residue of the said fund should be divided into fifty equal shares, which he bequeathed amongst various legatees, giving a certain number to each, and directing that, in case either of such legatees should die before his shares should become vested, such shares were to sink into the residue:—Held, upon the construction of the will, that certain portions of the residue (which was wholly made up of proceeds of realty) which had lapsed by the death of the legatees thereof in the lifetime of the testator belonged to the heir at law, and not to the next of kin of the testator. *Fairbairn* v. *Rothwell*, 9 Jur. 787. [1825 (8).

3. A testator directed a part of his personal estate to be converted into realty and settled on certain trusts. These being exhausted, and no investment having been made:—Held, that the residuary legatee was entitled to the fund, and took it in the character of personalty. *Hereford* v. *Ravenhill*, 5 Beav. 51; 11 L J., N. S., Ch., 173; 6 Jur. 228. [1832 (4).

4. Where land has been devised on trust to convert, the acts of the *cestuis que trustent* must be clear and unequivocal, and by all of them, in order to show their election to enjoy the property unconverted. *Vincent* v. *Fane*, 1 W. R. 264. [1837 (9).

5. Where real estate conveyed to trustees on trust to sell, has been used by the devisee of the settlor to all intents and purposes as realty, and is afterwards sold by the trustees, the trust fund, the produce of the sale, is to be taken as real and not as personal estate. *Re Gardner's Trusts*, 1 Eq. Rep. 57. [1837 (9).

6. If the person absolutely entitled to the money-land arising from a compulsory conversion have a right to elect to take it as personalty, a mere acquiescence in its remaining invested in consols during his life, and his will, by which he bequeaths personal estate only, and does not devise realty, are not such proof of election as to prevent the fund descending on his death to his heir. *Re Stewart's Trusts, Exp. Cramer*, 16 Jur. 1063; 1 Sm. & G. 32; 1 W. R. 17; 22 L. J., Ch., 369. [1837 (9).

CONVEYANCING COUNSEL.

See PRACTICE (CONVEYANCING COUNSEL).

COPIES.

— *Proof by Abstract and Copies* See PRACTICE (EVIDENCE).
— *Taking Copies after Inspection.* See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).
— *Filing Copy of Petition.* See PRACTICE (PETITION).
— *Service of Copy Bill.* See PRACTICE (SERVICE OF COPY BILL).
— *Service of Copy Decree.* See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).
— *Use of on Issues at Law.* See PRACTICE (ISSUES AND TRIAL BY JURY).
— *Costs of.* See SOLICITOR, XVI. XVIII. 8.
See also BANKRUPTCY, XV. VIII. 4.

COPYHOLD.

7. The defendant in ejectment for land in Ireland proved letters patent from the Crown, 2 Car. 1, granting to H., his heirs and assigns, certain lands, with power to create manors thereof. He also proved a commission of grace, 12 Car. 1, for remedying defective titles, and letters patent, 13 Car. 1, re-granting such lands unto H., his heirs and assigns, and declaring that certain of such lands, including the lands of B., should be the manor of D., with power to H. to grant the demesne lands in fee to be held of such manor. He traced the devolution of the manor to 1721 (when the then owner made a fee farm grant of the lands of B. to L., paying rent and doing service at the Court of D.), and down to his testator. He proved the devolution of the lands of B.; that manor courts had been held at D. by the successors in title of H. as far back as living memory would go; and that the occupiers of B. attended habitually as suitors and jurors. He proved the court books from 1771 down to the present time, also a lease of B. in 1781, wherein the lessee covenanted with the lessor to attend the manor courts of D., and another fee farm grant to R. doing suit at the Court of D., and yielding rent, and the payment of such rent up to the present time:—Held, that there was evidence

to go to the jury that there was in 1721 a manor of D., comprising the lands of B. as part of the demesne thereof. Whether the effect of the deed of 1721 was to vest the lands of B. in L. to be holden of the manor of D., *quære*. *Delacherois* v. *Delacherois*, 4 N. R. 501. [1843 (4).

1. Court will not determine in whom is the right to appoint a steward on petition for delivery of deeds, etc., to the appointment of one of the parties. *Mott* v. *Buxton*, 7 Ves. 201. [1843 (6).

2. The evidence of a neighbouring manor shall not in general be admitted to show the custom of another manor. *Ely (Dean)* v. *Warren*, 2 Atk. 189. [1846 (2).

Courts of law have admitted evidence with regard to profits of mines out of other manors where they are similar, to explain the custom of the manor in question. *Ib.*

The Court of Equity will not put persons to set forth a custom with the exactness which is requisite at law, or which the Exchequer expects. *Ib.*

3. Equitable tenant for life of copyholds under a will, which contained no special provision for the payment of expenses on admission, died without having paid the fines and fees incurred on the admission of a trustee in her lifetime. By her will she bequeathed her personal estate to her daughter for life for her separate use, and after her decease to her children. The daughter and her husband and children took estates in remainder in the copyholds:—Held, that having regard to the frame of the will, under which the tenant for life was entitled, and to the interest which the parties entitled to the copyhold estates took in the personal estate of the tenant for life, one-third of the fees was properly payable out of the *corpus* of his personal estate, the husband of the daughter consenting to pay the residue. *Bull* v. *Birkbeck*, 2 Y. & Coll. C. C. 447. [1859 (8).

4. B., tenant in common of copyholds, joins in deposit of deeds on an equitable mortgage, and a foreclosure bill is dismissed as against him. Upon the question of costs of admission:—Held, that a surrender of copyholds stands on the same footing as conveyance of freeholds, and a decree cannot be varied as to costs of admission. *Pryce* v. *Bury*, 2 W. R. 87; 2 Drew. 41; 17 Jur. 1173; 2 Eq. Rep. 8. [1859 (8).

5. Covenant by A. B., a husband, with trustees that he will at his proper costs and charges surrender to the lord of the manor, according to the custom, the copyhold hereditaments to which his wife was entitled to the use of the trustees, to the intent that they might, at the costs and charges of A. B., be admitted tenants upon trust to pay the rents to the wife for separate use:—Held, that the act of admittance was complete before the fine became payable, and that B. was not bound to provide for the fine under the words "costs and charges." *Barrow* v. *Barrow*, 3 W. R. 587. [1859 (8).

6. The descent of the interest possessed by a person entitled under an executory devise of customary lands is regulated by the common law and not by the custom. *Mallinson* v. *Siddle*, 39 L. J., Ch., 426; 18 W. R. 569. [1861 (3).

A testator devised customary lands of inheritance to his brother, his heirs and assigns, but in case his brother should die without issue, he directed that the whole should be divided amongst his five sisters or their lawful representatives. The brother survived the testator, but died without issue. A person entitled under the gift over to a share in the lands, died intestate in the lifetime of the brother:—Held, that the share of the intestate descended to her common law heirs and not to her customary heir. *Ib.*

COPYRIGHT.

7. The compiler of a dictionary or work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourably made. Various tests as to what constitutes the legitimate use of preceding works. *Spiers* v. *Brown*, 6 W. R. 352; 1 L. T., N. S., 16. [1873 (8).

P. 1884, after par. (6), add

See also DEFAMATION. V.

8. *Quære*, whether the Copyright of Designs Act (5 & 6 Vict., c. 100) protects the application of an old design to the ornamenting of textile fabrics. *Perfect* v. *Shepard*, 1 W. R. 213. [1887 (2).

Plaintiff purchased of an artist a drawing of a bunch of pears, supposing it to be original, and transferred it to damask. The Court refused an injunction to restrain the defendant from selling damask with a pattern almost identical, until the plaintiff had established his right at law. *Ib.*

9. Where an injunction restraining an infringement of copyright is continued subject to the plaintiff bringing an action, the Court will not allow the defendant to continue the sale of his works, he keeping an account, unless the plaintiff will consent. *Sweet* v. *Maugham*, 11 Sim. 51; 9 L. J., N. S., Ch., 323; 4 Jur., 479. And see *id.* 456. [1891 (3).

COSTS.

P. 1900, col. 1, after line 5, add

— *Taxation of.* See BANKRUPTCY, XXXV.—SOLICITOR XVI.

COUNSEL.

P. 1900, col. 1, after line 10, add

— *Conveyancing.* See PRACTICE (CONVEYANCING COUNSEL).

— *Fees of, on Taxation.* See SOLICITOR, XVI. XVIII. 7, 8, and 10.

P. 1900, col. 1, in line 11, after BARRISTER, add JUDGE.

COVENANT TO STAND SEISED.

1. Where a party, in consideration of love and affection, by release conveyed a specific freehold house, and assigned a particular leasehold, and "all other the property, real or personal, to which he might be then entitled," upon trust for his sisters, he being at the time seised of a share in another freehold house, of which no mention was made in the release:—Held, that the general words being, from the tenor of the deed, only applicable to leasehold and personal estate, the latter freehold did not pass by them, and that the release did not operate as a covenant to stand seised. *Doungsworth* v. *Blair*, 1 Keen 795; 6 L. J., N. S., Ch., 263; 1 Jur. 620. [1911 (6).

2. Feme covenants to stand seised to the use of herself in tail, remainder to such uses as she, by writing under her hand, should appoint, for want of such appointment, to the use of the plaintiff, her kinsman in fee. Whether this remainder to such uses as she should appoint is not a void remainder, being on a covenant to stand seised, *quære*. *Warwick* v. *Gerrard*, 2 Vern. 7. [1911 (6).

3. Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd* v. *Spillet*, 2 Atk. 149. [1911 (6).

COUNTERCLAIM.

See PRACTICE (COUNTERCLAIM UNDER THE JUDICATURE ACT).

CREDITORS' TRUST DEEDS.

4. One of the trustees of a composition deed consented that one of the other creditors (who was a banker) should retain a policy of insurance, which he held as a security for his debt, in part discharge of such debt. This was not communicated to the other creditors; but the trustees subsequently bought up the interests of all the creditors, and paid them a composition:—Held, in a suit between the trustees and the banker, that the banker was entitled to the moneys recovered on the policy for his absolute use. *Osborn* v. *Milford*, 1 W. R. 137. [1924 (4).

5. A man indebted by several mortgages, judgments, bonds, and simple contracts, settles his estates for payment of his debts; the real securities shall be first paid, and then bond and simple contract debts in average. *Child* v. *Stephens*, 1 Vern. 101. [1925 (4).

6. The appointment of a trustee by creditors to receive rents for the payment of debts, discharges the estates from any loss arising from the failure of the trustee. *Hutchinson* v. *Massareene*, 2 Ball & B. 49. [1926 (3).

7. Where a deed of arrangement with creditors contained a trust to pay the expenses attending the execution of a certain indenture of mortgage, or in any way relating thereto, and all costs, charges, and expenses, which the trustees might be put to in or about the execution of the trusts, or in relation thereto:—Held, that the trustee was justified in defending actions against the debtor, and providing abstracts of the mortgage property. *Maw* v. *Pearson*, 3 N. R. 99. [1927 (4).

Other Matters.] 8. Where a trust for the benefit of creditors was created in India, but subsequent events made it more convenient that it should be administered in England, the Court refused to allow a portion of the trust fund in its hands to be transferred to the trustees for the purpose of distribution in India, and overruled a demurrer to a suit for its administration. *Hartwell* v. *Colvil*, 2 Jur. 984. [1928 (2).

9. An application by creditors whose debts, secured by a trust deed, had been established by decree of the Court of Chancery in England, to appoint a receiver over the trust estates in possession of defendant the debtor, refused; it being doubtful as the record was framed, whether, at the hearing of the cause, the plaintiffs would be entitled to a decree. For the record to carry the English decree into execution was so imperfectly framed, that the defendant, by joining issue on the original record, would be at liberty to impeach the securities so established, which he could not do on a bill filed solely and exclusively to aid the execution of the English decree. *Houlditch* v. *Donegal* (*Lord*), Beat. 146. [1928 (2).

CREMATION.

See ECCLESIASTICAL PERSONS AND PROPERTY, XIII. IV.

CURRENCY.

See ANNUITY, XII. III.—INTEREST, IV.—IRELAND, IV.—JOINTURE, IV. 2.—LEGACY, XII. XII. AND XIII. VII.—PORTION, VI.

CURTESY.

10. S. being entitled under a will to real and personal estate marries twice, having issue by both husbands, and concurs with her second husband in mortgaging property belonging to them both, levying three fines. The second husband becomes insolvent, and a deed of arrangement is executed to which the husband and wife, assignee and mortgagee, are parties, whereby it is agreed, that in consideration of a small sum, to be paid in part liquidation of the mortgage, the mortgagee shall give up certain property of the husband's

to the assignee, for the creditors, the joint property of the husband and wife being charged with the remainder of the mortgage, reserving the power of sale, and subject thereto in trust for S. for her separate use; so that she might dispose of her property by deed or will attested by three witnesses as a *feme sole*, with a proviso that her intestacy, entire or partial, should not prejudice her husband's right as administrator. The deed was acknowledged, and S. died intestate, her husband administered to her estate, and her eldest son claimed to have the mortgage paid off, to receive back whatever the mortgagee had received since S.'s death, and subject to the mortgage, claimed the freeholds free from the right of the husband to curtesy.—Held, that the husband was entitled to curtesy, that there was no right to exonerate S.'s estate, and that the husband being her representative made no difference. *Wheeley* v. *Garfield*, 4 W. R. 700. 1942 (5).

1. Testator being possessed of a mill, etc., which had been granted to him and heirs for three lives, devised his property to trustees and their heirs upon trust to let and to pay one-fifth of the profits to his wife for life, and the other four parts he directed to be applied for the maintenance, education, and bringing up of his four children until they severally attain twenty-five, at which time, as they should severally attain that age, he gave, devised, and bequeathed unto such of his children as should attain that age, one-fifth of the property, to hold to them and their heirs. The testator then provided that, if any of his children should die under twenty-five and leave no lawful issue, then he gave, etc., the part of him, her, or them so dying unto the survivors or survivor of his said children, to be equally divided amongst them, their heirs, etc., with a like proviso if any of such children should happen to die under twenty-one; and after the death of his wife he gave the other fifth part to his children subject to the same trusts, provisoes, and conditions. The testator left all his four children, E., M., J., and Joseph, him surviving. E. attained twenty-five and married S.; M. married P. and died under twenty-five; J. attained twenty-five, married G., and had one child who died an infant, and afterwards J. died. Joseph died under twenty-five unmarried. On bill filed by E. and her husband against the children of M. and G., the husband of J., in order to ascertain the rights of the parties to the mill:—Held, that the children of the testator did not take vested interests until they severally attained twenty-five. That the words "survivors or survivor" could not be read "others or other;" that the husband of J. was not entitled to the share of J. during his life as tenant by the curtesy. *Stead* v. *Platt*, 18 Beav. 50. [1942 (5).

CY PRÈS.

P. 1944, col. 2, last line, after CHARITY, X. add PERPETUITY, VII.

DEATH. PRESUMPTION OF.

P. 1948 (5), last line, add 5 before Jur. 959.

2. Where, on a motion to take the bill off the file, on the ground that the plaintiff was not alive in 1839, when the suit was instituted, the affidavit in support thereof stated that the plaintiff went to America in 1824, and had not since been heard of by the defendant. No direct evidence was produced by the other side that the plaintiff was living, nor the date of any letter from him since 1827:—Held, that the circumstances afforded sufficient ground of suspicion to direct a reference to the Master as to that fact. *Howe* v. *Maclean*, 9 L. J., N. S., Exch. Eq., 1. [1948 (6).

3. A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837, the Master having certified, upon presumption, that she was dead, but without finding when she died, the Court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the Master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the Court ordered immediate payment to the same party of the accumulations since that time. And in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund in case the annuitant or her personal representative should ever establish a claim. *Cuthbert* v. *Purrier*, 2 Ph. 199; 6 Jur. 447. [1948 (6).

DECISIONS.

4. The decision of a co-ordinate branch of the Court will be followed until reversed on appeal, in order to avoid an unseemly conflict of decisions—Per James, V.-Ch. *Re Times Life Assurance and Guarantee Co.*, 18 W. R. 404, 406. [1958 (7).

5. Observations as to the necessity of preserving an uniformity of decision in the different courts. *Parkin* v. *Thorold*, 16 Beav. 59; 16 Jur. 959. [1958 (7).

6. Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it—Per Malins, V.-Ch. *Dugdale* v. *Dugdale*, 14 L. R., Eq., 234. [1958 (7).

7. Neither the decisions on an executor's legal right to retain an undisposed residue, nor the reasons for those decisions, are reconcilable with each other, but in tracing this subject through the successive cases, there appears to be a gradual tendency towards favouring the next of kin. *Browne* v. *M'Guire*, Beat. 365. [1958 (7.)

8. In determining whether a transaction amounts to a fraudulent preference, the Court ought now to have regard simply to the statutory definition contained in s. 92 of the Bankruptcy Act 1869. The decisions on the subject before the Act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in

the Act. *Exp. Griffith, Re Wilcoxon*, 23 L. R., Ch. D., 69; 52 L. J., Ch., 717; 48 L. T. 450; 31 W. R. 878. [1958 (7).

1. *Tottenham's Estate, Re* (3 Ir R., Eq., 528, 567, 568). (Decisions of Courts of co-ordinate jurisdiction.) When the decision of one Court is cited to another of co-ordinate authority, the latter has a right to regard it in a critical and even sceptical spirit; and while accepting the decision, to decline the reason of deciding, if a better one can be assigned. But I confess I think that, when an inferior Court (I mean inferior in the sense of curial precedence) has before it the decision of its non-appellate tribunal, it is its duty to conform itself frankly and loyally to the reason of the decision, and not merely to its letter. Per Christian, L. J. [1958 (7).

DEEDS.

2. Four deeds, though bearing date on four consecutive days, held to be necessarily connected together, and to form one transaction. *Ford* v. *Stuart*, 15 Beav. 493; 21 L. J., Ch., 514. [1960 (8).

3. W. R. and A. his wife, by deed dated the 30th June, appointed to the sole appointment of W. R., and subject thereunto to certain uses. W. R., by deed dated the 1st July, again subjected the estate to the joint appointment of himself and his wife; and by a deed of the 2nd July, W. R and his wife appointed the estate by way of mortgage. The intermediate deed was on paper. The dates of the other deeds were filled in, and the last deed was much interlined, the wife being by such interlineations made a party subsequently to the engrossment of the deeds. —Held, that the three deeds formed one transaction, and therefore that the last deed was not voluntary. *Whitbread* v. *Smith*, 2 W. R. 177; 18 Jur. 475; 2 Eq. Rep. 377; 1 Drew. 531; 17 Jur. 725; 1 Eq. Rep. 377; 23 L. J., Ch., 611; 3 De G. M. & G. 727. And see *Harman* v. *Richards*, 10 Hare 81; 22 L. J., Ch., 1066.—p. 2616 (5). [1960 (8).

DEFAMATION.

P. 1983, after par. (7), add

See also COPYRIGHT, V.

DEPOSIT.

P. 1984, col. 2, after line 10, add

— *On Sales of Land.* See VENDOR AND PURCHASER, XIV.

— *Bond and Deposit on Compulsory Purchase.* See LANDS CLAUSES ACT, XI.

DISCLAIMER.

P. 1987, col. 2, after line 20, add

See also MORTGAGE, XIV. VII.

DISTRIBUTION OF ESTATE.

4. When grandchildren shall take *per stirpes*, and not *per capita*. How far in collateral successions the parties shall take *per capita* and not *per stirpes* *Lockyer* v. *Vade*, Barn. Ch Rep. 441. [1998 (13).

5. A widow who has been divorced *à mensa et thoro*, on the ground of adultery, is nevertheless entitled to a share in the effects of her deceased husband, under the Statute of Distributions. *Rolfe* v. *Perry*, 1 N. R. 428. [1998 (13).

DISTRICT REGISTRY.

See PRACTICE (DISTRICT REGISTRY).

DOMICIL.

6. The authorisation of the Emperor of the French is not necessary in order to establish a domicil to give the rights of testacy and to regulate the succession of property. *Bremer* v. *Freeman & Bremer*, 5 W. R. 618 [2001 (3).

DOWER.

7. A separate report directed of what was due to a doweress, without entangling her in a general account of incumbrances. *Eccleston* v. *Berkeley*, Ridgw. 253. [2030 (2).

ECCLESIASTICAL PERSONS AND PROPERTY.

8. Letters of request are no part of the record. *Greata* v. *Treasure*, 5 N. R. 383. [2041 (9).

9. Under what circumstances churchwardens and overseers of a parish are, under 59 Geo. 3, c. 12, s. 17, a corporation within 16 & 17 Vict., c. 137, s. 48. *Re Hackney Charities (Poole & White's Charities)*, 5 N. R. 295; 10 Jur., N. S., 941; 12 W. R. 1129; 11 L. T., N. S., 34. [2073 (3).

10. G., one of the churchwardens of a parish, instituted a suit for church-rate in the

names of himself and F., the other churchwarden. A proxy was first filed for G. only, and it was declared that F. proceeded no further with the suit. A subsequent proxy was filed, purporting to be for both churchwardens, but signed by G. only. The defendant appeared all along under protest, on account of the non-joinder of F., who in fact had nothing to do with the suit:—Held, that one churchwarden cannot sue alone. He has no implied authority to give a proxy for the other, or to join him in a suit. Nor can the Court compel or dispense with the joinder of the unwilling churchwarden. *Greata* v. *Treasure*, 5 N. R. 383. [2074 (2).

1. A proposal for the making over to the burial board of a place, of a piece of land belonging to the parish to be used as a cemetery, will not be sanctioned by the Court without the previous approbation of the application by the Charity Commissioners. *Exp. Watford Burial Board*, 2 Jur., N. S., 1045. [2078 (5).

2. A burial board duly constituted under the 15 & 16 Vict., c. 85, and the 16 & 17 Vict., c. 134, agree to purchase parish lands on the terms of paying an annual sum, the principal to be secured either on the land or as a charge on the church-rate or poor-rate. On petition to carry out this agreement:—Held, that the money must be paid into court in a gross sum, the dividends to be paid to the vendors until invested in land, and the costs to be paid by the burial board. *Semble*, the Court will not sanction a perpetual charge. *Re Barrow*, 3 W. R. 635. [2078 (5).

3. A., holding meadow and pasture lands, under a lease of lives renewable for ever, demised a part of the premises to B. for a similar term, with a covenant to keep and deliver up the premises in tenantable order, etc., and with a power of surrender at the end of every three years. The assignees of B.'s interest being about to convert the premises into a public cemetery, the representatives of A. obtained an injunction to prevent them. *Semble*, the proposed alteration of the property would amount to waste at common law. *Hunt* v. *Brown*, Sau. & Sc. 179. [2078 (5).

ELECTION.

4. Devise of Whiteacre to A. for life upon condition that A. suffer a recovery of Blackacre and settle it; and if he does not, then after the decease of A. Whiteacre to go to B. A. took Whiteacre but did not settle Blackacre. The heir of A. is not bound to convey pursuant to the condition, nor are A.'s assets liable to make good the breach of the condition, for it is a conditional limitation, and not a case of bare condition or of election. *Freke* v. *Barrington*, 3 Bro. C. C. 274. [2087 (3).

5. Election by appointees under powers of appointment. See *Fox* v. *Charlton*, 10 W. R. 506; 6 L. T., N. S., 743. [2096 (6).

6. R. P., being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened) over one-third part thereof, by deed or will, and over the other two-third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P. by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l*; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue:—Held, that the appointment of the "one-third part" for payment of the annuity and legacies, extended only to one-ninth of R. P.'s original third share, and to one-third of her moiety of the other third share, and that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. *Savard* v. *M'Donnell*, 2 H. L. Ca. 88; 12 Jur. 685. Affirming 3 Jur. 682. [2094 (5).

7. P. 2095, after par. (5), add references 5 W. R. 540. S. C. in Court below *nom. Stephens* v. *Stone*, 5 W. R. 416.

8. Lord Colville gave all he should leave in the world to trustees to pay his debts and legacies, among which was the sum of 1,000*l*. to his brother and heir, and as to the residue in trust for natural children. The testator had a real estate in Nova Scotia, but, as there was no witness to his will, it descended to the heir at law:—Held, that, supposing the words of the will would have passed real estate if attested in due form (which was doubted), the brother was entitled to his legacy, and also to the real estate. *Farquharson* v. *Colville* (*Lord*), Romilly's Notes of Cases, 129. [2100 (7).

9. So, also, where a copyhold was expressed to be devised, but was not surrendered, and the heir had a legacy and an interest in other estates devised to him. *Jeffreys* v. *Duhamel* Romilly's Notes of Cases 129. [2100 (7).

10. E. having a life estate and a contingent reversionary interest in a farm, C., by his will, charged his farms R. and C. with the payments of debts and legacies, and devised all his real estates (subject as to R. and C. to the charge) to H. for life, with remainders over, and with a contingent executory devise to M. for life. Under a settlement made in E.'s lifetime, the farm C. was settled (subject to E.'s life estate) upon M. for life, with remainder to her children (of whom H. was one) in fee, subject to be divested, in the event of their dying without leaving issue:—Held, that the testator did not

intend to devise more than his own interest in the C. farm, and that M. and H. were not put to their election. *Evans* v. *Evans*, 2 N. R. 409. [2107 (5).

1. A testator, having a life interest with an executory devise over, as right heir of his father, in certain property, subject to the interests for life and in tail of M. D., H. D., and two other persons therein, devises that property *inter alia* to M. D. and H. D., subject to a charge for the payment of debts, annuities, and legacies. On the question whether M. D. and H. D. were put to their election:—Held, that they were not, inasmuch as the property in question was not the only thing given, and the contingent interest might have fallen into possession. *Evans* v. *Evans*, 3 W. R. 614. [2108 (1).

2. A widow electing to take against a post-nuptial settlement of her future personal property:—Held, that her life interest in the funds which had come under the settlement was to be retained by the trustees for the benefit of the children, and that she must account for what she had received in respect of it. *Anderson* v. *Abbot*, 5 W. R. 381. [2108 (1).

3. M., a widow with one child, a son, by a marriage contract with L., exercises a power vested in her to charge Scotch estates in favour of younger children of the marriage to the extent of 30,000*l*. This power binds her successive heirs in tail according to the Scotch law; and there being one child of the second marriage, he, on her death, becomes entitled to the charge, which is a personal bond. The heir of entail, the son by the first marriage, then substitutes a heritable bond for the personal security, and pays off portions; the son of the second marriage releasing the land *pro tanto*, and by his will bequeathing his property real and personal to trustees (the obligor in the second bond being one), upon certain trusts for the benefit of his wife and children, and specifically bequeathing estates of which he was a mortgagee; upon trust to re-convey on payment, and by a codicil referring to mortgages on Scotch estates. Upon the questions, whether the personal security under the marriage contract was merged in the heritable bond or *jus nobilius*, and became real estate; whether it was still personalty, and if so, whether it passed by the will, and whether the heir was put to his election:—Held, that *primâ facie* there was no conversion into realty; although that was not certain, and was a question of Scotch law, and was not moreover necessary to decide, inasmuch as it was clear that the heir was put to his election, and that there was an intention to pass by the will the money secured by the bond. *Lamb* v. *Lamb*, 5 W. R. 720. [2102 (5).

4. An infant heir at law may elect, with the sanction of the Court, without a reference to chambers. *Lamb* v. *Lamb*, 5 W. R. 772. [2112 (3).

5. Compensation claimed by the person disappointed by the devise of his interest in the property agreed to be settled in consideration of marriage, the settlement not having been made according to the terms of the agreement, refused; but they ordered a competent part of the fund in court to be retained, and set apart to answer the eventual claim of the parties. *Roper* v. *Bartholomew*, 12 Price 833. [2113 (10).

ESTOPPEL.

P. 2144, col. 1, in line 50, add

PRACTICE (TRANSFERS AND CONSOLIDATION).

6. A decree in a suit by A. against B., claiming as widow to succeed to her husband's estate, in preference to B., his nephew, on the ground of the family being divided, does not operate as *res judicata*, or as capable of being pleaded in bar to a suit by C., a daughter, claiming to succeed to her father's estate on A.'s death, on the ground that the property was self-acquired by her father. Such judgment determines only an issue raised concerning a particular person, and is not a judgment *in rem*, but simply a judgment *inter partes*. *Katama Natchiar* v. *Shivagunga* (*Rajah*), 9 Moo. Ind. App. 539, 540. [2154 (4).

7. Several incumbrancers' suits having been consolidated, a decree was made in them all, directing certain incumbrances to be kept down, and the several plaintiffs' costs to be added to the debts:—Held, that a party to one of the suits was estopped by the decree from disputing the validity of one of the incumbrances directed to be kept down. *Ford* v. *Tynte*, 3 N. R. 559. [2154 (4).

EXECUTOR AND ADMINISTRATOR.

8. A testator empowered the executors or executor acting under his will to carry on his business, if they should see fit. The executors renounced probate. It was:—Held, that the administratrix could not carry on the business under the power. *Lambert* v. *Rendle*, 3 N. R. 247. [2183 (2).

9. A. owed C. a large sum of money upon two promissory notes. C. appointed A. and B. executors of her will, who upon her death proceeded to obtain probate of the same. Before it was obtained, A. died: having previously, however, investigated the private papers of the testatrix, and obtained, in his character of executor, from B. her book of accounts:—Held, that such acts were sufficient to show that A. had accepted the office of executor, although he died before probate; and that where a question arose in chambers as to whether he was, under such circumstances, indebted to the testatrix, the proper course is to adjourn it into court under the 20th Order 16th October 1852. *Clarke* v. *Phillips*; *Baylis* v. *Phillips*, 2 W. R. 331. [2189 (1).

10. A man makes his brother executor, and gives him all his real and personal estate, and afterwards marrying, by a codicil makes his wife executrix; she shall have the personal estate, and not the brother. *Wilkinson* v. *Wilkinson*, 1 Vern. 23. [2198 (3).

11. A testatrix, by her will, gave to A., B., and C. distinct legacies, and appointed A. and

B. executors, and gave "to her executors A. and B." her residuary estate. By a codicil she appointed C. executor and trustee of her will, "as if his name had been inserted therein as a trustee and executor," and a legacy for his trouble in addition to the benefit he derived under her will," and she declared that her trust estate should vest in A., and B. and C., and confirmed her will in all other respects. C. claimed one-third of the residue, but the Court held that it was divisible between A. and B. *Hillersdon* v. *Grove*, 21 Beav. 518. [2198 (3).

1. A testator bequeathed all his residuary estate to his executrix, upon trust to pay thereout certain legacies which did not exhaust the personal estate:—Held, on construction of the will, that the executrix took the surplus personal estate beneficially, and that she did not hold such surplus in trust for the next of kin. *Williams* v. *Roberts*, 6 W. R. 93; 27 L. J., Ch., 177; 4 Jur., N. S., 18. [2204 (1).

2. Circumstances under which, from distance of time and the necessity of presuming that what has been done has been honestly done, executors have been exonerated from the consequences of a breach of trust in not taking steps to recover a fund which has been misapplied by the trustees. *Taylar* v. *Millington*, 4 Jur., N. S., 204. [2228 (13).

3. Real estate being devised in trust to sell at such times or time after testator's death as should seem most advisable, either together or in separate parcels, by auction or private contract, the trustees to stand possessed of the produce of such sale, and the rents and profits accruing in the meantime upon the trusts of the devise:—Held, that the *cestuis que trustent* were entitled to receive their respective portions of accruing rents, etc, from the end of the year after testator's death. *Noel* v. *Henley*, 7 Price 242. [2233 (6).

4. R., a surviving executor, entitled as next of kin and personal representative of W., a deceased co-executor, deposits a lease belonging to his testator with creditors for a private debt of his own. W. is an appointee under a power created by the will of the testator. In an administration suit R. is found to be a defaulting executor; and a bill being filed to recover the lease by parties interested under the testator's will:—Held, that R.'s interest, as personal representative and next of kin of W., is not liable for R.'s default; that the lease must be brought into court, with an inquiry as to what was due from the estate of the deceased executor, W. *Wilson* v. *Leslie*, 5 W. R. 815. [2241 (1).

5. Executors having left money lying at a banker's, who paid 2½ per cent. for it, ordered to pay interest themselves on the balances from time to time at the rate of 4 per cent. per annum. *Williams* v. *Williams*, 1 W. R. 237. [2250 (7).

6. At death of testatrix, her executor, a banker, has funds belonging to her in his hands, it does not appear upon what terms. The executor dies three months after his testatrix; there was no evidence that he had committed any breach of trust, or made any use or profit of the money in his business:—Held, that his estate could only be charged 4 per cent. on the money. *Penny* v. *Avison*, 3 Jur., N. S., 62. [2250 (7).

7. Bill by a married woman for an account against an executor and trustee, charging him with wilful default, her husband and a solicitor acting for all the legatees having been present at, and consented to, what was practically, though not formally, a settlement of the account, and certain items which were objected to appearing to the Court to be fair and reasonable, dismissed with costs, to be paid by her next friend. *Ibberson* v. *Warth*, 3 W. R. 230; 11 Jur., N. S., 440. [2257 (3).

8. A. devises to B. rent out of a lease for years, determinable on lives, to be paid half-yearly if the *cestuis que vient* lived so long. B. dies during their lifetime. Decreed, the rent was not determined, but should be paid to the executors of B. during the term. *Gifford* v. *Goldsey*, 2 Vern. 35. [2260 (8).

9. A. devised real estate upon trust for B. for life, and after B.'s death specifically devised part, and gave the residue to B. in fee:—Held, that B.'s life estate in the residue was applicable in payment of the testator's debts, in preference to the specifically devised estate. *Hibon* v. *Hibon*, 1 N. R. 532 [2280 (11).

10. A landlord who does not distrain the goods of his deceased tenant, of whose estate a receiver has been appointed, is not entitled to have his rent paid out of the proceeds of the sale of such goods in priority to other creditors. *Re Sutton's Estate, Sutton* v. *Rees*, 1 N. R. 464. [2291 (4).

11. There being a gift of leasehold property, with growing crops, etc., charged with 1,000*l.* to C. P. J., the executor pays the apportioned rent due at the testator's death out of the estate, and that sum is disallowed by the chief clerk in chambers. Upon application to vary the chief clerk's certificate:—Held, that the payment must be allowed, but the question as between the executor and legatees not decided. *Tomson* v. *Judge*, 5 W. R. 396. [2293 (5).

12. A testator was the original lessee of certain leasehold property. In a suit to administer the estate the usual advertisement for creditors was made, but the landlord made no claim in respect of any breaches of the covenants. Subsequently he gave notice to the executors of such claim. The Court refused to distribute the estate without an inquiry in reference thereto, and making a provision for the indemnity of the executors. *Hughes* v. *Young*, 4 N. R. 17. [2293 (5).

13. A testator gave the residue of his real and personal property to trustees in trust to sell the realty and invest the produce with the personalty, and to pay 5,000*l.* to his daughter, the plaintiff, on her attaining twenty-one, or day of marriage, and he appointed H. and R. and his widow executors, and H. and his widow guardians of the plaintiff. The trustees did not act. More than 5,000*l.* was paid into the hands of H., who paid the plaintiff's maintenance during minority. The plaintiff, on coming of age, filed a bill against H. and R. to recover the principal, and got a decree for an account. R. then came to a settlement with X., the residuary devisee and legatee, and, having ascertained what would

be coming to him, gave a mortgage for as much as was deficient of the personal estate, and X. went into possession of the real estate, R. and X. joining in securing under the mortgage pecuniary legacies to some other legatees:—Held, that he was bound to refund, and that the mortgage, if given in lieu of assets, should be treated as so much assets for the benefit of the plaintiff and unpaid legatees. Held, also, that the payment to her guardian H. did not bind the plaintiff. *O'Neill* v *Hamill*, Beat. 618. [2310 (3).

1. E. N. bequeaths leaseholds to trustees for sale, to pay the proceeds to his widow for life, and after in trust for the children; one executor proves; and his co-executor, the solicitor of the testator, finding himself involved in intricate transactions in respect of the leaseholds, proves also, and institutes a suit, and claims indemnity against liabilities in respect of the trust:—Held, that under the circumstances he was justified in filing the bill, and was entitled to indemnity and costs of the suit. *Semble*, that the assent of one executor to specific bequests does not take away the right of the other to indemnity. *Turner* v. *Nicholls*, 1 W. R. 157. [2313 (10).

2. A testator directs his trustees to apply his personalty in paying debts and legacies, contemplating that there may be a surplus, and he directs the application of the rents of the realty on payment of such of his debts (except his mortgage debts) and legacies as his personalty should be insufficient to pay. A suit is instituted to administer his estate, and the personalty being insufficient to pay the debts and legacies, mortgage debts created by the testator remain unpaid, and no direction is given in the suit respecting them. The two first tenants for life and a remainderman concur in a petition for a sale of such part of the realty as shall be sufficient to pay off the mortgages and for an account:—Held, that there ought to be an inquiry what part of the real estate it will be fit and proper to sell to pay off the mortgages and for an account, the Court having power after decree to direct a sale. *Cooke* v. *Cholmondeley*, 5 W. R. 835. [2334 (5).

3. Sale declared to be made subject to the trusts of the testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton* v. *Molesworth*, 1 Eden 18. [2338 (2).

4. On the application of executors, a sum of money was appropriated to answer the liability of the testator's estate in respect of shares in a joint stock company which was being wound up; the official manager not having gone in before the Master, but appearing on the motion *Re Hawkins*, 1 W. R. 446. [2344 (9).

5. A deed of release is executed to the executors of a will, reciting that a certain sum has been paid to S. P. for the purposes and upon the trusts declared in the will, and witnessing that in consideration of this payment, which is thereby acknowledged, by S. P., he S. P. holds this sum upon the trusts of the will:—Held, that this acknowledgment by S. P. under seal did not constitute a debt by specialty against his assets in favour of the *cestui que trust* under the will. *Brewe* v. *Cox*, 3 W. R. 276. [2352 (3).

6. Where a man gives a bond for himself "and his heirs," the obligee is entitled to priority, in respect of the real estate, over creditors by specialty, in which the "heirs" are not bound. *Jenkins* v. *Roberts*, 1 Eq. Rep. 123; 1 W. R. 298. [2353 (5).

7. Under the circumstances of the case a medical man was held not entitled to enforce against the assets his claim in respect of medical attendance upon the deceased. *Packman* v. *Virian*, 24 Beav. 290. [2358 (1).

8. Since the passing of the 25 & 26 Vict., c. 42, the Court of Chancery is bound to decide on the claims of creditors coming in under an administration decree, and cannot leave them to their remedies in an action at law. *Re Hooper's Estate*, *Baylis* v. *Watkins*, 1 N. R. 115. [2365 (13).

9. The equity of redemption of an estate in mortgage, subject to the usual proviso for redemption, for securing 3,000*l.*, devolved, by devise and conveyance, on several persons as tenants in common, in unequal shares. The mortgagee having required his money, an indenture was made between the mortgagee of the first part, the tenants in common of the equity of redemption of the second part, and new mortgagees of the third part, whereby, in consideration of 2,000*l.* to the old mortgagee paid by the new mortgagees, at the request of one of the tenants in common, and of 1,000*l.* in like manner paid at the request of two other of the tenants in common, in equal moieties, making 3,000*l.*, the mortgaged hereditaments were conveyed to the new mortgagees, subject to new distinct provisoes for redemption at the end of six months on payment of the 2,000*l.*, for re-conveyance of two-third parts to one tenant in common, and on payment of 1,000*l.* for re-conveyance to the two others, the tenants in common of the one-third part in equal moieties as between themselves; the tenants in common covenanted to pay their respective proportions, with interest, at the end of the six months. They, at the same time, executed a mortgage-bond with a condition avoiding the same on payment of the 3,000*l.* and interest, as stipulated for by the proviso for redemption, and according to their covenants:—Held, that neither the form of the new proviso for redemption, nor the new covenant to pay, showed an intention to change the nature of the mortgage-debt; and that the personal estate of one of the tenants in common was not liable, in exoneration of the mortgaged estate, to pay the proportion of the mortgage-debt. *Hedges* v. *Hedges*, 5 De G. & Sm. 330; 16 Jur. 634; 21 L. J., Ch., 858. [2397 (5).

10. A testator had, before his marriage, limited lands to trustees for a term, to secure a debt, and subject thereto to other trustees for another term, to secure an annuity of 100*l.* per annum to his intended wife for life, with a proviso for determining the latter term, on his investing a sufficient amount to secure an equal annuity. He died without having made such an investment, having by his will directed payment out of his personal estate of his debts, including what might be charged upon the settled lands; and he bequeathed his residuary

estate to his widow. Before his death, he had paid off the debt secured by the first of the above-mentioned terms, which had consequently determined, and the annuity was the only charge upon the estates:—Held, that the tenant of the estates was not entitled to have them exonerated as against the widow out of the residue. *Reeve* v. *Reeve*, 3 De G. & Sm. 714; 14 Jur. 264. [2399 (3).

1. Testator, after bequeathing his personal estate, gave his real estate upon trust to raise, in exclusion of his personal estate, sufficient to satisfy his just debts (except debts secured by mortgage) and legacies and expenses of the trust:—Held, that the personal estate was the primary fund to pay the mortgage debts, which exceeded in amount the whole personalty. *Briggs* v. *Davies*, 4 W. R. 696. [2400 (9).

2. 1. A. B. by his will directed that his son should repay to his executors by instalments a mortgage debt borrowed for the use of the son upon a leasehold house of the testator. The instalments were to be invested, and to sink into the residuary estate, to a share of which the son would be entitled. The testator by an indenture settled upon his wife this leasehold house subject to the mortgage, and directed that as between himself and the leasehold premises they were to be the "primary security and ultimate fund" for the payment of the debt:—Held, as between the widow and the son, that the leasehold house was only liable to pay the debt in case the son's share in the residuary estate were insufficient. 2. The testator, after giving one moiety of his stock in trade to his widow, absolutely gave her the use of the remaining moiety for carrying on his business:—Held, that the widow's estate was not liable to make good any deficiency in the remaining moiety. *Quartermaine* v. *Cuff*, 1 W. R. 176. [2400 (9).

3. When an order for an account of debts and liabilities is necessary under the 13 & 14 Vict., c. 35, s. 19. Such order may be mentioned to the Court; and *semble*, it should be by motion and not by petition. *Re Brown*, 6 W. R. 5. [2426 (7).

4. A., the executor of the surviving executrix of the testator, obtains probate to her estate; this is challenged by her next of kin and recalled, and pending that recall a suit is instituted for the administration of the estate of the original testator; and upon the question whether a decree for account could be taken, treating A. as the legal personal representative of the original testator and his testatrix:—Held, that it could not, although, if the litigation in the Ecclesiastical Court was prolonged, means might be found to prosecute the suit. *Way* v. *Way*, 2 W. R. 395. [2429 (6).

5. A legal mortgagee may maintain a creditor's suit. *Groves* v. *Lane*, 16 Jur. 854. [2435 (14).

6. Where a creditor of a testator obtained judgment against the executor *de bonis testatoris*, and a decree was immediately afterwards made in a creditor's suit:—Held, that the executor was not entitled to an injunction to stay execution on the judgment. *Vincent* v. *Godson*, 3 De G. & Sm. 717. [2440 (5).

7. The Court by consent made an immediate decree in a cause not in the paper for the administration of the real and personal estate of a testator at the suit of a creditor, after a summons in chambers for the administration of the real and personal estate had been taken out by another creditor, which was returnable before the first day on which the cause could be heard as a short cause. *White* v. *Lyons*, 4 N. R. 221. [2446 (11).

8. Where plaintiffs claim as a class, the regular practice at the hearing is to direct an inquiry, whether the plaintiffs are the parties entitled. *Brown* v. *Clark*, 1 Jur. 838. [2451 (1).

9. Under a direction, in a decree or order, to inquire who is the heir at law of a deceased person, it is not the practice to inquire who is the customary heir, although it appears that the deceased was entitled to land of copyhold tenure. *Freeman* v. *Roberts*, 10 L. J., N. S., Ch., 315. [2451 (3).

10. Where a bill was filed by parties claiming as next of kin of a testator, a native of France, resident in England, to set aside a deed by which they had been fraudulently induced to give up a portion of the testator's estate in favour of the executor, a preliminary inquiry was directed as to the domicil of the testator, and whether plaintiffs were next of kin, etc. *Chameaux* v. *Riley*, 2 Jur. 1081. [2452 (13).

11. In a suit to administer the estate of a testator, a devisee infant being incapable of managing his affairs, a motion made for a decree under the 16th section of 15 & 16 Vict., c. 86, for a reference to chambers to inquire into the devisee's state of mind:—Motion refused, and no order made. Costs reserved. *Adams* v. *Smyth*, 1 W. R. 475. [2452 (13).

12. In an administration suit a child of the testator, and a party to the suit, was a debtor to the estate. In such a case the proper course is to order him to pay the debt into court immediately. If he were a stranger to the record, an inquiry would be directed. *Walker* v. *Simpson*, 1 Jur., N. S., 675. [2453 (4).

13. Where an administration suit was instituted by one of two trustees, the other being one of the defendants, and after the hearing on further consideration the trustees were permitted by the Court to retire from the trust, and new trustees were appointed; it was held, that under 15 & 16 Vict., c. 86, s. 52, the suit might be revived at the instance of the new trustees, and that accounts directed against the old trustees might be continued against the new. *Williams* v. *Jeffreys*, 3 N. R. 458. [2459 (9).

14. One of two creditors, plaintiffs in a creditor's suit upon an abatement by the death of an executor of the testator, obtained administration *de bonis non* to the estate of the testator, and leave was given to the other creditor to file a supplemental claim against him and the executors of the deceased executor, the case not being within the 52nd section of the 15 & 16 Vict., c. 86, which gives to an order on motion the effect of a supplemental decree. *Tate* v. *Leithead*, 9 Hare (App.) li.; 16 Jur. 964. [2459 (9).

15. Where in an administration suit a co-plaintiff died, who, it was alleged, had no interest in the estate, leave was given to revive the suit, without making her represen-

tatives parties thereto. *Leycester* v. *Leycester*, 5 N. R. 183. [2459 (9).

1. Order on motion *ex parte* by the plaintiff to revive and carry on proceedings in an administration suit commenced by claim upon abatement by the death of the executor, under the 52nd section of the Act 15 & 16 Vict., c 86, upon allegation (without proof) of the facts constituting the abatement. *Martin* v. *Hadlow*, 9 Hare (App.) lii.; 16 Jur. 964. Like circumstances in a case where the suit was by bill: like order. *Cox* v. *Taylor*, 9 Hare (App.) lii. n. [2459 (9).

2. Where a decree was made in an administration suit, containing a declaration which bound the heir at law of a testator, and it was found that at the date of the decree the heir was dead, an order of revivor was made against the representative of the heir. *Fenton* v. *Hawkins*, 4 N. R. 54. [2459 (9).

3. An administration suit—which had abated after decree by the death, intestate as to trust estates, of the sole plaintiff, the executor and devisee in trust of the testator in the cause—was revived on the application of the deceased plaintiff's executors, and two of his co-heiresses, the other co-heiress being already a party to the suit. *Fane* v. *Richards*, 1 N. R. 563. [2459 (9).

4. In an administration suit by two residuary legatees, as co-plaintiffs, if one die before replication, the proper course is to mark him as dead, and when the cause comes into chambers, to serve his representatives with the decree. *Hinde* v. *Morton*, 5 N. R. 362. [2459 (9)

5. Where the plaintiff in a next of kin suit has been found to have no interest, the suit cannot be made perfect by a supplemental order under the 15 & 16 Vict, c. 86, s. 52. *Lawrence* v. *Maule*, 3 N. R. 239. [2459 (9).

6. A claim filed for the administration of personal estate dismissed with costs, on the ground that there was no personal representative of the testator before the Court, and that the claim erroneously stated that the defendant was the executor of the executrix of the testator, and sought relief against him in that capacity. *Boulding* v. *Boulding*, 1 W. R. 49; 16 Jur. 1154. [2469 (10).

7. After a decree to account in a suit against B. and C. (the executors of A., in a suit for the administration of A.'s assets), B. died. It appeared that B. had received part of the assets of A., and it was alleged but not proved that he died insolvent:—Held, that the cause could not proceed until the representative of B. was brought before the Court. *M'Mahon* v. *O'Kelly*, 5 Ir. Ch. R. 288. [2472 (7).

8. An executrix charged with the payment of an annuity to the testator's daughter's separate use, issuing out of real and personal estate, deposits the title deeds of a descended estate of which she and the executrix were co-heiresses, and a mortgage deed, with bankers for moneys advanced partly for the testator's estate and partly for herself, and joins in a promissory note to secure the sum borrowed. Upon her death, and an administration suit to administer both estates by an incumbrancer on the annuity, the executrix of the executrix files a bill for delivery up of the deeds. Four questions arose:—First, whether she could sue; secondly, if so, whether as to realty; thirdly, whether creditors could follow the deeds of a descended estate; and fourthly, what part of the borrowed money was recoverable from the testatrix's estate:—Held, that under the new practice no bill being dismissible for misjoinder, and this case not extending to that point under the new practice, the plaintiff could sue, and also, as to real estate, in her representative character, and to carry out a decree. That the doctrine as to alienees of real estate did not apply to a deposit only; and an inquiry directed as to the money borrowed. Declaration for delivery up of the deeds of the descended estate without prejudice to the right to the money. *Carter* v. *Saunders*, 2 W. R. 325; 2 Drew. 248. [2472 (7).

9. When a fund has been brought into court in an administration suit, the next of kin are properly represented after decree by the personal representative until the fund has been distributed. *Micklethwait* v. *Winstanley*, 5 N. R. 204. [2480 (4).

10. Upon motion for injunction to stay a creditor's action on ground of notice of decree in administration suit:—Motion granted, and creditor's costs taxed up to the time of notice. *McMullen* v. *Acres*, 1 W. R. 77. [2493 (8).

11. A judgment creditor prosecuting an action upon his judgment against the executors of his debtor after notice of decree in administration suit will be restrained, and must pay the costs of the executors, of proceedings in the action taken after such notice (which costs will be set off against his judgment debt when proved), and also the costs of the application to restrain his proceedings at law. *Boston* v. *Richardson*, 3 W. R. 432. [2493 (8).

12. Pending an action by a creditor against an executor, a decree is made in chambers in a creditor's suit, and notice of the decree given to the creditor. On the question of costs in the action, on motion:—Held, on the authority of certain of the registrars as to the practice, that the creditor is entitled to both sets of costs out of assets if admitted, but otherwise must add them to his debt; but *quære* by V.-Ch. Kindersley. *White* v. *Leatherdale*, 1 W. R. 403. [2493 (8).

13. As to costs of executor where account formerly rendered is found to be correct. *Hubbard* v. *Child*, 14 Jur. 544. [2495 (18).

14. An executor finds certain promissory notes in his testator's handwriting, and demands payment, but is met with a receipt in writing, signed by the testator. The notes are made the subject of bequest in the will to the maker, and the executor upon the advice of counsel brings an action and files a bill:—Held, that he was entitled to retain the costs of such action and suit out of the estate. *Foster* v. *Dawber*, 6 W. R. 47. [2495 (18).

15. In an administration suit the Master, pursuant to ss. 7 & 8 of the Masters in Chancery Abolition Act, had, for the purpose of finally settling the suit, made his report directing the costs of plaintiff and defendant to be paid ratably out of the fund in court, the defendant to be relieved from all further

liability to account. The fund was insufficient; and the defendant, the testator's executor and trustee, claimed his costs in priority:—Held, that under the Act the Master had full discretion as to the whole matters in the suit, and that his decision as to the costs could not be disturbed. *Gilbert* v. *Challenor*, 1 W. R. 209. [2501 (14).

1. A suit was instituted by husband and wife against the personal representative of the executor of a testator, for the wife's share of a specific legacy bequeathed to four persons. The personal representative of the executor died, and thereby the suit became abated. This suit was abandoned, and another against other parties was instituted. The costs of the representative of the executor of this abandoned suit were allowed in the accounts as against the original testator's general personal estate. *Trail* v. *Bull*, 1 Eq. Rep. 9. [2502 (9).

2. An executrix charged with breach of trust by investing in her own name dies, and her executor puts in an answer denying any residue, and scheduling certain documents. Inquiries are directed, and, after some contention, it appears upon those documents that there is a residue. The executor of the executrix is then sought to be charged personally with the costs of the inquiries, inasmuch as it appeared from the scheduled documents that there was a residue:—Held, that he was not liable for such costs. *Lilley* v. *Medlicott*, 5 W. R. 412. [2502 (9).

3. An executor is not justified upon a claim of interest by the legatee in imposing terms as to the payment of the legacy for the purpose of obtaining an abandonment of the claim for interest. *Semble*, that if a legatee has not exhausted every possible means of obtaining his legacy short of a suit, he will not receive costs upon a suit instituted by him for that purpose. *Alymer* v. *Winterbottom*, 4 Jur., N. S., 19. [2505 (6).

4. Costs, the difficulty having been caused by the testator, directed to come out of the estate. *Murton* v. *Markby*, 18 Beav. 196. [2509 (20).

5. The costs of a bill filed to determine the rights of the plaintiff under a will of difficult construction, and to which a demurrer was allowed, given out of the testator's estate. *Evans* v. *Rosser*, 3 N. R. 685. [2509 (20).

6. In an administration suit by one of a class interested in a specific devise, the only disputed question being among those interested in this devise, the costs, so far as they related to the real estate, were thrown upon the heir, who was made a defendant in respect of a void charitable devise of other specified land which had descended on him. *Saunders* v. *Miller*, 6 W. R. 454. [2512 (6).

7. T., by will, in 1856, after bequeathing a small legacy, gave all her personal estate to trustees, in trust, after payment of debts, as to so much thereof as she could lawfully give to charitable uses, for the Lincoln Penitent Female Home. The personal estate consisted of two classes, viz., pure personalty, and that which savoured of realty, and the latter was undisposed of. An administration summons was taken out by the legatee, which was subsequently adjourned into court:—Held, that, as between the charity and the next of kin, the costs of the suit ought to be paid wholly out of the personal estate which savoured of realty. *Taylor* v. *Bogg*, 5 Jur., N. S., 137. [2514 (3).

8. T. directed "all his just debts and funeral and testamentary expenses to be paid by his executors out of such part of his estate as could not by law be bequeathed for charitable purposes," and then devised and bequeathed all his real and personal estate which he could not bequeath for charitable purposes to legatees, and bequeathed all that could be lawfully bequeathed for charitable purposes to a charity:—Held, that the charity was not relieved from the costs of a suit in which a question was raised as to whether a certain part of the property, from its nature, was bequeathable to the charity or not, and that the costs must be apportioned between the two funds. *Taylor* v. *Linley*, 5 Jur., N. S., 701. [2514 (3).

9. A claim being filed by A., as next of kin, for the administration of an estate in which infants were interested, another claim was filed by the mother of the infants for the same purpose; on reference to the Master to inquire which should proceed, he reported in favour of the mother:—Held, that the plaintiff was entitled to costs of filing the original claim, and no costs subsequent to the filing of second claim. *Oppenheim* v. *Henry*, 1 W. R. 126. [2515 (9).

10. A. filed a bill against the executors of B. for the purpose of establishing a claim under an agreement entered into by B.; afterwards several suits were instituted by persons interested in B.'s estate, for the purpose of administering it. A. then filed a supplemental bill praying that he might have the benefit of such administration suits, the conduct of which was afterwards given to him:—Held, that he was entitled to the payment of the debt found due to him under his claim, and of his costs in all the suits in priority to the executor's costs. *Lodge* v. *Pritchard*, 1 N. R. 534. [2515 (9).

11. In a litigation in the Ecclesiastical Court a party intervenes and fails, but the decree of Court gives him his costs. An administration suit is then instituted; and upon the question at the hearing whether the costs of the intervener in the Ecclesiastical Court ought to be paid in priority to those of the administration suit:—Held, that they ought not, being in effect a charge on the estate. *Major* v. *Major*, 2 W. R. 382; 2 Eq. Rep. 155; 2 Drew. 281. [2518 (8).

12. Where a testator charges his estate with a specific bequest in favour of a particular class, *e.g.*, "the grandchildren of A.," the money will be raised at the cost of the general estate; but the costs incurred by persons claiming to compose such class, in substantiating their claim, must come out of the fund specifically bequeathed. *Boycott* v. *Newman*, 4 W. R. 707; 2 Jur., N. S., 702. [2519 (14).

13. Costs of parties originally brought before the Court by the executor, but declared by the decree to be unnecessary parties, but who, nevertheless, remained before the Court and attended the inquiries:—Ordered to be paid out of the parties' own share. *Girdleston* v. *Creed*, 1 W. R. 228. [2520 (8).

14. A testator left his property to his wife

for life, his business to be carried on for the support of her and his children, charged with debts. There was no personalty, the trustees disclaimed, and a bill was filed by one child, a legatee, for the administration of the estate, alleging an improper carrying on of the business, and asking an account and receiver. On the question of costs:—Held, that this Court being put in the place of trustees, the inquiry as to the business was necessary, and no costs could be reserved, but must be paid as usual. *Cooper* v. *Cooper*, 1 W. R. 501. [2520 (8).

1. Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in chambers as a matter of course. In order to entitle such parties to such costs, the order giving the liberty to attend should expressly provide that they are to be entitled thereto. *Day* v. *Batty*, 21 L. R., Ch. D., 830. [2520 (8).

2. The plaintiff in an administration suit, one of the executors and residuary legatees, being insolvent, his assignees in insolvency had been made defendants to the suit:—Held, that the plaintiff and the assignees were entitled to separate costs. *Chilwell* v. *Hocknell*, 2 W. R. 630; 2 Eq. Rep. 1106. [2520 (12).

3. Where shares of parties beneficially interested under a will have been incumbered, one set of costs is allowed in respect of each share, but without deducting the additional expense incurred by reason of the incumbrances. *Greedy* v. *Lavender* (11 Beav. 417), not followed. *Coates* v. *Coates*, 3 N. R. 355. [2520 (12).

4. The costs of proceedings to administer two separate estates which have been dealt with as one fund, must be borne by the two estates in equal shares, notwithstanding the estates are unequal. *Dean* v. *Morris*, 5 W. R. 315. [2521 (8).

5. Proof for calls. Petitioners entitled to their costs. *Wentworth* v. *Cheverl*, 5 W. R. 743. [2522 (12).

6. Persons interested under a will and unnecessarily made parties to a suit for the administration of the estate, ordered to bear their own costs, they not having objected to their being parties in their answers or at the hearing. *Williams* v. *Williams*, 1 W. R. 237; 17 Jur. 434. [2525 (6).

FAMILY ARRANGEMENTS.

7. E. S. by will gives to trustees, their executors, administrators, and assigns, all his messuages, etc., for his term and interest unexpired therein upon trust for his son J. S. for so long a time as should run out during his life, with a power of appointment and remainder to his children; and in default to his son W. S. in the same terms, with a gift of the residue to his son E. S. J. S. dies without issue, and W. S. by his will gives all his property to his wife, and she by her will gives all her property to her daughter E. There are five children of W. S., four sons and the daughter E., who, upon the representation of her eldest brother that the property is freehold and therefore descended to him, and did not pass by her mother's will, executes a deed of compromise under which a fifth is to be paid to each. One brother sells his fifth to a purchaser for value without notice, and a bill is filed by E. to set aside the deed of compromise on the ground of fraudulent representation and ignorance of E. of her rights. Decree made setting aside the deed, but without costs. *Semble*, a deed of compromise is only binding where every party is aware of his rights equally, and the nature of the question clearly appears on the deed. *Davis* v. *Chanter*, 3 W. R. 321. [2538 (4).

8. Sir J. S. directed his trustees, during the term of twenty-one years from his decease, to accumulate all the residue of his personal estate, and the rents and profits of his real estate, and the accumulations arising from sums invested in consols during the minorities of his grandchildren, and to stand seised and possessed of all the property, in trust, at the expiration of the term of twenty-one years, to convey, assign, and transfer the same unto all and every his great-grandchildren, the sons and daughters of his grandchildren J. S., M. S., and H. S., as should live to attain twenty-one, equally; and in trust in the meantime to pay the whole income of the trust premises unto the respective parents, his grandchildren J. S., M. S., equally; and in the event of there being no such great-grandchildren, then the testator gave the whole of his estate to F. absolutely. Sir J. S. died in 1837, and his grandson J. S. died in 1848, without having had any issue. M. S. and H. S. both married, but neither had any issue. The twenty-one years expired in January 1858, and in March following an agreement was entered into by F., M. S., and H. S., and their husbands, and other parties representing the testator, for a division of the property on the terms therein mentioned:—Held, that the agreement was fit and proper, and for the benefit of the married ladies, and ought to be carried into effect. *Conduitt* v. *Soane*, *Conduitt* v. *Preston*, *Conduitt* v. *Foxhall*, 6 W. R. 667; 4 Jur., N. S., 502. [2541 (6).

FOREIGNER AND FOREIGN LAW.

9. A testator was domiciled in a province of India, by the law of which the rules applicable to wills depended on status determined mainly by religion, and in default of specific regulations were to be the rules of justice, equity, and good conscience. The testator was of no distinct religion, and had no special status. He bequeathed certain property to his sons and their children. An illegitimate child born to one of the testator's sons some years after the testator's death claimed to share with a legitimate child the bequest, as included in the term children:—Held, that the rule of English law by which the claimant would have been excluded as illegitimate was not to be followed; that effect was to be given to the bequest according to the actual meaning with which the testator used the word children, and, under the circumstances of the case, the

testator intended to include in the class "children" of his sons, illegitimate children of his sons, whenever acknowledged by their putative father, and that the claimant was entitled. *Barlow* v. *Orde*, 18 W. R. 737; 3 L. R., P. C., 164; 6 Moo. P. C., N. S., 437. [2611 (1).

1. Gift by the will of a Jew domiciled in England, of a share of residuary real and personal estate in trust for the "children" of his son. At the date of the will the son had had three children by a lady, whom he subsequently married in Holland (she having been first converted to Judaism), pursuant to the ceremonies of the Jewish religion, and thus had made the three children legitimate according to Jewish law. He afterwards had other children:—Held, that the term "children" in the will must be construed according to the law of England; and that, as there were, at the date of the will, legitimate children to answer the description, the three children born before marriage took no interest. *Levy* v. *Solomon*, 37 L. T., N. S., 263. [2611 (1).

2. With reference to a Dutch contract upon which a construction had been judicially put in Holland, the Court refused to make a declaration which would be opposed to that construction. *Sudlow* v. *Dutch Rhenish Railway Co.*, 21 Beav. 43. [2622 (2).

3. A testamentary instrument, duly executed according to English law by a British subject, whose legal domicil was at Paris both at the time of the execution of the instrument in question and at the time of her death, cannot be admitted to probate if the party propounding the alleged will fails to prove that the law of the domicil was such as to authorise a will in that form. *Bremer* v. *Freeman and Bremer*, 5 W. R. 618. [2613 (8).

FORFEITURE.

P. 2628, col. 2, after line 18, add

— *Of Deposit on Sales of Land.* See VENDOR AND PURCHASER, XIV. 1. 1.

In line 21, after RECOVERIES, add PENALTY.

FRAUD AND MISREPRESENTATION.

4. A conveyed certain property to trustees in 1842, upon trust for charitable purposes, with the intention, and in the belief, from the representations made to her, that the charity would not take effect till after her death, and that during her lifetime the enjoyment of the property would be preserved to her. The deed was enrolled within six months, and retained in the possession of A., who continued to receive the rents of the property till 1850. In that year, believing herself to be dying, she was persuaded to add certain other property to what was already comprised in the deed of 1842. Deeds were executed declaring the trusts, and reciting that A. had received the rents from 1842 as the agent of the trustees, and that she was desirous of providing for the payment to them of all sums owing in respect thereof. The plaintiff stated that these recitals were untrue, and introduced without her knowledge. Before executing these deeds, in August 1850, she stipulated with the trustees for the receipt of the rent up to the Christmas following:—Held, that A. was entitled to have the deeds set aside, on the ground of the misrepresentation made as to the effect, and her want of knowledge with reference to the deed of 1842, and from the untrue recital and tacit reservation of benefit upon the deeds of 1850. *Howard* v. *Fingall (Earl)*, 1 W. R. 515. [2637 (5).

5. Liability of a party to make good the result of his misrepresentations. *Overbury* v. *Teale*, 1 W. R. 27. [2641 (3).

6. If a person seeks to set aside a sale of various kinds of property, on the ground of fraud, the contract must be rescinded *in toto* or not at all; and if the plaintiff is unable to restore any one of the kinds of property included in the contract, relief cannot be given. *Secus*, if the property be all of the same sort. *Semble*, where the property is of a perishable nature, the plaintiff is not bound to keep it in a state of preservation after bill filed. *Maturin* v. *Tredinnick*, 4 N. R. 15. [2664 (5).

7. A deed was fraudulently obtained, whereby certain real estates and some policies of assurance effected for the purpose were mortgaged to secure an alleged debt largely in excess of the actual advance, and the debtor covenanted to keep up the policies. The premiums were paid by the creditor, and some of the policies were afterwards dropped, and others sold by him under a power in the deed:—Held, that the term of setting aside the deed ought to be the repayment of the advance alone, and that the creditor had no right to be reimbursed the excess of the premiums he had paid over the proceeds of the sales. *Pennell* v. *Millar*, 5 W. R. 215. [2664 (5).

8. The Court will not allow a security to be enforced against the person from whom it was taken, where it had been taken from that person when just of age and living in the house and under the influence of another person who stood in anything like the relation of a guardian or trustee, or *in loco parentis* to the party from whom the security was taken, unless the security was given freely and without the exercise of any influence either by the party to whom it was given or the party who procured it to be given; and on mere allegations of such undue influence, and that the rate of interest on the security given was not fully stated, an injunction to stay execution was granted until the hearing. *Espy* v. *Lake*, 1 W. R. 59; 22 L. J., Ch., 336; 16 Jur. 1106; 10 Hare 260. [2673 (2).

9. Persons paying money to one standing *in loco parentis*, by the direction of persons of tender years, though of full age, are bound to see that such persons thoroughly understand the transaction, and have had access to independent advice. A sum of money advanced by a bank on the joint and several note of two young ladies, aged twenty-two and twenty-one, was, at the suggestion of the manager of the bank, made to the ladies, and without fraudulent intention, carried over to the sole

credit of their uncle, who stood *in loco parentis* to them, on a trust account: subsequently the latter drew out and applied the greater part of the same to his own purposes:—Held, that the note was invalid as against the young ladies, except as to sums actually received by them. *Dettmar* v. *Metropolitan and Provincial Bank*, 3 N. R. 364. [2673 (2).

FRAUDULENT CONVEYANCES.

1. A bill of sale by way of security, but containing no proviso for possession until default:—Held, under the circumstances, valid against creditors, notwithstanding continued possession of the party executing such bill of sale. *Cook* v. *Walker*, 3 W. R. 357 [2715 (3).

2. A settlement made on the wife by the husband, in consideration of her joining in a mortgage of her freehold and leasehold property, the money so raised being applied in payment of the husband's debts, and the settlement being made with the intervention of third parties on behalf of the wife—not considered fraudulent. *Carter* v. *Hind*, 2 W. R. 27. [2723 (9).

Remedy of Creditor.] 3. If the evidence raises a *primâ facie* case that the effect of a voluntary settlement will be injurious to settlor's creditors, a creditor may file a bill and have an inquiry into the state of settlor's property and debts at the date of the execution of the settlement. *Crabbe* v. *Moxey*, 1 W. R. 226. [2731 (8).

4. A. mortgaged his own estate for 5,000*l.* for the benefit of B., and B. (pursuant to an agreement to that effect with A.) conveyed his estate, not only as an indemnity to A., but also to uses for the benefit of his own (B.'s) children and their issue:—Held, that there was a sufficient valuable consideration as between A. and B. to support the limitations to B.'s children, as against subsequent purchasers for valuable consideration from B. Held, also, that this Court would have specifically enforced the whole agreement at the suit of A. *Ford* v. *Stuart*, 15 Beav. 493; 21 L. J., Ch., 514. [2736 (2).

FRIENDLY SOCIETY.

5. The defendant was the surviving trustee of an association for the relief of orphans and widows. A schism took place among the members, and a portion of them caused the society to be registered under the 13 & 14 Vict., c. 115. The defendant was removed from the office of trustee by a meeting acting in compliance with the regulations prescribed by the rules, and new trustees appointed. The bill was filed by the plaintiffs, on behalf of themselves and all other persons interested in the trust fund, to compel the defendant to transfer stock standing in his name to the new trustees; and he resisted the application on the ground, amongst others, that he was a trustee not only for the members of the registered society, but also for those subscribers of the old association who had been excluded from the new society. The Court, looking at the original rules, and the rules which had been certified:—Held, that the societies were identical, and that no persons claiming to be *cestuis que trustent*, could object to the frame of the suit; the object of placing the fund in the hands of the proper trustee being common to all; that the power given to meetings, by the Friendly Societies Act and rules, of appointing new trustees, from time to time, included the power of removing trustees; that the Friendly Societies Act did not oust the jurisdiction of the Court of Chancery; that where a society has been registered under the Act, *Clough* v. *Ratcliffe* (1 De G. & Sm. 164) does not apply; that the Court would be unwilling to consider a society for the benefit of widows and orphans illegal under the 39 Geo. 3, c. 79, but would take the registrar's certificate to be conclusive as to the society being in conformity with, and therefore entitled to, the benefit of the 21st section of the 13 & 14 Vict., c. 115. *Hodges* v. *Wale*, 2 W. R. 65. [2742 (1).

6. Powers of the Court of Chancery under the Act 10 Geo. 4, c. 56, to compel two members of a friendly society to restore money belonging to the society which had been received by them. *Re Brixton Friendly Society*, 1 W. R. 50. [2742 (6).

7. The committee of a benefit club, which was not registered, advanced some of the club money on the security of a deposit of a lease. Afterwards the surviving members of the club formed a new society, under a different name, which succeeded to the funds of the old club. The new society was duly registered under the 10 Geo. 4, c. 56:—Held, that the equitable mortgage would not vest in the public officer of the new society without a legal transfer. *Davies* v. *Griffiths*, 1 W. R. 402. 2742 (3).

GAME.

P. 2746, col. 1, line 2, add POACHING.

8. A farm was let by a writing not under seal, and rights of sporting reserved to the landlord, with a right of re-entry for non-observance of covenants. The tenants having trapped rabbits, which were said to abound, the landlord considering this an interference with his game, brought an action of ejectment, and on bill filed by the tenants for an injunction he was restrained. But *quære* see the report. *Marsh* v. *Mills*, 24 L. T. 169. [2747 (1).

GAMING AND WAGERING.

9. The Court will not assist a plaintiff seeking to have a contract set aside on the ground of fraud, if the contract be in its

nature one of gambling or wagering. Where a person having only thirty shares in a company, in the course of a fortnight entered into contracts for the sale of between seven hundred and eight hundred shares, to be delivered on a future day, and was unable to deliver them in consequence of the shares of the company being under the control of the persons to whom he had agreed to sell, the Court refused to assist him on an interlocutory application, though the fraud was not denied by the defendants. *Rees* v. *Fernie*, 4 N. R. 539. [2750 (3).

GUARDIAN AND WARD.

1. Uncle and aunt appointed guardians of the person of an infant on petition without suit or reference, no allowance being asked. *Re Neale*, 15 Beav. 250. [2774 (16).

2. A mother and her co-executor appointed guardians of her own children and those by a previous wife. *Anderton* v. *Yates*, 5 De G. & Sm. 202. [2774 (16).

3. Petition that a guardian may be assigned to consent to a marriage (unless to carry on a suit to protect an interest), must be pursuant to that stat. 26 Geo. 2, c. 33. *Exp. Beecher*, 1 Bro. C. C. 556. [2777 (4).

4. The Court will allow a guardian to expend the whole income of his ward's estate upon improvements, if such course of improvement has resulted in the accession of good and moneyed tenants to the property, and placed the land in an improving state, although no additional rent is obtained by the ward upon his coming into possession. A ward upon attaining his majority was induced by his guardian to create a mortgage for the purpose of paying off a debt of 5,000*l.* incurred by the guardian in improving the estate during a minority of seventeen years, in addition to an expenditure of the income of the property for the same purpose:—Held, that the ward was not entitled to have this mortgage set aside as against his guardian, without giving credit to his guardian for, and deducting the outlay upon, those improvements which have produced a permanent return in the shape of increased rental. *Dacre* v. *Strachan*, 4 W. R. 401. [2779 (17).

HARBOURS, DOCKS, AND PIERS.

5. An ancient pier and quay built by the lord of a manor is made the subject of a deed of trust, to which the lord for the time being is a party, and subsequently is from time to time regulated by statutes, local, but so far public, by which certain dues are imposed. In the deed and in the statutes there are recitals that the pier and quay are built on waste ground of the manor. An Act is obtained to make a railway on the pier coming from a distant range of hills containing iron ore, which is intended to be shipped from the pier, and the tenant for life and devisees in trust of the last lord assent to such Act. The railway company endeavour to obtain a lease of the pier, there being a power in their Act for the devisees in trust of the last lord to grant such lease with the sanction of the Court of Chancery, which however the company fail to do, the Court on a reference and motion considering it not beneficial that such lease shall be granted. The company purchase land of the devisees down to the foot of the pier, and then, without notice to them or any other proceedings taken as to compensation or otherwise, enter on the pier, and are proceeding to make a railway thereon. A bill is filed, and an injunction moved for to restrain such works, on the ground that the company had no more right to enter upon the pier than upon the ground of any ordinary person without proceeding regularly under the Lands Clauses and Railway Clauses Acts; and that the effect would be to prevent the pier being made use of, as theretofore, for the mooring of vessels, etc. This motion is opposed by the company, who contend that the pier, being supported by public money, both by subscription and by the dues levied upon vessels, was thus dedicated to the public, and that thenceforward the lords of the manor ceased to be the owners of the soil, which was vested either in the Crown, in the Lords of the Admiralty, or in the lord as trustee for the public; that it was a highway, as it appeared that it had been used by the public on foot, in carts, etc., without toll being paid; and that under these circumstances the railway company had a right to do what they were doing:—Held, that, first, there was sufficient evidence, in ancient documents, by recital and otherwise, to show that the pier was built upon waste ground of the manor; secondly, that nothing had been done to divest the rights of the lord, and that his devisees were owners of the soil; thirdly, that it was not a highway, not being vested in any person or body of persons to regulate and keep it in repair; and that if it was a highway as between the lord and the public, yet as between the lord and the company they would be liable to an action for trespass, if they interfered with the use of the pier, which their works, if prosecuted, it clearly appeared would do. Injunction granted to restrain the company from entering without taking the necessary legal steps by notices and making compensation, but refused to restrain the laying down rails in a particular manner, there being nothing to show that they intended to proceed irregularly. *Semble*, a power to grant a lease *primâ facie* implies ownership; and a dedication of land by the owner of the soil to public purposes does not prevent an encroaching stranger being liable to an action of trespass or ejectment. *Thompson* v. *West Somerset Mineral Railway Co.*, 5 W. R. 296. [2783 (2).

HEIRS EXPECTANTS AND REVERSIONERS.

6. Before instituting a suit to set aside the sale of a reversion, the plaintiff offered very nearly the same terms, that were after-

wards imposed by the decree:— Held, that the defendants, who had refused these terms, must pay the costs properly incurred up to the hearing. *Nesbitt* v. *Berridge*, 1 N. R. 345. [2796 (9).

HONG KONG.

See COLONIES AND COLONIAL LAW, X XV.

HUSBAND AND WIFE.

1. When a marriage has been solemnised in a registrar's office in the presence of the registrar and deputy registrar, the presumption of law is that the requisites of the Statute 6 & 7 Wm. 4, c. 85, s. 21, have been complied with. If it appeared from the evidence that such a marriage took place with closed doors, it would not on that account be held to be invalid, so as to disentitle the husband after the wife's death to have administration granted to him of her effects, a marriage so celebrated not being specified in the 42nd section of the statute as one that is null and void. *Campbell* v. *Corley*, 4 W. R. 675. [2813 (4).

2. The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife" (E. being the niece of the testatrix) —Held, that the husband and wife took one share each, and not merely one share between them. *Warrington* v *Warrington*, 2 Hare 54; 6 Jur. 872 [2842 (7)

3. Bequest to A., his wife and children. There were three children:—Held (*inter alia*), that A. and his wife together were only entitled to one-fourth share. *Atcheson* v. *Atcheson*, 11 Beav. 485. See *Dias* v. *De Livera*, 5 L. R., App. C, 135, 136. [2842 (7).

4. A married woman, entitled for her separate use, mortgaged her renewable leasehold estate as surety for her husband. The husband covenanted with the mortgagee to pay the money, and also gave him a judgment. The husband renewed the lease, and paid the fine. The lease was granted to the husband and wife, their executors, administrators, and assigns. The wife survived. The executor of the husband paid off the mortgage debt, and took an assignment of the mortgage. There were other creditors, and the estate was insolvent. In a creditor's suit against the executor of the husband, the wife made a claim to have her estate re-assigned to her, discharged of the mortgage debt and the renewal fine:—Held, that the husband's estate was solely liable for the mortgage debt; that the creditors of the husband had no right to marshal the assets, or to compel the mortgagee to resort to the wife's leaseholds; that the fine was not an advancement by the husband for the benefit of the wife; that the executor was an incumbrancer on the wife's leaseholds for the amount of the fine; and, subject to the payment of the fine, the wife's claim must be allowed. *Eyton* v. *Broughton*, 1 Eq. Rep. 164. [2858 (2).

5. A married woman entitled to a reversionary interest in a fund had assigned her interest absolutely, and was resident abroad. Upon the fund coming into possession:—Held, that the assignee was entitled to payment, though the assignor was not before the Court. *Hall* v. *Lys*, 2 Eq. Rep. 42. [2872 (8).

6. A small fund, the produce of a married woman's real estate, paid out of court without her appearance and consent. *Re Clark's Estate*, 5 N. R. 32. [2879 (5).

7. A sum of money liable to be invested in land ordered to be paid out of court on the petition of the tenant for life, entitled for her separate use, and of the reversioner, a married woman. *Re Edmeades*, 1 N. R. 43. [2879 (5).

8 A married woman, being entitled to a fund on attaining twenty-one, petitions for payment out to herself and her husband, a minor, for setting up a shop. The trustee of the will objects that it is a chose in action to be used in trade, and that the petition is entitled in the cause to which the infant husband is not a party:—Held, that with the consent of the wife, and through the instrumentality of the trustee, the order might, upon a special application for the purpose, be made. *Banks* v. *Davies*, 3 W. R. 47, 189; 3 Eq. Rep. 366. [2879 (5).

9. On petition by a married woman, living separate from her husband (upon which service of the petition could not be effected), that a sum of stock to which she was entitled under a residuary bequest, and standing by order of the Court to the account of her husband and herself, might be paid to her:—Ordered that the stock be sold and the proceeds paid to the petitioner upon her separate receipt. *Whitlow* v *Dilworth*, 2 W. R 150; 2 Sm & G. 35; 18 Jur. 415. [2879 (5).

10. On application for payment of a sum belonging to a married woman, the affidavit in support of the application must either deny any settlement whatever, or, if it states a settlement purporting not to embrace the sum in question, such settlement must be produced in court for examination. *Anon.*, 4 Jur. 5. [2881 (9).

11. When an application is made to draw money out of court, which has been made the subject of a settlement, the settlement itself must be produced in court. *Batt* v. *Cuthbertson*, 3 Dr. & War. 58. [2881 (9).

12. The affidavit, that there is no settlement affecting money in court, the property of the wife, must state that there is no settlement whatever of the money; and it is not sufficient to say, that there is no settlement, nor agreement for a settlement, upon the wife affecting the money in question. *Lawrence* v. *Johnson*, 7 Jur. 1122. [2881 (9).

13. The Court will not settle the reversionary interest of a married woman in personal estate, but leave a supplemental bill to be filed if necessary. *Adams* v. *Bennett*, 2 W. R. 535. [2883 (12).

14. An agreement to settle lands of such a value on wife, must be made up so much, and value proper to be settled by Master. *Hedges* v. *Everard*, 1 Eq. Abr. 18. [2884 (17).

1. A married woman, whose husband had been insolvent, became entitled to a sum of 200*l.*, and to the income of 400*l.* which was divisible after her death amongst her nine children. The Court settled the whole 200*l.* upon her, without giving any portion of it to her husband's assignee in insolvency. *Re Hooper's Trusts*, 6 W. R. 824. [2887 (6).

2. An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue after the death of the wife. *Prebble* v. *Boghurst*, 1 Swan. 319; 1 Wils. 161. [2889 (10).

3. By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent:—Held, that the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement. *Re Wray's Trusts*, 16 Jur. 1126. [2891 (8).

4. Upon the petition of a married woman for a settlement of the whole of a small fund in court, including dower to which she was entitled in certain lands belonging to her husband, and sold under an order in his bankruptcy:—Held, that she was entitled to the whole fund in court, the only thing with which the Court could deal, paying the assignee's costs, who appeared. *Bray* v. *Laycock*, 2 W. R. 324; 2 Eq. Rep. 385. [2892 (11).

5. Where there is a fund of 920*l.* in court belonging to a married woman, and her husband is already possessed of 1,500*l.* in her right, and has become insolvent, and swears that he does not make 50*l.* a year, the whole 920*l.* may be settled on the wife and children. *Morgan* v. *Morgan*, 2 W. R. 667; 2 Eq. Rep. 1270. [2892 (11).

6. Out of 5,000*l.*, the property of a married woman, 2,500*l.* clear of all costs and expenses was directed to be settled upon her as against the assignees of the husband, who was an uncertificated bankrupt in prison and totally unable to provide for the support of his wife and four children. *Lea* v. *Church*, 3 W. R. 603. [2892 (11).

7. A married woman joins her husband in assigning a sum of 465*l.* to which she was entitled in expectancy, for the benefit of his creditors. The husband, who had assigned all his property for the benefit of his creditors, had no other means of support beyond his salary as shopman, and there were seven children of the marriage:—Held, that the creditors were entitled to 150*l.* of the 465*l.* free of costs, the remainder to be settled upon the wife. *Gross* v. *Errington*, 3 W. R. 382. [2892 (11).

8. The whole of a fund of 1,000*l.* railway stock assigned to trustees upon trust to pay the dividends to a married woman for her life, for her absolute use and benefit, allowed to be retained against the assignee in insolvency of her husband. *Koehn* v. *Sturgis*, 4 W. R. 696. [2892 (11).

9. Where a husband had deserted his wife, but maintained his children, the Court, in settling the wife's property, reserved liberty to him to apply after her death for payment of any part of the income to him during his life. *Kernick* v. *Kernick*, 4 N. R. 533. [2895 (9)

10. The wife of a lunatic entitled to a share of residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorised to assent to a settlement of one-half of the fund; and, by an order made in the cause, it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the entire fund:—Held, that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the Court ordered the whole amount of the fund to be paid to the representatives of the wife *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319. [2895 (9).

11. Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the Court allowed the executors of the husband to deduct all the money paid for keeping up the establishment after the lunacy till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees. *Re Hewson*, 21 L. J., Ch., 825. [2898 (7).

12. Residuary bequests to the "sole use and benefit" of a married woman:—Held, that she was entitled to receive the bequest to her separate use. *Barnes* v. *Forsyth*, 1 W. R. 142 [2899 (10).

13. A testator gave certain property to trustees upon trust for his wife for life for her separate use, and after her death for her children. After the testator's death the widow married again. The trustees opened an account in their name at a banker's, to which they paid the produce of the trust property. The widow paid certain sums to this account from time to time out of her income. She died in the lifetime of her second husband, who claimed the sums paid in by his wife as her administrator:—Held, in the absence of express evidence of her intention, that the money was held by the trustees in trust for the children. *Metcalf* v. *Fisher*, 2 W. R. 326. [2906 (3).

14. By an ante-nuptial settlement an annuity was assigned to trustees in trust to the lady for her sole and separate use for her life, with a provision that all savings arising from her income should be held by the trustees subject to her appointment, and in default of appointment, in trust for her next of kin. The lady died in May 1847, without having made any appointment, and the last payment to her, in respect of the annuity, had been made in the

December preceding her death:—Held, that the portion of the annuity remaining in the hands of the trustees between the last payment to and the death of the lady constituted "savings out of income" within the meaning of the settlement, and that her administrator was not entitled to it as against the next of kin. *Re Rosenthall's Settlement*, 6 W. R. 139. [2909 (3).

1. By settlement in 1831, upon the marriage of N. with F., an annuity previously secured by D. to N., together with all arrears thereon, was settled for the sole and separate use of N., the receipts of her, her appointees, and assigns alone to be good and effectual discharges for the annuity, and all arrears and all future and growing payments thereof. After the death of N., in trust to pay all arrears of the annuity unpaid or undisposed of at her death as she should by will appoint; and in default of appointment, upon trust to pay the same to three children of N. (who were named) as tenants in common. In 1847 the arrears of the annuity amounted to 3,000*l*. F. and N., and the trustee of the settlement, released D. from the annuity, and all arrears and future payments thereof, certain hereditaments being assigned by D. upon trust out of the proceeds, after satisfying a mortgage debt thereon, to pay to N., her executors or administrators, 3,000*l*. N. died intestate:—Held, that the 3,000*l*. arising from the proceeds of the hereditaments assigned by D. did not pass to N.'s children as arrears of the annuity undisposed of at her death under the settlement of 1831, but went to her husband. *Calvert* v. *Johnston*, 3 Kay & J. 556. [2909 (11).

2. A married woman having personal property under a will for life and absolutely, a settlement is made of it to her separate use without power of anticipation, with a power of appointment by deed. Without adverting to the clause against anticipation, and in alleged ignorance of its existence, she and her husband grant an annuity in consideration of 215*l*., and an order is made for payment of the dividends of her separate property to the grantee to secure the annuity, and he receives the dividends and hands over the surplus from time to time. The clause against anticipation is then discovered, and the wife petitions for discharge of the order for payment of the dividends to the grantee of the annuity, for restitution of the money received, and for costs against the grantee and his solicitor:—Held, that the order must be discharged, and, the restitution not being pressed for, no order made upon that part of the petition, but costs given against the grantee, his solicitor, and her husband. *Forty* v. *Reay*, 3 W. R. 317. [2922 (4).

3. Where a married woman had property settled to her separate use for life, with a power of appointment over it, which she exercised by her will:—Held, that the appointment did not make the property appointed liable to her debts. *Beecher* v. *Major*, 6 N. R. 331. [2930 (3).

4. By marriage settlement a fund was settled in trust as husband and wife should jointly appoint, but not so as to deprive themselves of the benefit thereof by charge or otherwise by way of anticipation. The fund was appointed to trustees to pay and divide the dividends equally between the husband and wife during their joint lives:—Held, that the appointment was valid and effectual, the husband and wife not having thereby deprived themselves of the benefit of the fund. *Re Linzee's Settlement*, 23 Beav. 241 [2936 (3).

5. A fund was settled in trust for a married woman for life for her separate use without power of anticipation, and she had a power of appointment by deed or will over the reversion. Her consent in writing was required to any change of the investments. Part of the fund was at her request improperly advanced upon a security which proved deficient. She concurred in the mortgage deed, and her execution of it was attested as required by the power:—Held, that she could maintain a suit to have the deficiency in the fund made good, and that the trustees had no claim to be indemnified out of the reversion subject to the power of appointment. In a suit to realise the deficient security, a fund was paid into court and invested, and then sold out at a profit:—Held, that the trustees were answerable only for the deficiency, after taking into account this profit. *Fletcher* v. *Green*, 3 N. R. 626. [2936 (3).

INFANT.

6. Where a ward of court married without consent, and subsequently became entitled to property in the hands of the Court, the Court will order it to be carried to a separate account, and, with a view to save expense, may direct it to be inserted in the order that the fund shall be settled on the wife for her separate use. *Thorp* v. *Owen*, 2 W. R. 208; 2 Sm. & Gif. 90; 23 L. J., Ch., 286; 18 Jur. 641; 2 Eq. Rep. 392. [2956 (5).

7. The Court will give no direction as to dividends of separate property to which a ward of court is entitled, who is under age and has married without consent, until the husband has executed the settlement. *Cator* v. *Mason*, 2 W. R. 667. [2960 (3).

8. On the proposed marriage of the infant daughter of one who was *non compos mentis*, a petition was presented to the Lord Chancellor, under the stat. 4 Geo. 4, c. 76, s. 17, for his consent, in order to obtain a license. The petition was referred to the Master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The Master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor, but shortly afterwards married, under the 6 & 7 Will. 4, c. 85, without license:—Held, that the proposal laid before the Master amounted to a consent, which the Court would enforce. *Cook* v. *Fryer*, 1 Hare 498; 11 L. J., N. S., Ch., 284 6 Jur. 479. [2973 (2).

9. By a marriage settlement, made whilst the intended wife was an infant, the husband covenanted to assign to trustees certain property to which she was entitled to her separate use:—Held, that the settlement was inopera-

tive. *Re Waring*, 16 Jur. 652; 21 L. J., Ch., 784. [2975 (1).

1. Order made relieving the tenant of an infant's estate from payment of arrears of rent. *Henniker* v. *Chafy*, 3 W. R. 300. [2695 (4).

2. P. 2993 (13), for *Exp. Smith* read *Exp. Swift.*

3. The Court will not give a direct benefit out of an infant's income to his father. *Re Stables*, 21 L. J., Ch., 620. [2996 (15).

A scheme by which an infant (whose father was living) was to be articled to a solicitor, and to live with an uncle residing in the same place, was approved of by the Court; and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused. *Ib.*

4. The Court has no right to interfere with the course adopted for the education of an infant of tender years by a father who has not misconducted himself. Accordingly, where a husband and wife have been separated through the misconduct of the wife only, her petition for access to her infant child was dismissed, the Court being of opinion that such access would interfere with the course of education approved of by the father. *Re W———*, 5 N. R. 363. [2979 (7).

5. Right of mother to custody of or access to child under seven years of age, 2 & 3 Vict., c. 54. *Re Woodward*, 1 W. R. 59; 17 Jur. 56. [2981 (5).

6. A legacy of 10*l.* to an infant for mourning may be directed, by the decree on further directions, to be paid to the father, he undertaking to apply it for the benefit of the infant. *Ker* v. *Ruxton*, 16 Jur. 491. [2989 (8).

7. Order made upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education, and advancement, though the shares did not vest till the children came of age. *Exp. Chambers*, 1 Russ. & M 557. [2992 (9).

8. A fund was limited to children to vest at twenty-one. The income of their prospective shares to be applied for their maintenance at the discretion of the trustees. These children become entitled to certain annuities from the Bengal Military Orphan Society, during their respective minorities, on the condition of payment to the treasurer of all their property; to be dealt with according to the rules of the society. The Vice-Chancellor appointed the mother the sole guardian of her children, and directed the income of the infant children's respective shares to be paid to her, with liberty to her to pay the same to the treasurer of the society. *Re Osborne's Settlement*, 2 W. R. 85. [2992 (9).

9. A widow, on the death of her husband, entered into possession of the small real and personal property he had left, and out of its rents, and by carrying on his trade, maintained herself and his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death, a bill was filed in the names of all the children by the maternal grandfather of the three eldest, as their next friend, for a declaration of the rights of the infants and for accounts, and the appointment of guardians and of a receiver. The infant plaintiffs, by their next friend, presented a petition in the cause, containing imputations against the widow of improper treatment by her of the infants, and asking the appointment of guardians, and of a receiver. The Court directed a reference to the Master, who by his report approved of the widow and her co-executor as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The Court, on petition, confirmed this report, and directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they had been in before the suit was instituted; and the costs of all the proceedings were ordered to be paid by the next friend, and all further proceedings were stayed until further order. *Anderton* v. *Yates*, 5 De G. & Sm. 202. [3001 (4)

INJUNCTION.

10. The Court will not interfere to restrain future acts of a wrongdoer, unless it is plain that they will be of a wrongful nature. *Aldebert* v. *Leaf*, 3 N. R. 455. [3008 (7).

11. If it appears that there has been unnecessary delay, an interim injunction only will be granted. *Carew* v. *Yates*, 1 W. R. 11. [3010 (1).

12. An injunction to stay a trial at law will not be granted on the eve of the trial, where there has been delay on the part of the plaintiff in equity in making the application: but the lapse of time before the application is made is not an objection to granting it, if the trial be not near. *Holme* v. *Brown*, 9 Hare (App.) xxix. [3010 (1).

13. The Court will not grant relief by injunction where there has been, for a considerable time, a violation of the agreement in respect of which relief is sought, both by plaintiff and defendant. *Sheard* v. *Webb*, 2 W. R. 343. [3010 (1).

14. The word "trial," in an order to extend the common injunction, means the trial of an issue of fact, and not of a question of law raised by the demurrer. *Lowe* v. *Faulkner*, 16 Sim. 250. [3031 (14).

15. Common injunction which had been obtained under the old practice extended under the new on the application of the plaintiff. *Home* v. *Brown*, 1 W. R. 5. S. C. *nom. Holme* v. *Brown*, 9 Hare (App.) xxix. [3031 (14).

16. In a suit for the cancellation of a deed on the ground of fraud, and for an injunction to restrain an action on an agreement contained in the deed, where the evidence was insufficient to enable the Court to decide the question of fraud, and that question was raised by the pleadings in the action, the Court

refused to restrain the defendant from proceeding in the action to verdict and judgment, but did restrain him from suing out execution thereon, and from otherwise acting upon the deed until further order. *Leader* v. *McEwen*, 2 N. R. 474. [3032 (10).

1. T. was sued at law on a promissory note, in which he had joined as surety for a third party. He pleaded an equitable plea on which issue was taken, and the action was tried on the 29th May, when a verdict was found against T. On the 6th June, before judgment was signed, T. filed a bill to restrain the proceedings at law on the same equitable grounds as he had pleaded at law, and on the 12th June moved for an injunction, which was refused by the Vice-Chancellor. On the 15th June the plaintiff at law signed judgment, and afterwards T. gave notice of appeal from the decision of the Vice-Chancellor:—Held, that under the circumstances T. had elected to rest on his defence at law, and that judgment having been signed he could have no relief in equity. *Terrell* v. *Higgs*, 5 W. R. 746. [3033 (2)

2. The Court is not compelled by the Chancery Regulation Act 1862 (25 & 26 Vict., c. 42), to take upon itself the decision of a question which is involved in a pending action at law, even though there should be matter open between the parties which can only be decided in a court of equity. *Curlewis* v. *Carter*, 3 N. R. 60. [3035 (2).

3. A plaintiff is entitled to an injunction to restrain the use of an inequitable plea to his action at law, although the facts establishing its inequitable nature would form a sufficient answer to the plea at law. The Common Law Procedure Act 1851 has not affected the jurisdiction of the Courts of Equity by allowing equitable matters to be pleaded at law. In an action to recover damages for injuries sustained in a railway accident, the railway company pleaded a discharge by the plaintiffs, whereupon the plaintiffs filed a bill, alleging that the discharge was obtained by fraud, and seeking to restrain the use of it at law:—Held, that they were entitled to an injunction. *Stewart* v. *Great Western Railway Co.*, 6 N. R. 325. [3035 (2).

4. Under the common order to elect between proceedings at law and in equity, the plaintiff's action was stayed by injunction. The plaintiff having subsequently obtained a decree for specific performance, liberty was given to the defendant to take such proceedings for the recovery of the costs of the action at law as he should be advised, notwithstanding the injunction. *Simpson* v. *Sadd*, 3 W. R. 191; 24 L. T. 285. [3035 (2).

5. Injunction to restrain action at law refused before interrogatories are filed. *Lovell* v. *Galloway*, 1 W. R. 118. [3036 (10).

6. A lessee of a mill desires to surrender the lease, and certain terms are agreed upon, money paid by the lessee, and the lessors enter and repair. After four years the lessors sue the lessee at law for rent from the time of the surrender, on the ground that the agreement was not final. The lessee pleads under the Common Law Procedure Act that there is not a good equitable defence, but the plea is disallowed and a bill filed to restrain the action. On motion for an injunction:—Held, that the plaintiff might have an injunction until the hearing, on paying into court the amount for which he was sued. *Magnay* v. *Mines Royal*, 3 W. R. 258; 3 Drew 130, 24 L. J., Ch., 413; 1 Jur., N. S., 153; 3 Eq. Rep. 377. [3038 (8).

7. A mining company, admitting the forfeiture of their lease at law, sought relief in equity, on the ground of accidental stoppage of works, substituted performance of certain covenants, and implied acquiescence on the part of the lessor's agent. There appearing reasonable grounds for the exercise of equitable jurisdiction, an interim injunction was granted, the plaintiffs undertaking to abide by any order the Court might make at the hearing, and to allow judgment to go at law. *North Stafford Steel, Iron, and Coal Co.* (*Burslem*) v. *Camoys* (*Lord*), 6 N. R. 345. [3040 (7).

8. On motion for an injunction to restrain an action of ejectment, the injunction was granted on an undertaking that, judgment being allowed to go in the action, such judgment should be dealt with as this Court should direct. The plaintiff at Law then brought an action of trover for the fixtures, and sought to use the judgment as conclusive evidence of his legal title. Upon motion for an injunction to restrain such use of the judgment, motion refused with costs. *Semble*, a judgment allowed to be taken on the terms of an injunction being granted and to be dealt with by this Court, is not given *de bene esse*, but on admission of legal title. *Weeks* v. *Taylor*, 3 W. R. 47. [3040 (7).

9. After service of subpœna, and the appearance of a defendant, a motion for an injunction cannot be made *ex parte*. *Langham* v. *Great Northern Railway Co*, 1 De G & Sm 186. And see S. C. 16 L. J., N. S., Ch., 437; 11 Jur. 539. [3043 (18).

10. Service of notice of motion for an injunction to restrain execution on a judgment obtained in an action at law, on the housekeeper to the persons who were the defendants' attorneys in that action, is insufficient. Where the order obtained on such motion stated that it was made on notice to the defendants, they should move to discharge such order, and not to dissolve the injunction. *Angier* v. *May*, 3 W. R. 330; 3 Eq. Rep. 488. [3043 (22).

11. The Court will grant an *ad interim* injunction on the application of a plaintiff out of its jurisdiction, notwithstanding he has filed no affidavit in support of his bill. *Hamilton* v. *Board*, 1 N. R. 379. [3044 (16).

12. At the hearing an injunction may be granted, although not prayed for by the will. *Reynell* v. *Sprye*, 1 De G. M. & G. 660; 21 L. J., Ch., 633. [3046 (9).

13. A party seeking relief by injunction must state in his bill the whole of the agreement in respect of which he seeks relief. *Sheard* v. *Webb*, 2 W. R. 343. [3048 (16).

14. Where a bill is filed by some "on behalf, etc.," an injunction which restrains proceedings against persons not named parties to the record, is irregular, per the Lord Chancellor. *Armitstead* v. *Durham*, 11 Beav. 556; 13 Jur. 330. [3052 (14).

15. Where it is desired that the writ of

injunction should not actually issue, the terms of the order should be that the defendant "be restrained," not that "an injunction be awarded to restrain" him. *Goldsmid* v. *Croft*, 4 W. R. 450. [3052 (14).

1. An answer was filed on Saturday, and an order *nisi* to dissolve the injunction obtained the same day. Notice of filing the answer and of the order was not given till Monday. Upon motion to discharge the order *nisi*, the Court, finding that the plaintiff had not been prejudiced, refused to discharge it, but made the defendant pay the costs. *Suffield* (*Lord*) v. *Bond*, 10 Beav. 331. [3060 (3).

2. On showing cause on merits why common injunction should not be dissolved, the common injunction having been obtained under the old practice, affidavits cannot be read in opposition to the answer. *Lancaster* v. *Lancaster*, 1 W. R. 92. [3030 (14).

INSURANCE.

3. A company which carries on two different kinds of business under two separate departments—*e.g.*, the dealing with annuities, and the insuring of lives—is nevertheless one company; so that one department of it cannot enter into contracts with the other. *Grey* v. *Ellison*, 4 W. R. 497; 2 Jur, N. S, 511. [3078 (6).

4. Where policies are effected by the manager and secretary of one assurance society in the office of another, being a mutual assurance society, although such policy is expressed to be effected "for and on behalf of the society," the secretary alone is thereby constituted a member, by reason of the sum secured being payable to him and "his successors in office." Where directors of one assurance society have power to effect cross insurances in the office of another, if they do so in a mutual assurance office, that does not constitute their society a member, being *ultra vires*. The ordinary rules as to principal and agent do not apply to a case where the contract is *ultra vires*, and the society contracting with such agent must be taken to have constructive notice of such contract being *ultra vires*. *Re Security Mutual Life Assurance Society, Exp. Athenæum Life Assurance Society* (*Official Manager*), 6 W. R. 431; 1 L. T., N. S., 94. [3078 (6).

P. 3099, after par. (10), add

See also SETTLEMENT, V.

5. One of the conditions indorsed on a policy of insurance was, that no insurance would be held in force until the premium should have been actually paid to the company, nor would any policy be valid beyond fifteen days after the expiration of any year unless the premium for its renewal should have been paid to the company. Insurances might be renewed within three months on satisfactory proof of the health of the life insured. In the printed directions of the company to their agents every life policy was to be renewed within fifteen days after the premium became due; and if any policy was not renewed within fifteen days the agent was to give notice thereof to the secretary, and the policy could not afterwards be renewed without a fine and subject to the conditions of the company; and all receipts for the renewal of life policies not paid within a month from the expiration of the policies were to be returned at the end of that period A policy was effected with an agent of the company, who, to accommodate the insured, took bills for the amount of the several premiums, debiting himself with the amount of the premiums in his accounts with the company without communicating the transaction to the company. The bills not having been paid he took a security for them. A subsequent premium having accrued due in December 1846, the usual receipt in blank for the premium was forwarded to the agent. The premium was not paid, nor did the agent at the time it was due debit himself with the premium by any entry in a book or account; but in his next quarterly account in March 1847 he debited himself therewith, and shortly afterwards paid the account at the request of the treasurer without communicating to the company. Similar transactions took place in 1847 and 1848; the life died in 1849 The receipts for the premiums still in blank were handed back to the company. Shortly afterwards a correspondence took place between the secretary of the company and the agent, the agent claiming the amount of the policy; but as he had no assignment nor possession of the policy the company declined to pay unless the insurer joined in the receipt for the amount; and a report was prepared by the solicitor of the company and sent to the agent, suggesting that he or that the agent should proceed against the insurer to ascertain their relative rights. The insurer having declined to join in the receipt the company refused to give credit for the amount of the insurance against the balance by the agent, for which they brought an action, and recovered a verdict without giving credit for the three premiums of the disputed policy paid by the agent. The amount was demanded and paid by the agent to the company:—Held, first, that the policy had dropped:—Held, secondly, that the forfeiture of the policy was not waived by the report and correspondence relating to it. *Semble*, the retention of the premiums with knowledge of all the facts did not constitute a new contract to set up the policy, but the Court directed an action to be brought to try the question:—Held, thirdly, that supposing the policy to be set up by retention of the premiums, the agent had a lien on the policy enforceable in equity for the amount of them. *Busted* v. *West of England Fire and Life Assurance Co.*, 5 Ir. Ch. R. 553. [3100 (4).

6. Whether the stat. 35 Geo. 3, c. 63, renders a stamped policy necessary to a mutual insurance between shipowners. *Taylor* v. *Dean*, 4 W R. 665; 22 Beav. 429. [3115 (3)

INTERPLEADER.

1. Where a bill of interpleader stated a case for relief as between two of the defendants, but also set up the claim of a third, which was paramount and adverse to the claims of the two others:—Held, that although this last claim might be one which could not support the bill, the introduction of it did not expose the bill to a successful demurrer on the part of one of the first-named defendants. *Farebrother* v. *Beale*, 3 De G. & Sm. 637; 14 Jur. 215; 19 L. J., Ch., 149.

[3123 (14).

2. A., having a claim to certain property in India, agreed with B. that B. should undertake the trouble and expense of recovering it, and that if successful he should receive half the value of the property recovered. Afterwards, A.'s title having been established, A., with B.'s concurrence, sent a power of attorney to C. to receive the money with instructions to remit it to England. C. accordingly received the money and transmitted a bill of exchange for the amount to his agent in England. A. having refused to perform the agreement, B. filed a bill against him, and A. brought an action at law against C. for the amount of the bill. C. thereupon filed a bill of interpleader against A. and B:—Held, that C. having become possessed of the property solely as A.'s agent, it was not a proper case for interpleader, and the Court refused to allow C. a lien for his costs on the fund. *Watts* v. *Hammond*, 3 W. R. 312; 3 Eq. Rep. 641.

[3125 (1).

3. When two parties claim a right to a vessel which has been sold, and part of the proceeds is in the hands of a third party, in the form of a bill of exchange, that is a case for interpleader. *Gibbs* v. *Gibbs*, 6 W. R. 415.

[3127 (2).

4. Arrear of rent claimed by sequestrators, and a promissory note which had been given for the same arrear of rent put in suit by the defendant. Order obtained upon motion by the tenant in the cause without form, and to lodge in court expense of bill of interpleader. *Crone* v. *O'Dell*, 2 Moll. 348.

[3130 (7).

5. An interpleader bill cannot be filed without an affidavit by all the plaintiffs as to no collusion, unless a satisfactory reason can be given why some of the plaintiffs have not joined in such affidavit. *Gibbs* v. *Gibbs*, 5 W. R. 243

[3131 (12).

JOINT TENANTS.

6. A fund settled on the husband and wife "during their joint and natural lives":—Held, to be construed "during their joint lives, and the life of each of them." *Smith* v. *Oakes*, 14 Sim. 122.

[3158 (8).

7. Lands are settled to the use of the husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint tenants, and if any one dies before severance, his share shall survive to the others. There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants. If any of them have a bad opinion of their own lives, they may sever; but if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which the law affords no assistance. *Staples* v. *Maurice*, 4 Bro. P. C. 580.

[3158 (8).

8 Where a contract for sale severed a joint tenancy. See *Kingsford* v. *Ball*, 2 Giff. (App.) i.

[3160 (7).

JOINTURE.

9. A jointress had her own part of the marriage settlement in her custody, and became possessed of her husband's as his executrix; on motion, she was ordered to produce it to the clerk in court, but not to deliver it up, that being the very end of the bill. *Aston* v. *Aston*, 3 Atk. 302.

[3171 (4).

A jointress or purchaser ought to produce their deed, to see if the lands they claim are comprised therein. *Ib.*

JUDGMENT.

10. Where a testator devised a mortgage debt of 10,000*l.* secured on estates of H. in Ireland, and it appeared that the mortgage debt was 6,781*l.* only, but that H. also owed the testator 771*l.* on an Irish judgment.—Held, that if the judgment were registered against the estates under 13 & 14 Vict., c 29, ss. 6, 7, it was included in the bequest. *Puxley* v. *Puxley*, 1 N. R. 509; 8 L. T., N. S., 570.

[3177 (1).

11. An insolvent (under 7 Geo. 4, c. 57) assigns all present and future property to assignees, and executes a warrant of attorney to enter up judgment, which is not done. The insolvent died, being entitled to certain leaseholds; on bill filed by his representative:—Held, that the judgment not having been entered up, the plaintiff, and not the assignees, was entitled. *Holsgrove* v. *Hedges*, 3 W. R. 94; 3 Drew. 74; 24 L. J., Ch, 456.

[3178 (10).

12. Bond and judgment assigned, interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharpe* v. *Scarborough* (*Earl*), 3 Ves. 557.

[3192 (16).

13. Interest on the amount recovered was granted only from the date of the decree, as the bill contained no prayer for damages. *Harvey* v. *Beckwith*, 4 N. R. 90.

[3192 (16).

14. Where an inquiry was directed to be made in chambers as to the amount of premium to be returned to one partner on a dissolution of partnership, and a certain amount was certified by the chief clerk, whose certificate was afterwards confirmed

by the judge and the Court of Appeal, interest on the amount was directed to be paid from the date of the certificate. *Brewer* v. *Yorke*, 46 L. T. 289. [3192 (16).

1. Under 1 & 2 Vict., c. 110, a judgment is a security upon land as if the debtor had by writing agreed to charge his lands, independent of the intention of the parties. *Semble*, before 1 & 2 Vict., c. 110, a judgment creditor by *elegit* could get possession of lands and the debtor could not withdraw them, but a judgment was not properly a security upon land. *Bond* v. *Bell*, 6 W. R. 163: 26 L. J., Ch., 233; 3 Jur., N. S, 1290. [3200 (12).

2. On a petition, under the 27 & 28 Vict., c. 112, for the sale of the lands of a judgment-debtor, it was prayed that "all such inquiries and accounts might be directed to be made and taken as to the nature and particulars of the debtor's interest in such lands, and her title thereto, as might appear to be necessary and proper," etc.:—Ordered, that these general accounts and inquiries be omitted, and those only retained which were specifically asked for. *Exp. Clark*, 6 N. R 335. [3217 (2).

3. Under 23 & 24 Vict., c. 38, judgment debts not registered as required by 1 & 2 Vict., c. 110 and subsequent Acts have no priority in the administration of assets over simple contract debts. The rule is the same with regard to a County Court judgment. *Walter* v. *Turner*, 3 N. R. 413. [3234 (10).

LANDLORD AND TENANT.

4. Bill for specific performance dismissed with costs, where the agreement had been procured by the plaintiff under circumstances of great suspicion. A., B., and C., being jointly interested in certain property, A. contracts with B. to take a lease of the whole of it: and the contract expresses that B. is to be bound by the contract, only so far as it is to be performed by him; but that A. is to be answerable to B., even for what is to be done by C.:—Held, that B. will not be precluded from enforcing the contract against A, by the circumstance that C. has taken proceedings in a court of equity, which deprive A. of that possession and enjoyment of the property, the subject of the contract, which it was the purport of the contract to give him: nor by the circumstance that B., A. having declared his resolution not to perform the agreement, has supported C. in some of the applications which he has made, tending to interfere with A.'s enjoyment and possession of the property. —— v. *Ogden*, 5 L. J., Ch., 104. [3285 (1).

5. A. B. offered in writing to grant a lease of a coal mine upon certain terms. C. D. verbally accepted the offer. A draft lease was sent to him, and returned with the approval of C. D.'s solicitor. C. D. laid out money in driving shafts towards the coal mine through the adjoining property. Before any lease was executed, and something more than a month after the return of the draft lease, A. B. died:—Held, that the parol acceptance of the written offer of the lessor, coupled with the subsequent acts in the lifetime of A. B., entitled C. D. to specific performance of the agreement from the representatives of A. B. *Benecke* v. *Chadwicke*, 4 W. R. 687. [3297 (13).

6. Agreement to grant a lease for twenty-one years of a house in H. Place, according to proposals, by which it was stipulated, that the lease should contain a covenant by the lessor not to let land near H. Place for the purpose of making or burning bricks; and that the lease should be in the form of one to be inspected at the office of the lessor's solicitor. The form of lease referred to contained a covenant by the lessor not to let land near H Place, for the purpose of making or burning bricks, during the term of twenty-one years, if the lessor should so long live; and it turned out, on inspection of the abstract of the lessor's title, that the lessor was only tenant for life of land near H. Place, and unable to bind his successors in the ownership by the covenant not to let:—Held, on exception to the Master's report (finding in favour of the plaintiff's title to grant the lease in a suit by the lessor for specific performance), that this fact, under all the circumstances of the case, formed no ground for resisting the performance of the contract. *Dawes* v. *Betts*, 12 Jur. 709. [3302 (8).

Semble, that the objection was not one which could be rightly taken on a reference to the Master as to title. *Ib.*

The plaintiff was tenant for life in possession, with power of leasing, of certain premises, subject to a mortgage charge in trustees. The trusts of the mortgage were for the plaintiff and wife, for their respective lives, with remainder to their unborn children. To enable the plaintiff to grant a lease of a portion of the property in mortgage, the trustees and the plaintiff and the wife (as *cestuis que trustent*) joined in releasing that portion from the mortgage; and the plaintiff thereupon agreed to grant a beneficial lease, under the power, of such portion to the defendant. Upon an objection being taken, in a suit for specific performance, to the title to grant a lease, on the ground that the release of the mortgage would be inoperative as against the wife and ulterior *cestuis que trustent*:—Held, that whether this was or was not a breach of trust on the part of the trustees (there being no legal title by which the position of the lessee could be affected), a court of equity would, under no circumstances, interfere with the title of the lessee, and that, therefore, the objection could not be supported. *Ib.*

7. P. 3308, after par. (3), add reference S. C. *nom. Thorpe* v. *Milligan*, 5 W. R. 336.

8. The lessee of a house in the Strand contracted to grant an underlease to the defendant. The lease contained a covenant not to exercise any obnoxious trade. In the absence of evidence of express notice of the covenant:—Held, that notice of the existence of the lease did not imply notice of the contents of the lease, except of usual covenants; and that the covenant in restraint of trade was not a usual covenant. *Wilbraham* v. *Livesey*, 2 W. R. 281. [3308 (4).

Execution of Counterpart.] 9. In the absence of any stipulation to that effect, the lessor is not entitled to insist upon witnessing by himself or his agent the execution of the

counterpart of the lease by the lessee; and in a suit by the lessee to enforce specific performance of the agreement for a lease, the lessor ordered to pay the costs of the suit occasioned by his refusal to execute the lease, unless the execution of the counterpart was attested by his agent. *Borradaile* v *Smart*, 5 W R. 270. [3311 (1).

1. Agreement for lease of factory, with engines, gas-houses, and appurtenants, to contain usual covenants —Held, that the lease properly added the words "gas works," though the retorts and other gas works had been erected by the tenant when in occupation before the agreement. *Thorpe* v. *Milligan*, 5 W R. 336. [3314 (3).

2. Under a covenant to renew a lease, there being no clause of re-entry the lessor cannot refuse to renew upon the ground of breach of covenant unless there has been a gross breach. *Semble*, the breach must not only be gross but wilful. *Hare* v. *Burges*, 5 W. R. 585. [3325 (11).

3. The Court refuses to relieve lessees against the legal consequences of breaches of covenant as well in cases which rest in contract, as where the legal relation between the parties is fully established. *Gregory* v. *Wilson*, 9 Hare 683; 16 Jur. 304. [3337 (5).

Neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of such covenants, will the Court relieve the tenant against the consequences of the breach. *Ib.*

A tenant is not absolved from the performance of the covenants of his lease by a notice to quit; such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenant. *Ib.*

The fact of there being no personal representative of a lessee on whom the duty of performing the covenants of the lease has devolved, cannot be set up against the landlord. *Ib.*

It must be a strong case of equity created by a landlord against himself to control his legal right. *Ib.*

Covenants to repair after notice considered as distinct covenants. *Id.*, 9 Hare 690; 16 Jur. 304.

4 A lessee of land covenanted to build thereon two houses, with the approbation and under the inspection of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l.*, though all together were worth much more:—Held, that the covenant was substantially performed, and that there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title. *Hume* v. *Bentley*, 16 Jur. 1109; 21 L. J., Ch, 760. [3354 (3).

5. A. B. leases to C. D. the T. ferry and all the rights of shore thereunto appertaining, with a covenant by A. D. not to erect any building upon the ferry or landing place without the consent in writing of A. B. C. D., upon obtaining verbal permission from A. B., commenced building a bridge upon the foreshore; and subsequently, in January 1852, executes a deed tendered to him by A. B.'s solicitor, acknowledging, in consideration of permission to complete the bridge, the right to insist upon its removal, and agreeing to pay C. D. the yearly rent of 20*l.* for the concession, and 500*l.* on failure to remove the bridge after notice. C. D. subsequently discovers that the title to the foreshore upon which the bridge is built is claimed by the Crown—a circumstance in the knowledge of A. B. in January 1852—obtains a lease of the soil from the Crown, but continues to pay rent to both A. B. and the Crown Upon notice from A. B. to remove the bridge, and action brought for the 500*l.* penalty accruing from noncompliance, C. D files a bill against A. B. to set aside the deed of January 1852, for an account of the rent paid, and in restraint of the action:—Held, upon demurrer, that C. D. being in possession either under the original lease or the deed of 1852, could not set aside that contract without also giving up possession; and that in order to retain possession, he could not set up the adverse title of the Crown. The bill containing no offer to restore the property to A. B, demurrer allowed. *Willoughby* v. *Chamberlaine*, 5 W. R. 328. [3377 (9).

LAND REGISTRY.

6. Mode of obtaining the opinion of the Court under the 17th and 134th sections of the 25 & 26 Vict., c. 53. *Anon.*. 5 N. R. 230. [3380 (6).

LANDS CLAUSES ACT.

7. The Court will not take into consideration the possibility of a public company hereafter obtaining extended parliamentary powers. *Great Western Railway Co.* v. *Metropolitan Railway Co*, 1 N. R. 551. [3382 (2).

8. On an application for a mandamus against a railway company, by a landowner, over whose land the line was authorised to be made, but to whom no notice had been given by the company requiring his land, to complete the line, and to purchase the necessary land for that purpose:—Held, that it was no answer to the rule, that the prescribed period for the compulsory purchase of the necessary land had nearly expired, if there was still a period during which the company might take the requisite initiatory steps. *Reg.* v. *York, Newcastle, & Berwick Railway Co.*, 6 Rail. Ca. 648. S. P. *Reg.* v. *Lancashire & Yorkshire Railway Co.*, 6 Rail. Ca. 654. [3385 (5).

Semble, the obtaining a private Act of Parliament enabling parties to execute railway works, creates an obligation on the parties to complete them. *Ib.*

9. The 8 Vict., c. 18, s. 123, enacts, "that the powers of the promoters of the undertaking for the compulsory purchase or taking of land, for the purposes of the special Act, shall not be exercised after the expiration of the prescribed period," etc.:—Held, that this limitation did not apply against a landowner,

who, having within the prescribed period received a notice that his land was required by the promoters, and having within that period regularly served them with a notice that he required the amount of compensation to be determined by a jury, and, wishing to complete the sale of his land, applies for a mandamus to compel the company to issue a warrant for summoning a jury; that, in such case, the powers that the landowner wished to be exercised, were not "powers of the promoters of the undertaking for the compulsory purchase or taking of land" within the above section *Reg.* v *Birmingham & Oxford Junction Railway Co*, 6 Rail Ca 628 [3385 (5)

1. The owner of houses, which were liable to be taken for making a railway under an Act of Parliament, received notice under the 18th section of the 8 Vict, c. 18, from the promoters, that they would be required for the railway, and the company demanded the particulars of his interest therein, and stated their willingness to purchase. The particulars were furnished by the landowner, and 4,500*l.* was claimed as compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the company to summon a jury to assess the amount. The company took no further step in the matter:—Held, that the landowner could not maintain an action to recover the 4,500*l.* *Burkinshaw* v. *Birmingham & Oxford Junction Railway Co.*, 6 Rail. Ca. 600 [3388 (7).

2. A railway company were empowered to take land for the purposes of their Acts:—Held, that the Court would not go beyond the affidavit of the engineer of the company, which stated the specific purposes for which the land was wanted. *Flower* v. *Muspratt*, *Flower* v. *Frowd*, *Flower* v. *London, Brighton, & South Coast Railway Co.*, 6 N. R 200. [3395 (1).

3. A railway company empowered by Act of Parliament to construct "a railway and works," within certain limits as to space and time, is authorised under the 16th section of the Railway Clauses Consolidation Act, within such limits, without the consent of the owner, to take land for the purpose of constructing the various works mentioned in that section, although the line be opened, and the works be not necessary, but only convenient for the purposes of the line. *Sadd* v. *Maldon, Witham, & Braintree Railway Co.*, 6 Rail. Ca. 779. [3395 (5).

4. The words "lands which shall have been taken for or injuriously affected by the execution of the works," in the 68th section of the Lands Clauses Consolidation Act (8 Vict., c. 18), include such lands only as are actually taken or actually affected by the works *Burkinshaw* v. *Birmingham & Oxford Junction Railway Co.*, 6 Rail. Ca. 600. [3403 (3).

5. *Semble*, the Court will not subject a person being in possession of land taken by a railway company under the Lands Clauses Act to adverse proof of his title, when the purchase money has been paid in court under s. 79. *Re Sterry's Estate*, 3 W. R. 561. [3422 (1).

P. 3432, after par. (2), add *See also* RAILWAY, I. 2.

6. A railway company must pay the costs of a motion to dissolve an injunction obtained against them from their having failed to comply with the provisions of the Lands Clauses Act. Plaintiff at liberty to make application to the Court for the purpose of disposing of the suit in which the injunction has been obtained, and the costs of it. *Woodward* v. *Eastern Counties Railway Co.*, 3 W. R. 330. [3435 (2).

7. Purchase money which ought under the Lands Clauses Act to have been paid into court, having been paid to the tenant in tail of the land, was on his petition ordered to be invested. *Re London, Brighton, & South Coast Railway Co*, *Exp Abergavenny (Earl)*, 4 W. R. 315. [3436 (4).

8 Whether the Court can order the investment in East India Stock of money paid into court under the Lands Clauses Act 1845, *quære* *Re Briscoe*, 4 N R 311. [3440 (7).

9. Upon a petition for payment of the dividends of stock representing money paid in by a railway company, for glebe land, to the dean and chapter for the time being:—Held, that the dividends must accumulate. *Exp Battle (Dean)*, 1 W. R. 271. [3441 (12).

10 Upon a petition for investment and payment of dividends of purchase money for charity lands paid into court under the Lands Clauses Act, payment of dividends ordered to the rector for the time being, he being a perpetual trustee of the charity. *Re Davenant's Charity*, 2 W. R. 1. [3441 (12).

11. Lands belonging to a see, and held on lease, are taken under an Act, and the money paid into court. The sum being under 150*l.*, a petition is presented praying payment of the dividends to the bishop and his successors. Application refused. *Re Bath and Wells (Bishop)*, 2 W. R. 1. [3441 (12).

12 Where real estate of a college, subject to a lease, was taken by the Commissioners of Public Works, and the purchase money paid into court:—Held, that during the continuance of the lease, the college was entitled only to so much of the dividends as was equal to the rent, and that the rest of the dividends must be accumulated until the determination of the lease. *Exp. Merton College (Warden)*, 1 N. R. 176. [3441 (12).

13. On a petition for payment into court of the difference between the sum deposited in the bank under s. 85, and the whole of the purchase money ultimately agreed upon, and for investment and payment of dividends of the whole to the tenant for life:—The Court made the order. *Exp. London, Tilbury, & Southend Railway Co.*, 1 W. R. 533. [3443 (9).

14. Form of order which has been settled for the re-investment in lands of purchase money paid for the lands of incapacitated persons, etc., sold to railway companies or otherwise, and paid into court under the Lands Clauses Consolidation Act and similar statutes. *Mem*, 10 Hare (App.) xxxvi. [3447 (5).

15. On petition for re-investment of purchase money paid into court, and arising from settled lands bought under legislative powers, the Court, in the first instance, only approves of the propriety of the proposed investment, and reserves the directions as to the completion

of the purchase until the certificate of a conveyancing counsel is obtained approving of the title. *Re Martin's Estate*, 17 Jur. 30; 22 L. J., Ch., 248. [3447 (5).

1 The Court will not sanction a purchase of lands upon a surveyor's opinion as to their value The facts themselves must be proved, and then the Court will form its own conclusions. *Re Kinsey*, 1 N. R. 303. [3447 (6).

2. The tenant for life of certain settled estates, part of which had been purchased in 1849 by a railway company under the Lands Clauses Consolidation Act 1845, and which estates were subject to several mortgages, some created previously and some subsequently to the date of such purchase, applied by petition to have the purchase money, which had been paid into court, re-invested in land.—Held, that the Court had jurisdiction under the Act to order the purchase money of the lands in question to be re-invested in lands to be conveyed to the uses of the settlement, and to be subject to the existing mortgages; and that all the incumbrancers were entitled to notice of such re-investment; and that the railway company was liable to the entire costs and expenses of and incidental to the same. Whether a company has waived the right to pay off a mortgage under the 113th section, by neglecting to resist the usual order for investment of the purchase money in consols and payment of dividends to the tenant for life, *quære*. *Re Eastern Counties Railway Co., Exp. Peyton's Settlement*, 4 W. R. 380. [3446 (9).

3. Money paid into court by a railway company—paid out and invested in the enfranchisement of copyholds under the 4 & 5 Vict., c. 35. *Re Ground's Estate*, 1 W. R. 32. [3447 (12)

4. Where leaseholds are taken by a railway company, and the purchase money is paid into court under the Lands Clauses Act, the Court will sanction the investment of such purchase money in the purchase of a reversion in fee of other leaseholds. *Re Brasher's Trust*, 6 W. R. 406. [3448 (3).

5. Under a local Act, containing a power to lay out money in land, and for repairs in the same terms as the Lands Clauses Act, ss. 69 to 80, a petition is presented to allow a sum to re-build a farmhouse. Order made on the authority of *Exp. Shaw, Re Wigan Glebe Act*, 4 Y. & Coll. 506; 10 L. J., N. S., Exch., 92; 3 W. R. 41. *See also* Subdivision IMPROVEMENTS, p 3451. [3448 (9).

6 Tenant for life allowed to receive a sum of 220*l* paid into court in respect of a portion of the estate purchased by a railway company, upon her undertaking to apply the money towards payment of the expenses of building certain cottages upon the estate and to make up the deficiency (80*l*.) herself. *Re Wright's Devised Estates*, 6 W. R. 718. [3452 (1).

7. Where money has been paid into court in respect of lands taken by the company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l*., the Court will allow it to be paid to the tenant for life, but not otherwise. *Re Bateman's Estate*, 21 L. J., Ch., 691. [3452 (7).

8. Where a sum paid into the bank, under the Lands Clauses Act, was about to be reduced by an investment in land to less than 70*l*, the residue was ordered to be paid out to trustees nominated under the 71st section. *Re Kinsey*, 1 N. R. 303. [3453 (9).

9. A petition under the Lands Clauses Consolidation Act 1845, s. 69, for the application in the purchase of land of the purchase money paid in respect of charity land taken by a company, will be entertained without the certificate of the Charity Commissioners. *Re Chesbunt College*, 3 W. R. 638; 1 Jur., N. S., 995 *See also as to Consent of Charity Commissioners*, CHARITY, II. III. [3460 (5).

10 Certain property being taken by the Commissioners of Woods and Forests under the Metropolitan Building Act, on a petition for payment of the dividends or the proceeds in court to a tenant for life.—Held, that service upon the Commissioners was unnecessary. *Re Dryland's Estate*, 1 W. R. 139. [3460 (8).

11. Purchase money of land taken by a company paid out without service on the *cestuis que trustent*; the trustees for sale, after the death of a tenant for life, adopting the purchase. *Re East*, 2 W. R. 111. [3460 (8).

12. A petition by a railway company for investment of money paid into court by them, under the provisions of the 85th section of the Lands Clauses Consolidation Act 1845, need not be served upon the landowner, for whose security the money was deposited. *Exp. Carmarthen & Cardigan Railway Co.*, 2 N. R. 515. [3460 (8).

13. Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the Master's office, the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary. *Semble*. *Exp. Lea* (*Rector*), 21 L. J., Ch., 776. [3460 (8).

14. *Semble*, where purchase money has been paid into court, it is not necessary for the person in possession as owner to serve any other person than the company with the petition for investment. *Re Sterry's Estate*, 3 W. R. 561. [3460 (8).

15. Where a tenant for life applies to the Court for investment and payment to him of the dividends of moneys paid in under the Lands Clauses Consolidation Act, he must make an affidavit that no other person is entitled thereto. *Re Milnes' Estate*, 1 N. R. 516. [3461 (12).

16. Land belonging to a vicarage was taken by a railway company, and the purchase money paid into court to the account of the vicar. On a petition by the vicar stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct, and praying for a conveyance and payment of the money out of court, without a reference to the Master, the Court made the order. *Exp. East Dereham* (*Vicar*), 21 L. J., Ch., 677. [3462 (11).

17. The Court will not, by one order, direct a reference as to the propriety of a proposed

re-investment, and as to title, and for the completion of the purchase by payment to the vendors, and for taxation and payment of costs. *Exp. Duckle*, 16 Jur. 511. [3462 (11).

After the Master has approved of the title and settled the conveyance, the matter must come again to the Court for approval and further directions. *Ib.*

1. A railway company pay purchase money into court under the Lands Clauses Consolidation Act, and a person absolutely entitled to a portion of the fund, under 300*l.* in value, petitions for payment out of such part, and asks costs against the company; the company resisting the payment of the costs on the ground that the application ought to have been made in chambers:—Held, that the application was rightly made by petition of which the company must pay the costs. But see R. 2 (7) of Ord. LV. of the Rules of the Supreme Court 1883. *Re Clarke's Devisees*, 6 W. R. 812. [3463 (4).

2. Lands are purchased by a railway company and the money paid into court, and invested under an Act passed previously to the passing of the Lands Clauses Act, after the passing of which the company is amalgamated with others, which Amalgamation Acts incorporated the Lands Clauses Act. On a petition for payment out of court of the purchase money to the party entitled, and for payment of the costs of such petition by the company:—Held, that the company was not bound to pay the costs. *Re Neachell's Trusts*, 3 W. R. 634. *See also* Subdivision, XVI. 1., page 3484. [3464 (9).

3. A petition, under the Trustee Act 1850, stated that A. had mortgaged lands to B. in fee; that B. had died, having by his will devised his lands to infants, and appointed C. his executor; that a contract had been entered into by C. with a railway company for a sale of a part of the lands at a certain price, and that, for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C., and that the railway company might pay the costs of the petition. The railway appeared at the hearing, but objected to pay the costs:—Held, that the Court had no jurisdiction to make any order either in favour of, or against, the company. *Re Rees' Devisees*, 21 L. J., Ch., 687. [3465 (6).

4. Land having been taken by a railway company from the transferee of a deceased mortgagee whose heir at law could not be discovered:—Held, that the company were bound to pay the costs of a petition by the vendor, for the appointment of a person to convey to the company in the place of the heir at law of the deceased mortgagee. *Re Nash's Estate*, 4 W. R. 111. [3465 (6).

5. "A." tenant for life of certain leaseholds, part of which are taken by a railway company. The compensation money is paid into court, and afterwards invested, and the dividends ordered to be paid to A. for life. The lease expires in the lifetime of A.:—Held, that A. is entitled to the whole of the compensation money and the dividends thereon. Costs of all parties out of the fund. *Re Oxford, Worcester, & Wolverhampton Railway Co., Re Beaufoy's Trusts*, 1 W. R. 14. [3466 (10).

6. Money has been paid into court under the Lands Clauses Act in respect of land purchased by a railway company. The tenant for life, who is plaintiff in a suit instituted for the purpose of raising certain legacies and charges upon the estate by sale of a portion thereof, petitions that the money be transferred to the credit of the cause to meet *pro tanto* the charges:—Held, that the company were bound to pay the costs of the petition only, and not the costs of the defendants to the suit interested in the charges who had been served and appeared upon the petition. *Re Picton's Estate*, 3 W. R. 327. [3467 (9).

7. H., by will, gave his personalty to his wife, and all his real estate by description for the maintenance of herself and his three children, until his son G. attained twenty-one, when he gave him certain portions of the property charged with an allowance to his (testator's) wife; to his son H., when twenty-one, certain portions on the same condition; and to his daughter E., at twenty-one, certain portions; as to some to the wife for life, and at her decease to the daughter absolutely. If G. died without issue, then H. to possess the property; and if H. died before G. without issue, then G. to have H.'s property. If E. died without issue, her property to be equally divided between her brothers or the survivor; but if she survived them and they left no issue, then she to have all the property. But if the wife survived all the children, to her for life; remainder to his (the testator's) nephews and nieces equally. If there should be an after-born child which survived G. and H., they leaving no issue, the whole to such child; and if such child died without issue, to the wife for life, as if there had been only three children. Testator left four children, one after-born, and nephews and nieces. G. died an infant and unmarried; and on petition by H. to have certain money paid into court by a railway company, paid out to him, ordered accordingly; and held, that the wife took a life estate until eldest son attained twenty-one, and that there were three estates tail successively, and H. was now tenant in tail. The after-born child presented a counter-petition, which was dismissed with costs as against the company; but the costs of the daughter and H. appearing separately:—Held, not costs occasioned by adverse claimants. *Re Hinks's Estate*, 2 W. R. 108. [3470 (13).

8. Land devised in trust for sale in an administration suit, is taken by a railway company, and the purchase money paid into court under the Lands Clauses Act. Upon a petition by a mortgagee of the land, entitled to one-tenth of the proceeds of sale, for transfer of the fund in Court from the account of the company to the credit of the cause:—Held, that it was a payment out within the meaning of the Act, but that the company was not liable to pay the costs of the parties to the suit appearing separately, inasmuch as they should have been made co-petitioners. The trustees and the petitioners were entitled, however, to appear and have their costs against the company, but the costs of the other parties must be costs in the cause. *Melling* v. *Bird*.

1 W. R. 219; *Patten* v. *Gatty*, 1 W. R. 219; 22 L. J., Ch., 599; 17 Jur. 155. [3474 (1).

1. The dividends arising from the purchase money of lands purchased by a railway company from the trustees of a school, had been ordered to be paid to the then trustees; subsequently new trustees were appointed. On a petition for payment of the dividends to the new trustees, no order was made upon the company for payment of costs. *Re Andenshaw School*, 1 N. R. 255. [3475 (6).

2. Where lands settled in the same manner have been purchased by different railway companies, and the purchase moneys paid into court and invested, and the tenant for life afterwards dies, the orders directing payment of the dividends of the several funds to the person next entitled may all be obtained upon the same petition; and the railway companies will not in future be required to pay the costs of more than one petition. The point being a new one, the petitioner was not deprived of his additional costs out of pocket. *Re Broke's (Lord) Estate*, 1 N. R. 568. [3475 (6).

3. Costs of a petition for payment of dividends on interim investment must be paid by the company, although the petition was rendered necessary by a defective order on a former petition, such order having been made in the presence of the company. *Re Goe's Estate*, 3 W. R. 119. [3475 (6).

4. Where land is purchased of a party seised in fee, by a railway company, and the money paid into court, and he dies leaving his real estate charged with legacies, upon the usual petition for payment out of court the costs of the legatees must be paid by the petitioners. *Exp. Oxford & Rugby Railway Co., Re Turner*, 2 W. R. 411. [3477 (8).

5. The Commissioners of Sewers for the purposes of their Act took lands belonging to a charity, and provided other lands in substitution:—Held, that the charity was entitled to its costs of the enrolment, under the Statute of Mortmain, of the conveyance of the substituted lands. *Semble*, the conveyance would be void unless enrolled. *Exp. Christ's Hospital (Governors)*, 4 N. R. 14. [3479 (1).

6. By a railway Act a company was empowered to take lands belonging to a vicarage; and it was declared that the purchase money should be paid into court, and that, on a petition by the vicar and patron, and with the consent of the ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly:—Held, that the bishop was entitled to be paid by the company, not only the costs of his attendance in the Master's office, but also of his appearances on the petitions to the Court for a reference and confirmation of the Master's report. *Exp. Creech St. Michael (Vicar)*, 21 L. J., Ch., 677. [3479 (1).

7. Railway purchase money being paid into court under the Lands Clauses Act, charity lands are contracted for as an investment, the usual reference is made, and, a petition under Sir Samuel Romilly's Act being necessary, the owner of the money agrees with the charity trustees to pay those costs, and, on a petition to confirm the purchase, asks for such costs against the company:—Held, that he was not entitled. *Exp. Alsager (Incumbent)*, *Re North Staffordshire Railway*, 2 W. R. 321, 2 Eq. Rep. 327. [3479 (1).

8. Where money has been paid into court under the Lands Clauses Act, and is afterwards invested, together with a larger sum of money, in the purchase of land held under one title, the company must pay all costs except the extra stamp duty on the surplus money. *Exp. Carlisle (Mayor)*, 1 W. R. 103. [3480 (4).

9. Where two estates, settled upon different trusts, were jointly charged with certain incumbrances, and such incumbrances were, by arrangement between the two tenants for life, paid off by them out of their private moneys in certain proportions, and part of one of such estates was taken by a railway company for the purposes of their Act, and the purchase money paid into court:—Held, upon petition by the tenant for life of the land taken by the company, for payment to him out of the fund in court of the amount of the incumbrance paid off by him, and for the investment of the residue of the fund, that the company was liable for the costs of the appearance of the persons interested in remainder expectant on the life estate of such tenant for life. *Re Furness Railway Co., Re Romney*, 3 N. R. 287. [3481 (11).

10. The 9 & 10 Vict., c. 39 (The Chelsea Bridge Act), empowers certain Commissioners to take land for the purposes of the Act, and, in the case of land held on trust, or belonging to persons under disability, directs the purchase money to be paid into court, and subsequently, on the petition of the persons interested, to be invested in the purchase of substituted land, or in other specified ways. The Act provides that, wherever it shall be necessary to pay the purchase money into court, the Court may order the expenses of all purchases from time to time to be made in pursuance of the Act, or so much as it shall deem reasonable, to be paid by the Commissioners:—Held (following *Re Strachan's Estate*, 9 Hare 185), that these words do not authorise the Court to order the Commissioners to pay the costs of the sale or conveyance to them. But, inasmuch as the Act was passed after the Lands Clauses Consolidation Act 1845:—Held, that the 82nd section of the latter Act, not being excepted from or inconsistent with the provisions of the former, must be considered as part of it, and that therefore the Commissioners were rightly ordered to pay these costs. *Re Cherry* (10 W. R. 305) explained. *Re Westminster Bridge Acts, Exp. St. Sepulchre's (Vicar)*, 3 N. R. 594. [3485 (10).

11. Where lands which were subject to a lease were taken for the purposes of a company, and the purchase money in respect of such leasehold interest was invested under the Lands Clauses Act, the company was ordered to pay the costs of the half-yearly sales of stock for the purposes of distribution. *Re Long's Estate*, 1 W. R. 226. [3486 (10).

12. The Court has no jurisdiction, except by express enactment, to make a company pay the costs of a petition for payment out to persons becoming absolutely entitled of moneys paid into the Court of Chancery, or the Court of Exchequer, in respect of lands taken by the company from owners under disability. *Exp.*

Ecclesiastical Commissioners for England, 5 N. R. 483. [3486 (10).

1. Upon petition for payment out of court of money paid in pursuant to an award in respect of land taken by a railway company, to a portion of which land the petitioners subsequently to the arbitration discovered that they were not entitled, an apportionment under the Lands Clauses Act (1845), s. 78, was directed by the Court, the petitioners paying the costs occasioned by such apportionment. *Re Alston's Estate*, 5 W. R. 189. [3486 (10).

2. On a reference to arbitration under the Lands Clauses Consolidation Act, 8 Vict., c. 18, the arbitrators or umpire have no power, in the first instance, to determine anything but the amount of compensation payable by the promoters; but as soon as that is determined under s. 34, the costs may be subsequently taxed and settled by a separate instrument, and they need not be incorporated in the award. The settlement of the costs need not be within three months after the time of the reference. The 34th section directs the arbitrators, not the umpire, to settle the costs:—Held, that the term "the arbitrators" means the persons who make the award, either as arbitrators or umpires. *Gould* v. *Staffordshire Potteries Waterworks Co.*, 6 Rail. Ca. 568. [3489 (2).

3. Railway purchase money invested in 1844, and asked to be paid out by trustees of a settlement to mortgagees on the property, and that the company might pay brokerage both of investment and selling out, as well as costs of tenant for life, and mortgagees appearing separately:—Held, that the investment being made before the recent rule of deducting brokerage made no difference, but it would be payable by the company, except in this case there had been no taxation of costs of investment, and therefore the company were only liable to brokerage, on selling out; and that mortgagees and tenants for life had a right to appear separately and have their costs. *Re Legh's Settled Estate*, 2 W. R. 109. [3490 (9).

LEGACY.

4. In an abstract of legacies bequeathed by will, the testator added in the outer margin to his daughter's legacies, "I intend to make this up British money":—Held, this is an immediate gift in augmentation of the legacies, and not merely a memorandum indicating intention to augment them by future acts. The words contain the essential requisites of a gift; the amount of the bounty and the objects are certain; they do not import fluctuation of mind, or future deliberation, as suspending testator's purpose; they are, therefore, capable of being considered a declaration of his immediate and fixed intention that the legacies should be augmented, and that is sufficient to constitute a bequest. *Mason* v. *Mason*, Beat. 322. [3492 (1).

5. A testator gave his freehold and copyhold estates at H., and his leaseholds at C. and K., and all other his freehold, copyhold, and leasehold estates, and all the residue of his personal estate and effects, upon trust for his wife for life, and after her death for his four children, in equal shares, absolutely. The testator had no other leaseholds than those at C. and K.:—Held, that the gift of the leaseholds was specific. Report of *Fielding* v. *Preston* (1 De G. & J. 438) questioned. *Cook* v. *Drew*, 2 N. R. 437. [3502 (6).

6. Where two legacies of different amount are given by the same will to the same person, the legacies are to be considered cumulative unless a contrary intention appears in the will. *Brennan* v. *Moran*, 16 Ir. Ch. R. 126. [3512 (8).

7. Where two legacies are bequeathed to the same person by different testamentary instruments, *e.g.*, one by the will, the other by the codicil, or where they are given by different codicils and both are given *simpliciter*, the Court, in the absence of intrinsic evidence to the contrary, considers the legacies as cumulative. *Brennan* v. *Moran*, 6 Ir. Ch. R. 126. [3513 (5)

A testator by his will, after confirming the provision made for his wife by his marriage settlement and reciting his intention to make a further provision for her by way of annuity, directed his executor to purchase 3,333*l.* 6*s.* 8*d.* stock, and transfer the same to trustees upon trust to pay the dividends to his wife so long as she remained unmarried, and on her marriage or death that the stock should become part of the residue of his property. By a codicil, after reciting his will and directing that the codicil should be annexed thereto and taken as part thereof, and that it was his wish to increase the annuity bequeathed by his will to his wife, he directed his executor to purchase 3,333*l.* 6*s.* 8*d.* stock, and transfer the same to the same trustees upon trust, to pay the dividends to his wife so long as she might remain his widow and no longer, and from and after her decease, or in case she should marry again, that the said stock should form and be a portion of the residue of his property to be disposed of as directed by his will, and he ratified and confirmed his will and codicil in every respect:—Held, that the legacies were cumulative, and that the widow was entitled to both annuities. *Ib.*

8. Ademption or satisfaction of legacy charged on land, by loan to legatee's husband. *Higginson* v. *Wilson*, 2 W. R. 217. [3534 (4).

9. Testator, after directing that his residuary real and personal estate should be applied in payment of certain specified legacies if there should remain any surplus of the moneys to be appropriated to the object of the will after satisfying the legacies, gave the surplus to a charitable society, the same to be paid out of the funds appropriated as should not consist of lands or mortgages:—Held, that the legacies were payable out of the personal estate savouring of the realty; and if that were insufficient, out of the proceeds of the realty which had been sold, so as to appropriate to the charity all such pure personalty as might not be required to satisfy the legacies, after application for that purpose of the personalty savouring of realty, and the proceeds of the realty. *Pritchard* v. *Norris*, 4 W. R. 733. [3508 (4).

1. A testator bequeathed to A. a share of the income of his personal estate, and directed that after A.'s death the share to which he would if then living be entitled, should be paid to his wife E. In a subsequent part of the will the testator, after reciting that A. was indebted to him for a sum advanced to him, directed that the sum advanced should be retained by his executors out of the share of A. in the income. A. having survived the testator and died before the sum was fully paid off:—Held, that the executors were to retain the balance out of the income bequeathed to E. *Knight* v. *Sterry*, 18 Jur. 928. [3534 (4).

2. In 1815, a sum of 1,000*l.* was bequeathed to J. R. and C. R., in equal shares, to be raised out of the share of E. A. D. in the testator's residue, on the death of his (the testator's) widow. In 1818 J. R. bequeathed his interest in the 1,000*l.* to C. R., and appointed him one of his executors. In 1822, by an indenture reciting that all J. R.'s debts and legacies were paid, C. R. assigned the 1,000*l.* to D. and L., from whom, by divers mesne assignments, the trustees of the Economic Life Assurance Society purchased it for valuable consideration. The testator's widow died, when the legacy fell into possession:—Held, that the whole of it might be paid to the said trustees, and that the 500*l.* which represented J. R.'s share ought not to be paid to his surviving representative, to be handed over to the said trustees. *Revill* v. *Revill*, 3 W. R. 541. [3574 (11).

3. Where a legacy was given to A., to be paid on her attaining the age of twenty-one years, and in case of her death before that time, was given over, the evidence on which the Master made a report as to her age, with a view to allowing her a suitable maintenance, though sufficient for that purpose, may not be sufficient to establish the time of her birth so clearly as to sustain an application for the payment of the legacy. *Anon.*, 1 L. J., Ch., 77. [3577 (7).

LIFE ESTATE.

4. Order to produce *cestui que vie* before Commissioners, or the Court, granted on motion, although notice of the motion had not been served on the tenant *pur autre vie*. *Exp. Abergavenny* (*Lord*), 6 N. R. 335. [3612 (5).

5. Trustees, having a discretion, allowed a reversionary interest to remain unsold for nineteen years, when it fell into possession:—Held, that the tenant for life, who had in the meanwhile received nothing in respect of income on it, was entitled to be recouped out of the fund. *Wilkinson* v. *Duncan*, 23 Beav. 469; 5 W. R. 398; 26 L. J., Ch., 495; 3 Jur., N. S., 530. [3637 (5).

Mode of calculating the amount to be received by the tenant for life, and of regulating the relative rights of the tenant for life and remainderman, in such a case. *Ib.*

6. Widow held entitled to enjoyment in specie of long annuities (in which she had a life interest) not required for payment of debts of testator. *Milne* v. *Parker*, 17 L. J., N. S., Ch., 194; 12 Jur. 191. [3640 (9).

7. As a rule the legatee for life of a reversion is entitled to have it sold, though the legatee be tenant for life in possession of the fund out of which the reversion springs. The surplus of a fund appropriated to discharge an annuity is not a reversion within the above rule. *Johnson* v. *Routh* (27 L. J., Ch., 305) approved and distinguished. *Harrington* (*Countess*) v. *Atherton*, 4 N. R. 206. [3640 (9).

8. A testator directed his executors to get in his debts, and to invest the proceeds with the clear moneys he should die possessed of in consols, and to pay certain annuities out of the stocks standing in his name and those purchased by his executors, and out of the rents of the real estate if necessary; and to accumulate the surplus during the lives of the annuitants (a period which turned out to be more than twenty-one years). Part of the personal estate consisted of long annuities, which the executors did not convert, but accumulated with the other surplus income till the death of the annuitants. The income of the personal estate would have been more than sufficient to pay the annuitants if the long annuities had been converted:—Held, that the executors were not bound to convert the long annuities. *Hughes* v. *Perrens*, 1 Eq. Rep. 385. [3640 (9).

9. A testatrix, in terms sufficiently large to include "long annuities," directed her residuary estate to be converted, and, after payment of debts, to be invested in Parliamentary stocks and funds; and she gave the income of such stocks and funds, and of such stocks as should be standing in her name at the time of her death, to A. for life:—Held, that A. was not entitled to the income of the long annuities *in specie*. *Sheppard* v *Joynes*, 2 W. R. 26. [3640 (9).

10. A testator gave his property to trustees for the benefit of his wife for her life, and after her decease to be equally divided among his ten children, the object being that during the widow's life she might have the means of bringing up her children. One of the children became insolvent, and, on a claim for the administration of the testator's estate, filed by assignees in insolvency, and praying that the widow might be ordered to convert certain leaseholds and long annuities, and to invest the money in court, instead of enjoying the income *in specie*:—Held, upon the construction of the will, and considering that the testator's object was to provide not only for his widow, but also for his children during her life, that she was entitled to the income *in specie*, and that the plaintiffs were not entitled to costs in prosecuting a claim in such a case. *Marshall* v. *Bremner*, 2 W. R. 320. [3640 (9).

11. Testator gave all his freehold and leasehold messuages, lands, and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels, and effects, and all other his real and personal estates and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest, and proceeds of his money in the funds, and other, his said personal estate, to his daughter for life, and after her

death to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his real and personal estate for the children of his daughter, and in default of such children in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interests, and proceeds of his said stock in the funds, and other his said personal estate, to his nephews for their lives, and after their deaths in trust to stand possessed of his freehold and leasehold money in the funds, and other his said personal estate, for their children; and in default of such children, he gave his said freehold and leasehold estates, stock in the funds, and all other his said real and personal estate, to the corporation of S. in trust, as soon as conveniently might be after they should come into possession thereof, to sell the said freehold and leasehold estates, and also to sell, call in, and convert into money his said stock in the public funds, and all other his said personal estate, and to lend the same to certain persons, upon the terms therein mentioned. The testator, at the date of his will, and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate:—Held, that the bequest to the trustees was a general residuary bequest, and that the leasehold and bank stock ought to be sold, and the proceeds invested in 3 per cents.; and an inquiry was directed, whether the turnpike securities were real and permanent securities *Mills* v *Mills*, 7 Sim. 501; 4 L. J., N. S., Ch., 266.

[3646 (1).

1. The testator having directed his property to be converted and invested, and the dividends paid to his children for life, with remainder to their children after their deaths, and the Court being of opinion that it would be for the benefit of all parties that the business should be carried on, the tenants for life were allowed out of the profits 5*l.* per cent. on the capital for the time being in the business, the surplus to be accumulated and to go with the capital. Some of the tenants for life had drawn larger sums out of the profits than others. It was ordered that the drawings should be equalised, but no allowance should be made of interest on the sums which had been allowed to remain in the business. *Lambert* v. *Rendle*, 3 N. R. 247. [3650 (6).

LIGHT AND AIR.

2. Where the plaintiff and defendant held adjoining pieces of ground under a common landlord, and the plaintiff, with the licence of the landlord, and without objection by the defendant, had erected a manufactory, an injunction was granted to restrain the defendant so building as to obstruct the lights of the plaintiff's manufactory, pending a trial at law. *Crook* v. *Wilson*, 3 W. R. 378.

[3657 (1).

LIMITATIONS.

P 3673, col. 2, after line 2 add

— *Remainders and Gifts over of Chattels generally and of Chattels quæ consumuntur usu* See VESTED CONTINGENT AND FUTURE INTERESTS.

LIMITATIONS. STATUTE OF AND LAPSE OF TIME.

3. In assumpsit the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the breach, and not from the time of the refusal to perform the contract. *East India Co.* v. *Oditchurn Paul*, 7 Moo. P. C. 85; 14 Jur. 253.

[3678 (5).

4 Gift of a leasehold house to executors, with direction to sell it, and out of the proceeds to pay 50*l.* to A.:—Held, that there being a trust for sale, the gift to A. is not barred by the Statute of Limitations *Low* v. *Nash*, 1 W. R. 63. [3728 (1).

LOCAL GOVERNMENT.

5. By the 5 Geo. 4, c. 49, the Corporation of Plymouth were empowered to make certain waterworks, and were required to supply a certain daily quantity of pure, wholesome, fresh water for the use of Her Majesty's naval establishments, in consideration whereof they were to be entitled to an annuity. In the course of the present session they failed in an application for an Act to extend their powers. They were restrained from applying any part of the borough fund in paying the expenses of the application to Parliament. *Att.-Gen.* v. *Plymouth (Mayor, Aldermen, and Burgesses of)*, 1 W. R. 445 [3786 (6).

6. A local board of health, in the execution of certain works under the Public Health Act 1848, occasioned some damage to property belonging to A. Compensation was claimed by A. for the damage thus occasioned to him, or to have the same ascertained by arbitration. The Court refused to grant an injunction restraining A. from proceeding by arbitration under s. 123 of the Public Health Act 1848, holding that this section could not be distinguished from the compensation clauses in the Lands Clauses Consolidation Act 1845. *Bradford Local Board of Health* v. *Hopwood*, 6 W. R. 818. [3801 (4).

LUNATIC.

7. An alleged lunatic is entitled of right to have an inquiry which has been ordered prosecuted at once, or to have the order for such inquiry discharged. Section 4 of the Lunacy Regulation Act 1862, 25 & 26 Vict.,

c. 86, s. 4, is prospective only. *Re Naylor*, 1 N. R. 173. [3824 (11).

An inquiry ordered before this Act came into force ought to be prosecuted before the Master in Lunacy, not before a judge of a common law court. *Ib.*

Protection will be granted to the person of the alleged lunatic pending inquiry. *Ib.*

1. The wife of A. B. sued out a commission of lunacy, under which he was found a lunatic, and an order was made for taxation of the costs; but before taxation the lunatic died:—Held, that assuming the proceedings to have been proper, the solicitor of the wife was entitled to stand as a creditor against the lunatic's estate in respect of his bill of costs, and to institute a creditor's suit to enforce his right. *Re Rutter*, 2 Eq Rep. 19. [3829 (15).

Whether he would have been so entitled if employed by a person who was *sui juris*. *Quære*. *Ib.*

2. Where costs are incurred in opposing a commission of inquiry as to the state of mind of a party and the opposition fails, although circumstances are stated showing a previous knowledge and that the opposition was vexatious, a solicitor will be allowed the costs of opposition as between solicitor and client. *Field* v. *Turner*, 3 W. R. 469. [3829 (15).

3. In an inquiry as to an alleged lunacy, the costs of the petitioner were ordered to be paid out of the estate of the alleged lunatic, notwithstanding that the alleged lunatic had recovered and was certified to be of sound mind. *Anon.*, 3 N. R. 272. [3829 (15).

4. Previously to an inquisition of lunacy held in the case of Mrs. C., who was alleged and found to be of unsound mind, she was attended by several physicians, as well in their ordinary capacity as for the purpose of preparing themselves to give evidence in her favour upon the inquisition in question. They received at the time no remuneration for their services except in the case of one of them, to whom a promissory note was given by the lady, bearing date subsequently to the period at which her imbecility was afterwards declared to have begun. Under a suit to administer her estate, these gentlemen applied by motion to vary a certificate of the chief clerk, by adding their names to the schedule of creditors, in respect of their claims for the above services:—Held, that they were not entitled to be included in such schedule, and that their fees ought to have been paid and claimed by the solicitor of the lady; but the amount of the promissory note given to one of their number was ordered to be allowed to him. *Elliott* v. *Ince*, 4 W. R. 515. [3829 (15).

5. A person who was entitled to a share in a business in partnership with a lunatic, and who was an accounting party in respect of such business, may, under special circumstances, be appointed committee of the lunatic's estate. *Re Millington*, 2 Eq. Rep. 158. [3832 (13).

6. Where it is desired to enforce against the committee of the estate of a deceased lunatic and his sureties, the usual bond required of the committee of the estate, the proper course is to petition the Court that the bond may be deposited by the Master in Lunacy with the Queen's Remembrancer; this Court will not transfer the bond to the administrators of the estate of the deceased lunatic. *Re Wall's Lunacy*, 1 N. R. 250. [3832 (13).

7. An investment of lunatic's property ordered in a particular form. *Magnus* v. *Bingley*, 2 W. R. 130. [3836 (12).

8. Where the committee of a lunatic's estate had passed his accounts and resigned his office, leaving a debt for maintenance of the lunatic still due to a third person, and the new committee repudiated the debt, the Court, on the petition of the creditor served on the new committee, directed a reference to the Master to ascertain the amount of the debt. *Re T———*, 5 N. R. 481. [3837 (1).

9. The Court will, without application to it for that purpose, where the estate of a lunatic has been increased, direct the Master in Lunacy to inquire whether, by an additional expenditure, any increase of comfort can be procured for the lunatic. *Re Melhuish* and *Re Haran*, 1 W. R. 236. [3839 (7).

10. Where a pauper lunatic has been placed in an asylum, and expenses incurred by the parish to which he belongs in his maintenance and that of family, and he comes into property, the Court will order payment to the overseers and guardians out of the fund, for the past maintenance of himself, his wife and child. *Re Drewery's Trust*, 2 W. R. 436. [3841 (1).

11. Expenses incurred by the overseers for the maintenance of a lunatic paid to them, upon petition, out of his share in a sum of stock standing in court. *Re Ward's Estate*, 2 W. R. 106. [3841 (1).

12. Practice as to granting leases of lunatic's estate at rack rent. *Re White*, 1 W. R. 294. [3848 (18).

13. In a suit in which a person found lunatic sought to set aside a deed executed by her as a security for moneys advanced at a time subsequent to that from which she was found lunatic, and in which the defendant by his answer denied notice of the lunacy, the deed was not set aside, although at the hearing the defendant by his counsel admitted that the plaintiff was at the time of executing the deed of unsound mind; inquiries were directed as to the fact of the advance and the circumstances attending it, and as to the application of the money; and upon further directions the deed was ordered to stand as security for the money reported to have been actually advanced, with interest and costs. *Kirkwall* v. *Flight*, 3 W. R. 529. [3850 (1).

14. A testator divided estates A. and B. in trust for payment of his debts, and afterwards purchased estate C. Subsequently he was found a lunatic, and under an order in the lunacy, estates B. and C. were mortgaged, for payment of certain debts of the lunatic and costs, with a proviso in the deed that as between the lunatic, his heirs, and devisees, estate C. should be the primary security:—Held, that the mortgage debt was payable out of the proceeds of the devised estate in exoneration of estate C. *Semble*, it is not *ultra vires*, under the Lunacy Regulation Act 1853, s. 116, for the Court sitting in lunacy to insert a proviso in a mortgage

of the lunatic's estates, making one estate the primary security. *Freeman* v. *Ellis*, 3 N. R. 243. [3850 (1).

1. Method by which an alleged lunatic residing abroad may obtain a sale of stock standing in his name pending an inquiry as to his sanity. *Re Naylor*, 1 N. R 173. [3852 (12).

2. Order in lunacy requisite for production and inspection of documents filed in office of Master in Lunacy, where lunatic is living *Re Sartoris' Lunacy*, *Wylde* v. *Arnold*, 1 N. R 4. [3853 (10).

3. Order in lunacy requisite for production and inspection of documents, etc., filed in office of Master in Lunacy, where lunatic is deceased. *Re Silcock's Lunacy*, *Hutton* v. *Hutton*, 1 N. R. 4. [3853 (10).

4. The heir at law of a lunatic appearing on a petition relating solely to the life estate of a lunatic, is not entitled to costs. *Re Dyneley*, 1 W. R. 294. [3855 (6).

5 After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed. Ordered upon motion, that the name of the new committee should be substituted for the deceased in all future proceedings in this cause. *Bryan* v *Twigg*, 3 W. R. 42 ; 3 Eq. Rep. 62. [3858 (17).

MERGER.

6. Mortgagee purchasing an equity of redemption preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey* v. *Richardson*, 9 Hare 736. [3870 (13).

MINES AND MINERALS.

7. A reservation of "mines" includes minerals." *Proud* v. *Bates*, 6 N. R. 92. [3881 (8).

8. A., a shareholder in a cost-book mine, receives notice, in 1851, of an intended sale of a portion of the mine with a view to its being worked by a new company, and is subsequently informed that the arrangement had been adopted, that a transfer of the old share and issue of shares in the new company had been agreed upon, and a call directed in order to clear off the liability remaining upon the old mine as shown by the balance-sheet. A. does not transfer his shares or take up those issued by the new company, and declines to pay the call. On his being sued by a creditor of the company for a sum equal in amount to this unpaid call:—Held, that although A. could not disturb the arrangement of 1851 as to the transfer and sale, he was entitled to have the old company wound up for the purpose of settling the outstanding liabilities, in respect of which the allegations in the petition had not been satisfactorily explained. *Re Birch Torr and Vitifer Mining Co.*, 3 W. R. 148; 1 Kay & J. 204. [3904 (5).

9. R., on the faith of a prospectus, stating that a company was shortly to be formed, to be conducted on the cost-book system, applied for, received, and paid deposit on shares in the company. He subsequently received scrip certificates in respect of such shares, whereon it was stated that the shares were to be held "subject to the rules and regulations of the company." At the date of the receipt by R. of the scrip certificates sent to him there were no rules or regulations of the company in existence, but soon after such receipt rules and regulations were entered on the cost-book of the company R neither signed the cost-book, nor attended meetings of the company, nor received any notices of such meetings, and he alleged that the rules and regulations above mentioned were at variance with the prospectus, and not in accordance with the cost-book system. The company was not abortive or fraudulent, but was unsuccessful, and was in course of being wound up. On the question whether R. ought to be placed on the list of contributories:—Held, that he ought, no substantial variation between the prospectus and the rules having been proved. but leave reserved to enter into evidence in chambers to prove that the rules were at variance with the cost-book system. *Richardson's case*, *Re Great Cambrian Mining and Quarrying Co.*, 4 W. R. 670. [3905 (4).

10. Although in general no contract exists between a company and a person who holds scrip certificates by assignment from a shareholder who has signed the cost-book *bonâ fide* in respect of those shares so as to fix such scrip holder with the liabilities of a shareholder, there may be such a course of dealing as to establish a privity between the company and the holder of scrip certificates, and a liability against him, although he has not signed the cost-book in respect of the shares represented by such scrip certificates. A. B. signs the cost-book for certain shares, and transfers them to C. D., who accepts the transfer, and signs the book in respect of the shares. C. D. having been made a contributory in respect of these shares: —Held, that A. B. could not also be fixed with liability as a contributory in respect of these shares. *Bowen's Case*, *Re Cambrian Mining and Quarrying Co.*, 4 W. R. 800. [3905 (4).

MORTGAGE.

11. A. B. is induced to intrust C. D., his co-trustee and a solicitor, with trust moneys, upon his representation that E. F. wishes to obtain the amount upon mortgage. C. D., who is also confidential solicitor of E. F., induces him to execute a mortgage to A. B. and C. D. of certain property of which C. D., as his solicitor, holds the title deeds. E. F. executes this deed in ignorance of its contents and effect from his confidence in C. D. The money advanced by A. B. is retained by C. D., nor is any part of it ever received by E. F. Two years afterwards C. D. becomes bankrupt, and is subsequently struck off the rolls. Mort-

gage deed set aside as fraudulent and void as against E. F., and an action upon the covenant by A. B. restrained, the money not having been advanced by him upon the execution of the mortgage deed, but upon the false representation of C. D., who retained the money in his own possession. *Rushout* v. *Turner*, 5 W. R. 670. [3951 (4).

1. A mortgagee, before the repeal of the Usury Acts, advanced to a mortgagor the sum of 342*l.* 0*s.* 10*d.*, being the produce of a sale of stock; and the mortgagor agreed that the sum so advanced to him should be regarded as 360*l.*, so as to protect the mortgagee against loss on re-investment, and to pay interest on 360*l.* at 5*l.* per cent.—Held, that this was a fair bargain, and, therefore, not void within the Usury Acts. *Baskett* v. *Skeel*, 2 N. R. 547. [3974 (1).

2. Where there is the common proviso for reduction of the interest payable on a mortgage debt, in case of punctual payment, a failure in such punctual payment only affects the rate of interest payable for the half year in which such condition was not fulfilled. *Wayne* v. *Lewis*, 3 Eq. Rep. 1021; 3 W. R. 600. [3975 (9).

3. The plaintiff, being the purchaser from a co-heir of a mortgagor, had tendered the mortgage money. An injunction was granted to restrain the mortgagee in possession from proceeding in ejectment against a lessee of the property, the plaintiff undertaking to make the other co-heirs parties. *Herries* v. *Griffiths*, 2 W. R. 72. [3993 (3).

4. A tenant for life of leaseholds under a settlement, who is also entitled to a share of a deceased child, mortgages her interest twice, and a suit being instituted to carry out the settlement, the leaseholds are sold and others held for three lives are purchased; two of the lives drop, and a large fine being demanded to renew, a bill is filed to compel a renewal. A policy having been effected on the last life, the first mortgagee, who is in possession, with notice of the second mortgage, pays two premiums, with the authority of the tenant for life, and then allows the policy to drop. Such premiums were paid by the first mortgagee out of the rents, he being a solicitor, and managing the estate and suit himself. Another bill was afterwards filed impeaching the settlement, but ultimately dismissed with costs, and in that suit the first mortgagee is a defendant. Pending the suits, the surviving trustee of the settlement pays various sums to the tenant for life. In taking the accounts in chambers, the chief clerk disallows the premiums, the payments to the tenant for life, and allows only costs out of pocket to the first mortgagee. Upon exceptions to that certificate:—Held, that he was right in all the disallowances. *Selater* v. *Cottam*, 5 W. R. 744; 3 Jur., N. S., 630. [3995 (7).

5. In 1812 a mortgage was executed by A. and B. to C.; in 1813 two judgments, and in 1815 a third judgment, were obtained by C. against A. C. entered into possession of the mortgaged lands in 1812, and continued in possession until 1855. In a redemption suit it was held that the judgments were not, so far as related to the question in this case, to be considered as incorporated in the mortgage so as to form one security, and therefore that the rents received or which might have been received by C, were to be applied; first, in payment of the interest and principal due on the mortgage; secondly, in payment of the interest and principal due on the two judgments of 1813; thirdly, in payment of the interest and principal due on the judgment of 1815. *Montgomery* v. *Donohoe*, 5 Ir. Ch. R. 495. [4040 (7).

6. A. was seised in fee of estate X. and for life, with remainder to his son in tail, of estate Y., subject to certain incumbrances. By a private Act of Parliament passed in 1843, estate X. was vested in a trustee, subject to the incumbrances affecting it, and to certain judgments against A., which were specified in a schedule to the Act, to the use of A for life, remainder to his son in tail; and estate Y. was vested in the trustee in trust to sell and pay off incumbrances, and to pay the residue to A. A. was also seised in fee of estate Z., which was not included in the private Act. A. confessed a judgment in 1846, and died, having allowed large arrears to accrue on the incumbrances on X.; a portion of X. and Z. were sold in the Incumbered Estates Court. X. was sufficient to pay the arrears of interest:—Held, that the arrears of interest on the judgment named in the schedule to the private Act should be paid out of the produce of the sale of X., so as to leave the produce of Z. to pay the judgment of 1846. *Re Fox*, 5 Ir. Ch. R. 541. [4048 (1).

7. The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorise him to receive the mortgage money for the client. If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by showing that he paid the money to the solicitor, unless he can show that the solicitor was expressly authorised by the client to receive it. *Exp. Swinbanks, Re Shanks*, 11 L. R., Ch. D., 525; 48 L J., Bky, 120; 27 W. R. 898; 40 L. T. 825. [4054 (7).

8. The plaintiff, being the purchaser from a co-heir of the mortgagor, had tendered the mortgage money. Mortgagee in possession restrained from proceeding in ejectment against a lessee of the property, the plaintiff undertaking to make the other co-heirs parties. *Herries* v. *Griffiths*, 2 W. R. 72. [4056 (3).

9. Mortgagee not compelled to produce draft deeds. *Bycroft* v. *Sibel*, 1 W. R. 96. [4060 (1).

10. In a suit for the administration of trust property, part of which had been properly, and part improperly, included in a mortgage security:—Held, that no relief could be given against the mortgagee unless the plaintiff offered to redeem him. *Eaton* v. *Hazel*, 1 W. R. 87. [4073 (16).

11. Two promissory notes being given, accompanied by a memorandum and deposit of title deeds, to remain as a security for both sums, judgments are entered up against the drawer; the acceptor of the notes and depositee of the debts transfers his interest by a mortgage on the premises comprised in the deeds, in which the drawer confirms and the acceptor releases. Upon a foreclosure claim by the transferee, and the question whether the trans-

fer was not a separate transaction, and therefore came after the judgment debts:—Held, that the plaintiff was entitled to foreclosure, and stood in the shoes of the first equitable mortgagee. *Neve* v. *Hodges*, 2 W. R. 315. [4082 (9).

1. A mortgagor being a defendant to a claim for foreclosure, in that character, and who, in such character, has a right given to him to redeem, is bound by the foreclosure, in respect of an interest which he may have as tenant for life under a settlement made of moneys secured by a second mortgage of the same estate, although such latter interest be not stated on the claim. *Bromitt* v. *Moor*, 9 Hare (App.) xxxix. n. [4083 (9).

2. Plaintiff in redemption suit became insolvent after decree, but before default in payment. The bill was dismissed after default, without bringing the assignee before the Court:—Held, that the foreclosure was good against a purchaser under a second mortgage made before the insolvency, but pending the suit, of which the purchaser and his vendor had notice, though they were not parties thereto. *Wood* v. *Surr*, 2 W. R. 683. [4083 (9).

3. Mortgagor having been outlawed, the first mortgagee obtained a decree to foreclose subsequent mortgagees, and if they should not redeem, to sell against the Crown. *Scott* v. *Robarts*, 4 W. R. 499. [4083 (16).

4. In a foreclosure suit under 15 & 16 Vict., c. 86, s. 48, an immediate sale will be ordered, notwithstanding that infants are interested in the equity of redemption without inquiring whether such sale is for their benefit. *Wigham* v. *Measor*, 5 W. R. 394. [4085 (15).

5. The Court will decree a foreclosure against defendants who disclaim any interest, instead of simply dismissing the bill as against them. *Johnson* v. *Clarke*, 3 W. R. 193. [4095 (1).

6. Form of order for foreclosure taken by consent without account. *Boydell* v. *Manby*, 9 Hare (App.) liii. [4097 (1).

7. Immediate sale directed on a foreclosure suit, instead of the common foreclosure decree. *Anning* v. *Lavers*, 1 W. R. 19. [4103 (6).

8. Under the 15 & 16 Vict., c. 86, s. 48, the Court requires a case to be made for a sale instead of a foreclosure. *Robert* v. *Price*, 1 W. R. 303. [4103 (6).

9. Under statute 15 & 16 Vict., c. 86, s. 48, the Court will not make a decree for sale instead of foreclosure without the consent of the mortgagor, except under special circumstances. *Probert* v. *Price*, 1 Eq. Rep. 51. [4103 (6).

10. Application by the mortgagor for sale, instead of foreclosure. *Boydell* v. *Manby*, 9 Hare (App.) liii. [4103 (6).

11. A sale will not in general be ordered, under the 15 & 16 Vict., c. 86, s. 48, instead of foreclosure, unless there is such complication that the common decree cannot be conveniently worked. *Hiorns* v. *Holtom*, 16 Jur. 1077. [4103 (6).

12. The Court refused, on the application of the mortgagee, after a decree of foreclosure had been made, to vary the decree by directing a sale, under the 48th section of the 15 & 16 Vict., c. 86. *Girdlestone* v. *Lavender*, 9 Hare (App.), liii.; 16 Jur. 1081. [4103 (6).

13. An order for sale made on a claim for foreclosure, at the request of the mortgagee, such sale to be "one month after the judge's clerk shall have made his certificate of the amount of the principal, interest, and costs due to the mortgagee, if such amount shall not be paid." *Staines* v. *Rudlin*, 9 Hare (App.), liii. n.; 16 Jur. 965 [4103 (6).

14. The right of an equitable mortgagee by deposit without memorandum is foreclosure, not sale. *Samble* v. *Wilson*, 5 N. R. 395. [4105 (6).

15. *Semble*, that a mortgagor having conveyed to trustees for sale, cannot redeem as against a purchaser under the trustees; his remedy is to set aside the sale and have a new sale made. *Manser* v. *Dix*, 3 Jur., N. S., 253. [4108 (9).

16. A sale of mortgaged property, consisting of freehold and leasehold premises, and a policy of life insurance, ordered in a foreclosure suit, at the request of the mortgagee. The mortgagors were bankrupt, and the suit was against their assignees and against incumbrancers subsequent to the plaintiff. The decree directed the accounts of what was due to the several incumbrancers, and directed the proceeds of the different property to be distinguished. *Cator* v. *Reeves*, 9 Hare (App.), liii n.; 16 Jur. 1004. [4116 (6).

17. Where the receiver in a matter under the Mortgage Act pending at the passing of the 19 & 20 Vict., c. 77, dies, the Court has power to appoint a new receiver, notwithstanding the repeal of the former by the 5th section of the latter Act. *Harstone* v. *Tottenham*, 6 Ir Ch. R. 144. [4124 (5).

18. A. mortgages to B. in fee; B. dies, having devised the mortgaged estate to C. and D. D. subsequently advances money to A. on the same security:—Held, that C. was alone entitled to file a bill for foreclosure, and that D. was properly made a party defendant. *Remer* v. *Stokes*, 4 W. R. 730. [4126 (9).

19. Trustees of a will, whereby property is devised subject to mortgages, sufficiently represent the devisees; and although there are infants interested in the equity of redemption, the Court will direct an immediate sale where it appears to be for the benefit of the infants. *Cockburn* v. *Aukett*, 3 W. R. 641. [4126 (13).

20. A mortgagee in fee died intestate; his heiress at law was also his administratrix; she, by will, devised all estates vested in her as mortgagee to two trustees, whom she also appointed executors, and by a codicil appointed the husband of her heiress at law "to be a trustee and executor of her will, jointly" with the two trustees named in the will, and died. The two trustees named in the will disclaimed the devise and renounced probate, but the husband proved. He and his wife filed their bill against the mortgagor, offering to re-convey and for a foreclosure. At the hearing, the mortgagor objected that the heiress at law had no interest, and was improperly made a co-plaintiff, and he asked the dismissal of the bill:—Held, that she had no interest, and that, though the objection would have prevailed if it had been made by demurrer, yet she was

not so improper a party as that the Court would entertain the objection at the hearing; but the Court allowed no additional costs occasioned by her being made plaintiff, or of evidence in support of her pedigree. *Pearce* v. *Watkins*, 5 De G. & Sm. 315; 16 Jur. 832. [4133 (14).

Two separate portions charged on real estates were assigned by way of mortgage to a person who also became the mortgagee in fee of the entirety of the same estates, subject to the portions. The mortgagee in one foreclosure suit sought to foreclose the mortgagors of the two portions and the mortgagor of the entirety. On an objection taken by the mortgagor of the entirety at the hearing:—Held, that the suit was not multifarious. *Ib.*

1. Mortgagee, after the death of the mortgagor and the person supposed to be his heir, finds the mortgaged premises, which have been left vacant and out of repair, occupied by lodgers placed there by M., the owner of the adjoining house, who had entered by breaking through the party wall. Possession having been obtained by the mortgagee, M. enters with a band of men and recovers possession. The mortgagee brings ejectment, upon the advice of counsel, against M., and obtains a verdict. M. had previously brought an action of trespass against the mortgagee, in which he was nonsuited:—Held, that the mortgagee was entitled to receive the costs of the proceedings in ejectment out of the estate of the deceased mortgagor, but not the costs of defending the action of trespass. *Owen* v. *Crouch*, 5 W. R. 545. [4134 (1).

2. An administratrix borrowed money for the repairs of a leasehold house, and secured the re-payment by a mortgage of the shares of herself and another party in the beneficial interest. The mortgagee was made a party to a suit for the administration of the estate:—Held, that his costs could not be paid out of the estate. *Scurrah* v. *Scurrah*, 2 W. R. 53. [4150 (10).

NOTICE.

3. Communications to a solicitor, to make them notice to a client, must be made in respect of some pending matter, and be such that the solicitor was bound to communicate them to the client. *Hooper* v. *Cooke*, 25 L. J., Ch., 467; 2 Jur., N. S., 527. [4167 (18).

4. Stock was transferred into the names of trustees, and, by a settlement made in 1799, settled upon trust for A. for life, and after his death in trust for other persons. By another settlement, dated in 1829, the reversionary interest under the first settlement was assigned to trustees upon trust for B. for life, and other persons. During the lifetime of A., B. mortgaged his interest to C. and D. successively. C. gave notice of his assignment to the trustee of the settlement of 1799. D. gave notice to the trustee of the settlement of 1829:—Held, that C. thereby retained his priority over D. *Re Booth's Settlement Trusts*, 1 W. R. 444; 16 Jur. 965. [4174 (5).

NUISANCE.

5. The 135th section of 18 & 19 Vict., c. 120 does not authorise the Metropolitan Board of Works to create a nuisance in executing the works directed by the Act. The 31st section of the 21 & 22 Vict., c. 104 does not take away the power of any person to prosecute the Metropolitan Board of Works for a nuisance created by them in the execution of their works, but gives an easier remedy to persons unwilling to prosecute at their own expense. *Att.-Gen.* v. *Metropolitan Board of Works*, 2 N. R. 312. [4193 (5).

PARENT AND CHILD.

6. A father who had been extensively engaged in business, after directing that his trustees should carry on his business for a period not longer than till his youngest child should attain twenty-one, and should then sell his business if not previously sold, and directing the sale and conversion and investment of his estate, and giving an annuity to his wife, empowered his trustees to apply "the whole or so much as they shall think fit of the annual income as a common fund for the maintenance, education, and bringing up or otherwise for the benefit of my several children till the youngest shall attain twenty-one, in such manner as my trustees or trustee shall judge expedient, accumulating the surplus income in aid of the common fund, and the income and accumulation shall follow the destination of the capital whence the same shall have arisen." The capital of the estate was directed to be divided equally amongst all the children who attained twenty-one, or being daughters married under that age, except one son, for whom a different provision was made. By a codicil the testator recited that he had made advances to some of his children, and directed that all advances should be brought into hotchpot. The youngest child had recently attained twenty-one, and the trustees having, since the testator's death, applied portions of the income for the maintenance and benefit of the children, and accumulated the rest:—Held, that the proper mode of distribution was to divide the whole accumulated fund equally among the children, they giving credit for sums allowed for maintenance with interest and for interest from the testator's death on advances made by him, the capital of the advances being to be brought into hotchpot on the division of the capital of the estate. *Hilton* v. *Hilton*, 14 L. R., Eq., 468. [5381 (2).

PARTNERSHIP.

7. An executor, a member of a firm of stock-brokers, allowed the firm to use a portion of the administration assets for their own purposes:—Held, that the other partner, after

the executor's death, was liable to account for the assets, and could not rely, in discharging himself, upon a settled account, which had been regularly kept and settled by the executor with the firm. Interest was allowed on either side at 5*l.* per cent. *Price* v. *Peppercorne*, 6 N. R. 317. [5506 (7).

PRACTICE AND PLEADING.

1. The conveyancing counsel of the Court, though in a sense an officer of the Court, is still counsel for the vendor, who is responsible for any misrepresentations in the conditions of sale settled by such counsel. *Broad* v. *Munton, Re Banister*, 27 W. R. 547, 826; 40 L. T. 319, 828. [4451 (1).

2. *Semble*, a bill to set aside a purchase may be maintained by some partners of a company, including the actual purchasers, without making all the partners parties against a vendor who is not a partner. *Attwood* v. *Small*, 6 Cl. & F. 232; 2 Jur. 200, 226, 246. [5057 (1).

To a bill seeking payment of the residue of purchase money, payable under a contract on behalf of a company by some of their number, the directors of the company should be parties, as well as the individuals who entered into the contract, if it is right to enforce the lien on the property as well as the personal remedy against the contractors. S. C. 6 Cl. & F. 523. n.

3. Where real estates belonging to a charity had been improperly sold, the Court made a decree against the parties who had in their hands the proceeds of the sale, without requiring the persons in whom the charity estates had become vested to be made parties to the information. *Att.-Gen.* v. *Kell*, 2 Beav. 575; 9 L. J., N. S, Ch., 389. [5086 (11).

4. Premises held under a demise, containing a proviso that lessees shall not assign without the licence of the landlord in writing, are sold under a decree to a purchaser, who pays his purchase money into court, and is let into possession; the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging that his conduct with respect to the sale had been such as to deprive him in equity of any right to an act on the legal construction of the covenant and proviso against assignment, and praying that he might be decreed to give his licence in writing for the transfer of the interest: the purchasers are necessary parties to such a bill. *Maule* v. *Beaufort (Duke)*, 1 Russ. 349. [5125 (6).

APPENDIX.

DECISIONS AND BOOKS DIGESTED IN THIS WORK WHICH HAVE BEEN EXPRESSLY DOUBTED, OVERRULED, FOLLOWED, OR OTHERWISE COMMENTED ON.

See also DECISIONS.

A.

1. *Abercorn's (Lord) case, Re National Insurance and Investment Association* (4 De G. F. & J. 78; 8 Jur, N. S., 951; 31 L. J., Ch., 828; 10 W. R. 548). The principle of the decision in this case applied in *Roney's case, Re Llanharry Hematite Iron Ore Co.*, 4 De G. J. & S. 426; 33 L. J., Ch., 731; 10 Jur., N. S., 790, 812; 12 W. R. 814, 994; 10 L. T., N. S., 394, by Knight L. J.

2. *Abinger (Lord)* v. *Ashton* (17 L. R., Eq., 358; 22 W. R. 582,) observed upon in *Strelley* v. *Pearson*, 15 L. R., Ch. D., 113; 49 L. J., Ch., 406; 43 L T, 155; 28 W. R. 752.

3. *Acherley* v. *Wheeler* (1 P. W. 783) doubted in *Ellis* v. *Ellis*, 1 Sch & Lef. 5.

4. *Ackroyd* v. *Smith* (10 C. B. 164) explained in *Thorpe* v. *Brumfitt*, 8 L. R., Ch., 650.

5. *Acton* v. *Blundell* (12 M & W. 324) commented on in *Chasemore* v. *Richards*, 7 H. L. Ca. 349; 5 Jur, N. S, 873; 33 L. T. 350; 7 W. R. 685; 29 L. J., Exch., 81.

6. *Adams, Re* (4 De G. J. & S. 182; 9 L. T. 626; 12 W. R. 291; 10 Jur., N. S, 137; 3 N. R. 339), commented on in *Faircloth, Re*, 13 L. R., Ch. D., 307; 28 W. R. 481; 42 L. T. 72.

7. *Adams* v. *Adams* (1 Hare 537) explained in *Mackenzie* v. *Bradbury*, 6 N. R. 283.

8. *Adams* v. *Fisher* (3 Myl. & Cr. 526) dissented from in *Swinborne* v. *Nelson*, 16 Beav. 416; 22 L. J., Ch., 331.

9. *Adams* v. *Gamble* (12 Ir. Ch. R. 102). In this case, it was held that a married woman could dispose of freeholds settled to her separate use as if she were a feme sole, without an acknowledgment under the statute. The cause came before the full court in Ireland, by way of appeal from the Lord Chancellor. I have carefully read and considered that case, but am unable to concur with the two learned judges who dissented from, and overruled the decision of, the Lord Chancellor of Ireland. If the decision had been unanimous, I should not have ventured to differ from it; but as the Lord Chancellor, on reflection, adhered to his previous opinion, the case has not that weight which it would otherwise have possessed. The distinction that the words "separate use," applied only to what the husband would have taken if those words had not been used, does not appear to have been sufficiently presented to the minds of the learned judges who dissented from the Lord Chancellor. . . . I must choose between conflicting decisions, and I am of opinion that on principle, and by the preponderance of authority, it is established, that before the 3 & 4 Will. 4, c. 74, a fine was necessary to pass the interest of a married woman in that part of her fee-simple estate which did not belong to her husband, and that since that statute an acknowledgment, under the 3 & 4 Will. 4, c 74, s. 77, is necessary for that purpose, notwithstanding that the estate of the wife is given for her separate use. Per Romilly, M. R., in *Lechmere* v. *Brotheridge*, 32 L. J., Ch., 577, 583; 9 Jur., N. S., 705.

10. *Adams' Settled Estates, Re* (9 L. R., Ch. D, 116; 27 W. R. 110; 38 L. T., N. S., 877) not followed in *Harvey's Settled Estates, Re*, 21 L. R., Ch. D., 123; 30 W. R. 697.

11. *Addison's case* (44 L. J., Ch., 537; 20 L R, Eq, 620; 24 W. R. 113; 32 L. T., N. S, 392) followed in *Shaw's claim, Brampton and Longtown Railway Co., Re*, 10 L. R, Ch., 177; 41 L. J., Ch, 670; 23 W. R. 813; 33 L. T., N. S, 5.

12. *Ainslie* v. *Sims* (1 Eq. Rep. 17; 17 Jur. 657; 22 L. J, Ch., 834; 17 Beav. 57) overruled by *Cambottie* v. *Ingate*, 1 W. R. 533; 1 Eq. Rep. 533.

13. *Aird's Estate, Re* (12 L. R., Ch. D., 291; 48 L. J., Ch., 631; 41 L. T. 180; 27 W. R. 882), not followed in *Taylor's Estate, Re, Tomlin* v. *Underhay*, 22 L. R., Ch. D., 495; 48 L. T. 552. Reversing 43 L. T. 530.

14. *Aitchison* v. *Dixon* (10 L. R, Eq., 589). The circumstance of the alleged domicil being the residence of the testator's wife and children has been much relied on in *Forbes* v. *Forbes* (Kay 341), and other cases, though the supposed rule that a man will be considered as domiciled where his wife and children permanently reside, which is referred to in the head-note in *Aitchison* v. *Dixon* (*supra*), seems not to be established by the judgment in that case, or by *Forbes* v. *Forbes*, and is hardly to be reconciled either with the general tenor of the authorities, or with principle. Per Wickens, V.-C., in *Douglas* v. *Douglas*, 12 L. R., Eq., 617, 647; 25 L. T. 30; 20 W. R. 55; 41 L. J., Ch., 74.

15. *Aiton* v. *Brooks* (7 Sim. 204). I have always considered the case of *Aiton* v. *Brooks*, and it has always been treated, as not quite consistent with the previous authorities, and there were peculiar circumstances in it which prevent its governing an ordinary case. The

tendency of modern decisions is to construe words according to their natural signification, and not to turn them to something else, on the ground that it must have been intended, and that it is more beneficial to legatees. Per Romilly, M. R., in *Greenwood* v. *Percy*, 26 Beav. 572, 573.

1. *Albion Steel and Wire Co., Re* (7 L. R., Ch. D., 547; 47 L. J., Ch., 229; 38 L. T 207; 26 W. R. 348), followed in *Association of Land Financiers, Re*, 16 L. R., Ch. D., 373; 50 L. J., Ch., 201; 43 L. T. 753; 29 W. R. 277.

2. *Alexander* v. *Alexander* (2 Ves. 640) is not quite in point. There were various questions in that case, but the actual decision was, that under the particular circumstances, the son was entitled to the whole of the appointed fund. Sir Thomas Clarke read the will as if the words were, "to my son Francis and his wife and children, if they shall by law be capable." In saying that the reasoning was "very artificial" and "not satisfactory," Lord St. Leonards (Vendors and Purchasers, 8th edition, pp. 504, 505) means to say it was unsound reasoning, and I agree with him. The Master of the Rolls had no right to put into the will the words he did. The decision in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. That decision has been overruled by later authorities. Oswald interposed this observation, "But Sir Thomas Clarke expressly follows the principle laid down in *Humphrey* v. *Tayleur* (Ambl. 136)." What he says in *Alexander* v. *Alexander* is a mere dictum, and it is difficult to support a dictum when the decision is gone. With great deference to Sir Thomas Clarke, I do not see what *Humphrey* v. *Tayleur* had to do with the case before him. *Humphrey* v. *Tayleur* does not appear to have been decided on general law, but on the words of the codicil. Lord Hardwicke treats the codicil as if it had the effect of erasing the name of one of the original appointees. Per Jessel, M.R., *Kerr, Re*, 4 L. R., Ch. D., 600, 602; 46 L. J., Ch., 287; 36 L. T. 356; 25 W. R. 390.

3. *Alexander* v. *Wellington (Duke)* (2 Russ. & M. 35) discussed in *Kinloch* v. *Secretary of State for India in Council*, 7 L. R., App Cas., 619; 51 L. J., Ch., 885; 47 L. T. 133; 30 W. R. 845. Affirming 15 L. R., Ch. D., 1; 49 L. J., Ch., 571; 42 L. T. 667: 28 W. R. 619.

4. *Allan* v. *Bower* (3 Bro. C. C. 149) doubted in *Clinan* v. *Cooke*, 1 Sch. & Lef. 37.

5. *Allen* v. *Greenslade* (33 L. T. 567) followed in *Greenwood* v. *Brownhill*, 44 L. T. 47.

6. *Allen* v. *M'Pherson* (1 H. L. Ca. 191) followed in *Meluish* v. *Milton*, 3 L. R., Ch. D., 27; 45 L. J., Ch., 836; 35 L. T. 82; 24 W. R. 892.

7. *Allen* v. *Maddock* (11 Moo. P. C. 427; 6 W. R. 825) followed in *Heathcote, In goods of*, 6 L. R., P. D., 30; 50 L. J., P., 42; 44 L. T. 280; 29 W. R. 356.

8. *Allen* v. *Richardson* (13 L. R., Ch. D., 524) considered in *Phelps* v. *White*, 7 L. R., Ir., 160.

9. *Alleyne* v. *Alleyne* (2 J. & L. 544). I should have had some doubt about that case. What was said was, however, merely a dictum of the learned judge, or rather a speculation as to what he would have decided if the case had come before him for decision. What was there said amounted to no decision, and I think can hardly be relied upon as such. Per Cranworth, V.-C., in *Windus* v. *Windus*, 6 De G. M. & G. 549, 562.

10. *Alleyne* v. *Darcy* (5 Ir. Ch. R. 55) followed in *Sargent's Policy, Re*, 7 L. R., Ir., 66.

11. *Allsopp* v. *Wheateroft* (15 L. R., Eq., 59; 42 L. J., Ch., 12; 27 L. T. 372; 21 W. R. 102) dicta disapproved of in *Rousillon* v. *Rousillon*, 14 L. R., Ch. D., 351; 49 L. J., Ch., 339; 42 L. T 679; 28 W. R. 623.

12. *Ames, Re, Ames* v. *Taylor* (25 L. R., Ch. D., 72; 32 W. R 287) distinguished in *Chapple, Re, Newton* v. *Chapman*, 27 L. R., Ch. D., 584.

13. *Amies* v. *Shillern* (14 Sim. 428) not reconcilable with *Woodgate* v. *Unwin* (4 Sim. 129), but followed in *Kenworthy* v. *Ward*, 11 Hare 196; 1 W. R. 493; 1 Eq. Rep. 389.

14. *Amiss* v. *Hall* (3 Jur., N. S., 584) not followed in *Emmett's Estate, Re, Emmet* v. *Emmet* (No. 2), 17 L. R., Ch. D., 142; 50 L. J., Ch., 341; 44 L. T. 172.

15. *Amos* v. *Chadwick* (4 L. R., Ch. D., 869: 9 L. R., Ch. D., 459; 47 L. J., Ch., 871; 39 L. T. 50; 26 W. R. 840) approved in *Bennett* v. *Bury (Lord)*, 5 L. R., C. P. D., 339; 49 L. J., C. P., 411; 42 L. T. 480.

16. *Anderson* v. *Fitzgerald* (4 H. L. Ca. 484) proceeded on the ground that, when a warranty of a previously existing fact is part of the contract for life insurance, the materiality of the fact is important, and its falsehood is fatal to the contract. Per Stuart, V.-C., in *Towle* v. *National Guardian Assurance Society*, 3 Giff. 42, 55.

17. *Anderson's case, Scottish Petroleum Co., Re* (17 L. R., Ch. D., 373: 50 L. J., Ch., 269; 43 L. T. 723; 29 W. R. 372) approved (by Kay, J.) in *Scottish Petroleum Co., Re, Wallace's case*, 23 L. R., Ch. D., 413; 49 L. T. 348; 31 W. R. 816.

18. *Andrew* v. *Buchanan* (2 L. R., H. L., (Sc.) 286) cited and approved in *Dixon* v. *White*, 8 L. R., App. Cas. (Sc.), 833.

19. *Andrews* v. *Powys* (2 Bro. P. C. 504) is no authority for the proposition that a court of equity has no jurisdiction to try the validity of a will of real or personal estate. *Middleton* v. *Sherburne*, 4 Y. & Coll 358.

20 *Andrews* v. *Salt* (8 L. R., Ch., 622; 21 W. R. 431, 616; 28 L. T., N. S., 686) considered in *Clarke's Estate, Re*, 21 L. R., Ch. D., 817; 51 L. J., Ch., 762; 47 L. T. 84; 31 W. R. 37.

21. *Angerstein* v. *Martin* (T. & R. 232) considered in *Macpherson* v. *Macpherson*, 16 Jur. 847.

22. *Anglo-Italian Bank* v. *Davies* (9 L. R., Ch. D., 275; 47 L. J., Ch., 833; 39 L. T. 244; 27 W. R. 3) approved in *Evans, Exp., Watkins, Re*, 13 L. R., Ch. D., 252; 49 L. J., Bky., 7; 41 L. T. 565; 28 W. R. 127; and in *Bryant* v. *Bull, Bull* v. *Bryant*, 39 L. T., N. S., 370; 10 L. R., Ch. D., 153: 48 L. J., Ch., 325; 27 W. R. 246.

23. *Anon.* (Buck 475) overruled, *semble*, in *Coates, Exp.*, 1 Mont. & A. 328; 3 Dea. & Ch., 626.

24. *Anon.* (1 Giff. 392). It is clear, upon the authorities, with the one exception of the anonymous case before Vice-Chancellor Stuart, reported in 1 Giff. 392, that, the trusts of the

settlement having failed, there is a resulting trust to the lady of the property settled by her, and that such property must now go to her next of kin, there never having been, either in form or in fact, any reduction of it into possession by her husband, the whole arrangement as to the settlement having been made before any marital right existed. Each fund will go to the next of kin of the individual settlor. With regard to the anonymous case before Vice-Chancellor Stuart, it was heard in private, no cases were cited, and it should also be borne in mind that it was a case where the wife was illegitimate, and consequently had no next of kin, and that in that case the husband survived the wife, and, therefore, probably the right of the crown, which was the only adverse claim, was not insisted on. Per Hall, V.-C., in *Wollaston* v. *Berkeley*, 24 W. R. 360; 34 L. T., N. S., 171, 172; 2 L. R., Ch. D., 213, 216.

1. *Anon.* (6 L. R., Eq., 135; 37 L. J., Ch., 705) reversed by *Newton* v. *Newton*, 4 L. R., Ch., 143; 38 L. J., Ch., 145; 17 W. R. 238; 19 L. T., N. S., 588.

2. *Anon.* (15 Ves. 174) followed in *Smith* v. *Blofield*, 2 Ves. & B. 100.

3. *Anon.* (3 Wils. 135) overruled in *Rose* v. *Rowcroft*, 4 Camp. 245.

4. *Ansley* v. *Cotton* (16 L. J., Ch., 55) followed by *Johnson, Re, Cockerell* v. *Essex (Earl)*, 26 L. R., Ch. D., 538; 53 L. J., Ch., 645; 32 W. R. 634.

5. *Anthony* v. *Rees* (2 Cr. & J. 75) considered and followed in *Davies* v. *Jones*, 24 L. R., Ch. D., 190; 52 L. J., Ch., 720; 49 L. T. 624.

6. *Apperly* v. *Page* (1 Ph. 779; 16 L. J., N. S., Ch., 302; 11 Jur. 271) observed upon in *Sibson* v. *Edgeworth*, 2 De G. & Sm. 73; 12 Jur. 279.

7. *Arbuckle, Re* (14 W. R. 435), followed in *Re Tanner*, 53 L. J., Ch., 1108; 51 L. T. 507.

8. The principle of *Archer* v. *Hudson* (7 Beav. 551), held not to apply. *Blackie* v. *Clark*, 15 Beav. 595; 22 L. J., Ch., 377.

9. *Argles* v. *Heaseman* (1 Atk. 578) followed by Romilly, R., in *Webb* v. *England*, 7 Jur., N. S., 153.

10. *Armitage, Exp. Learoyd, Re* (17 L. R., Ch. D., 13; 44 L. T. 262; 29 W. R. 772), followed in *Price, Exp., Roberts, Re*, 21 L. R., Ch. D., 553; 47 L. T. 402; 31 W. R. 104.

11. *Armstrong* v. *Eldridge* (3 Bro. C. C. 215), and *Jones* v. *Randall* (1 Jac. & Walk. 100) reconciled in *Pearson* v. *Cranswick*, 9 Jur., N. S., 397.

12. *Armstrong* v. *Lyne* (Younge, 562) most erroneously reported, for nothing of the kind was decided in that case as stated in the report of it. The incorrectness of that report has been commented upon by Lord Cottenham in *Tullett* v. *Armstrong* (4 Myl. & Cr. 403). Per Lord Westbury, C., in *Gilbert* v. *Lewis*, 32 L. J., Ch., 347, 351.

13. *Arnold* v. *Ridge* (13 C. B. 745) observed upon in *Arnold* v. *Gravesend (Mayor)*, 2 Kay & J. 574; 2 Jur., N. S., 703; 25 L. J., Ch., 530.

14. *Arrowsmith's Trusts, Re* (29 L. J., Ch., 774; 3 L. T. 635; 9 W. R. 258; 2 De G. F. & J. 474) followed in *Chaston, Re, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778; and observed upon in *Bubb* v. *Padwick*, 13 L. R., Ch. D., 517; 49 L. J., Ch., 178; 42 L. T. 116; 28 W. R. 882.

15. *Arthur Average Association, Re* (10 L. R., Ch., 542; 44 L. J., Ch., 569; 32 L. T. 525; 23 W. R. 943), not followed in *Smith* v. *Anderson*, 15 L. R., Ch. D., 247; 50 L. J., Ch., 39; 43 L. T. 329; 29 W. R. 21.

16. *Ashbury Railway Carriage and Iron Co.*, v. *Riche* (7 L. R., H. L., 653; 44 L. J., Exch., 185; 33 L. T. 450; 24 W. R. 794). "Doctrine to be applied reasonably," *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 L. R., App. Cas., 473; 49 L. J., Ch., 545; 42 L. T. 810; 28 W. R. 769. Affirming 11 L. R., Ch. D., 449; 48 L. J., Ch., 428; 27 W. R. 759; 40 L. T. 265.

Semble, the case of *Ashbury Railway Co.* v. *Riche* (*supra*) appears to decide this, at all events, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving a power for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited. In an Act of this kind granting special powers, what is not permitted is prohibited. *Ib.*

Semble, the test applied in *Ashbury Railway Co.* v. *Riche* to the powers of a joint stock company (limited) registered under the Companies Act 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. *Ib.*

The doctrine of *ultrà vires* as explained in *Ashbury Railway Co.* v. *Riche* is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorised by an Act of Parliament ought not (unless expressly prohibited) to be held as *ultrà vires*. *Ib.*

17. *Ashby* v. *Ashby* (7 B. & C. 444). Now the only doubt that has been raised is from what is said by Mr. Justice Bayley, in the case of *Ashby* v. *Ashby*, which I cannot help thinking has been misunderstood by the Vice-Chancellor (Bacon) in this case; and I must also say it appears to me to have been misunderstood by the present Lord Chancellor (Lord Hatherley), when Vice-Chancellor, in *Haynes* v. *Forshaw* (11 Hare 93; 22 L. J., Ch., 1060), both of those learned judges appearing to understand him to have laid down, that if an executor asked a banker or anybody else to pay money for the purpose of paying a debt of the testator, and he did pay the money, that then that would be money paid to his use as an executor. All that Mr. Justice Bayley was considering was, whether the count for money paid to the use of an executor as executor was a good count; and of course it was a good count if, by any possibility, money could be paid to the use of an executor as executor. I think that what he says is explained by the instance which he puts afterwards, and that he did not mean to say that the money could be money paid to the use of the executor as executor, unless the matter arose out of a contract with, or something done by, the testator. And that is very clearly explained in the same case by Mr Justice Littledale, who does not share the doubts of Lord Tenterden and Mr. Justice Bayley, but lays down very plainly what, I apprehend, is perfectly clear law, that the debts contracted by the executor cannot come into competition with the debts contracted by

the testator in respect of their being paid out of the assets. Per Mellish, L. J., in *Farhall* v. *Farhall*, 7 L. R., Ch., 123, 129; 41 L. J., Ch., 146, 149.

1. *Ashley* v. *Ashley* (6 Sim. 358; 3 L. J., Ch., 61). With great respect to the memory of Sir Lancelot Shadwell, I cannot help thinking that he went too far (in *Ashley* v. *Ashley*), in holding that life estates may be given to unborn issue as tenants for life, with cross remainders between them, because every such remainder must either be a remainder upon an estate tail or a cross executory remainder, bequest or limitation limited, so as to take effect necessarily within a life in being and twenty-one years afterwards. Per Malins, V.-C., in *Stuart* v. *Cockerell*, 38 L. J., Ch., 473, 477; 7 L. R., Eq., 363; 20 L. T., N. S., 513.

2. *Ashley* v. *Waugh* (4 Jur. 572). There must be some inaccuracy in the report of *Ashley* v. *Waugh*; the point really did not arise. Per Pemberton Leigh, P. C., in *Hughes* v. *Hosking*, 11 Moo. P. C. C. 9; and see also 2 Jarman on Wills, p. 724.

3. *Ashmore*, *Re* (9 L. R., Eq., 99). In this case Lord Justice James, when Vice-Chancellor, held that a similar gift was not vested. He admitted that his first impression was the other way, but he decided as he did on the authority of an old case, *Pulsford* v. *Hunter* (3 Bro., C. C., 416). I cannot help thinking there is some mistake in the report of *Pulsford* v. *Hunter*. The observations in the judgment, as reported, seem to me to point, not to a gift of the interest for maintenance, but to a gift of maintenance out of the interest, which is not in accordance with the terms of the will as given in the report. However that may be, it seems to me that the law is clearly laid down in subsequent authorities. In *Watson* v. *Hayes* (5 Myl. & Cr. 125, 133) Lord Cottenham says, "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not giving the maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy." If that be law, it is very difficult to support the decision in *Ashmore*, *Re*. I agree that the case of *Ashmore*, *Re*, is not to be distinguished from *Pulsford* v. *Hunter* (3 Bro., C. C., 416), as regards the terms of the will, but I do not find that Lord Loughborough said that giving the whole of the income for maintenance was not equivalent to giving interest. The report says, that "the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest." These observations, if correctly reported (which I doubt), seem to me to point to the distinction taken by Lord Cottenham between a gift of interest to be applied in maintenance, and a gift of maintenance apart from interest; but if this be not the true meaning of them, then I think they are overruled by what Lord Cottenham said, and by the current of modern authorities. Indeed, I cannot think that *Watson* v. *Hayes* (5 Myl. & Cr. 125), and the subsequent cases, were called to the Vice-Chancellor's attention; if they had been, I feel sure he would willingly and cheerfully have followed them. Per Jessel, M. R., in *Fox* v. *Fox*, 19 L. R., Eq., 286, 288, 289; 23 W. R. 314.

4. *Askew* v. *Woodhead* (14 L. R., Ch. D., 27) followed in *Walsh's Trusts*, *Re*, 7 L. R., Ir., 554.

5. *Astley* v. *Weldon* (2 B. & P. 346), commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 389; 31 W. R. 214.

6. *Ashton* v. *Corrigan* (13 L. R., Eq., 76). There Wickens, V.-C., doubted whether a contract to execute a mortgage is one which the Court will specifically perform. I have no doubt whatever that the Court can make the decree. Per Lord Selborne, C., in *Herman* v. *Hodges*, 21 W. R. 571; 16 L. R., Eq., 18; 43 L. J., Ch., 122.

7. *Ashton* v. *Langdale* (*Lord*) (4 De G. & Sm. 402) (Debenture stock an interest in land within the Mortmain Act, 9 Geo. 2, c. 36) overruled by *Attree* v. *Hawe*, 9 L. R., Ch. D., 337; 47 L. J., Ch., 863; 38 L. T. 733; 26 W. R. 871.

8. *Ashton* v. *Langdale* (*Lord*) (20 L. J., Ch., 234; 17 L. T., O. S., 175; 4 De G. & Sm. 402), not followed in *Jervis* v. *Lawrence*, 22 L. R., Ch. D., 209; 52 L. J., Ch., 242; 47 L. T. 428; 31 W. R. 267.

9. *Ashworth*, *Exp.* (18 L. R., Eq., 705; 43 L. J., Bky., 142; 30 L. T. 906; 22 W. R. 925) "may require further consideration," in *Bagshaw*, *Exp.*, *Ker*, *Re*, 13 L. R., Ch. D., 304; 41 L. T. 743; 28 W. R. 403.

10. *Ashworth* v. *Outram* (No. 2) (5 L. R., Ch. D., 943) commented on in *Jarmain* v. *Chatterton*, 20 L. R., Ch. D., 493; 51 L. J., Ch., 471; 30 W. R. 461.

11. *Aslatt* v. *Southampton Corporation* (16 L. R., Ch. D., 143; 50 L. J., Ch., 31; 43 L. T. 464; 29 W. R. 117) doubted. Per Brett, L. J., in *North London Railway* v. *Great Northern Railway*, 11 L. R., Q. B. D., 30; 52 L. J., Q. B., 383; 48 L. T. 695; 31 W. R. 490.

12. *Aspden* v. *Seddon* (10 L. R., Ch., 394; 44 L. J., Ch., 359; 23 W. R. 580; 32 L. T., N. S., 415. Affirming 31 L. T., N. S., 626) approved but distinguished in *Dixon* v. *White*, 8 L. R., App. Cas. (Sc.), 833.

13. *Aston* v. *Meredith* (40 L. J., Ch., 241; 11 L. R., Eq., 601; 24 L. T. 128). A decree for sale of property under the Partition Act 1868, will be made unless the bill prays for a partition as well as a sale; dissented from in *Teall* v. *Watts* (40 L. J., Ch., 176; 11 L. R., Eq., 213), and in *Holland* v. *Holland*, 41 L. J., Ch., 220; 12 L. R., Eq., 406; 26 L. T. 17; 20 W. R. 290.

14. *Athenæum Life Assurance Society* v. *Pooley* (3 De G. & J. 294). Apart from this case I do not think there is any other authority which supports the contention of the official liquidator. And in that case I think the decision should have been the other way; but the judges seem never to have got over the impression of the fraudulent circumstances

under which the bonds were in that case issued. Lord Cairns decided, in the case of *Natal Investment Co.* (3 L. R., Ch., 355; 37 L. J., Ch., 362; 16 W. R. 637; 18 L. T., N. S., 171), to some extent in accordance with *Athenæum Life Assurance Society* v. *Pooley;* but the subsequent decisions of the Lords Justices are opposed to this, and the decision of the Court of Queen's Bench in *Webb* v. *Herne Bay Commissioners* (5 L. R., Q. B., 642), and the other authorities adduced, warrant me in coming to the conclusion that whatever equities this company might have set up against Mr. Sheridan, their conduct has precluded them from setting those equities against the assignee from Sheridan. Per Malins, V.-C., in *Hercules Insurance Co., Re,* 23 W. R. 286; 19 L. R. Eq., 302; 44 L. J., Ch., 450; 31 L. T. 747.

1. *Atkinson* v. *Mackreth* (35 L. J., Ch., 624; 2 L. R., Eq., 570) observed upon. Malins, V.-C., in *Plumer* v. *Gregory* (43 L. J., Ch., 616; 31 L. T., N. S., 17; 18 L. R., Eq., 621), said that, with great submission to the late Master of the Rolls (Lord Romilly), he took it to be perfectly settled that where money had been advanced by a client to a firm of solicitors, to be applied on his behalf, if the money were lost, the client could sue all or any one of the members of the firm. That was settled by *St. Aubyn* v. *Smart* (5 L. R., Eq., 183, and on appeal, 3 L. R., Ch., 646), in which *Atkinson* v. *Mackreth* (*supra*) was cited.

2. *Atkyns* v. *Kinnier* (4 Exch. 776), commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 389; 31 W. R. 241.

3. *Att.-Gen.* v. *Acton Local Board* (22 L. R., Ch. D., 221; 52 L. J., Ch., 112; 47 L. T. 510; 31 W. R. 153) distinguished in *Charles* v *Finchley Local Board*, 23 L. R., Ch. D., 767; 52 L. J., Ch., 554; 48 L. T 569; 31 W. R. 717.

4. *Att.-Gen.* v. *Alford* (4 De G. M. & G. 843; 1 Jur., N. S., 360) observed upon in *Berwick* (*Mayor*) v. *Murray*, 3 Jur., N. S., 847.

5. *Att.-Gen.* v. *Alford* (4 De G. M. & G. 843). There was a gross case of gross neglect by a trustee. I refer to the case of the *Att.-Gen.* v. *Alford*, in which I charged the trustee with compound interest. But the Lord Chancellor Cranworth having reversed that decision, I should have felt bound in this case by his decision, if the circumstances had been the same in the present case. I have observed, however, that in a valuable text book (Lewin on Trustees), the decision of Lord Cranworth is commented on as inconsistent with several cases of high authority which probably were not referred to in the argument. Per Stuart, V.-C., in *Townend* v. *Townend*, 1 Giff. 201, 212.

6. *Att.-Gen.* v. *Birmingham and Derby Junction Railway Co.* (2 Rail. Ca. 124) pronounced by Lord St. Leonards to be not "very clear or altogether satisfactory. *Finnie* v. *Glasgow & South-Western Railway Co.*, 2 Macq. H. L. Ca. 177.

7. *Att.-Gen.* v. *Bowles* (2 Ves. 547; 3 Atk. 806) "undoubtedly a wrong decision; and it was declared to be so by Lord Northington, just ten years afterwards, in the case of *Att.-Gen.* v. *Tyndall* (2 Eden 207; Ambl. 614), where Lord Northington pointed out the error into which Lord Hardwicke had fallen. It is said, and we know from the history of the times that it was so, that Lord Northington owed a grudge to Lord Hardwicke, and that he liked to throw out observations against his judgments; and probably there may be something of feeling in the mode in which he expressed himself in that case. But I must say that I quite agree with Lord Northington in his opinion that the judgment which Lord Hardwicke gave in the case of *Att.-Gen.* v. *Bowles* is utterly irreconcilable with the statute and with all subsequent decisions. But Lord Northington, while triumphantly showing the error in *Att.-Gen.* v. *Bowles*, says: 'Building on a site is laying out the money in realty, and therefore contrary to the spirit of the statute. It is demandable in a præcipe, and is a purchase of so much realty'" That has been entirely overruled in subsequent times. Per Cranworth, C., in *Philpott* v. *St. George's Hospital*, 6 H. L. Ca. 351, 352. This case was also observed upon to a similar effect in *Carter* v. *Green*, 3 Kay & J. 591; 26 L. J., Ch., 845.

8. *Att.-Gen.* v. *Bright* (2 Keen 57) observed upon in *Wynch, Exp.*, or *Wynch's Trusts, Re*, 5 De G. M. & G. 188; 18 Jur. 659; 23 L. J., Ch., 930; 17 Jur. 588; 22 L. J., Ch., 750; 1 W. R. 426; 2 W. R. 570; 1 Eq. Rep. 521; 2 Eq. Rep. 1025; 1 Sm. & G. 427.

Att.-Gen. v. *Bright* (2 Keen 57) is inconsistent with Lord Thurlow's decision in *Knight* v. *Ellis* (2 Bro. C. C. 569), which is good law, and has never been overruled. Per the Lord Chancellor and Sir G. J. Turner, L.J. *Ib.*

9. *Att.-Gen.* v. *Compton* (1 Y. & C. Ch. 417) distinguished in *Att.-Gen.* v. *Bermondsey Vestry*, 51 L. J., Ch., 848; 46 L. T. 852; 30 W. R. 872.

10. A bequest to lay out money in the erection or repair of buildings upon lands already in mortmain, is a valid and effectual bequest. The rule is, as stated in *Att.-Gen.* v. *Davis* (9 Ves. 544), "that, unless the testator distinctly points to some land in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good." *Trye* v. *Gloucester* (*Corporation*), 14 Beav. 173; 21 L. J., N. S., Ch., 81; 15 Jur. 887.

11. *Att.-Gen.* v. *Day* (1 Ves. 221) Lord Brougham referred to the statement that the proviso in the 9 Geo. 2, c. 36 was inserted on account of the charity of Queen Anne's Bounty (per Lord Hardwicke, C., in *Att.-Gen.* v. *Day*); and added, "When I was presiding in the Court of Chancery I applied to Lord Hardwicke for his ancestor's notes, and found a material difference between them and the report of that case." *Philpott* v. *St. George's Hospital*, 3 Jur., N. S., 1270.

12. *Att.-Gen.* v. *Dorking Guardians* (20 L. R., Ch. D., 595; 51 L. J., Ch., 585; 46 L. T. 573; 30 W. R. 579) distinguished in *Charles* v. *Finchley Local Board*, 23 L. R., Ch. D., 767; 52 L. J., Ch., 551; 48 L. T. 569; 31 W. R. 717.

13. *Att.-Gen.* v. *Dunn* (6 M. & W. 511) is irreconcilable with a great number of cases. (*Forbes* v. *Forbes*, Kay 341.) Per Romilly, M. R., in *United States* (*President*) v. *Drummond*, 10 Jur., N. S., 533.

14. *Att.-Gen.* v. *Floyer* (9 H. L. Ca. 477; 31 L. J., Exch., 404) followed in *Charlton* v. *Att.-Gen.*, 4 L. R., App. Cas., 427; 27 W. R. 921; 40 L. T. 760; 49 L. J., Exch., 86.

15. *Att.-Gen.* v. *Hanmer* (4 Jur., N. S., 751

order of Stuart, V.-C., varied on appeal as to costs. 6. C. 5 Jur., N. S., 693.

1. The expression attributed to the Lord Chancellor in *Att.-Gen.* v. *Hardy* (1 Sim., N. S., 338), with respect to the removal of dissentient trustees, observed upon in *Att.-Gen.* v. *Clapham*, 4 De G. M. & G. 591; 1 Jur., N. S., 505; 24 L. J., Ch., 177.

2. *Att.-Gen.* v. *Harley* (5 Madd. 326). It is possible that this case may still stand with *Myers* v. *Perigal* (2 De G. M. & G. 599), on the ground that the testator, in the former case, had a sole interest entitling him to elect to take the land. Per Wood, V.-C., in *Marsh* v. *Att.-Gen*, 2 John. & H 61, 66

3. *Att.-Gen.* v. *Hodgson* (15 Sim. 146) extremely difficult to be reconciled with the principles of former decisions, or with the common understanding of mankind. *Hall* v. *Warren*, 9 H. L. Ca. 420.

4. *Att.-Gen.* v. *Hodgson* (15 Sim. 146) observed upon in *Warren* v. *Rudall*, 4 Kay & J. 603.

5. *Att.-Gen.* v. *Lloyd* (1 Ves. 32). This case was a very peculiar case, and I am of opinion that if the question had turned on the construction of the first codicil the decision would have been the other way. It is perfectly clear that the reason on which the gift was made having failed, the conditional gift would not be good. Then came the second codicil, by which the testator made an absolute gift of the realty to one person and an absolute gift of the personalty to the charity to which he had previously given the whole, stating, as a reason for the alteration in disposition, his having been advised that a gift of the realty would have been void under the Statute of Mortmain. This was a mistake, because the will was made before the Act of 9 Geo. 2, but the codicil was upheld. That does not reach this case, because here there is no complete alternative gift. I think, however, that if the *Att.-Gen.* v. *Lloyd* had to be decided now, the decision would be the other way. Per Malins, V.-C., in *Thomas* v. *Howell*, 18 L. R., Eq., 198, 211, 212; 43 L. J., Ch., 511, 512; 30 L. T. 244; 22 W. R. 676.

6. *Att.-Gen.* v. *Lucas* (2 Phillips 753). I feel bound to follow the decision in that case, although I do so with great reluctance, considering, as I did in *Att.-Gen.* v. *Clements* (12 L. R., Eq., 32), that that decision is contrary to the spirit and intention of the framers of the Act of Parliament, 4 Geo. 4, c. 76. Per Bacon, V.-C., in *Att.-Gen.* v. *Read*, 12 L. R., Eq., 38, 40; 40 L. J., Ch., 678; 24 L. T. 494.

7. *Att.-Gen.* v. *Magdalen College* (6 H. L. Ca. 206, 3 Jur., N. S., 675; 26 L. J., Ch., 620. The decision in this case held to govern a case where charity land had not been aliened in fee, but had been held under a lease for five hundred years, at a rent which had been regularly paid. *Att.-Gen.* v. *Davey*, 4 De G. & J. 136.

8. *Att.-Gen.* v. *Nichol* (16 Ves. 338) observed upon in *Jackson* v. *Newcastle* (*Duke*), 10 Jur., N. S., 688; 10 L. T., N. S, 635.

9. *Att.-Gen.* v. *Poole* (*Corporation*) (4 Myl. & C. 17) observed upon in *Pratt* v. *Keith*, 3 N. R. 406; 10 Jur., N. S., 305; 33 L. J., Ch., 528.

10. *Att.-Gen.* v. *Read* (12 L. R., Eq., 38; 40 L. J., Ch., 678; 24 L. T. 494) explained in *Att.-Gen.* v. *Teather*, 43 L. T. 749: 29 W. R. 347.

11. *Att.-Gen.* v. *Sands* (Hardr. 488; 2 Freem. 129; 3 Ch. Rep. 33) commented on in *Nicholls* v. *How*, 2 Vern. 389.

12. *Att.-Gen.* v. *Sidney Sussex College* (15 L. T. 318; 15 W. L. 162) followed in *Att.-Gen.* v. *Manchester* (*Dean*), 18 L. R., Ch. D., 596; 50 L. J., Ch, 562; 45 L. T. 184.

13. *Att.-Gen.* v. *Sidney Sussex College* (15 W. R. 162; 15 L. T. 518) dissented from in *Glen* v. *Gregg*, 21 L. R., Ch. D, 513; 51 L. J., Ch., 783; 47 L. T. 285; 31 W. R. 149. Reversing 51 L. J., Ch., 551; 46 L. T. 375; 30 W. R. 633.

14. *Att.-Gen.* v. *Smythe* (9 H. L. Ca. 497; 31 L. J., Exch., 404) followed in *Charlton* v. *Att.-Gen.*, 4 L. R., App. Cas., 427; 27 W. R. 921; 40 L. T. 760; 49 L. J, Exch, 86.

15. *Att.-Gen.* v. *Stamford* (*Earl*) (1 Ph. 737; 12 L. J., N. S., Ch, 297; 7 Jur 359) observed on in *Att.-Gen.* v. *Ludlow* (*Corporation*), 2 Ph. 685.

16. *Att-Gen.* v. *Swansea Improvements Co.* (9 L. R., Ch. D., 46; 48 L. J., Ch., 72; 26 W. R. 840) commented on in *Cropper* v. *Smith*, 24 L. R., Ch. D., 305; 53 L. J., Ch., 170; 49 L. T. 548; 32 W. R. 212.

17. *Att.-Gen.* v. *Tomline* (7 L. R, Ch. D., 389; 47 L. J., Ch., 473; 26 W. R. 188), dictum as to judgment by consent explained in *Davis* v. *Davis*, 13 L. R, Ch. D., 861; 49 L. J., Ch., 241; 41 L. T. 790; 28 W. R. 345.

18. *Att.-Gen.* v. *Tyndall* (2 Eden 207, Amb. 614). Lord Northington's decision in this case, that a gift over for charitable uses, in the event of a previous gift being void under the 9 Geo 2, c. 36, must be taken as in fraud of the law, and intended to intimidate the heir or next of kin, and prevent their disputing the charity, and therefore void, disapproved of. *Carter* v. *Green*, 3 Kay & J. 591; 26 L. J., Ch, 845. See also *Philpott* v. *St. George's Hospital*, 6 H. L. Ca. 351.

19. A gift to trustees, with an option to build upon land already in mortmain, or to acquire other land, is good. When money is directed to be given to others for building upon new land, it is bad within the statute. The proper test is that laid down in *Att.-Gen.* v. *Williams* (2 Cox 387), viz., to see what, independently of the statute, would be the directions of the Court in carrying out the trust. If those directions, or any of them, are struck at by the statute, the trust is bad. *Edwards* v. *Hall*, 17 Jur. 593; 22 L. J., Ch., 1078; 11 Hare 17. Affirmed 1 Jur., N. S., 1189.

20. *Att.-Gen.* v. *Williams* (2 Cox 387) followed in *Hill* v. *Jones*, 2 W. R. 657.

21. *Att.-Gen.* v. *Wyggeston Hospital* (12 Beav. 113) questioned by Kindersley, V.-Ch., lowed in *Att.-Gen.* v. *Payne*, 27 Beav. 168.

22. *Attwood* v. *Small* (6 Cl. & F. 232) commented on in *Maccabe* v. *Hussey*, 2 Dow & Cl. 440.

23. *Attwood* v. *Small* (6 Cl. & F. 232) commented on in *Redgrave* v. *Hurd*, 20 L. R., Ch. D., 1; 51 L. J., Ch., 113; 45 L. T. 485; 30 W. R. 251.

24. *Attree* v. *Hawe* (9 L. R., Ch. D., 337; 47 L. J., Ch., 863; 38 L. T. 733; 26 W. R. 871) distinguished in *Ashworth* v. *Munn*, 15 L. R., Ch. D., 363; 50 L. J., Ch., 107; 43 L. T. 553; 28 W. R. 965.

1. *Attree* v. *Hawe* (9 L R, Ch. D, 337; 47 L. J., Ch., 863; 38 L. T 733: 26 W. R) followed in *Jervis* v. *Lawrence*, 52 L. J., Ch., 242; 22 L. R., Ch. D., 209; 47 L. T. 448; 31 W. R. 267.

2. *Auckland* (*Lord*) v. *Westminster District Board of Works* (7 L. R., Ch., 597; 41 L. J., Ch., 753; 26 L. T. 961: 20 W. R. 845) distinguished in *Barlow* v. *St. Mary Abbotts Vestry*, 27 L. R., Ch. D., 362; 53 L. J, Ch., 899; 32 W. R. 966.

3. *Auckland* (*Lord*) v. *Westminster Local Board of Works* (7 L. R., Ch, 597; 41 L. J., Ch., 723; 26 L. T. 961; 20 W. R. 845). Now I have referred to this case, and speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of the case. The lords justices dealt with the case as if the Westminster Board of Works had threatened to pull down what they had no right to pull down, and that being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here, I should, without that decision, have granted an injunction, just as in the case of a railway company exceeding its powers. But on reading the report, that was not the real state of the case at all. The Westminster Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such order could not have been made except by a magistrate having jurisdiction to make it; to that the application was really to restrain the board, not from pulling down, as both the lords justices treated it, but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has, in fact, no real application to the present case. I cannot therefore treat that as a decision upon the question whether a court of equity will restrain an application to a magistrate for an order to pull down; it decided a totally different point, and therefore I cannot consider it as an authority applicable to the present case. If there is any reason against the application the magistrate will listen to it, and refuse to grant the order Per Jessel, M.R., in *Kerr* v. *Preston Corporation*, 6 L. R., Ch. D., 463, 467; 46 L. J., Ch., 409; 25 W. R. 264.

4. *Austin* v. *Jackson* (11 L. R., Ch. D., 942, n.) approved in *Potter* v *Jackson*, 13 L. R, Ch. D., 845; 49 L. J., Ch, 232; 42 L. T. 291; 28 W. R. 411.

5. *Australasia* (*Bank of*) v *Breillat* (6 Moo. P. C. C. 152, 201, *nom. Australasia* (*Bank of*) v. *Australia* (*Bank of*), 12 Jur. 189, 197). Pemberton Leigh, P C., in delivering the judgment of the Court, said:—"It has always been held, that when there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot." Upon which, Lord Campbell, C. J., said, "That is not so if part of the consideration is illegal." *Haddon* v. *Ayres*, 5 Jur., N. S. 408, 410.

6. *Averall* v. *Wade* (Ll. & G. *temp.* Sugd. 252) considered in *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

7. *Averall* v. *Wade* (1 Moll. 571, n.) not binding. *Barry* v. *Stawell*, Fl. & K. 9; 3 Ir. Eq. R. 18.

8. *Avern* v. *Lloyd* (5 L. R., Eq., 383; 18 L. T., N. S., 282; 37 L. J., Ch., 489) observed upon by Malins, V.-Ch., in *Stuart* v. *Cockerell*, 20 L. T., N. S., 513; 7 L. R., Eq., 363; 38 L. J., Ch., 473.

9. *Axmann* v. *Lund* (18 L. R., Eq., 330; 43 L. J., Ch, 655; 31 L. T. 119; 22 W. R. 789) dicta disapproved of in *Halsey* v. *Brotherhood*, 15 L. R., Ch. D., 514; 49 L. J., Ch., 786; 43 L. T. 366; 29 W. R. 9.

10. *Ayerst* v. *Jenkins* (16 L. R., Eq., 275; 42 L. J., Ch., 690; 29 L. T. 126; 21 W. R. 878) distinguished in *Panson* v. *Bronn*, 13 L. R., Ch. D., 202; 28 W. R. 652.

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11. *Back* v. *Ketts* (Jac. 534) is a strong authority against *Churchman* v. *Ireland* (1 Russ. & M. 250; 1 L. J., N. S., Ch., 172), and the reasoning of Sir Thomas Plumer is directly inconsistent with it. *Tennant* v. *Tennant*, Ll. & G. *temp.* Plunk. 529.

12. *Baddeley* v. *Baddeley* (9 L. R., Ch. D., 113; 48 L. J., Ch., 36; 38 L. T. 906; 26 W. R. 850) not followed in *Breton's estate, Re*, *Breton* v. *Woolven*, 17 L. R., Ch. D., 416; 50 L. J., Ch., 369; 44 L. T. 337; 29 W R. 777.

13. *Badham* v. *Marris* (52 L. J., Ch., 237 n.; 45 L. T. 579) followed in *Swainston* v. *Metropolitan Board of Works*, 52 L. J., Ch., 235; 48 L. T. 634; 31 W. R. 498.

14. *Badham* v. *Mee* (1 Myl. & K. 32; 2 L. J., N. S., Ch, 4; 7 Bing. 695; 9 L. J., N. S., C. P., 213) dissented from in *Jones* v. *Winwood*, 10 Sim. 150; 10 L. J, N. S, Ch., 165; 5 Jur. 190.

15. *Baggett* v. *Meux* (7 L. T., O. S., 41; 1 Ph. 627) followed in *Bown, Re*, *O'Halloran* v. *King*, 49 L. T. 165.

16. *Bagot* v. *Bagot*, Dan. Chan. Prac. (4th edit.), p. 1319, explained in *Taylor* v. *Dowlen*, 21 L. T., N. S., 70; 17 W. R 778; 38 L. J., Ch., 680; 4 L. R., Ch., 697.

17. *Bailey* v. *Birchall* (2 Hem. & M. 371) followed in *Charlton* v. *Charlton*, 52 L. J., Ch., 971; 49 L. T. 267; 32 W. R. 90.

18 *Bailey* v. *Grundy* (1 Keen 53) followed in *Manby* v. *Bewicke*, 2 Jur., N. S., 671; 8 De G. M. & G. 468; 4 W. R. 757.

19. *Bailey* v. *Richardson* (9 Hare 734). The case of *Barnhart* v. *Greenshields* (9 Moo. P. C. C. 32, 33) was referred to in the course of the argument upon the question of notice. It does not seem to me to affect the present case; but I take this opportunity of observing, that I quite concur in the explanation there given of what fell from me in the case of *Bailey* v. *Richardson* (9 Hare 734). It was not my intention in that case at all to extend the doctrine of *Daniels* v. *Davidson* (16 Ves. 249) and *Allen* v. *Anthony* (1 Meriv. 282). Per Turner, L. J., in *Knight* v. *Bowyer*, 4 Jur., N. S., 569, 575; 27 L. J., Ch., 520, 532.

20. *Baily* v. *Ekins* (2 Dickens 632). It is scarcely necessary to notice *Baily* v. *Ekins*, a case reported in the second volume of Dickens' Reports. The accuracy of his reports is not to be relied upon, and this case is a remarkable instance of their inaccuracy. He reports it

to have been laid down by Lord Thurlow that where there was a covenant to settle an estate, if the covenantor sold the estate he was only to be considered as a trustee and a debtor by simple contract; but that if a judgment at law were recovered on the covenant he became a debtor by specialty; that is, that where by the judgment the debt became of higher order than a debt by specialty, it was then, and not till then, a specialty debt. Per Stuart, V.-C., in *Stutely* v. *Kepp*, 20 L. T., N. S., 58, 59, 60.

1. *Baker* v. *Baker* (6 H. L. Ca. 616; 27 L. J., Ch., 417) distinguished in *Carmichael* v. *Gee*, 5 L. R., App. Cas, 588; 49 L. J., Ch., 829; 43 L. T. 227.

2. *Baker* v. *Bradley* (7 De G. M. & G. 597) followed in *Smith, Re, Chapman* v. *Wood*, 51 L. T. 501.

3. *Baker* v. *Hanbury* (3 Russ. 340) dissented from in *Edwards* v. *Saloway*, 2 Ph. 625; 17 L. J., N. S., Ch., 329; 12 Jur. 487.

4. *Baker* v. *Parson* (42 L. J., Ch., 228). I should not have felt either doubt or difficulty about deciding this case were it not for the decision of my predecessor, Lord Romilly, in the office I have the honour to hold, when this very case on this very will was before him in the case of *Baker* v. *Parson*. In accordance with the practice, which I consider to be binding on every judge of primary jurisdiction, I should have deferred to that authority without argument had there been no other decision on the subject of this very will by a court of co-ordinate jurisdiction. But considering that the decision of the Court of Common Pleas in *Doe* d. *Baker* v *Winchester* (15 L. T. 68), and the decision of Lord Romilly in *Baker* v. *Parson* on the same will, which I have now before me, cannot, by any possibility, stand together, I think I am at liberty to say that I am not conclusively bound by the decision in *Baker* v. *Parson*, especially considering that that decision was so recent as the year 1872. As I said before, being completely antagonistic to the decision of the Court of Common Pleas, which decision was not cited to Lord Romilly, it cannot be considered to have settled the law for any purpose whatever. Per Sir George Jessel, M. R., in *Baker* v. *White*, 44 L. J., Ch., 651, 653; 20 L. R., Eq., 166; 32 L. T. 347; 23 W. R. 670.

5. *Baldwin, Exp.* (1 Mont. & A. 617), corrected in *Thompson, Exp.*, 2 Mont & A 40; 4 Dea. & Ch. 534.

6. *Baldwyn* v. *Banister* (3 P. W. 251.n.) commented upon by Turner, L. J., in *Shaw* v. *Bunny*, 2 De G. F. & S. 468, 473; 11 Jur., N. S., 99; 34 L. J., Ch., 257, 260; 13 W. R. 374; 11 L. T., N. S., 645.

7. *Ballard, Re* (9 L. T., N. S., 399), dissented from in *Hyams, Exp., Newberry, Re*, 11 L. T., N. S., 390.

8. *Ball's Trust, Re* (11 L. R., Ch. D., 270; 48 L. J., Ch., 279; 40 L. T. 880; 27 W. R. 409), questioned in *Emmins* v. *Bradford. Johnson* v. *Emmins*, 13 L. R., Ch. D., 493; 49 L. J., Ch., 222; 28 W. R. 531.

9. *Banco de Portugal* v. *Waddell* (5 L. R., App. Cas., 161; 49 L. J., Bky., 33; 42 L. T. 698; 28 W. R. 447) applied in *Pim, Re*, 7 L. R., Ir., 458.

10. *Banister, Re* (12 L. R., Ch. D., 131; 48 L. J., Ch., 837; 40 L. T. 828; 27 W. R. 826), approved in *Smith* v. *Robinson*, 13 L R., Ch. D., 148; 49 L. J., Ch., 20.

11. *Banks* v. *Braithwaite* (32 L. J., Ch., 45; 7 L. T., N S., 149). It is settled by *Haynes* v. *Haynes* (3 De G. M. & G. 570), that when a testator gives a clear annuity, that is to be construed as an annuity free from duty, and in this case the testator has in effect given a clear yearly sum of 100*l.* to this charity. In *Banks* v. *Braithwaite* there was a direction to retain so much stock as should be sufficient to realize the clear yearly income of 150*l*, and to pay, not an annuity, but the dividends of the stock. Here the direction is to pay such income or yearly sum, that is to say, the clear income or yearly sum of 100*l.* Whether *Banks* v. *Braithwaite* is consistent with *Haynes* v. *Haynes*, it is unnecessary for me to consider; I am bound to follow the latter, which is the decision of the Court of Appeal, and in the good sense of which, moreover, I entirely concur. I think that decision governs the present case, and I am therefore of opinion that this legacy was given free of duty. Per James, V.-C., in *Cole's Will, Re*, 22 L. T., N S., 221, 222; 8 L. R., Eq., 271, 272.

12 *Banks* v. *Sutton* (2 P. W. 700), holding a wife to be endowed of equity of redemption, overruled. See *Id.* 719, note (2).

13. That a wife is not dowable of a trust estate, is now an established doctrine. In *Banks* v. *Sutton* (2 P. W. 712), Sir Joseph Jekyll took distinction in regard to a trust, where it descends to the husband from another, and not created by himself; but Lord Talbot afterwards, in the case of the *Att.-Gen.* v. *Scott* (Forrest. 138), determined directly contrary to this distinction. *Godwin* v. *Winsmore*, 2 Atk. 526.

14. *Bannerman* v. *Clarke* (3 Drew. 632). In the conflicting state of the authorities on the point before me, I feel myself bound to follow that which seems to me to be the most consistent with justice and common sense. I confess I do not see why it is more the act of God, that a vendor, having contracted to sell property, should afterwards die testate, than he should afterwards die intestate. *Bannerman* v. *Clarke* does not appear to have been mentioned to Wood, V.-C., when he decided *Purser* v. *Darby* (4 Kay & J. 41). I shall therefore follow the earlier decision, and now hold that, although there was really no fault in this case on either side, the decree (as to the plaintiff's right, to which there is no doubt) must nevertheless be without costs. Per Lord Romilly, M. R., in *Hall* v. *Bushill*, 12 Jur., N. S, 243; 14 W. R. 495; 14 L. T., N. S., 246.

15. *Bariatinsky, Re* (1 Ph. 442), overruled in *Townshend, Re*, 1 Ph. 804; 16 L. J., N. S., Ch., 266.

16. *Barker* v. *Rayner* (5 Madd. 208) observed upon in *Clark* v. *Browne*, 18 Jur. 903; 2 Sm. & G. 524.

17. *Barnard, Re* (2 De G. M. & G. 364; 17 Jur. 53). Dictum of Cranworth, V.-C., explained in *Strother, Re*, 3 Kay & J. 518, 527; 3 Jur., N. S., 736.

18. *Barnardiston's* reports said not to be an authority, *arguendo*. *Ocklestone* v. *Benson*, 2 Sim. & S. 266; 3 L. J., Ch., 142.

19. *Barnes* v. *Patch* (8 Ves. 604), mistake in report of, noticed in *Hamilton (Mayor)* v. *Hodsdon*, 11 Jur. 193; 6 Moo. P. C. 76.

1. *Barnes* v. *Racster* (1 Y. & C., Ch. C., 401) commented on in *Lawder, Re*, 11 Ir. Ch. R. 347.

2. *Barnes* v. *Vincent* (5 Moo. P. C. 201) considered in *Este* v. *Este*, 15 Jur. 159.

3. *Barnesley* v. *Powell* (Ambl. 102). Certainly that case seems to want very much the force of an authority. It appears to have been heard *ex parte*. There is no report whatever of any argument having taken place, and it is said that the counsel for the solicitor, whose lien was declared upon that occasion, "doubted of it" (that is the expression in the report). He doubted whether there could be any such lien. I think that doubt is very well founded, because to hold that a solicitor, obtaining a real estate for his client, could be entitled to a lien upon it for costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor, or if though a solicitor, it is conveyed to the client, and not to the solicitor, but his client is in possession of it, all that the solicitor has are the deeds and documents; he has a lien upon them. Per Chelmsford, C., in *Shaw* v. *Neale*, 6 H. L. Ca. 601; 4 Jur, N. S., 695, 697; 27 L. J., Ch., 444, 445.

4. *Barnett, Exp* (2 M. D. & De G. 478), overruled as inapplicable to the existing state of the bankruptcy law. *Meisner, Exp., Gibbons, Re*, 10 L. T., N. S., 354.

5. *Barr, Re* (1 Kay & J. 219) proceeded on the previous Bankrupt Acts (13 Eliz., c. 7, 1 Jac., c. 15, and 46 Geo. 3, c. 135), which contained no such language as in the 131st section of the 12 & 13 Vict., c. 106, that reversionary interests did not pass to assignees in bankruptcy, and the absence of such language was in fact the ground of the decision. It is satisfactory to find that the 12 & 13 Vict., c. 106, s. 141, has remedied the defect in the law, which occasioned great hardship and injustice. Per Stuart, V.-C., *Coombe, Re*, 1 Giff. 91, 93.

6. *Barrett* v. *Hammond* (10 L. R., Ch. D., 285; 48 L. J., Ch., 249; 27 W. R. 471) followed in *Holroyde* v. *Garnett*, 20 L. R., Ch. D., 532; 51 L. J., Ch., 663; 46 L. T. 801; 30 W. R. 604.

7. *Barrett* v. *Hammond* (10 L. R., Ch. D., 285; 48 L. J., Ch., 249; 27 W. R. 471) questioned in *Marris* v. *Ingram*, 13 L. R., Ch. D., 338; 49 L. J., Ch., 123; 41 L. T. 613; 28 W. R. 434.

8. *Barrington, Exp.* (2 Mont. & A. 245), overruled by *Cutts, Exp., Goren, Re*, 3 Mont. & A. 549; 3 Dea. 242.

9. *Barrington* v. *Liddell* (2 De G. M. & G. 480) remarked upon and approved of by the Lord Chancellor in *Edwards* v. *Tuck*, 3 De G. M. & G. 40; 17 Jur. 921.

10. *Barrow* v. *Barrow* (4 Kay & J. 409; 4 Jur., N. S., 1049; 27 L. J., Ch., 678) followed in *Wilder* v. *Pigott*, 22 L. R., Ch. D., 263; 52 L. J., Ch., 141; 48 L. T. 112; 31 W. R. 377.

11. *Barrow* v. *Gray* (Cro. Eliz. 551) considered in *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

12. *Barrow* v. *Wadkin* (24 Beav. 1). I feel no difficulty in following the decision of the Master of the Rolls in *Barrow* v. *Wadkin*. From a very early time, first, in *Rex* v. *Holland* (Aleyn, 14), by the dicta of Rolle and the other judges who were present, next by Lord Chief Justice Hale, in the *Att.-Gen.* v. *Sands* (Parker, 144), where he narrates that opinion, saying that he was counsel in the case, and gives his approbation to the doctrine; then by Gilbert, in his Treatise on Uses (3rd ed., p. 86); and recently, in the case before the Master of the Rolls, it has been recognized as law that the Crown cannot by virtue of office found oust trustees who are seised of land in trust for an alien, but is driven to its remedy in equity. That doctrine has been recognized by Lord St. Leonards, in his edition of Gilbert on Uses, as the true result of the authorities. On the other hand, we have dicta of Vice-Chancellor Shadwell, in *Burney* v. *Macdonald* (15 Sim. 6), and a decision of Vice-Chancellor Stuart, in *Rittson* v. *Stordy* (3 Sm & Giff. 230), adverse to the view contended for by the Crown. Per Lord Hatherley, C., in *Sharp* v. *St. Saviour*, 7 L. R., Ch., 343, 353; 41 L. J., Ch., 576; 26 L. T. 142; 20 W. R. 469.

13. *Barrows, Re* (25 W. R. 407, 564; 5 L. R., Ch. D., 353), followed in *Brook, Re*, 26 W. R. 791.

14. *Barry* v. *Butlin* (2 Moo. P. C. 480) approved of in *Browning* v. *Budd*, 6 Moo. P. C. 430.

15. *Barry* v. *Stawell* (Fl. & K. 1; 3 Ir. Eq. R. 18, 146) observed upon in *Bowyer* v. *Beamish*, 2 J. & L. 228; 8 Ir. Eq. R. 63. Affirming 7 Ir. Eq. R. 7.

16. *Barry* v. *Stawell* (Fl. & K. 1; 3 Ir. Eq. R. 18, 146) considered in *Upton* v. *M'Garry*, 13 Ir. Eq. R. 164.

17. *Barry* v. *Wilkinson* (3 Ir. Eq. R. 121) disapproved of in *Burt* v. *Bernard*, Fl. & K. 414; 4 Ir. Eq. R. 328. Affirmed 3 Dr. & War. 461; 2 Con. & L. 271.

18. *Bartlett* v. *Bartlett* (3 Sm. & G. 533; 3 Jur., N. S., 284, overruled 1 De G. & J. 127; 3 Jur., N. S., 705; 26 L. J., Ch., 577), but the decision on appeal seems to have been made without any accurate knowledge of the ground of decision of Stuart, V.-C. Lord St. Leonards' view of the law seems irreconcilable with the decision of the Lords Justices. See note at end of case, 3 Sm. & G. 542.

19. *Bartlett* v. *Bartlett* (*supra*), followed in *Re Raxbone*, 3 Kay & J. 476; 3 Jur., N. S., 837; 26 L. J., Ch., 588. Reversing 3 Kay & J. 300; 3 Jur. 556; 26 L. J., Ch., 509.

20. *Bartlett* v. *Bartlett* (4 Hare 631), followed in *Marryatt* v. *Marryatt*, 2 Eq. Rep. 1198; 2 W. R. 576; 23 L. J., Ch., 876.

21. *Bartlett* v. *Pickersgill* (1 East 577, n.; 1 Cox 15). This is a bill of a very ordinary description, and it is a startling proposition to say that, unless the bill alleges that the agency was constituted by writing, such a bill cannot be sustained. The only authority which has been cited in support of that proposition is *Bartlett* v. *Pickersgill*. It appears to me that it does not govern the present case, because it was a case in which the conveyance was executed, and it appears from the short statement in 4 East, that the bill sought a conveyance to the plaintiff from the defendant, to whom a conveyance had already been made. That entirely distinguishes that case from the present, which is an ordinary suit by a principal, bringing before the Court the agent and the person with whom the contract was entered

into. Assuming *Bartlett* v. *Pickersgill* to be good law, it cannot, I think, be considered as laying down any such general proposition as is contended for by the defendants. At all events it would be subject to qualifications, especially to those which are mentioned by Lord St. Leonards in p. 118 of his book, and also to the qualification established by Lord Hardwicke in *Willis* v. *Willis* (2 Atk. 71), where his lordship says, There is another way of taking a case out of the statute, and that is by admitting parol evidence within the rules laid down in this Court to show the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser. Per Selwyn, L. J., in *Heard* v. *Pilley*, 17 W. R. 750; 38 L. J., Ch., 718, 720; 4 L. R., Ch., 548; 21 L. T., N. S., 68.

I cannot help saying, as regards the case of *Bartlett* v. *Pickersgill*, that it seems to be quite inconsistent with all the authorities of this Court, which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud. Per Giffard, L. J., *Ib.*

1. *Bartlett* v. *Rees* (12 L. R., Eq., 395) followed in *General Credit and Discount Co.* v. *Clegg*, 22 L. R., Ch. D., 549; 52 L. J., Ch., 297; 48 L. T. 182; 31 W. R. 421.

2. *Basset* v. *Basset* (3 Atk. 203). It appears from the registrar's book, that the decree in this case was not as the report in Atkyns implies, a declaration merely that the posthumous heir was not entitled to an account, but a declaration; "that the rents and profits of the settled estates belonged to the plaintiff from the time of the death of his father, and that the rents and profits of the lands in fee belonged to the plaintiff from the time of his birth only." See *Richards* v. *Richards*, Johns. 758. n.

3. *Bateman* v. *Gray* (29 Beav. 447). Evidently there had been a mistake on the hearing of this case, and the decree varied in accordance with *Iredell* v. *Iredell*, 25 Beav. 485. See *Bateman* v. *Gray*, 37 L. J., Ch., 592; 6 L. R., Eq., 215.

4. *Bateman* v. *Gray* (6 L. R., Eq., 215). I cannot agree to the ruling in this case. The original decision in *Bateman* v. *Gray* (29 Beav 447) was right. Per Bacon, V.-Ch., in *Gimblett* v. *Purton*, 24 L. T., N. S., 793; 12 L. R., Eq., 427; 40 L. J., Ch., 556.

5. *Bates, Exp. & Re* (2 M. D. & De G. 337), not followed in *Jones, Exp.*, 45 L. T. 193.

6. *Bates and Redgate, Exp.* (4 L. R., Ch., 577; 21 L. T. 410; 17 W. R. 900), "open to reconsideration," in *Dering's patent, Re*, 13 L. R., Ch. D., 393; 42 L. T. 634; 28 W. R. 710.

7. *Bates* v. *Dandy* (3 Russ. 72. n.) questioned in *Hutchings* v. *Smith*, 9 Sim. 137; 7 L. J., N. S., Ch., 128; 2 Jur. 231.

8. *Bathurst* v. *De La Zouch* (2 Dick. 460), or as it ought to be, *Bathurst* v. *De Latouche*, commented upon in *Boyd* v. *Brooks*, 34 L. J., Ch., 605; 13 W. R. 419; 12 L. T., N. S., 38.

9. *Battiscombe* v. *Eve*, 7 L. T., N. S., 697). (A church rebuilt requires reconsecration.) With regard to the necessity of the consecration, very little authority has been produced; no decided case has been cited, with the exception, perhaps, of the church of South Morley (Gibson's Codex, tit. 9, c. 1, 189); but in that case the church had been polluted, and also it is not to be regarded as a solemn legal decision. The other authorities cited are mere dicta of different judges. With regard to the case of *Battiscombe* v. *Eve*, Dr. Robertson in his judgment cites an authority anterior to the Reformation, which could not apply to the case of a Protestant church. As their lordships ground their judgment on the second question, it is unnecessary for them to consider the first question, but they are desirous of stating that they give no authority to the position, that, if a church be built on the same lines and on the same foundation as originally occupied by the one pulled down, such church requires reconsecration. Per Lord Westbury, P. C., in *Parker* v. *Leach*, 12 Jur.. N. S., 911.

10. *Battsford* v. *Kebbell* (3 Ves. 363) commented on in *Westwood* v. *Southey*, 2 Sim., N. S, 192; 21 L. J., N. S., Ch., 473; 16 Jur. 400.

11. *Baxter* v. *Bower* (23 W. R. 805), "a very special case," per Thesiger, L. J., in *Gaskin* v. *Balls*, 13 L. R., Ch. D., 324, 329; 28 W. R. 552.

12. *Beachcroft* v. *Beachcroft* (1 Madd. 430) is a case in which Sir Thomas Plumer made a slip as to the right of illegitimate children to take as a class under a will. Per Stuart, V.-Ch., in *Holt* v. *Sindrey*, 38 L. J., Ch., 126, 131. I have more than once had occasion to say that I consider the case of *Beachcroft* v. *Beachcroft*, and the principle upon which it was decided, to be inconsistent with the other authorities upon this subject. Per Stuart, V.-Ch., in *Crook* v. *Hill*, 38 L. J, Ch., 579, 582.

13. *Beachcroft* v. *Beachcroft* (1 Madd. 430) stated to have been overruled. *Overhill's Trust, Re*, 1 Sm. & G. 362; 17 Jur. 342; 22 L. J., Ch., 485; 1 W. R. 208.

14. *Beachcroft* v. *Beachcroft* (1 Madd. 430). It is said that this case is no longer authority. My opinion, however, is that *Beachcroft* v *Beachcroft* is a good and binding authority, founded on the soundest principles. Per Malins, V.-Ch., in *Dorin* v. *Dorin*, 42 L. J., Ch., 462, 466; 29 L. T., N. S., 731, 733; 17 L. R., Eq., 463; 22 W. R. 217.

15. *Beak* v. *Beak* (13 L. R., Eq., 489; 14 L. J., Ch., 470; 26 L. T., 281) followed in *Mead, Re*, 15 L. R., Ch. D., 651; 50 L. J., Ch., 30; 43 L. T. 117; 28 W. R. 891.

16. *Beamish* v. *Beamish* (11 Ir. Com. Law Rep. 511; 5 L. T., N. S., 97; 9 H. L. Ca. 274). This appeal, in two preceding sessions, was most elaborately and learnedly argued on both sides at your lordship's bar before the English judges, who were summoned to assist your lordships with their advice, and who have favoured us with an opinion which displays extraordinary research, and will hereafter be considered a repertory of all the learning to be found in any language upon this important subject (marriage). Per Campbell, C., in *Beamish* v. *Beamish*, 5 L. T., N. S., 97, 102.

17. *Beauchamp (Lord)* v. *Great Western Railway Co.* (3 L. R., Ch., 745; 38 L. J., Ch., 162; 19 L. T., 189; 16 W. R. 1155) followed in *Wilkinson* v. *Hull, Barnsley, & West Riding Railway and Dock Co.*, 20 L. R., Ch. D., 323; 51 L. J., Ch., 788; 46 L. T. 455; 30 W. R. 617.

18. *Beaufort (Duke)* v. *Neeld* (12 Cl. & F. 248). I do not by any means desire or mean to intimate the slightest doubt upon the opinion

given in the House of Lords in this case, that a general agent may bind the principal as to third persons, notwithstanding that the principal may have limited the authority of the general agent; but I take the rule to be otherwise when the limit of the authority of the general agent is known to the person who deals with the agent. I do not see how a third person dealing with my agent, knowing the fact that I have limited his authority, can say that the agent had power to bind me against the express limit which I have put upon the authority of the agent when the person with whom the agent is dealing knows that the authority of the agent is limited. Per Turner, L. J., in *Towle* v. *National Guardian Assurance Society*, 30 L. J., Ch, 900, 915; 7 Jur., N. S., 1109; 5 L. T., N. S, 193.

1. *Beaumont* v. *Barrett* (1 Moo P. C. 59). In the case of *Beaumont* v. *Barrett*, from Jamaica, it was decided that an assembly possessed of supreme legislative authority had the power of punishing contempts; that the power was inherent in such an assembly, and incident to its legislative functions; and, according to the judgment in that case, every colonial assembly or council possessed the same authority for contempts which the House of Commons had exercised in this kingdom for a long series of years. But in the year 1842 the same question, in substance, came before this committee on an appeal from Newfoundland, and was twice argued; the second time before the Lord Chancellor, two noble members of the committee who had formerly held the great seal, the three chiefs of the common law courts in Westminster Hall, two out of the four members of the court who were present at the decision of the case of *Beaumont* v. *Barrett*, the Vice-Chancellor, and Dr. Lushington; and on that occasion (4 Moo. P. C. 84) their lordships "were of opinion that the House of Assembly did not possess the power of arrest, with a view to adjudication, on a complaint of contempt committed out of its doors." They held that the power of the House of Commons in England was part of the "*Lex et Consuetudo Parliamenti*," and the existence of that power in the Commons of Great Britain did not warrant the ascribing it to every supreme legislative council or assembly in the colonies. We think we are bound by the decision of the case of *Keilley* v. *Carson* (4 Moo. P. C. 63), the greater authority of which, as compared with *Beaumont* v. *Barrett*, it is quite unnecessary to enlarge upon. Per Pollock, C. B, delivering the judgment of the Committee in *Fenton* v. *Hampton*, 11 Moo. P. C. 347, 396.

2. The principles of *Beaumont* v. *Barrett* (1 Moo, P. C. 59) as to the *lex et consuetudo parliamenti* examined in *Keilley* v. *Carson*, 4 Moo. P. C. 63; 7 Jur. 137.

3. *Beavan* v. *Oxford* (*Earl*) (6 De G. M. & G. 492; 1 Jur., N. S., 1121; 25 L. J., Ch, 299) approved of in *Shaw* v. *Neale*, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444.

4. *Beck* v. *Burn* (7 Beav. 492) "I should hesitate to follow." Per Romilly M. R., in *Adams* v. *Roberts*, 25 Beav. 658, 661.

5. *Beckett* v. *Midland Railway Co.* (3 L. R., C. P., 82; 37 L. J., C. P., 11). It appears to me that the case comes within the principle of *Beckett* v. *Midland Railway Co.* By that decision we are bound, and we must act upon it until authoritatively told that we are wrong. It appears to me to have been a correct decision, and not to be at variance with any of the cases which have been referred to. Certainly it is not at variance with *Ricket* v. *Metropolitan Railway Co.* (3 L. R., H. L., 175), where there was only a temporary loss of trade to the tenant, and no diminution in the value of the house itself. That is explained in *Beckett* v. *Midland Railway Co.*, and constitutes the distinction between that case and the *Caledonian Railway Co.* v. *Ogilvy* (2 Macq. H. L. Cas. 229). Per Willes, J., in *M'Carthy* v. *Metropolitan Board of Works*, 7 L. R., C. P., 508, 514; 26 L. J. 772.

I think that this case is governed by *Beckett* v. *Midland Railway Co.*, and I am not aware of any case which at all interferes with that decision. Per Keating, J. *Ib.*

6. *Beckett* v. *Midland Railway Co.* (3 L. R., C. P., 82) approved of in *Caledonian Railway* v *Walker's Trustees*, 7 W. R., App. Cas. (Sc.), 259; 46 L. T. 826; 30 W. R. 569.

7. *Beckford* v. *Beckford* (Lofft. 490) imperfectly reported. Per Wood, V.-C., in *Soar* v. *Foster*, 4 Kay & J. 152, 157.

8. *Bedford* (*Duke*) v. *British Museum Trustees* (2 Myl. & K. 552) distinguished in *Sayers* v. *Collyer*, 54 L. J., Ch., 1; 33 W. R. 91. 24 L R., Ch. D., 180; 52 L. J., Ch., 770; 48 L. T. 939; 32 W. R. 200.

9. *Begg* v. *Jack* (3 Court Sess. Cas., 4th Series, 35), approved, as an authority in favour of the equitable jurisdiction of the Court; but see Lord Watson as to his disapproval of the result at which the Court arrived in *Begg* v. *Jack*. *Grahame* v. *Swan*, 7 L. R. App. Cas (Sc.), 547.

10. *Beere* v. *Head* (3 J. & L. 340) approved of in *Huthwaite*, *Re*, 2 Ir. Ch. R. 54.

11. *Beeton* v. *Vachell* (5 Bro. P. C. 51). I may here refer to the case of *Beeton* v. *Vachell*, which, I confess, appears to me rather a strong decision. Per Romilly, M. R., in *Ramsay* v *Shelmerdine*, 11 Jur., N. S., 905.

12. *Beevor* v. *Luck* (4 L. R., Eq., 537; 36 L. J., Ch., 865; 15 W. R. 1221) commented on and not followed in *Jennings* v. *Jordan*, 6 L. R., App. Cas., 698; 51 L. J., Ch., 129; 45 L. T. 593; 30 W. R. 369. Affirming S. C. *sub. nom. Mills* v. *Jennings*, 13 L. R., Ch. D., 639; 49 L. J., Ch., 209; 42 L. T. 269; 28 W. R. 549; and in *Harter* v. *Colman*, 19 L R., Ch. D., 630; 51 L. J., Ch., 481; 46 L. T. 154; 30 W. R. 484.

13. *Belaney* v. *Ffrench* (8 L. R., Ch., 918; 43 L. J., Ch., 312; 29 L. T. 796; 22 W. R. 177) distinguished in *Capital Fire Insurance Association*, *Re*, 24 L. R., Ch. D., 408; 53 L. J., Ch, 71; 49 L. T. 697; 23 W. R. 260.

14. *Bell* v. *Receiver of Land Revenue* (1 L. R., App. Cas., 707; 45 L. J., P. C., 47; 34 L. T. 629) distinguished in *Pearson* v. *Spence*, 5 L. R., App. Cas., 70; 49 L. J, P. C., 13; 41 L. T. 598; 28 W. R. 325.

15. *Bellamy* v. *Jones* (8 Ves. 31), the rule there laid down by Lord Eldon is now considerably qualified. *Blackwood* v. *Burrowes*, Fl. & K. 630; 4 Ir. Eq. R. 609.

16. *Bellhaven* (*Lord*), *Exp.*, *Agriculturist Cattle Insurance Co.*, *Re* (11 Jur., N. S. 207; 13 W. R. 479 on appeal, 3 De G. J. & S. 41; 34 L. J., Ch., 503; 13 W. R. 849; 12 L. T.

N. S., 595; 11 Jur., N. S., 572). I am unable to distinguish this case in substance from *Bellhaven (Lord), Exp.* I am also unable to distinguish it from *Spackman, Exp., Agriculturist Cattle Insurance Co., Re* (11 Jur., N. S., 207; 34 L. J., Ch., 321; 13 W. R. 479; 12 L. T., N. S., 130. Reversing 10 Jur., N. S, 911; 12 W. R., 1133; 11 L. T., N. S., 13. Affirmed *sub nom. Spackman* v. *Evans*, 3 L. R., H. L., 171; 19 L. T., N. S., 151; 37 L. J., Ch., 752); but at the same time, with all due submission, I approve of the decision of the Lords Justices in *Bellhaven (Lord), Exp*, and I disapprove of Lord Westbury's judgment in *Spackman, Exp.* I cannot reconcile the two. It seems to me a monstrous thing, that when shares have been cancelled by the directors, under an arrangement of this sort, and they have taken money for so doing, after a lapse of fifteen years it should be said to be a fraud which makes no time a bar, though the fact that the person whose shares were cancelled was no longer a member of the company was duly registered, and that was the only notice that could be given of the matter. Per Romilly, M. R., in *Agricultural Cattle Insurance Co., Re, Stanhope, Exp.*, 11 Jur., N. S., 872.

1. *Bendyshe, Re* (5 W. R. 816). Dictum of Kindersley, V.-Ch., in this case not followed in *Re Lewis*, 24 W. R. 103.

2. *Bengough* v. *Walker* (15 Ves. 507) considered in *Lawes, Re, Lawes* v. *Lawes*, 45 L. T. 453; 30 W. R. 33; 20 L. R., Ch. D., 81. Affirming 45 L. T. 273.

3. *Bennett* v. *Aburrow* (8 Ves. 609), followed in *Davies* v. *Davies*, 4 Jur., N. S., 1291.

4. *Bennett* v. *Biddles* (10 Jur. 534) disapproved of in *Cooke, Re*, 21 L. J., N. S., Ch., 145; 15 Jur. 765.

5. *Bennett's Trusts, Re* (19 L. R. Eq., 245; 44 L. J., Bky., 244); 31 L. T. 720; 23 W. R. 229. Property acquired after a liquidating debtor's order of discharge has been granted does not vest in the debtor but in his trustee: overruled in *Ebbs* v. *Boulnois*, 10 L. R., Ch., 479, 490; 44 L. J., Ch. 691; 23 W. R. 820; 33 L. T. 342.

6. *Bensley* v. *Burdon* (2 Sim. & S. 519) determined that a conveyance by lease and release operated by way of estoppel. That decision was overruled, so far as it was thereby decided that a conveyance by lease and release operated as an estoppel, by *Stackpoole* v. *Stackpoole*, and *Lloyd* v. *Lloyd* (4 Dru. & War. 354). But it was decided, on the appeal in *Bensley* v. *Burdon*, that the recital of a particular fact concluded the party executing the deed. The judgment, on the appeal, is not reported in the regular reports, as the concluding portion of 5 Russell, in which the case would have appeared, has never been published; but the decision on the appeal is referred to by Lord Tenterden in giving judgment in *Right* v. *Bucknell* (2 B. & Ad. 282), and the case, on appeal, is reported in 8 L. J., N. S., Ch., 85. Per Cusack Smith, M. R., in *Hungerford* v. *Becher*, 5 Ir. Ch. R. 417, 426.

7. *Bentham* v. *Wiltshire* (4 Madd. 44) disapproved of in *Forbes* v. *Peacock*, 12 Sim. 528; 13 L. J., N. S., Ch., 46; 7 Jur. 688.

8. *Benyon* v. *Collins*, as reported in 2 Bro. C. C. 323, and Dick. 697, is erroneous. *Adair* v. *Shaw*, 1 Sch. & Lef. 259.

9. *Berdan* v. *Greenwood* (3 L. R., Exch. D., 251) followed in *Emden* v. *Carte*, 45 L. T. 328; 30 W. R. 17; 19 L. R., Ch. D., 311; 51 L. J., Ch., 371. Reversing 44 L. T. 840; 29 W. R. 840.

10. *Berdan* v. *Greenwood* (20 L. R., Ch. D., 764. n.; 46 L. T. 524. n.) distinguished in *Langen* v. *Tate*, 24 L. R., Ch. D., 522; 53 L. J., Ch., 361; 49 L. T. 758; 32 W. R. 189.

11. *Beresford* v. *Adair* (2 Cox 156) overruled by *Davis* v. *Chanter*, 2 Ph. 545; 1 Coop. C. C. 285; 17 L. J., N. S., Ch., 297; 10 Jur. 975. Reversing 10 Jur. 151.

12. *Beresford's case, Kollman's Railway Locomotive and Carriage Improvement Co., Re* (2 Macn & G. 197). There has been a contention as to the language of Lord Cranworth in *Beresford's case*. There is no doubt that that language does, to some extent, justify the contention. I do not think it too strong to say that the language must be taken in connection with what precedes and what follows, and to decide that it was competent to the directors to forfeit the shares under the circumstances of that case, and under the power of their deed. Per Kindersley, V.-Ch., in *National Patent Steam Fuel Co, Re, Barton, Exp.*, 5 Jur., N. S., 306, 307.

13. *Berkeley* v. *Swinburne* (16 Sim. 275; 17 L. J, Ch., 416) commented on and explained in *Emmett's Estate, Re, Emmet* v. *Emmet*, 13 L. R, Ch. D., 484; 49 L. J, Ch., 295; 42 L. T. 4; 28 W. R. 401. Affirming 49 L. J., Ch., 21; 28 W. R. 301.

14. *Bernard* v. *Bond* (1 Ir. Ch. R. 198) followed in *Moneypenny* v. *Gibbings*, 1 Ir. Ch. R. 210.

15. *Bernard* v. *Drought* (1 Moll. 38) cannot be sustained. *Smith* v. *Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

16. *Berrie* v. *Howitt* (9 L. R., Eq., 1; 39 L. J., Ch., 119; 21 L. T. 414) not followed in *Greer* v. *Young*, 24 L. R., Ch. D., 545; 52 L. J., Ch., 915; 49 L. T. 224; 31 W. R. 930; and in *Charlton* v. *Charlton*, 52 L. J., Ch., 971; 49 L. T. 267; 32 W. R. 90.

17. *Berry, Exp.* (19 Ves. 218) observed upon in *Hoskins* or *Hookins, Exp., Gundry, Re*, 3 De G. & Sm. 549; 18 L. J., N. S., Bky., 11; 13 Jur. 114.

18. *Besant* v. *Wood* (12 L. R., Ch. D., 605; 40 L. T. 445) explained and commented on in *Cahill* v *Cahill*, 8 L. R., App. Cas., 420; 49 L. T. 605; 31 W. R. 861. Reversing 7 L. R., Ir., 361.

19. *Besch* v. *Frolich* (1 Ph. 172) followed in *Murtagh* v. *Costello*, 7 L. R., Ir., 428.

20. *Besley, Exp.* (3 Macn. & G. 287; 20 L. J., Ch., 385; 15 Jur. 523. Reversing on a rehearing 2 Macn. & G. 176; 2 H. & Tw. 375; 19 L. J., N. S., Ch., 382; 14 Jur. 704. Affirming 3 De G. & Sm. 224; 14 Jur. 587), distinguished in *Hole's case*, 3 De G. & Sm. 241; 14 Jur. 910.

21. *Best, Exp., Best & Marshall, Re*, 18 L. R., Ch. D., 488; 51 L. J., Ch., 293; 45 L. T. 95; explained in *Solomon, Exp., Tilley, Re*, 20 L. R., Ch. D., 281; 51 L. J., Ch., 677; 47 L. T. 57; 30 W. R. 603. And see *Amor, Exp. & Re*, 21 L. R., Ch. D., 294.

22. *Betts* v. *Burch* (4 H. & N. 506) commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 389; 31 W. R. 214.

23. *Betts* v. *Clifford* (1 John. & H. 74). I

must suggest that in *Betts* v. *Clifford*, I am satisfied that the Vice-Chancellor, whose decision is there reported, must have been misunderstood in the passage referred to, because, as that passage stands, if I have read it correctly, it amounts to a dictum to this effect, that it is now settled by *Bacon* v. *Jones* (1 Beav. 389; 4 Myl. & Cr. 433), that a party filing a bill for an injunction will not succeed at the hearing unless he has applied for it by interlocutory application. I am sure the Vice-Chancellor never laid down, or intended to lay down, any such proposition. It might have been that he expressed himself in general terms, *quo ad hoc*, with reference to the case before him, and it was assumed that he meant to lay down that as a general proposition; but I am satisfied he never meant to do so. Per Kindersley, V.-Ch., in *Davis* v. *Marshall*, 7 Jur., N. S., 720, 721.

1. *Betts* v. *Willmott* (6 L. R., Ch., 236; 25 L. T. 188; 19 W. R. 369) disapproved of and distinguished in *Société Anonyme, des Manufactures, de Glaces* v. *Tilghman's Patent Sand Blast Co.*, 25 L. R., Ch. D., 1; 53 L. J., Ch., 1; 49 L. T. 145; 32 W. R. 71.

2. *Bickett* v. *Morris* (1 L. R., H. L. (Sc.), 47; 14 L. T. 835) distinguished in *Kensit* v. *Great Eastern Railway Co.*, 27 L. R., Ch. D., 122; 32 W. R. 885.

3. *Biddle* v. *Bond* (34 L. J., Q. B., 137: 12 L. T. 178; 13 W. R. 561; 6 B. & S. 225) distinguished in *Davies, Exp., Sadler, Re*, 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237.

4. *Biggs* v. *Head* (Sau. & Sc. 335) approved and adopted in *Little* v. *Kingswood Collieries Co.*, 20 L. R., Ch. D., 733; 52 L. J. Ch., 56; 47 L. T. 323; 31 W. R. 178. Reversing 51 L. J., Ch., 498.

5. *Billiald, Exp.* (Buck 220), overruled, 1 Dea & Ch. 443.

6. *Billing* v. *Flight* (1 Madd. 230) inconsistent with *Short* v. *Mercier*, 3 Macn. & G. 205. Per Willes, J., in *Bartlett* v. *Lewis*, 9 Jur., N. S., 202, 204.

7. *Bingley* v. *Mallison* (3 Dougl. 333) overruled by *Rose* v. *Rowcroft*, 4 Camp. 245.

8. *Billingsley* v. *Wills* (3 Atk. 219) commented on in *Westwood* v. *Southey*, 2 Sim., N. S., 192; 16 Jur. 400; 21 L. J., Ch., 473. See also *Tribe* v. *Newland*, 5 De G. & Sm. 236; 16 Jur. 286; 21 L. J., Ch., 283.

9. *Birchell, Exp.* (3 Atk. 813), explained from a note taken from Reg. Book, 1753, A. 471 in *Hodge, Re*, 3 Kay & J. 217. n.

10. *Bird* v. *Luckie* (8 Hare 301; 14 Jur. 1015) followed in *Philps* v. *Evans*, 4 De G. & Sm. 188; 15 Jur. 809.

11. *Bird* v. *Webster* (1 Drew. 338) observed upon in *Wyneh, Exp.*, or *Wyneh's Trusts, Re*, 5 De G. M. & G. 188; 18 Jur. 659; 22 L. J., Ch., 930; 17 Jur. 588; 22 L. J., Ch., 750; 1 W. R. 426; 2 W. R. 570; 1 Eq. Rep. 521; 2 Eq. Rep. 1025; 1 Sm. & G. 427.

12. *Biscoe* v. *Kennedy* (1 Bro. C. C. 16. n.). It had been argued on the authority of *Vanderheyden* v. *Mallory* (1 Comstock, 452, America), that the case of *Biscoe* v. *Kennedy* was not now law; but, though it might not be law in America, yet he must take it to be so in this country. He was clearly of opinion that it was sound and good law, as it undoubtedly was good sense, and he should willingly follow it. Per Malins, V.-Ch., in *Chubb* v. *Stretch*, 18 W. R. 483, 484; 9 L. R., Eq., 555; 39 L. J., Ch., 329; 29 L. T. 86.

13. *Birmingham Canal Co.* v. *Cartwright* (11 L. R., Ch. D., 421; 48 L. J., Ch., 552; 40 L. T. 784; 27 W. R. 597) considered in *London & South-Western Railway Co.* v. *Gomm*, 45 L. T. 505.

14. *Birmingham Canal Co.* v. *Cartwright* (11 L. R., Ch. D., 421; 48 L. J., Ch., 552; 40 L. T. 784; 27 W. R. 597) not followed in *London & South-Western Railway Co.* v. *Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 539; 46 L. T. 449; 30 W. R. 620. Reversing 45 L. T. 405.

15. *Blackborn* v. *Edgley* (1 P. W. 605) questioned, *arguendo* in *Baker* v. *Tucker*, 3 H. L. Ca 106; 14 Jur. 771.

16. *Blacker* v. *Phepoe* (1 Moll. 354) reviewed in *Garrett* v. *Besborough* (*Earl*), 2 Dr. & Wal. 441; 2 Ir. Eq. R. 180.

17. *Blake, Exp.* (16 Beav. 463), observed on in *Wilton* v. *Colvin*, 3 Drew. 617, 626; 2 Jur., N. S., 867; 25 L. J., Ch., 850; 4 W. R. 759.

18. *Blakemore, Exp.* (5 L. R., Ch. D., 372; 46 L. J., Bky., 118; 36 L. T. 783; 25 W. R. 488), approved in *Neal, Exp., Batey, Re*, 14 L. R., Ch. D., 579; 43 L. T. 264; 28 W. R. 875.

19. *Blanchard* v. *Drew* (10 Sim. 240) is founded on an erroneous construction of *Monteith* v. *Taylor* (9 Ves. 615). *Robson* v. *Devon* (*Earl*), 3 Sm. & G. 227.

20. *Blanchard* v. *Hill* (2 Atk. 484) (as to the use of trade marks), doubted considerably by Romilly, M. R., to be law at the present day, in *Hall* v. *Barrows*, 32 L. J., Ch., 548, 550.

21. *Blatch* v. *Wilder* (1 Atk. 420). See observations in *Newton* v. *Bennet*, 1 Bro. C. C. 137.

22. *Blewitt, Re* (3 Myl. & K. 250), overruled by *Blewitt, Re*, 6 De G. M. & G. 187; 2 Jur., N. S., 217; 25 L. J., Ch., 393.

23. *Blewitt* v. *Roberts* or *Stauffers* (Cr. & Ph. 274; 10 L. J., N. S., Ch., 342; 5 Jur. 979; 10 Sim. 491. Reversing 4 Jur. 501) doubted in *Yates* v. *Maddan*, 3 Macn. & G. 532; 21 L. J., N. S., Ch., 24; 16 Jur. 45. Reversing 16 Sim. 613; 18 L. J., N. S., Ch., 310; 13 Jur. 331.

24. *Blewitt* v. *Roberts* or *Stauffers* (10 Sim. 491; Cr. & Ph. 274; 10 L. J., N. S., Ch., 342; 5 Jur. 979) has been considerably shaken. Per Turner, L. J., in *Hedges* v. *Harpur*, 3 De G. & J. 138.

25. *Blissett* v. *Daniel* (10 Hare 493) distinguished in *Russell* v. *Russell*, 14 L. R., Ch. D., 471; 49 L. J., Ch., 268; 42 L. T. 112.

26. *Bloomar, Re* (2 De G. & J. 88), commented on in *Molyneux, Re*, 10 W. R. 512; 4 De G. F. & J. 465.

27. *Blore* v. *Sutton* (3 Mer. 237) examined and followed in *Marshall* v. *Berridge*, 19 L. R., Ch. D., 233; 51 L. J., Ch., 329; 45 L. T. 599; 30 W. R. 93.

28. *Blower* v. *Morret* (2 Ves. 420) observed on in *Miller* v. *Huddlestone*, 3 Macn. & G. 513; 21 L. J., N. S., Ch., 1; 15 Jur. 1043.

29. *Blower* v. *Morret* (2 Ves. 420) not followed in *Hardy, Re, Wells* v. *Barwick*, 17 L. R., Ch. D., 798; 50 L. J., Ch., 241; 44 L. T. 49; 29 W. R. 834.

30. *Bloxam's case, New Theatre Co., Re* (4 De G. J. & S. 447; 10 Jur., N. S., 833; 33 L. J., Ch., 574; 12 W. R. 995; 10 L. T., N. S., 772. Affirming 10 Jur., N. S., 814; 33 L. J., Ch., 519; 12 W. R. 700; 10 L. T., N. S., 320; 33 Beav. 529). Where a person applies for shares

in a company, there is in general no binding contract to take shares until the company has communicated to him an allotment of shares; the decision in *Bloxam's case* (33 Beav. 529; 12 W. R. 995) being referable to its special circumstances. *Pellatt's case*, 2 L. R., Ch., 527.

1. *Bloxham, Exp.* (5 Ves. 448), overruled. See *id.* 449. n. 17.

2. *Blundell* v. *Windsor* (8 Sim. 601). The second ground of objection is, that the shares were transferable by delivery. I am not aware that any principle, either of law or equity, is violated by the shares in this association being indefinitely assignable; it does not appear to me to offend against society, or to injure any class of individuals; and therefore, unless bound by distinct authority, I should not be disposed to hold such an association to be void at common law. *Harrison* v. *Heathorn* (6 M. & G. 81) is an authority the other way; in that case the very point came before the Court, and the judge held, that, at common law, such an association is not an illegal association. In opposition to this case, I am referred to *Blundell* v. *Windsor*, which, singularly enough, was a decision upon the very same association as that in *Harrison* v. *Heathorn*. Upon referring to the judgment of the Vice-Chancellor of England (Shadwell) in *Blundell* v. *Windsor*, it is clear that the learned Vice-Chancellor founded his judgment on the ground, that, in point of fact, there was a fraudulent attempt by certain persons, to draw in others to subscribe to the association by false representations. No doubt, if that were established, the association would be fraudulent and void, and upon that ground the judgment ought not to be supported; but if it proceeded, on the other ground only, then, as it appears to me, it would be at variance with *Harrison* v. *Heathorn*, and I should be disposed to follow the latter case. Per Romilly, M. R., in *Mexican and South American Co., Re, Aston, Exp.*, 5 Jur., N. S., 615, 616.

3. *Blyth and Young, Re* (13 L. R., Ch. D., 416; 41 L. T. 746; 28 W. R. 266), followed in *New Callao Co., Re*, 22 L. R., Ch. D., 484; 52 L. J., Ch., 283; 48 L. T. 251; 31 W. R. 185.

4. *Blythe* v. *Granville* (13 Sim. 190; 12 L. J., Ch., 82) observed upon in *Wilton* v. *Colvin*, 3 Drew. 617, 625; 2 Jur., N. S., 867; 25 L. J., Ch., 850; 4 W. R. 759; and again in *Willcox* v. *Smith*, 26 L. J., Ch., 596, 599.

5. *Bogue* v. *Houlston* (21 L. J., Ch., 470; 18 L. T., N. S., 326; 5 De G. & Sm. 267) followed in *Maple* v. *Junior Army and Navy Stores*, 21 L. R., Ch. D., 369; 52 L. J., Ch., 67; 47 L. T. 589; 31 W. R. 70.

6. *Bolchow* v. *Fisher* (10 L. R., Q. B. D., 161) distinguished in *Rasbotham* v. *Shropshire Union Railways & Canal Co.*, 24 L. R., Ch. D., 110; 48 L. T. 902; 32 W. R. 117.

7. *Bolton* v. *Williams* (2 Ves. J. 138) observed upon in *Tidd* v. *Lister*, 3 De G. M. & G. 874; 18 Jur. 543; 23 L. J., Ch., 249.

8. *Bonomi* v. *Backhouse* (9 H. L. Ca. 503). I can claim to be well acquainted with the ratio decidendi of that case in the Exchequer chamber. It was an action of tort. There was neither *damnum* nor *injuria* till the plaintiff's land was affected. The excavations were not tortious at the time they were made, and never would have become so had those who made them prevented these consequences reaching the plaintiff's land. Per Bramwell, B., in *Spoor* v. *Green*, 9 L. R., Exch., 99, 111; 43 L. J., Exch., 57; 30 L. T. 393; 22 W. R. 547.

9. *Bonser* v. *Bradshaw* (30 L. J., Ch., 159; 13 L. T. 545; 9 W. R. 329; 4 Giff. 260) not followed in *Greer* v. *Young*, 24 L. R., Ch. D., 545; 52 L. J., Ch., 915; 49 L. T. 224; 31 W. R. 930.

10. *Booker* v. *Allen* (2 Russ. & M. 270) considered in *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir Eq R. 27.

11. *Booth* v. *Carter* (3 L. R., Eq., 757). It is in my opinion so important that the rules of construction should be free from doubt, and that every one should be able, upon reading the will, to say whether a bequest is valid or invalid, that I should not have called upon the counsel for the respondent in this case if it had not been for the decision of the Master of the Rolls in *Booth* v. *Carter*. I asked Mr. Cole to distinguish that case from the present, but he failed to do so, and in my opinion the two cases are undistinguishable. The only additional words in the bequest in this case, viz., "when such an erection shall take place," merely express that which would have been implied if it had not been expressed, and consequently they have no effect upon the construction. In *Booth* v. *Carter* the Master of the Rolls seems to have allowed himself to be influenced by the extrinsic evidence that there was land already in mortmain on which the chapel might be built. But in my opinion the rule is clearly settled, that in order to uphold such a bequest you must find in the will itself, and not outside it, a saving clause rebutting the implication which arises from a direction to build, that land is be purchased, and as in *Booth* v. *Carter* there was nothing in the will but a direction to apply the money in building, I think that the decision in that case is contrary to all the authorities, and to the established rule, which is founded on principles of convenience and justice, and I must, with all respect for the Master of the Rolls, decline to follow it, and must decide that this bequest is void. I hope the case may be carried further, so that this point may be clearly settled by the Court of Appeal. Per Malins, V.-Ch., in *Watmough, Re*, 22 L. T., N. S., 88, 90; 17 W. R. 959, 960; 38 L. J., Ch., 723, 725; 8 L. R., Eq., 272, 276.

12. *Bos* v. *Helsham* (2 L. R., Exch., 72) approved of in *Phelps* v. *White*, 7 L. R., Ir., 160.

13. *Bostock* v. *Floyer* (1 L. R., Eq., 26; 35 L. J., Ch., 23; 13 L. T. 489; 14 W. R. 120) explained and commented on in *Speight, Re, Speight* v. *Gaunt*, 22 L. R., Ch. D., 727; 52 L. J., Ch., 503; 48 L. T. 279; 31 W. R. 401. Affirmed 9 L. R., App. Cas., 1; 53 L. J., Ch., 419; 50 L. T. 330; 32 W. R. 435. Reversing 51 L. J., Ch., 715; 46 L. T. 726; 30 W. R. 785.

14. *Bothamley* v. *Sherston* (20 L. R., Eq., 304; 44 L. J., Ch., 589; 33 L. T. 150; 23 W. R. 848) commented on in *Ovey, Re, Broadbent* v. *Barrow*, 20 L. R., Ch. D., 676; 51 L. J., Ch., 665; 46 L. T. 613; 30 W. R. 645; which reversed 46 L. T. 232; 30 W. R. 483; and was affirmed *sub nom. Robertson* v. *Broadbent*, 8 L. R., App. Cas., 812; 32 W. R. 205.

15. *Bouch* v. *Sevenoaks, Maidstone, & Tunbridge Railway Co.* (4 L. R., Exch. D., 213) disapproved of and not followed in *Finlayson*,

Exp., *Waterford, Dungarvan & Lismore Railway Co.*, *Re*, 5 L. R., Ir., 584.

1. *Boughton* v. *Boughton* (1 H. L. Ca. 406) followed in *Tench* v. *Cheese*, 3 W. R. 582; 1 Jur., N. S., 689; 3 Eq. Rep. 971. And see the previous reports of this case, 3 W. R. 42; 19 Beav. 3; 24 L. J., Ch., 49; 18 Jur. 1087; 24 L. T. 151; 3 Eq. Rep. 47. And on appeal, 3 W. R. 500; 1 Jur., N. S., 689.

2. *Boughton* v. *Boughton* (23 L. R., Ch. D., 169; 48 L. T. 413; 31 W. R. 517) distinguished in *Capital Fire Insurance Association*, *Re*, 24 L. R., Ch. D., 408; 53 L. J., Ch., 71; 49 L. T. 697; 32 W. R. 260.

3. The principle of *Bourne*, *Exp.* (2 G. & J. 137), held to have no application in *Russell*, *Exp.*, *Winn*, *Re*, 2 L. R., Ch. D., 424; 45 L. J., Bky., 85; 24 W. R 802; 34 L. T., N. S, 295.

4. *Bourne* v. *South-Eastern Railway Co.* (26 L. T. 60) is no authority whatever, and is expressly overruled. Per Hill, J., in *Shields* v. *Great Northern Railway Co.*, 7 Jur., N S., 631, 632.

5. *Bourne* v. *Tynt* (2 Vent. 346). Lord Hardwicke expressed some disapprobation of this case in *Heath* v. *Perry*, 3 Atk. 102.

6. *Boville*, *Exp.* (2 Mont. & A. 382.n.), observed on in *Bristow* v. *Warner* 10 Ir Eq. R. 246.

7. *Bowen* v. *Brecon Railway Co.* (15 W. R. 482; 3 L. R., Eq., 541), where Lord Chancellor Hatherley (then Vice-Chancellor), held that a debenture holder, who recovered judgment against a railway company for his debenture debt, could only hold the fruits of his judgment as a trustee for himself and all the other debenture holders entitled under the company's special Acts to be paid *pari passu* with himself. Giffard, L. J., said that he entertained the gravest doubts as to the correctness of that decision. If the decision of the present case turned upon that he would not like to dispose of it without the Lord Chancellor. *Potteries, Shrewsbury, & North Wales Railway Co*, *Re*, 18 W. R. 155, 156; 39 L. J., Ch., 273, 22 L. T., N. S., 53; 5 L. R., Ch., 67. Reversing 18 W. R. 87; 21 L. T., N. S., 545.

8. *Bower* v. *Peate* (1 L. R., Q. B. D., 321; 45 L. J., Q. B., 446; 35 L. T. 321) followed in *Dalton* v. *Angus*, 6 L. R., App. Cas. 740; 50 L. J., Q. B., 689; 45 L. T. 844; 30 W. R. 191.

9. *Bower* v. *Peate* (1 L. R., Q. B. D., 321; 45 L. J., Q. B., 446; 35 L. T. 321) explained and commented on in *Hughes* v. *Percival*, 8 L. R., App. Cas., 443; 52 L. J., Q. B., 719; 49 L. T. 189; 31 W. R. 725. Affirming S. C. *sub nom. Percival* v. *Hughes*, 9 L. R., Q. B. D., 441; 51 L. J., Q. B., 388; 46 L. T 677.

10. *Bowers, Exp.* (1 De. G. M & G. 460). All that the Lords Justices say in *Bowers, Exp.*, is, that such an order (a protection order made under the 211th section of the 12 & 13 Vict., c. 106, giving protection until a certain day and until further order) as that was, may be irregular, and may be rescinded by the Court of Bankruptcy. Per Cockburn, C. J., in *Tomline* v. *Cadman*, 6 C. B., N. S., 733, 738.

I have felt somewhat embarrassed by the case of *Bowers, Exp.* But the Court of Exchequer in *Bellhouse* v. *Melton* (4 H. & N. 116) dealt with it in a way to bring it to the very words of this order. I do not think we can do better than follow the Court of Exchequer. Per Williams, J. *Ib.*

I consider that the objection in *Bowers, Exp.*, was one of mere irregularity. I do not see how it can be necessary to renew an order made for protection until further order. I should have thought that the order in *Bowers, Exp.*, could only be questioned in the Court out of which the process issued. At all events the case of *Bellhouse* v. *Melton* is an authority that this is a valid order. Per Willes, J. *Ib.*

11. *Bowers* v. *Bowers* (8 L. R., Eq., 283; 38 L. J., Ch., 596; 21 L. T., N. S., 134; 17 W. R. 1004), a decision of Malins, V.-Ch., reversed, on appeal, 5 L. R., Ch., 244; 39 L. J., Ch., 351; 18 W. R. 201; 23 L. T., N. S., 35. With regard to the case of *Bowers* v. *Bowers*, in a similar case, it will be my duty, however reluctant I may be to do so, to bow to the decision of the Court of Appeal. Per Malins, V.-Ch., in *Clark* v. *Henry*, 11 L. R., Eq., 222, 231; 40 L. J., Ch., 151; 24 L. T. 256; 19 W. R 319.

12. *Bowey* v. *Bell* (36 L. T. 640) overruled in *Garnett* v. *Bradley*, 3 L. R., App. Cas., 944; 48 L. J., Exch., 186; 39 L. T. 261; 26 W. R. 698. Reversing 2 L. R., Exch. D., 349; 25 W. R. 353.

13. *Bowsher* v. *Watkins* (1 Russ. & M. 277). This case does not establish the general proposition that in every case a bill may be filed against any executor and the surviving partner of the testator, without charging and proving fraud and collusion between them. *Davies* v. *Davies*, 2 Keen 534; 1 Jur. 446.

14. *Bowyer* v. *Griffin* (9 L. R., Eq., 340; 39 L. J., Ch, 159; 18 W R. 227) followed in *Clare* v. *Clare*, 21 L. R., Ch. D., 863; 51 L. J., Ch., 553; 46 L. T. 851; 30 W. R. 789; and considered in *Lewis* v. *Trask*, 21 L. R., Ch. D., 862.

15. *Boyce* v. *Hanning* (2 C. & J. 334; 1 L. J., Exch., 123) followed in *Lantsbery* v. *Collier*, 2 Kay & J. 709; 25 L. J., Ch., 672.

16. *Boyd's Settled Estates*, *Re* (42 L. J., Ch, 506; 28 L. T. 799; 21 W. R. 667), not followed in *St. John's College, Oxford*, *Exp.*, 22 L. R, Ch. D., 93; 31 W. R. 55; 52 L. J., Ch, 268; 48 L. T. 331; and in *St. Mary Wigton* (*Vicar*), *Exp*, 18 L. R., Ch., 646; 45 L. T. 134.

17. *Boyd*, *Re* (26 L. J., Bky, 33), commented on in *Simond*, *Exp.*, 26 L. J., Bky., 49.

18. *Boyd* v. *Shorrock* (37 L. J., Ch., 144; 5 L. R., Eq, 72) dissented from in *Daglish*, *Exp.*, *Wilde*, *Re*, 42 L. J., Ch., 102; 8 L. R., Ch., 1072; 29 L. T. 168; 21 W. R. 893.

19. *Boyes* v. *Bedale* (1 Hem. & M. 798; 10 L. T. 131, 12 W R. 232; 33 L. J., Ch., 233) approved in *Goodman's Trusts*, *Re*, 14 L. R., Ch. D., 619; 49 L. J., Ch., 805; 43 L. T. 14; 28 W. R. 902, but not followed in S. C. 17 L. R, Ch. D., 266; 50 L. J., Ch., 425; 44 L. T. 527; 29 W R. 586.

20. *Boyse* v. *Rossborough* (1 Kay & J. 124) followed in *Lovett* v. *Lovett*, 2 Jur., N. S., 1130; 5 W. R. 5; 3 Kay & J. 1.

21. *Bozon* v. *Bolland* (reported in *Tennyson*, *Exp.*, Mont. & Bli. 67), corrected in *Duncan* v. *Chamberlayne*, 11 Sim. 123; 10 L. J., N. S., Ch., 307; 4 Jur 819; but see *Thompson* v. *Speirs*, 13 Sim. 469; 14 L. J., N. S., Ch., 453; 9 Jur 933.

22. *Brace* v. *Wehnert* (25 Beav. 348; 27 L. J., Ch., 572), as to the specific performance of a contract to build a house according to a plan, would have put some difficulty in the plaintiff's way, if it were still the law of the

Court, but it was decided before the passing of Lord Cairns' Act (21 & 22 Vict., c. 27), and I think it is allowed on both sides now, that it would not, at the present day, have been decided in the same way. Per Malins, V.-Ch. in *London (Mayor and Corporation)* v. *Southgate*, 38 L. J., Ch., 141, 143.

1. *Brackenbury* v. *Gibbons* (2 L. R., Ch. D., 417) not followed in *Lechmere and Lloyd, Re*, 18 L. R., Ch. D., 524 ; 45 L. T. 551.

2. *Brackenbury* v. *Gibbons* (2 L. R., Ch. D., 417) observed upon in *Miles* v. *Jarvis*, 24 L. R., Ch. D., 633 ; 52 L. J., Ch , 796 ; 49 L. T 162.

3. *Braddon* v. *Farrand* (4 Russ. 87) not followed in *Knowles, Re, Roose* v. *Chalk*, 49 L. J., Ch , 625 ; 43 L T. 152 ; 28 W. R. 975.

4. *Bradford Local Board of Health* v. *Hopwood* (6 W. R. 818). It is said that, looking at the provisions of 11 & 12 Vict., c. 63, and construing them by analogy to the decisions on the Lands Clauses Act (8 & 9 Vict, c. 18), the prosecutor has mistaken his course; that the proper course would have been to set in motion the local board, under s. 144, to get the amount of compensation fixed by means of the course there prescribed, viz., by arbitration; and, the amount being ascertained, then to have brought an action, in which the liability of the local board would be tried. In support of that proposition, the decision of Wood, V.-Ch, in *Bradford Local Board of Health* v. *Hopwood*, was cited. That decision, which is entitled to great consideration, as all Vice-Chancellor Wood's decisions are, was, that this Act ought to be construed by analogy to the Lands Clauses Act, and, so construing it, he refused to grant an injunction restraining the claimant from proceeding by arbitration under s. 123. But that decision involves the necessity, in all these cases, of commencing an inquiry, which, in the result, may be entirely futile, and serve no purpose ; and as there is nothing in this Act which constrains us to adopt that construction, we prefer the decision of the Court of Queen's Bench, that the proceeding by mandamus is proper, and that it is more convenient to hold that the question of liability should be settled in the first instance. Per Williams, J., in *Reg.* v. *Burslem Local Board of Health*, 6 Jur., N. S., 696, 697 ; 29 L. J., Q. B., 234 ; 1 El. & E. 1077.

I am not at all sure that there was not some circumstance in the case before Wood, V.-Ch., which does not appear in the report, and which might make his decision consistent with that of the Court of Queen's Bench in *Reg.* v. *Metropolitan Commissioner of Sewers* (1 El. & Bl. 694 ; 17 Jur. 787 ; 22 L. J., Q. B., 234). Per Willes, J. *Ib.*

5. *Bradshaw* v. *Tasker* (2 Myl. &. K. 221) doubted in *Att.-Gen.* v. *Drummond*, 1 Dr. & War. 380 ; 1 Con. & L. 231.

6. *Bramwell* v. *Halcomb* (3 Myl. & Cr. 737) explained in *Saunders* v. *Smith*, 3 Myl. & Cr. 711 ; 7 L. J., Ch., 227.

7. Important effect of Lord Eldon's judgment in *Brandon* v. *Robinson* (1 Rose 197). Distinction between a disposition to a man until he shall become bankrupt, and after his bankruptcy over, and a gift to a man for life, with a proviso restraining alienation. *Rochford* v. *Hackman*, 9 Hare 482 ; 21 L. J., N. S., Ch., 511 ; 16 Jur. 212.

8. *Brandon* v. *Brandon* (25 L. J., Ch., 896; 4 W. R. 533 ; 7 De G. M. & G. 365) distinguished in *Curtis* v. *Sheffield* (No, 2), 21 L. R., Ch. D., 1 ; 51 L. J., Ch., 535 ; 46 L. T. 177 ; 30 W. R. 581.

9. *Brantom* v. *Griffits* (1 L. R., C. P. D., 349 ; 2 L. R., C. P. D., 212) distinguished in *National Mercantile Bank, Exp., Phillips, Re*, 16 L R, Ch. D., 104; 50 L. J., Ch., 231; 44 L. T. 265 , 29 W. R. 227.

10. *Braybrooke (Lord)* v. *Att.-Gen.* (9 H. L. Ca. 150; 31 L. J., Exch., 177) followed in *Charlton* v. *Att.-Gen* , 4 L. R., App. Cas., 427 ; 27 W R. 921 ; 40 L. T. 760 ; 49 L. J., Exch , 86.

11. *Breadalbane* v. *Macgregor* (7 Bell's App. Cas. 43) observed upon in *Robin* v. *Hoby*, 2 Jur., N. S , 647.

12. *Brend* v. *Brend* (1 Vern. 213) observed upon in *Trulock* v *Robey*, 2 Ph. 395 ; 11 Jur. 999.

13. *Brereton* v. *Hutchinson* (2 Ir. Ch. Rep. 648 ; 3 Ir. Ch. R. 361) not followed by Giffard, V.-Ch., in *Brittlebank* v. *Goodwin*, 5 L. R., Eq., 545 ; 37 L J , Ch., 377, as being contrary to the dicta of Lancelot Shadwell, V.-Cn. E., in *Baker* v. *Martin*, 3 Sim. 380, of Wood, V.-Ch., in *Storey* v. *Gape*, 2 Jur., N. S , 706, and of Turner, L. J., in *Obee* v. *Bishop*, 1 De G. F. & J. 137, 141, and consequently in analogy to the Statute of Limitations, time cannot be set up by an executor in answer to a claim founded on a breach of trust committed by his testator.

14. *Brislauer* v. *Brown* (3 L. R., App. Cas., 672; 47 L. J., C. P., 729; 39 L. T. 67 ; 26 W. R. 536) explained in *Lacey, Exp.*, 16 L. R., Ch. D., 131; 50 L. J., Ch., 207 ; 43 L. T. 579; 29 W. R. 299.

15 *Brett* v. *Greenwell* (3 Y. & Coll. 230) Sir Edward Sugden declined to follow the rule there laid down in *Napier* v. *Napier*, 1 Dr. & War. 407.

16. *Bridge* v. *Bridge* (16 Beav. 315, as to voluntary settlements) observed upon in *Gilbert* v. *Overton*, 10 Jur., N. S , 721.

17. *Bridges* v. *North London Railway Co* (7 L. R., H. L , 213) does not lay down any new rule as to what is evidence for the jury. *Metropolitan Railway Co.* v. *Jackson*, 3 L. R., App. Cas , 193 ; 47 L. J., C. P., 303 ; 37 L. T 679 ; 26 W. R. 175. Reversing 2 L. R . Ch. D., 125 ; 46 L. J., Ch., 376 ; 36 L T. 485 ; 25 W. R. 661 ; 10 L. R., Ch., 49 ; 45 L. J., Ch., 83 ; 31 L. T. 475 , 23 W. R. 78.

18. *Briggs* v. *Penny* (3 Myl. & C. 546) I have been referred to the case of *Briggs* v. *Penny* as an authority by which I am bound to decide that a trust was created. In that case Lord Truro laid down what he considered to be the general principle. Being a decision of the Lord Chancellor it would be binding upon me if I had the same will to construe, but it is not necessarily binding upon me in the case of any other will, even if the words were the same. . . It has never been followed, as far as I know; at any rate, I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The decision in *Briggs* v. *Penny* turned upon the particular words of the will and particular circumstances, and those words or circumstances are not before me in this case. The words were these : "well knowing that she"—the legatee—"will make a good use, and dispose of it in a manner and in accordance with

my"—the testatrix's—"views and wishes." The Lord Chancellor appears to have been of opinion that the words "well knowing" were equivalent to, if not synonymous with, the expression "in the fullest confidence," and that they were used in such a manner as to exclude all option or discretion. With great deference to Lord Truro, that reason is very unsatisfactory to my mind. Why should the words "well knowing" not receive their natural meaning? No reason is given. However, that is the decision. Whether the case of *Briggs* v. *Penny* was rightly or wrongly decided (and I must not forget that it affirmed the decision of a very learned Vice-Chancellor) it is distinguishable from the present case. Unless you find the words "well knowing," the case of *Briggs* v. *Penny* does not apply. Per Jessel, M. R., in *Stead* v. *Mellor*, 36 L. T., N. S., 498, 499; 46 L. J., Ch., 880, 881; 5 L. R., Ch. D., 225, 226: 25 W. R. 508.

1. *Bright* v. *Hutton* (3 H. L. Ca. 341) commented upon, and treated as settling the law as to the non-liability of provisional committeemen merely as such, as well in Scotland as in England. *M'Ewan* v. *Campbell*, 2 Macq. H. L. Ca. 499. And commented on in *Lucy's case*, 4 De G. M. & G. 356; 17 Jur. 1143; 22 L. J., Ch., 732.

2. *Bright's Settlement, Re* (13 L. R., Ch. D., 413; 42 L. T. 308; 28 W. R. 551), considered in *Palmer* v. *Locke*, 18 L. R., Ch. D., 381; 51 L. J., Ch., 124; 45 L. T. 229; 30 W. R. 419.

3. *Bristow* v. *Warde* (2 Ves. 336) explained in *Minton* v. *Kirwood*, 3 L. R., Ch., 614; 37 L. J., Ch., 606.

4. *British and American Telegraph Co.* v. *Colson* (6 L. R., Exch., 108; 40 L. J., Exch., 97). Now it appears to me that the Vice-Chancellor's decision is correct, and that the contract was completed the moment the notice of allotment was committed to the post directed to the address in Dublin, which Mr. Harris himself had given. That decision seems to me to be entirely in accordance with a great number of cases in this court, and to be utterly undistinguishable, in principle or in fact, from *Dunlop* v. *Higgins* (1 H. L. Ca. 381), a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is, in fact, the decision in *Hebb, Exp.* (4 L. R., Eq., 9; 36 L. J., Ch., 748; 15 W. R. 754; 16 L. T., N. S., 308). Against this current of authority there is the case of the *British and American Telegraph Co.* v. *Colson*, in which the Court of Exchequer—not disputing the authority of the previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords—established a distinction which does not apply to this case at all. The Court there held that although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the post office, the letter never arrives at all, then there is a difference. Per James, L. J., in *Imperial Land Co. of Marseilles, Re, Harris's case*, 7 L. R., Ch., 587, 591, 592; 41 L. J., Ch., 621, 623; 20 W. R. 690; 26 L. T., N. S., 781.

I confess I have great difficulty in reconciling the case of the *British and American Telegraph Co.* v. *Colson* with the previous decision in *Dunlop* v. *Higgins*. Per Mellish, L. J. *Ib.*

5. *Brocklebank* v. *King's Lynn Steamship Co.* (3 L. R., C. P. D., 365; 47 L. J., C. P., 321; 38 L. T. 489; 27 W. R. 94) followed in *Carta Para Gold Mining Co., Re*, 19 L. R., Ch. D., 457; 51 L. J., Ch., 191; 46 L. T. 406; 30 W. R. 117.

6. *Brocklehurst* v. *Jessop* (7 Sim. 442) dictum not followed in *Cockburn* v. *Edwards*, 18 L. R., Ch. D., 449; 51 L. J., Ch., 46; 45 L. T. 500. Affirming 16 L. R., Ch. D., 393; 50 L. J., Ch., 181; 43 L. T. 755; 29 W. R. 136.

7. *Brockwell's case* (4 Drew. 205) overruled. See *Mixer's case, Royal British Bank, Re*, 4 De G. & J. 575, 583.

8. Neither the decisions on an executor's legal right to retain an undisputed residue, nor the reasons for those decisions are reconcilable with each other, but in tracing this subject through the successive cases, there appears to be a gradual tendency towards favouring the next of kin. *Browne* v. *M'Gwire*, Beat. 365.

9. *Brogden* v. *Metropolitan Railway Co.* (2 L. R., App. Cas., 666). But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter in a drawer, completes a contract, I must say I differ from that. It appears from the year books, that as long ago as the time of Edward IV. (17 Edw. IV., T. Pasch. Cas. 2) Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops, because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2*s.* 6*d.* for them, he might take them: that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on the Contract of Sale (page 190 et seq.) and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien as early as that time, exactly as the law now stands, and he consequently says, "This plea is clearly bad, as you have not shown the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them, signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my lords, that that, which was said 300 years ago and more, is the law to this day, and it

is quite what Lord Justice Mellish in *Harris's case, Imperial Land Co of Marseilles, Re* (7 L. R., Ch., 593; 41 L. J., Ch., 621; 20 W. R. 690; 26 L. T., N. S., 781), accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject. Per Lord Blackburn, in *Brogden* v. *Metropolitan Railway Co.*, 2 L. R., App. Cas., 666, 692.

1. *Brook* v. *Badley* (3 L. R., Ch., 672; 37 L. J., Ch., 884; 16 W. R. 947) explained and commented on in *Hill's Trusts, Re*, 16 L. R., Ch. D., 173; 50 L. J., Ch., 134; 43 L. T. 623; 29 W. R. 211.

2. *Brook* v. *Badley* (3 L. R., Ch., 672; 37 L. J., Ch., 884; 16 W. R. 947) approved and followed in *Ashworth* v. *Munn*, 15 L. R., Ch. D., 363; 50 L. J., Ch., 107; 43 L. T. 533; 28 W. R. 965.

3. *Brooke's Abridgment, tit. Conscience and Subpœna.* In Spence's Eq. Jur. 635, it is said that equity will reform a contract for some collateral mistake upon the authority of Brooke, tit. Conscience and Subpœna, pl. 4, who vouches the Year Book, 37 Hen. 6, fo. 13. The following case comes very near to relief in respect of mutual ignorance of law, both parties having, from such ignorance, made a mistake as to the material of the thing sold. "The plaintiff had purchased from the defendant certain debts that were due to him: they were assigned to him, and he gave the vendor a bond for the price. The plaintiff afterwards filed a bill to be relieved from the bond, on the ground that nothing passed to him by the assignment of the debts, they being choses in action not assignable at law. The Chancellor, with the concurrence of the justices of both benches, whom he called to his assistance, decided that the bond should be delivered up as given without consideration, 'pur ceo que le plaintiff ne poet aver quid pro quo,' and the defendant on refusal was sent to the Fleet." The case cited from Brooke is wrong, for two reasons; first, that no consideration at all is necessary for a bond; secondly, that now debts may be the subject of assignment. Per Willes, J., in *Balfour* v. *Sea Fire Life Assurance Society*, 3 C. B., N. S., 305; 3 Jur., N. S., 1304.

So again, per Willes, J., with regard to the authority cited from Brooke's Abridgment. I should have thought a much better authority might have been found for the proposition that a court of equity would prevent a party from suing upon a security, the consideration for which had failed. The Court there seem to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, long since been exploded, certainly so long since as the year 1791, and probably 200 years before, as appears from *Master* v. *Miller* (4 T. R. 340), where Buller, J., says, "It is laid down in our old books, that, for avoiding maintenance, a chose in action cannot be assigned or granted over to another, Co. Litt. 214, a, 266, a; 2 Roll. 45, c. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case." However, taking the case in Brooke to be an authority, it is only an authority for this, that a bond will be relieved against, if it be shown that the consideration has failed. *Id.* 308.

4. *Brooke* v. *Aston* (4 Jur., N. S., 279; 5 Jur., N. S., 1025). The principle laid down in this case, that the mere application of a known process to a new article, the mode of application not being new, is not a good subject of a patent, does not apply when the process is chemical. *Young* v. *Fernie*, 4 Giff. 577; 4 N. R. 218.

5. *Brown, Exp.* (1 Dea. & Ch. 34), overruled by *Williams, Exp., Hall, Re*, 1 Dea. & Ch. 489; Mont 514.

6. *Brown, Exp., Jeavons, Re* (9 L. R., Ch., 304; 43 L. J., Bky., 105; 30 L. T. 108; 22 W. R. 605), explained and commented on in *Geisel, Exp., Stranger, Re*, 22 L. R., Ch. D., 436; 48 L. T. 405; 31 W. R. 264; and in *Ritso, Exp.* and *Re*, 22 L. R., Ch. D., 529; 52 L. J., Ch., 535; 48 L. T. 376; 31 W. R. 373.

7. *Brown, Exp., Appleby, Re* (2 L. R., Ch. D, 799; 45 L. J., Bky, 115; 35 L. T. 10; 24 W. R. 750), followed in *Evans, Exp., Orbell, Re*, 44 L. T. 762; 29 W. R. 573. Affirming, 43 L. T. 475; 29 W. R. 200.

8. *Brown, Exp., Yates, Re* (11 L. R., Ch. D, 148; 48 L. J., Bky, 78; 40 L. T. 402; 27 W. R. 651), explained and commented on in *Armitage, Exp., Learoyd, Re*. 17 L. R., Ch. D., 13; 44 L. T. 262; 29 W. R. 772.

9 *Brown* v. *Bateman* (15 W. R. 350; 2 L. R., C. P., 272) distinguished in *Jay, Exp., Harrison, Re*, 14 L. R., Ch. D., 19; 42 L. T. 600; 28 W. R. 444. Reversing S. C. *nom. Meads, Exp., Harrison, Re*, 49 L. J., Bky., 47; 41 L. T. 560; 28 W. R. 308.

10. *Brown* v. *Cross* (14 Beav. 105). The respondents relied much upon some observations which fell from the Master of the Rolls in *Brown* v. *Cross*, seeming to import that if a *cestui qui trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held barred by acquiescence if he does not promptly do so. But this broad proposition was not necessary to the decision of that case; and with all deference to the Master of the Rolls, if he intended to lay down the proposition thus broadly, which I doubt, I am not, as at present advised, prepared to assent to it." Per Turner, L. J., in *Life Association of Scotland* v. *Siddall*, 7 Jur., N. S., 785, 786.

11. *Brown* v. *Selwin* (Ca. *temp.* Talb. 240) commented on in *Ulrich* v. *Litchfield*, 2 Atk. 372.

12. *Brown* v. *Nisbett* (1 Cox 13) observed upon in *Webster* v. *Boddington*, 16 Sim. 177.

13. *Brown* v. *Harris* (13 Ves. 522) distinguished in *Kinloch* v. *Secretary of State for India in Council*, 7 L. R., App. Cas., 619; 51 L. J., Ch., 885; 47 L. T. 133; 30 W. R. 845. Affirming 15 L. R, Ch. D., 1; 49 L. J., Ch., 571; 42 L. T. 667; 28 W. R. 619.

14. *Brown* v. *Walker* (22 L. J., N. S., Ch., 82) observed upon in *Key* v. *Key*, 1 Jur., N. S., 372.

15. *Brown* v. *Weatherby* (12 Sim. 6) overruled by *Bridges* v. *Hinxman*, 16 Sim. 71.

16. *Brown* v. *Yeall* more fully reported in

Shelford on Charities, but best reported in 7 Ves. 50. n. *Marsh* v. *Means*, 3 Jur., N. S., 790, 791.

1. *Brown and Sibly's Contract, Re* (3 L. R., Ch. D., 156), disapproved of by Jessel, M. R., in *Bellis, Re*. 5 L. R., Ch. D., 504; 46 L. J., Ch., 353; 36 L. T. 644; 25 W. R. 456.

2. *Browne* v. *Browne* (3 Sm. & G. 568; 26 L. J., Ch., 635) dissented from, and *Festing* v. *Allen* (12 M. & W. 279; 13 L. J., Exch., 74), followed and preferred in *Holmes* v. *Prescott* (10 Jur, N. S., 587, 33 L. J, Ch., 264; 12 W. R 636; 11 L. T, N. S., 38; 2 N. R. 559; 1 W. R. 636.

3. *Browning* v. *Sabin* (5 L. R., Ch. D., 511; 46 L. J., Ch., 728; 25 W. R. 602) observed upon and explained in *A Solicitor, Re*, or *Ryan, Re*, 14 L. R., Ch. D, 152; 49 L. J., Ch., 205; 42 L. T. 310: 28 W. R. 529.

4. *Browning* v. *Sabin* (5 L R. Ch. D, 511; 46 L. J., Ch, 728: 25 W. R. 602) distinguished in *Mann* v. *Perry*, 50 L. J., Ch., 251; 44 L. T. 248.

5. *Brownson* v. *Lawrance* (37 L. J., Ch., 351, 6 L. R., Eq., 1; 18 L. T., N. S., 143). Sir George Jessel, M. R. in *Sackville* v. *Smyth* (42 L. J., Ch., 494, 495; 17 L. R., Eq, 153; 22 W. R. 179), said that he did not agree with the decision in *Brownson* v. *Lawrance*, that the mere "fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift," was sufficient to show an intention to exonerate the specifically-devised property, and that he should hold that the mortgaged hereditaments were not to be exonerated from the mortgage

6. *Brownson* v. *Lawrance* (18 L. T., N. S., 143; 6 L. R, Eq., 1). It was admitted that if the two estates had been specifically devised, that is, if the Heyford estate had been devised by name as the Bugbrooke estate was, those two estates must have borne the mortgage debt ratably. It was not and could not be questioned that before the Wills Act (1 Vict., c. 25) every devise of land, whether given by name, or passing by a residuary devise, was specific. But it had been decided by Vice-Chancellor Kindersley, in *Dady* v. *Hartridge* (1 Dr. & Sm. 236), and *Hansman* v. *Fryer* (14 L. T., N. S., 882; 12 Jur, N. S., 681), that, since the Wills Act, a residuary devise of real estate was not specific, because the 24th section made the will speak as if it had been executed immediately before the death of the testator. I confess I am unable to follow the reasoning of my learned predecessor, as I cannot see any reason for a devise being less specific because the will speaks at one time instead of another. The decision of Kindersley, V.-Ch., was, however, followed by the Master of the Rolls in *Rotherham* v. *Rotherham* (26 Beav. 465) and *Bethell* v. *Green* (34 Beav. 302). But Stuart, V.-Ch., had held the contrary in *Pearman* v. *Twiss* (2 Giff. 130), and so had the present Lord Chancellor, when Vice-Chancellor, in *Edwards* v. *Pugh*, which is reported in a note to *Pearmain* v. *Twiss* (2 Giff 135). In this conflict of opinion the decision of Kindersley, V.-Ch., in *Hensman* v. *Fryer*, was heard on appeal before Lord Chancellor Chelmsford in November 1867, and on the 3rd December in that year his lordship gave judgment, reversing the decree of the Vice-Chancellor, and holding that a residuary devise of land is just as specific after the Wills Act as it was before (3 L. R., Ch., 420). It being thus settled that a residuary devise of real estate is still specific, these rights of the parties claiming under this will are just the same as if the Heyford estate had been specifically devised by name to the plaintiff and the infant defendant, from which it follows that the Bugbrooke and Heyford estates must bear the mortgage debt ratably. There must, therefore, be a reference to make the apportionment, the plaintiff and defendant being both infants, and incapable of binding themselves as to the amount. The decision of the Master of the Rolls in *Brownson* v. *Lawrance*, *supra*, was much pressed upon me to show that the devisees of the Heyford estate were bound to exonerate the devisees of the Bugbrooke estate from the mortgage debt. It was there held that there was an exoneration, and the decision evidently proceeded on the ground that a residuary devise of land was not specific, as his lordship himself had decided in the cases of *Rotherham* v. *Rotherham* and *Bethell* v *Green*, to which I have before referred; and though *Brownson* v. *Lawrance* was decided three months after Lord Chelmsford had reversed the decision of Kindersley, V.-C., in *Hensman* v. *Fryer*, and had thereby overruled *Rotherham* v. *Rotherham* and *Bethell* v. *Green*, and though the decision of Lord Chelmsford was cited, he did not advert to it in his judgment: and I am satisfied that his decision would have been different if he had done so, for that settles the law that an estate passing by a residuary devise is specific, and takes away therefore the ground of the decision. I cannot, therefore, treat that case as an authority in favour of the contention of the defendant James Bazeley. Per Malins, V.-Ch., in *Gibbins* v. *Eyden*, 20 L. T., N. S., 516, 517.

7. *Brownsword* v. *Edwards* (2 Ves. 242) disapproved of in *Pearson* v. *Rutter*, 3 De G. M. & G. 398.

8. *Brownsword* v. *Edwards* (2 Ves. 243). The observation sometimes made on this case, that Lord Hardwicke read "or" for "and," is not correct, and this is pointed out and explained in the case of *Mortimer* v. *Hartley* 6 Exch. 60; 3 De G. & Sm. 316. Per Lord Wensleydale in *Grey* v. *Pearson*, 6 H. L. Ca. 109; 3 Jur, N. S., 831; 26 L. J., Ch., 473; 5 W. R. 454. Not being called upon to say whether, upon the grounds pointed out by Lord Hardwicke, that case (*Brownsword* v. *Edwards*) was or was not rightly decided, I shall only observe that I conceive that either it was not rightly decided, or that, if rightly, it was so decided upon principles not governing this case. Per Cranworth, C.—This brings me to the case of *Brownsword* v. *Edwards*, which was so much discussed at the bar, and I must without reserve say that I consider it a binding authority, and I entirely subscribe to Lord Hardwicke's doctrine in it. Per Lord St. Leonards.—This case has not been followed by any uniform course of other decisions, so as to make it binding upon us in the construction of similar words in this will. On the contrary, it is directly impugned by that of *Doe* d. *Usher* v. *Jessop*, 12 East 288. Per Lord Wensleydale, 6 H. L. Ca. 110.

9. Lord Hardwicke's opinion in *Brownsword* v. *Edwards* (2 Ves. 243) followed in

Collingwood v. *Russell*, 13 W. R. 63; 5 N. R. 1.

1. *Brutton* v. *St. George, Hanover Square* (13 L. R., Eq., 339; 41 L. J., Ch., 134; 25 L. T. 552; 20 W. R. 84). When the case came before the magistrate, he was at first inclined to think that the limitation clause did not apply to this case; but, upon being pressed with the case of *Brutton* v. *St. George, Hanover Square*, he decided that this was a case in which it was sought to make the defendant liable for the payment of a penalty or forfeiture under the Act (25 & 26 Vict., c. 102), within s. 107. I am, however, unable to see that this is a proceeding for "penalty or forfeiture" within that section. I think the magistrate very properly deferred to the opinion of Malins, V.-Ch., and dismissed the summons. But now that the matter has come before us, with every disposition to give due weight to an opinion expressed by a judge of the Court of Chancery, I am unable to give my assent to the view of the Vice-Chancellor in that case. There the vestry had proceeded against the builder, and not against the owner, and the summons was not issued until after the work was completed, and more than six months after the structure had been discovered to be so far advanced as to show the full extent of the projection complained of. Vice-Chancellor Malins decided against the vestry. But I find that, although it was brought under his notice that s. 107 did not apply to the case, he did not in his judgment take any notice of that argument. Having decided the real point in the case, he does go on to the other question in a way which shows that he assumed s. 107 to be applicable. In differing from that impression, therefore, we cannot be said to overrule a decision by which we might otherwise have felt ourselves bound. Per Keating, J., in *Bermondsey Vestry* v. *Johnson*, 8 L. R., C. P., 441, 445, 446; 42 L. J., M. C., 67; 28 L. T. 665; 21 W. R. 626.

I also agree with my brother Keating that, if we had found a deliberate expression of opinion by Vice-Chancellor Malins on the subject, we ought to have hesitated long before we came to a contrary conclusion. Per Honyman, J. *Ib.*

2. *Bryden* v. *Willett* (7 L. R., Eq., 472). James, V.-Ch., could not agree with the decision in that case, that the word "having" meant "having had." *Watson, Re*, 39 L. J., Ch., 770; 10 L. R., Eq., 36; 18 W. R. 642.

3. *Bubb* v. *Padwick* (13 L. R., Ch. D., 517; 49 L. J., Ch., 178; 42 L. T. 116; 28 W. R. 382) not followed in *Chaston, Re, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

4. *Buck* v. *Robson* (3 L. R., Q. B. D., 686; 48 L. J., Q. B., 250; 39 L. T. 325; 26 W. R. 804) followed in *Fisher* v. *Calvert*, 27 W. R. 301.

5. *Buckell* v. *Blenkhorn* (5 Hare 131) overruled in *Taylor* v. *Meads*, 11 Jur., N. S., 166; 13 W. R. 394. Per Lord Westbury, C.

6. *Buckell* v. *Blenkhorn* (5 Hare 131) observed upon in *Collard* v. *Sampson*, 17 Jur. 641; 22 L. J., Ch., 729; 67 Beav. 543; 4 De G. M. & G. 224; 1 Eq. Rep. 262.

7. *Buckell* v. *Blenkhorn* (5 Hare 140) decided by Wigram, V.-Ch., and followed by the Master of the Rolls, in *Man* v. *Ricketts* (7 Beav. 95); though he expressed, however, his dissatisfaction with it, the decision being, that because it was a testamentary instrument, one of the requisites which the power prescribed—the seal—might be dispensed with. It was matter of surprise that so careful a judge as Sir James Wigram should so have decided. The case, however, came before the lords justices (*Collard* v. *Sampson*, 4 De G. M. & G. 224), and they refused to follow it. Per Kindersley, V.-Ch., in *Orange* v. *Pickford*, 4 Jur., N. S., 649, 650.

8. *Buckell* v. *Blenkhorn* (5 Hare 131) not followed in *West* v. *Ray*, 1 Kay 385; 23 L. J., Ch., 447; 2 Eq. Rep. 431; 2 W. R. 319.

9. *Buckland, Re* (1 F. N. R. 250), overruled in *Matheson, Exp.*, 1 De G. M. & G. 448, and in *Copeland, Exp.*, 2 De G. M. & G. 914.

10. *Buckton* v. *Hay* (11 L. R., Ch. D., 645; 48 L. J., Ch., 563; 27 W. R. 527) observed upon in *Herbert* v. *Webster*, 15 L. R., Ch. D., 610; 49 L. J., Ch., 620.

11. *Buden* v. *Dore* (2 Ves. 445) seems overruled. See note there.

12. *Bulkeley* or *Buckeley* v. *Wilford* (2 Cl. & F. 102; 8 Bli. N. S. 11) distinguished in *Lysaght* v. *M'Grash*, 11 L. R., Ir., 142.

13. *Bulkeley* v. *Schutz* (3 L. R., P. C., 674; 8 Moo. P. C., N. S., 170) followed in *Bateman* v. *Service*, 6 L. R., App. Cas., 386; 50 L. J., P. C., 41; 44 L. T. 436.

14. *Bulmer* v. *Jay* (4 Sim. 48; 3 Myl. & K. 197) has, to say the least, been disapproved of by Lord Cottenham, who, in *Daniel* v. *Dudley* (1 Ph. 1, 7) says that the case of *Bulmer* v. *Jay* "stands alone." Per Wood, V.-Ch., in *Page* v. *Sloper*, 11 Hare 323; 17 Jur. 851; 22 L. J., Ch., 1044; 1 W. R. 518; 1 Eq. R. 540.

15. *Buonaparte, The* (8 Moo. P. C. 459). This brings their lordships to the consideration of that objection, and it is impossible for them not to perceive that, in dealing with it in the court below, it has been considered that it derived whatever weight it was entitled to from the decision of this committee, in the case of the Buonaparte, which it was supposed had introduced a new rule of decision into this branch of maritime law. Whether this supposition be correct or not, undoubtedly, if in itself that decision was both rightly understood below, and also rightly applied to the circumstances of this case, the learned judge could only determine the case before him as he has done. The important sentence in that judgment is to be found in p. 470, and is as follows:—"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said that, in general, it is his duty to do so, or it is his duty, in general, to attempt to do so." This sentence is followed by one which in the report is printed as follows:—"If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at

least to make the attempt." This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and with a slight correction of the text, would stand thus:—"If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." That this is the true wording of the passage we have ascertained by communicating with Lord Justice Knight Bruce, who delivered the judgment. It is a most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make an attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed. In the rule thus enunciated their lordships are unable to discern any novelty, either in the principle on which it rests, or in its application to the case. Per Lord Chelmsford, P.C., in *Duranty* v. *Hart*, 10 Jur., N. S., 600, 602.

1. *Burder* v *O'Neil* (9 Jur, N. S, 1109) first doubted by the Privy Council in *Berney* v. *Norwich* (*Bishop*) (36 L J., Ecc. Cas., 10; 1 L. R., Ecc. Cas., 281), and reversed in *Norwich* (*Bishop*) v. *Pearse* (37 L. J., Ecc Cas., 90, by Sir Robert Phillimore); and in a criminal suit under 3 & 4 Vict., c. 86, against a clergyman, he is competent and compellable to give evidence.

2. The principle of *Burdett* v. *Abbott* (14 East 137), as to the *lex et consuetudo parliamenti* examined in *Kelley* v. *Carson*, 4 Moo. P. C. 63; 7 Jur. 137.

3. *Burdett* v. *Spilsbury* (10 Cl. & F. 340) observed upon in *Vincent* v. *Sodor and Man* (*Bishop*), 4 De G & Sm 294.

4. *Burdich* v. *Garrick* (39 L. J., Ch., 661; 5 L. R., Ch., 453; 22 L. T., N. S., 502). (As to costs of staying proceedings during pendency of appeal to the House of Lords) not followed in *Merry* v. *Nickalls*, 42 L. J., Ch., 479; 8 L. R., Ch., 205; 21 W. R. 305; 28 L. T., N. S., 296.

5. *Burgess* v. *Burgess* (3 De G. M. & G. 896; 22 J. J., Ch., 675). As to the case of *Burgess* v. *Burgess*, which was much relied upon on the part of the defendant, I confess it has always seemed to me rather a strong decision, though it was undoubtedly the rule of the Court. But in that case there did not appear to have been any distinctive label. Had the words "late of 107, Strand," which the defendant in that case painted over his shop door (and was restrained from so doing) been also printed on the labels of "Burgess's essence of anchovies," the decision of Lord Justice Knight Bruce would probably have been different. Per Malins, V.-Ch, in *Schweitzer* v. *Atkins*, 16 W. R. 1080.

6. *Burgess* v. *Eve* (13 L. R., Eq., 450; 41 L. J., Ch., 515; 26 L. T. 540; 20 W. R. 311) distinguished in *Lloyds* v. *Harper*, 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 419.

7. The dicta and opinions of Sir Thomas Clarke, in *Burgess* v. *Wheate* (1 Eden), and Lord St. Leonards, in his *Treatise on Vendors and Purchasers*. Commented on in *Wythes* v. *Lee*, 4 W. R. 184; 3 Drew. 396 & 25 L. J., Ch, 177; 2 Jur., N. S., 7; 26 L. T. 192. S. C. on appeal 4 W. R. 316; 25 L. J., Ch., 389; 2 Jur, N. S., 130.

8. *Burgess* v. *Wheate* (1 Eden 177). With regard to the decision in *Burgess* v. *Wheate*, it might, or might not, be desirable that a different law should exist; but after a decision which has established a most important point of law for a hundred years, and upon which so many titles depend, it would be a great evil if the House of Lords were to reverse the decision in that case. Per Kindersley, V.-Ch, in *Sweeting* v. *Sweeting*, 33 L. J., Ch., 211, 215.

9 *Burke* v. *Hutchinson* (7 Ir. Eq. R. 508) explained in *Worrall* v. *White*, 9 Ir. Eq. R. 572; 3 J. & L. 513.

10. *Burke* v. *Lidwell* (1 J. & L. 703) commented on in *Worrall* v. *White*, 3 J. & L. 513; 9 Ir. Eq. R. 572.

11. *Burke* v. *Vicars* (3 Bro. C. C. 23). See note there, Belt's ed.

12. *Burkitt* v. *Ransom* (2 Colly. 536), disapproved of in *Weston* v. *Clowes*, 15 Sim. 610.

13. Condition for marriage, with consent and approbation, with a limitation over on marriage, without such consent or approbation. Lord Hardwicke's opinion in *Burleton* v. *Humphries* (Ambl. 256), holding approbation, eleven months after marriage, sufficient, denied by Lord Thurlow. *Clarke* v. *Parker*, 19 Ves. 21.

14. *Burn* v. *Burn* (3 Ves. 573) was a case to be followed, but not to be extended. Per Wickens, V.-Ch., in *Ferguson* v. *Gibson*, 41 L. J, Ch., 640, 643; 14 L. R., Eq., 379.

15. *Burn* v. *Carvalho* (4 B. & Ad. 382; 1 N & M. 883). We had held in the King's Bench in that case, that there was no legal or equitable assignment of the goods, but Lord Cottenham said (4 Myl. & Cr. 690), that though we were right at law, we were wrong in equity. Per Lord Wensleydale in *Hoare* v. *Dresser*, 7 H. L. Ca. 290, 308.

16. *Burn* v. *Maddon* (Ll. & G. *temp.* Plunk. 493) discussed in *French* v. *Macale*, 2 Dr. & War. 269; in 1 Con. & L. 459; 4 Ir. Eq. R. 568.

17. *Burney* v. *Macdonald* (15 Sim. 6) not followed in *Barrow* v. *Wadkin*, 24 Beav. 1; 3 Jur., N. S., 679.

18. *Burns* v. *Irving* (34 L. T., N. S., 752; 3 L. R., Ch. D., 291) not followed by the Court of Appeal in *Widgery* v. *Tepper*, 37 L. T., N. S., 297; 6 L. R., Ch. D., 364; 25 W. R. 872.

19. *Burrel's case* (6 Rep. 72) explained in *Lewis* v. *Rees*, 3 Kay & J. 132.

20. *Burrell, Exp.* (1 L. R., Ch. D., 537; 45 L. J., Bky., 68; 34 L. T. 198; 24 W. R. 353), distinguished in *Allard, Exp., Simons, Re*, 16 L. R., Ch. D., 505; 44 L. T. 35; 29 W. R. 406.

21. *Burrell, Re, Burrell* v. *Smith* (9 L. R.,

Eq., 443 ; 39 L. J., Ch., 544 ; 22 L. T. 263), "the V.-Ch. did not intend to interfere with the general rule," in *Richardson, Re*, 14 L. R., Ch. D., 611 ; 49 L. J., Ch., 612 ; 43 L. T. 279 ; 28 W. R. 942.

1. *Bush* v. *Fox* (5 H. L. Ca. 707 ; 2 Jur., N. S., 1029). The dictum of Lord Cranworth, "that it is the duty of the Court to compare the two specifications of a patent together," is an *obiter dictum*, and cannot be taken as a declaration of the law, and expressly repudiated in *Hills* v. *Evans*, 8 Jur., N. S., 525. Per Westbury, C.

2. *Bush's case, Imperial Rubber Co., Re* (30 L. T., N. S., 458 ; 9 L. R., Ch., 554 ; 43 L. J., Ch., 772 ; 22 W. R. 699. Affirming 22 W. R. 685 ; 30 L. T., N. S., 458), explained. I think it desirable to say, as the appellant appears to have been misled by the marginal note to *Bush's case*, that the notion that shares are only issued when the certificates are issued, is a blunder which could hardly be attributed to us. Per James, L. J., in *Blyth's case, Heaton's Steel and Iron Co., Re*, 36 L. T., N. S., 124, 125 ; 4 L. R., Ch. D., 140 ; 25 W. R. 200.

3. *Bute* (*Marquis*) v. *Cunynghame* (2 Russ. 275) explained and distinguished in *Athill, Re*, 16 L. R., Ch. D., 211 ; 50 L. J., Ch., 123 ; 43 L. T. 581 ; 29 W. R. 309.

4. *Bute* (*Marquis*) v. *Harman* (9 Beav. 320), marginal note of is incorrect. See *Southern* v. *Wollaston*, 16 Beav. 166 ; 22 L. J., Ch., 664, 1 W. R. 86.

5. *Butler* v. *Swinnerton* (Palmer, 339 ; Cro. Jac. 656). This case is the Magna Charta of the liberal construction of covenants for title. Per Lord St. Leonards, 2 Sugden's Vendors and Purchasers, p. 515 (10th edit.).

6. *Butler, Re* (16 L. R., Eq., 479), not followed in *Re Row*, 17 L. R., Eq., 301 ; 29 L. T., N. S., 824 ; 42 L. J., Ch., 347.

7. *Buxton* v. *Lister* (3 Atk. 383) observed upon in *Pollard* v. *Clayton*, 1 Kay & J. 462 ; 1 Jur., N. S., 342 ; 3 W. R. 349.

8. *Byerley* v. *Prevost* (6 L. R., C. P., 144) disapproved in *Cooper, Exp., Baum, Re*, L. R., 10 L. R., Ch. D., 313 ; 48 L. J., Bky., 54 ; 27 W. R. 299 ; 39 L. T. 523.

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9. *Caillaud's Patent Tanning Co.* v. *Caillaud* (26 Beav. 427 ; 5 Jur., N. S., 259) (as to security for costs by a limited liability company). I do not understand the case cited, as it is reported. It appears by the report that I did not call on the counsel for the plaintiffs, but that, upon the statements of the affidavits, which were uncontradicted, I declined to make the order. There must have been some counter evidence which influenced me. Per Romilly, M. R., in *Isle of Wight and Southampton Steamboat Co.* v. *Rawlins*, 9 Jur., N. S., 888.

10. *Caldwell* v. *Gregory* (1 Price 129) overruled. Mont. 365.

11. *Caledonian and Dumbartonshire Railway Co.* v. *St. Helensburgh* (*Magistrates*) (2 Macq. H. L. Ca. 391). That decision, as to the authority of which no one ought to entertain any doubt, proceeding as it did from the highest branch of judicature, went to this extent, and to this only : "that what directors cannot do after the incorporation of a company, provisional directors certainly cannot do before, for the purpose of binding the shareholders of the company. They cannot spend the money of their shareholders before their Act is passed, for the purposes for which they would not be allowed to spend it after the passing of the Act." Per Wood, V.-Ch., in *Leominster Canal Navigation Co.* v. *Shrewsbury & Hereford Railway Co*, 3 Kay & J. 658, 664 ; 3 Jur., N. S., 930 ; 26 L. J., Ch., 764.

12. *Caledonian Railway Co.* v. *Ogilvy* (7 Macq. H. L. Ca. 229) followed, and approved of in *Penny* v. *South-Eastern Railway Co.*, 2 El. & Bl. 660 ; 3 Jur., N. S., 957 ; 26 L. J., Q. B., 225.

13. *Caledonian Railway Co.* v. *Ogilvy* (2 Macq. H. L. Ca. 229) explained and distinguished. Per L. C. in *Caledonian Railway* v. *Walker's Trustees*, 7 L. R., App. Cas., 259 ; 46 L. T. 826 ; 30 W. R. 569.

See also remarks of Blackburn (Lord) on this case. *Ib.*

14. *Callisher* v. *Bischoffsheim* (5 L. R., Q. B., 449 ; 39 L. J., Q. B., 181 ; 18 W. R. 1137) questioned in *Banner, Exp., Blyth, Re*, 17 L. R., Ch. D., 490 ; 51 L. J., Ch., 300 ; 44 L. T. 913 ; 30 W. R. 26. Per Brett, L. J.

15. *Calvert* v. *Gason* (2 Sch. & Lef. 561) may now be considered as overruled. *Semble. Hunt* v. *Browne*, Sau. & Sc. 178.

16. *Calvert* v. *Gordon* (3 M. & R. 124) followed in *Lloyd's* v. *Harper*, 43 L. T. 481 ; 16 L. R., Ch. D., 290 ; 50 L. J., Ch., 140 ; 29 W. R. 452. Affirming 49 L. J., Ch., 217 ; 42 L. T. 218 ; 28 W. R. 419.

17. *Camden* v. *Benson* (1 Keen 671) stated to be inaccurately reported. *Flower* v. *Hartopp*, 8 Beav. 199.

18. A passage in the report of *Campbell* v. *Leach* in Ambl. 749 doubted in *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 65.

19. *Campbell* v. *Walker* (5 Ves. 678) followed in *Boswell* v. *Coaks*, 23 L. R., Ch. D., 302 ; 52 L. J., Ch., 465 ; 48 L. T. 929 ; 31 W. R. 540.

20. *Caney* v. *Bond* (6 Beav. 486 ; 1 L. T., N. S., 409) not followed in *Owens, Re*, 47 L. T. 61.

21. *Cape Breton Co.* v. *Fenn* (17 L. R., Ch. D., 198) considered in *Dronfield Silkstone Coal Co., Re* (No. 2), 23 L. R., Ch. D., 511 ; 52 L. J., Ch., 963 ; 31 W. R. 671.

22. *Capdeville, Re* (2 H. & C. 985). With reference to this case it would appear that the commissioners of Inland Revenue subsequently forbore to press for the duty to which the decision of the Court of Exchequer adjudged them entitled, in consequence of the decision in *Wallace* v. *Att.-Gen.* (1 L. R., Ch., 1), overruling the case of *Wallop's Trust, Re* (1 De G. J. & S. 656), so far as it applied to the case of *Capdeville, Re*. Vide note to *Jopp* v. *Wood*, 4 De G. J. & S. 620.

23. *Capper, Exp., Newman, Re* (4 L. R., Ch. D., 734) commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243 ; 52 L. J., Ch. 145 ; 47 L. T. 389 ; 31 W. R. 214.

24. *Carew, Exp. & Re* (10 L. R., Ch., 308 ; 44 L. J., Bky., 67 ; 32 L. T. 318 ; 23 W. R. 459), distinguished in *Lacey, Exp. & Re*, 16 L. R., Ch. D., 131 ; 50 L. J., Ch., 207 ; 43 L. T. 579 ; 29 W. R. 299.

1. *Carling, Hespeler, and Walsh's cases, Western of Canada Oil, Land, and Works Co., Re* (1 L. R., Ch. D., 115; 45 L. J., Ch., 5; 33 L. T. 645; 24 W. R. 165), distinguished in *Peter Rowland's case, Newport and South Wales Shipowners' Co., Re*, 42 L. T. 785.

2. *Carmichael* v. *Carmichael* (2 Ph. 101). Where an executor *de son tort* before action hands over the property in his possession, and settles an account with the true legal personal representative, he cannot be called upon to account by the persons beneficially interested in the estate. *Carmichael* v. *Carmichael* observed upon as to this point. *Hill* v. *Curtis*, 12 Jur, N. S, 4; 13 L. T., N. S., 584.

3. *Carne* v. *Long* (4 Jur., N. S., 475), decision of Stuart, V.-Ch., overruled on appeal, not on the ground taken by the Vice-Chancellor that the plaintiff was not within the Mortmain Act, but on the ground that it was void for a perpetuity, 6 Jur., N. S., 639; 2 L. J., N. S., 552; 29 L. J., Ch., 503. Campbell, C.

4. *Carpenter's and Weiss's cases* (5 De G. & Sm. 402; 16 Jur. 900; 21 L. J., Ch., 835) distinguished in *British Guardian Life Assurance Co., Re*, 14 L. R., Ch. D., 335; 28 W. R. 945.

5. *Carr* v. *Burlington* (*Countess*) (1 P. W. 228) overruled. See notes there, and *Creuze* v. *Hunter*, 2 Ves. J. 157; 4 Bro. C. C. 316; *Shirt* v. *Westby*, 16 Ves. 393; *Lloyd* v. *Williams*, 2 Atk. 110.

6. *Carrington* v *Holly* (Dick. 280) questioned in 2 Madd. Ch. Pr. 390.

7. *Carrington* (*Lord*) v. *Payne* (5 Ves. 404) conflicted with the case of *Darley* v. *Darley*, 2 Ambl. 653; 3 Bro. P. C. 365. Per Malins, V.-Ch., in *Bridges* v. *Strahan*, 26 W. R. 691, 692; 8 L. R., Ch. D., 558; 38 L. T. 502.

8. *Carrow* v. *Ferrior* (3 L. R., Ch, 719; 37 L. J., Ch., 569) not followed in *Berry* v. *Keen*, 51 L. J., Ch, 912.

9. *Carter* v. *De Brune*, as reported in Dick. 39, overruled in *Smith* v. *Hibernian Mine Co.*, 1 Sch. & Lef. 240.

10. *Carter, Exp., Threappelton, Re* (12 L. R, Ch. D., 908; 27 W. R. 943; 41 L. T. 37), questioned in *National Mercantile Bank, Exp., Haynes, Re*, 15 L. R., Ch. D., 42; 49 L. J., Bky., 62; 43 L. T. 36; 28 W. R. 848. Reversing 42 L. T. 64; 28 W. R. 399.

11. *Carter* v. *Carter* (3 Kay & J. 618; 27 L. J., Ch., 74) disapproved of by the Lords Justices James and Mellish, but defended by Lord Hatherley, C., in *Pilcher* v. *Rawlins* (41 L. J., Ch., 485; 7 L. R., Ch., 259; 25 L. T., N. S., 921; 20 W. R. 281). The case of *Carter* v. *Carter* held, that, although you may get in any outstanding interest which a person may *bonâ fide* assign to you, you having notice of the intervening circumstances, and he not having any such notice, you cannot get an assignment from a trustee who has himself another duty to perform, and makes over to you that estate to protect you against those interests which he was bound to protect. That case has been quarrelled with and, to a considerable extent, overruled in the recent case of *Pilcher* v. *Rawlins* (7 L. R., Ch., 259; 41 L. J., Ch., 485), by the Lords Justices, sitting with Lord Hatherley, who had decided *Carter* v. *Carter*, and who still adhered to his opinion. Per Chatterton, V.-Ch., in *Monckton* v. *Braddell*, 6 Ir. R., Eq., 352, 361.

12. *Carter* v. *Carter* (3 Kay & J. 617). Since the decision in *Pilcher* v. *Rawlins* (7 L. R., Ch., 259; 20 W. R. 281; 41 L. J., Ch., 485; 25 L. T. 94) *Carter* v. *Carter* cannot be considered law. Per Jessel, M. R., in *Mumford* v. *Stohwasser*, 22 W. R. 833, 834; 18 L. R., Eq., 556; 43 L. J., Ch., 694; 30 L. T. 859.

13, *Carter* v. *Green*, 3 Kay & J. 591, not followed in *Wilkinson* v. *Barber*, 14 L. R., Eq., 96.

14. *Carter* v. *Saunders* (2 Drew. 248, 256) contrary to the opinion of Lord Chelmsford in *Coope* v. *Cresswell* (2 L. R., Ch., 122) and *British Mutual Investment Co.* v. *Smart* (10 L. R., Ch., 567; 44 L. J., Ch., 695; 32 L. T. 849; 23 W. R. 800).

15. *Carter* v. *Taggart* (1 De G. M. & G. 286; 16 Jur. 300; 21 L. J., Ch., 216) observed upon in *Bagshaw* v. *Winter*, 16 Jur. 561; 5 De G. & Sm. 466.

16. *Carter* v. *Wake* (4 L. R., Ch. D., 605) distinguished in *General Credit and Discount Co.* v. *Clegg*, 22 L. R., Ch. D., 549; 52 L. J., Ch., 297; 48 L. T. 182; 31 W. R. 421.

17. The assignees of a bankrupt do not take under the assignment property the equitable title to which had been transferred before the bankruptcy. *Burn* v. *Carvalho*, 4 Nev. & M. 889; 1 Ad. & Ell. 883. Affirming *Carvalho* v. *Burn*, 4 B. & Adol. 382; 1 Nev. & M. 700.

18. *Cary* v. *Cary* (2 Sch. & Lef. 189) commented on in *Barrs* v. *Fenwkes*, 3 N. R. 704. And see S. C. 34 L. J., Ch., 522; 11 Jur., N. S., 669; 13 W. R. 987; 12 L. T., N. S., 727; 6 N. R. 355.

19. *Cary* v. *Hills* (15 L. R., Eq, 79; 42 L. J., Ch., 100; 28 L. T, N. S., 6; 21 W. R. 166) observed upon in *Rowsell* v. *Morris*, 17 L. R., Eq., 20, 22, 23; 22 W. R. 67.

20. *Cary* v. *Hills* (15 L. R., Eq., 79; 42 L. J., Ch., 100; 28 L. T. 6; 21 W. R. 166). The Master of the Rolls having decided a case of *Cary* v. *Hills*, the case of *Rayner* v. *Koehler* (14 L. R., Eq, 262; 41 L. J., Ch, 697; 27 L. T, N. S., 506; 20 W. R. 859), having been cited to him, the reporters have inserted in head-note "*Rayner* v. *Koehler*, not followed." Finding that in a head-note, I expected at least that the Master of the Rolls would have given some reason why he did not follow it. Possibly it escaped his notice altogether, and he did not even know of it, and from what I know of the Master of the Rolls, I think that if he had intended to dissent from me, he would at least have paid me the respect of stating the ground of his dissent when I had so explicitly decided this case in the month of July preceding. No notice appears to have been taken of it however. Therefore I cannot regard the Master of the Rolls as deciding contrary to me, and even if he had, I am sure I should feel constrained, with the most perfect respect, to decide in accordance with my own decision in *Rayner* v. *Koehler*. Per Malins, V.-Ch., in *Coote* v. *Whittington*, 16 L. R., Eq., 534, 543, 544; 21 W. R. 839; 29 L. T. 206.

21. *Case* v. *Drosier* (2 Keen 764; 6 L. J., Ch., N. S., 353; on appeal, 5 Myl. & Cr. 246). That case is of the highest authority, from the care with which it was argued, and the judges (Lords Langdale and Cottenham) by whom it was decided. It may be observed, that the construction assumed by both judges as to the true one of the limitations there, and by virtue of which it becomes applicable here, has been since established as correct by a decision of the House of Lords in the case

of *Baker* v. *Tucker*, 3 H. L. Ca. 106. Per Wickens, V.-Ch., in *Sykes* v. *Sykes*, 41 L. J., Ch., 25, 29; 13 L. R., Eq. 56; 25 L. T. 560; 20 W. R. 90.

1. *Cash* v. *Kennion* (11 Ves. 314) commented on in *Bertrand* v. *Bertrand*, 2 Moo. P. C. 212.

2. *Casson* v. *Roberts* (31 Beav. 613; 32 L. J., Ch., 105). With regard to this case, I do not think it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory. Per Quain, J., in *Thomas* v. *Brown*, 1 L. R., Q. B. D., 714, 724; 45 L. J., Q. B., 811; 24 W. R. 821; 35 L. T. 237.

3. *Caton* v. *Caton* (34 L. J., Ch., 564; on appeal to the Lord Chancellor, 35 L. J., Ch., 292; 1 L. R., Ch., 137; on appeal to the House of Lords, 36 L. J., Ch., 886; 2 L. R., H. L. Ca., 127). I think that Lord Cottenham and the House of Lords, in *Hammersley* v. *De Biel* (*Baron*) (12 Cl. & F. 45, 62. n), through Lord Brougham and Lord Campbell, have, with the utmost care, stated the doctrine as it really ought to prevail in this court. Lord Cottenham in that case, when it was before him as Lord Chancellor (12 Cl. & F. 62. n.), said, "A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this court for the purpose of realising such representation." That I conceive to be an accurate statement of the equitable principle which governs this court. No doubt it may be said that there is no uniformity of decisions on the subject, and that the principle has not always been adhered to. In *Jorden* v. *Money* (5 H. L. Ca 185; 23 L. J., Ch., 865) it was not adhered to. In a very recent decision of the House of Lords, it seems to me to have been violated. The case of *Caton* v. *Caton* (*supra*) was one in which a representation had been made to a lady on the occasion of her marriage, that the husband would by will make a certain provision for her. A will was actually prepared and made according to that representation, yet it was held that the husband was entitled to set that representation at nought, and to leave his wife to survive him and become his widow with a non-performance of the representation, and that representation one of so serious a nature. That case, I admit, was so decided. I can, however, only think that it was so decided in consequence of the extraordinary and peculiar circumstances of the case itself, and in obedience to the view entertained by Lord Cranworth with respect to it. That view appears to me to have been taken by him entirely in opposition to the principles laid down by Lord Cottenham, and acted upon and repeated by Lord Brougham and by Lord Campbell in the case of *Hammersley* v. *De Biel*. There are, moreover, subsequent cases in this court in which that of *Hammersley* v. *De Biel* has been followed. I must, therefore, consider that Lord Cottenham's decision of that case in this court, and the authentication and confirmation of his decision by the House of Lords upon the appeal to them, fortified by the grounds and reasons then stated in the judgments of Lord Brougham and Lord Campbell, have established the authority of it on impregnable grounds. . . . It was said, however, in the argument of the present case, that, in that of *Gulliver*, *Re* (2 Jur., N. S., 701), I had decided in a way contrary to *Hammersley* v. *De Biel*. To say that in that case I departed in the least from the doctrine laid down by Lord Cottenham, in *Hammersley* v. *De Biel*, is a mistake. Indeed, I referred to that case, when I decided that of *Gulliver*, *Re*, and I considered the evidence there adduced before me to be too loose and not specific enough as to the sum, and insufficient to prove that the representation had been made to the proper person. Per Stuart, V.-Ch., in *Williams* v. *Williams*, 37 L. J., Ch., 854, 857, 858.

4. *Chadwick* v. *Doleman* (2 Vern. 528). The principle of this case does not apply to a younger son succeeding to the reversion of the settled estates not under the settlement under which portions were created, but by descent *Sing* v. *Leslie*, 2 Hem & M. 68; 10 Jur., N. S., 794; 10 L. T., N. S., 332.

5. *Challenger* v. *Sheppard* (8 T. R. 597) commented on and followed in *Moore* v. *Cleghorn*, 12 Jur. 591; 16 L. J., N. S., Ch., 469; 11 Jur. 958.

6. *Challinor*, *Exp.*, *Rogers*, *Re* (16 L. R., Ch. D., 260; 51 L. J., Ch., 476. n.; 44 L. T. 122; 29 W. R. 205), not followed in *Rolph*, *Exp.*, *Spindler*, *Re*, 19 L. R., Ch. D., 98; 51 L. J., Ch., 88; 45 L. T. 482; 30 W. R. 52; and in *Firth*, *Exp.*, *Cowburn*, *Re*, 19 L. R., Ch. D., 419; 51 L. J., Ch., 473; 45 L. T. 120; 30 W. R. 529.

7. *Challinor*, *Exp.*, *Rogers*, *Re* (16 L. R., Ch. D., 260; 44 L. T. 122; 29 W. R. 205), not followed in *Hamilton* v. *Chaine*, 7 L. R., Q. B. D., 320; 59 L. J., Q. B., 456; 44 L. T. 764; 29 W. R. 676. Per Cotton, L. J.

8. *Exp. Chalmers*, *Edwards*, *Re* (42 L. J., Bky., 2). The rule laid down in this case only applies where there is something amounting to a declaration on the part of the purchasers that they will be unable to meet their engagements. *Carnforth Hæmatite Iron Co.*, *Exp.*, *Phœnix Bessemer Steel Co*, *Re*, 46 L. J., Ch., 115; 4 L. R., Ch. D., 108; 35 L. T. 776; 25 W. R. 187.

9. *Chalmers* v. *Storil* (2 V. & B. 222) is imperfectly reported. *Bending* v. *Bending*, 3 Kay & J. 257; 3 Jur., N. S., 535; 26 L. J., Ch., 469.

10. *Chamberlain* v. *West End of London Railway Co.* (2 B. & S. 617) approved in *Caledonian Railway Co.* v. *Walker's Trustees*, 7 L. R., App. Cas. (Sc.), 259; 46 L. T. 826; 30 W. R. 569.

11. *Chambers*, *Re* (11 L. T. 726; 13 W. R. 375; 34 Beav. 177), explained and commented on in *Holroyde and Smith*, *Re*, 43 L. T. 722; 29 W. R. 599.

12. *Chancery Cases* is a book of doubtful authority. *Leonard* v. *Leonard*, 2 Ball & B. 183.

13. *Chandler* v. *Howell* (4 L. R., Ch. D., 651; 46 L. J., Ch., 25; 25 W. R. 55) overruled in *Attree* v. *Hawe*, 9 L. R., Ch. D., 337; 47 L. J., Ch., 863; 38 L. T. 733; 26 W. R. 871.

14. *Chaplin's Trusts*, *Re* (9 L. T. 475; 12 W. R. 147), followed in *Allen*, *Re*, *Wilson* v. *Atter*, 44 L. T. 240; 29 W. R. 480.

15. *Chapman* v. *Brown* (6 Ves. 404) had been commented upon by V.-Ch. Wood, in *Fisk* v. *Att.-Gen.* (4 L. R., Eq., 521; 15 W. R.

1200), and the latter case practically reversed the former. Per Malins, V.-Ch., *Williams, Re*, 36 L. T., N. S., 689, 690; 5 L. R., Ch. D., 735, 737; 46 L. J., Ch., 92; 25 W. R. 689.

1. *Chapman* v. *Brown* (6 Ves. 404) has been relied upon, but the case of *Dundee Magistrates* v. *Morris* (3 Macq. H. L. Ca. 134), where in spite of almost every conceivable difficulty the House of Lords managed in favour of a charitable object to spell out the purpose of the testator, has at all events reduced the case of *Chapman* v. *Brown* to very narrow limits. Per Wood, V.-Ch., in *Fish* v. *Att.-Gen.*, 15 W. R. 1201.

2. *Chapman* v. *Chapman* (13 Beav. 308; 15 Jur. 265; 20 L. J., Ch., 465) observed upon in *Burgess* v. *Moxon*, 2 Jur., N. S., 1059.

3. *Chapman* v. *Royal Netherlands Steam Navigation Co.* (4 L. R., P. D., 157; 48 L. J., P., 449; 40 L. T. 433; 27 W. R. 554); not followed in *Stoomvaart Maatschappy* v. *Peninsular and Oriental Steam Navigation Co.*, 7 L. R., App Cas., 795; 52 L. J., P. C., 1; 47 L. T. 198; 31 W. R. 249.

4. *Chappel's case, Accidental Death Insurance Co., Re* (6 L. R., Ch., 902; 25 L. T. 438; 20 W. R. 9) distinguished in *Taurine Co., Re*, 25 L. R., Ch. D., 118; 53 L. J., Ch., 271; 49 L. T. 514; 32 W. R. 129.

5. *Charge* v. *Goodyer* (3 Russ. 140) observed upon in *Parker, Re, Baker* v. *Baker*, 15 L. R., Ch. D., 528; 49 L. J., Ch., 587; 43 L. T. 115; 28 W. R. 823.

6. *Charing Cross Advance and Deposit Bank, Exp.* (16 L. R., Ch. D., 35; 50 L. J., Ch., 157; 44 L. T. 113; 29 W. R. 201), distinguished in *Challinor, Exp., Rogers, Re*, 16 L. R., Ch. D., 260; 44 L. T. 122; 29 W. R. 205; 51 L. J., Ch., 476. n.

7. *Charlton* v. *Wright* (12 Sim. 271) observed upon, and overruled in *Turner* v. *Cox*, 8 Moo. P. C. 288.

8. *Chasemore* v. *Richards* (7 H. L. Ca. 349) followed in *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R., Ir., 172.

9. *Chatteris* v. *Young* (6 Madd. 30) facts incorrectly stated. See S. C. 2 Russ. 184. n.

10. *Chatterton* v. *Watney* (16 L. R., Ch. D., 378; 50 L. J., Ch., 227; 44 L. T. 53; 29 W. R. 373) explained and commented on in *Webb* v. *Stenton*, 11 L. R., Q. B. D., 518; 52 L. J., Q. B., 584; 49 L. T. 432.

11. *Cherry, Re* (10 W. R. 305), explained in *Westminster Bridge Acts, Re, St. Sepulchre's (Vicar), Exp.*, 3 N. R. 594.

12. *Cherry* v. *Boultbee* (4 Myl. & Cr. 442) followed in *Orpen, Re, Beswick* v. *Orpen*, 16 L. R., Ch. D., 202; 50 L. J., Ch., 25; 43 L. T. 728; 29 W. R. 467.

13. *Chester* v. *Painter* (2 P. W. 335) overruled by *Stewart* v. *Garnett*, 3 Sim. 398, 406.

14. *Cheslyn* v. *Dalby* (4 Y. & C. 238), if correctly decided, goes to the utmost extent of the law. Per Cockburn, C. J., in *Hales* v. *Stevenson*, 9 Jur., N. S., 301.

15. *Child* v. *Stenning* (as to costs) (11 L. R., Ch. D., 82; 48 L. J., Ch., 302; 40 L. T. 302; 27 W. R. 462) not followed in *Rudow* v. *Great Britain Mutual Life Assurance Society*, 17 L. R., Ch. D., 600; 50 L. J., Ch., 504; 44 L. T. 688; 29 W. R. 585.

16. *Chitty* v. *Parker* (4 Bro. C. C. 411) impugned in *Simmons* v. *Rose*, 6 De G. M & G. 411; 25 L. J., Ch., 615; 2 Jur., N. S., 73.

17. *Chitty* v. *Parker* (2 Ves. J. 271) is obscurely reported. Per Kelly, C. B., in *Att.-Gen.* v. *Lomas*, 9 L. R., Exch., 29, 35; 43 L. J., Exch., 32; 22 W. R. 188; 29 L. T. 749.

18. *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 5, observed upon in *Boidell* v. *Golightly*, 12 L. J., N. S., Ch., 187; 7 Jur. 53.

19. *Christian* v. *Corren* (1 P. W. 329). The case of *Christian* v. *Corren* really proves nothing. The argument is the argument of Mr. Peere Williams himself, for it is not the judgment of the Court. No doubt Peere Williams is a great authority as a reporter, a very learned person, and I believe a very accurate reporter he is generally allowed to be; but what he says there is no part of the judgment of the Court. He says, even if there be express words in the charter, excluding the right of the subject, those words shall not be held to deprive the subject of his common law right of appeal to the Crown, in order that justice may not fail. The Court, which was assisted in that case by Lord Chief Justice Parker, in giving their judgment, proceeds upon no such ground. They only say, in this case there is nothing to take away the general right of appeal, which is necessary to prevent a failure of justice. And Lord Chief Justice Parker, in that case, observes that the Court of Chancery, even in the case of a proceeding of a copyhold court, if anything were done against good conscience, would review it, and would direct that the Court should re-assemble for the purpose of acting more conscientiously. But it is certain that that case was not borne out by the judgment of the Court of Chancery, when an attempt was made in a case before Lord Jeffries, Lord Chancellor, which had been very much considered at the Rolls by Mr. Serjeant Trevor, who was then Master of the Rolls, and where such a power to interfere was wholly denied, *Ash* v. *Rogle*, 1 Vern. 367. It is quite unnecessary, however, to enter into that, because it is quite sufficient to observe that the Lord Chief Justice, in granting that right of appeal which has been contended against, does not in the slightest degree bear out the generality of Mr. Peere Williams' argument. Per Lord Brougham, P. C., in *Reg* v. *Alloo Paroo*, 5 Moo. P. C. 296, 302; 11 Jur. 857.

20. *Christian* v. *Goldie* (2 Moo. P. C. 226) observed upon in *Birnie* v. *Caystile*, 9 Moo. P. C. 303, 324.

21. *Christopherson* v. *Naylor* (1 Mer. 320) disapproved in *Hall* v. *Woolley*, 39 L. J., Ch., 106, by Malins, V.-Ch., and commented on in *Phillips* v. *Phillips*, 10 Jur., N. S., 1173; 13 W. R. 170; 11 L. T., N. S., 472; 5 N. R. 102.

22. *Christopherson* v. *Naylor* (1 Meriv. 362) overruled in *Potter, Re*, 20 L. T., N. S., 649; 8 L. R., Eq., 52; 39 L. J., Ch., 102. Per Malins, V.-Ch.—I take *Christopherson* v. *Naylor* still to be an authoritative case, established, if necessary, by a recent recognition of it by the Lord Chancellor, when sitting as Lord Justice, so lately as on the 8th June 1868, in *Gowling* v. *Thompson*. That I set off against the express overruling of the case by V.-Ch. Malins in *Potter, Re*. Per James, V.-Ch., in *Hotchkiss, Re*, 8 L. R., Eq., 643, 648.

23. I think that this case is clearly within the rule of *Christopherson* v. *Naylor* (1 Meriv. 320), which I hold to be still a binding

authority; and I consider that it does not come within any of the distinctions which have been taken in the cases to which I have been referred, where the rule of *Christopherson* v. *Naylor* was held excluded. At the same time, following *Christopherson* v. *Naylor*, I do not think I am overruling *Potter, Re* (8 L. R., Eq., 52), there being, as it seems to me, a substantial distinction between the two cases. Per James, V.-Ch., in *Hotchkiss, Re*, 8 L. R., Eq., 643, 650.

1. *Christopherson* v. *Naylor* (1 Meriv. 320). I agree entirely with what Lord Justice James, when V.-Ch., said in *Hotchkiss, Re* (8 L. R., Eq., 643), as to the unseemliness of courts of co-ordinate jurisdiction coming to contrary decisions in similar cases. Whatever has been said as to the decision in the case of *Christopherson* v. *Naylor*, that decision has been followed by a long bead-roll of authorities, subsequent in point of time as well as prior to the decisions of the Vice-Chancellors Stuart and Malins impugning that decision, and has been upon two, if not more, occasions cited without disapproval in the Court of Appeal in Chancery, to the position and jurisdiction of which this Court has succeeded. Under such circumstances I do not feel myself at liberty to question the principles of decision which were laid down in that case, and which form the foundation of the judgment in it. Per Thesiger, L. J., in *West* v. *Orr*, 8 L. R., Ch. D., 60, 68; 38 L. T., N. S., 5, 8; 26 W. R. 409.

2. *Christopherson* v. *Naylor* (1 Meriv. 320), followed in *Barker, Re*, *Isquith* v. *Saville*, 51 L. J., Ch., 835; 47 L. T. 38, and in *Webster's Estate, Re*, *Wigden* v. *Mello*, 23 L. R., Ch. D., 737; 52 L. J., Ch., 767; 49 L. T. 585.

3. *Church* v. *Tyacke* (12 L. R., Ch. D., 205; 48 L. J., Ch., 598) not followed in *Pomfret* v. *Graham*, 19 L. R., Ch. D., 186; 51 L. J., Ch., 43; 45 L. T. 670.

4. *Churton* v. *Douglas* (Johns. 174; 28 L. J., Ch., 841; 33 L. T., N. S., 57) observed upon in *Ginesi* v. *Cooper*, 14 L. R., Ch. D., 596; 49 L. J., Ch., 601; 42 L. T. 751; but see *Leggott* v. *Barrett*, 15 L. R., Ch. D, 306; 28 W. R. 962.

5. *Clache's case* (Dyer 33, b.) observed upon in *Atkinson* v. *Barton*, 8 Jur., N. S., 902; 31 L. J., Ch., 410.

6. *Clare* v. *Clare* (Forrest. 21) is overruled by *Sabarton* v. *Sabarton*, *id.* 245. See 3 Ves. 616.

7. *Clare* v. *Clare* (21 L. R., Ch. D., 865; 51 L. J., Ch., 553; 46 L. T. 851; 30 W. R. 789) not followed in *Basham, Re*, *Hannay* v. *Basham*, 23 L. R., Ch. D., 195; 52 L. J., Ch., 408; 48 L. T. 476; 31 W. R. 743.

8. *Clare* v. *Clare* (21 L. R., Ch. D., 865; 51 L. J., Ch., 553; 46 L. T. 851; 30 W. R. 789) not followed in *McEwan* v. *Crombie*, 25 L. R., Ch. D., 175; 53 L. J., Ch., 24; 49 L. T. 499; 32 W. R. 115.

9. *Clark* v. *Browne* (2 Sm. & Giff. 524). I must say I cannot reconcile that case with the doctrine of ademption. If a man by will gives a debt, and he is paid that debt in his lifetime, and with the money buys a horse or a perpetual annuity, the horse or annuity does not pass. That one authority does not seem to me to be consistent with the ordinary rules of law on the question of ademption. Per Jessel, M. R., in *Harrison* v. *Jackson*, 7 L. R., Ch. D., 339, 343; 47 L. J., Ch., 142.

10. *Clark* v. *Clark* (1 L. R., Ch., 16; 11 Jur., N. S., 914; 35 L. J., Ch., 151; 14 W. R. 115; 13 L. T, N. S., 482). The remarks of Cranworth, C., in his judgment in this case, gave rise to the supposition that in cases of injunctions to restrain an interference with light and air, a greater amount of diminution of light and air by reason of the obstruction complained of must be shown in the case of a populous town than in the open country. Such a principle appears to have been acted upon by the Lords Justices in *Durell* v. *Pritchard* (1 L. R., Ch., 224; 14 W. R. 212; 13 L. T., N. S., 545) and *Robson* v. *Whittingham* (1 L. R., Ch., 442; 35 L. J., Ch., 227; 13 L. T., N. S., 730). But the doctrine was apparently repudiated in *Yates* v. *Jack* (1 L. R., Ch., 295; 14 W. R. 618; 14 L. T., N. S., 152); and the decisions of Wood, V.-Ch., in *Dent* v. *Auction Mart Co.* (2 L. R., Eq., 238; 35 L. J, Ch., 555); and of Kindersley, V.-Ch., in *Martin* v. *Headon* (2 L. R, Eq., 425; 12 Jur., N. S., 387; 35 L. J., Ch., 602; 14 W. R. 723; 14 L. T., N. S., 585), have proceeded upon the assumption that such a doctrine does not exist.

11. *Clark* v. *Freeman* (11 Beav. 112) not approved in *Rivière's Trade Mark, Re*, 26 L. R., Ch. D., 53.

12. *Clark* v. *Grant* (14 Ves. 519). Mr. Karslake very properly relied upon the reported judgment in that case. But the case is one in which the reported judgment, unless it be read with the strictest reference to the remarkable circumstances of the case itself, would be wholly unintelligible. . . . The material and guiding fact of that case is this: not only was the agreement by parol to give the defendant the choice of the particular piece of land clearly proved to have been so made, but it was acted upon; for we find that the defendant was put into possession, not of the half acre mentioned in the agreement, but of the other half acre which he had chosen according to the parol understanding. Not only that,—not only was he so put into possession and enjoyment of the half acre,—but he had been six years in that enjoyment and possession, upon the parol modification of the written agreement, before the bill in the suit was filed against him. That was the ground of Sir William Grant's decision; and it would have been monstrous had he decided the case otherwise than he did, possession having followed the parol agreement. Because possession and part performance are, according to the established doctrines of this court, matters which will relieve the case from the obstacle of the Statute of Frauds. I mention the facts of that case to show how very easy it is, upon a doctrine so extremely difficult, and depending upon such refined circumstances as that involved in the present case, to fancy others are applicable, which, however, when thoroughly understood, afford no countenance to the arguments they are advanced to support. Per Stuart, V.-Ch., in *Dear* v. *Verity*, 38 L. J., Ch., 297, 302, 303.

13. *Clark* v. *Phillips* (17 Jur. 886), commented on in *Chaplin, Re*, 33 L. J., Ch., 183.

14. *Clarke* v. *Elliott* (1 Madd. 606) was reversed by Lord Eldon on appeal. *Lilley* v. *Allen*, 12 Jur., N. S., 181; 14 L. T., N. S., 52.

15. *Clarke* v. *Hart* (6 H. L. Ca. 633) dis-

tinguished in *Rule* v. *Jewell*, 18 L. R., Ch. D., 660; 29 W. R. 755.

1. *Clarke* v. *Law* (2 Kay & J. 28) followed in *Young, Exp., Quartz Hill Consolidated Gold Mining Co., Re*, 21 L. R., Ch. D., 642; 51 L. J., Ch., 940; 47 L. T 644; 31 W. R 173.

2. *Clarke's Estate, Re* (21 L. R., Ch. D., 748; 51 L J., Ch., 855; 47 L. T. 43: 30 W. R. 778), not followed in *Bown, Re, O'Halloran* v. *King*, 49 L. T. 165.

3. *Clarke's Estate, Re* (21 L. R., Ch. D., 748; 51 L J., Ch, 855; 47 L. T. 43; 31 W. R. 37), disapproved in *O'Halloran* v. *King*, 27 L. R., Ch. D., 411; 53 L. J., Ch, 881, 50 L T. 796; 33 W. R. 58

4. *Clavering* v. *Westley* (3 P. W. 402), so far as it might be an authority for the recovery of rent as an equitable debt, disapproved in *Walters* v. *Northern Coal Mining Co*, 5 De M. & G. 629; 2 Jur., N. S, 1; 25 L. J., Ch., 633.

5. *Clavering's case* (5 Ves. 690) considered in *Bankart* v. *Tennant*, 10 L. R, Eq, 131; 39 L. J., Ch., 809; 23 L. T., N. S., 137.

6. *Clayton, Exp.* (cited 3 Madd 302), distinguished in *Cullin, Re*, 14 Ir. Ch. R. 506.

7. *Clayton* v. *Lowe* (5 Barn. & Ald. 656) observed upon in *Gosling* v. *Townshend*, 2 W. R. 23. Affirming 17 Beav. 245.

8. *Clayton's case* (1 Meriv. 572) discussed in *Sandham, Exp*, 4 Dea & Ch. 818.

9. *Clayton's case* (1 Meriv. 572). The difficulty probably has arisen from the bankers not being aware of the rule in *Clayton's case* in *Devaynes* v. *Noble* (1 Mer 572), which has always been acted on since that payments not specifically appropriated are to be attributed to the payment of the earliest of several debts. Per Romilly, M. R, *Medone, Re*, 26 Beav 588, 592.

10. *Clayton's case* (1 Meriv 572) followed in *Pennell* v *Deffell*, 4 De G M. & G. 372, 18 Jur. 273; 23 L. J., Ch., 115; and *Annaird* v. *Webster*, 10 L. R., Ch. D, 139; 48 L. J., Ch, 348; 39 L. T 494; 27 W. R 212, and distinguished in *Hallett's Estate, Re, Knatchbull* v. *Hallett*, 13 L. R., Ch. D, 696, 49 L J, Ch, 415; 42 L. T. 421; 28 W. R. 732.

11. *Clements* v. *Clifford* (11 Jur, N. S, 851). Upon motion *ex parte* on application of a plaintiff, the Court will order defendants who have disclaimed, to be dismissed from the suit, with their costs, without prejudice to the question how such costs are ultimately to be borne. See *Wigginton* v. *Pateman* (12 Jur. 89); Knight Bruce, V.-Ch, *contrà*, where *Baily* v. *Lambert* (15 Hare 178. 10 Jur 109) was only cited.

12. *Clindennin* v. *O'Keeffe*, 1 Hog. 118. This case was cited before, and approved of by Lord Lyndhurst, in *Begbie* v. *Beale*, MS., May 1834.

13. *Clinton* v. *Hooper* (1 Ves. J. 187) disapproved of in *Hudson* v. *Carmichael*, 1 Kay 613; 18 Jur. 851; 23 L. J., Ch., 893

14. *Clive* v. *Clive* (Kay 600). This decision in *Clive* v. *Clive* turned upon the peculiar wording of the clause of the deed of settlement in that case. Per Wood, V.-Ch., in *Wright* v. *Tuckett*, 1 John. & H. 266.

15. *Clogstown* v. *Walcott* (13 Sim. 523). I think all the authorities are consistent with this view of the case, except *Clogstown* v. *Walcott*. But I do not think that case can be reconciled with *Elliott* v. *Elliott* (15 Sim. 321) or with *Cowx* v. *Foster* (1 John. & H. 30), to say nothing of *Ferrier* v. *Jay* (10 L. R., Eq., 550; 39 L. J., Ch., 686; 23 L. T. 302; 18 W. R. 1130), so that case creates no difficulty. Per Lord Selbourne, C., in *Teape's Trusts, Re*, 16 L. R., Eq., 442, 446; 28 L. T. 799; 21 W. R. 780; 43 L. J., Ch., 87.

16. *Clough* v. *Ratcliffe* (1 De G. & Sm. 164). I think that case has been overruled in a recent case, where the Lords Justices held that a court of equity may entertain a suit merely to declare a will valid. Per Willes, J., in *Hall* v. *M'Farlane*, 2 C. B., N. S., 803.

17. *Clough* v. *Ratcliffe* (1 De G. & Sm. 164) distinguished in *Hodges* v. *Wale*, 2 W. R 65.

18. *Clones* v *Higginson* (1 Ves. & B. 524). With respect to that case, Sir Edward Sugden, in his excellent treatise, has noticed as a criticism on the elaborate judgment of Sir Thomas Plumer, that that judge did not distinguish between two sets of cases which have occurred in these courts (Sugden on Vendors and Purchasers, 13th ed, 132). Per Stuart, V.-Ch, in *Dear* v. *Verity*, 38 L. J., Ch., 297, 302.

19. *Coalville* v. *Wood* (2 C. B. 210) commented on in *Dobbs* v. *Grand Junction Waterworks Co.*, 9 L. R, App. Cas, 49; 53 L. J., Q. B., 50; 49 L. T. 541: 32 W. R. 432. Reversing 10 L. R., Q. B. D., 337; 52 L. J., Q B., 90; 47 L. T. 504; 31 W. R 359.

20. *Cobbett* v. *Woodward* (14 L. R., Eq., 407; 41 L. J., Ch., 656; 27 L. T. 27; 20 W. R. 963) overruled in *Maple* v. *Junior Army and Navy Stores*, 21 L. R., Ch. D., 369; 31 W. R. 70; 47 L. T. 589; 52 L. J, Ch., 67

21. *Cockell* v. *Taylor* (15 Beav. 103; 21 L. J., Ch., 545), observed upon in *Barnard* v. *Hunter*, 2 Jur., N. S., 1213; 5 W. R. 92.

22. *Cockroft* v. *Sutcliffe* (25 L J., Ch., 313; 5 W. R. 340). To hold the deed to be void would be what I fear is too much the tendency of technical rules; it would be to strain a rule, intended for the purpose of benefiting the objects of the power, to a rigid exactness which inflicts a plain and manifest injury on them. This appears to me to be the evil attempted to be avoided by Lord Eldon in *McQueen* v. *Farquhar* (11 Ves. 467), and also in the case of *Cockroft* v. *Sutcliffe*, which is a still stronger case, and which appears to me to be a most valuable decision. There a tenant for life with a power of appointment among his children appointed to two of them, and then joined with them in a mortgage, the money being expressed to be advanced to all three, and it was held by Lord Hatherley, then Wood, V.-Ch, that this was no fraud on the power of appointment. I adopt that case in its fullest extent. The meaning and the good sense of the rule appear to be that if the appointor, either directly or indirectly, obtains any exclusive advantage for himself, and that to obtain this advantage is the object and the reason of its being made, then the appointment is bad; but that if the whole transaction taken together shows no such object, but only shows an intention to improve the whole subject-matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent or void, although by the force of circumstances such improvement cannot be bestowed on the property which is the subject of the appointment without the appointor to some extent participating therein. Per Lord Romilly

M. R., in *Huish's Charity, Re*, 22 L. T., N. S., 565, 566, 567; 10 L. R., Eq., 5; 39 L. J., Ch., 499; 18 W. R. 817.

1. *Cockle* v. *Joyce* (7 L. R., Ch. D., 56; 26 W. R. 41). When this case came before me I was at first disposed to think that the defendant need not prove that he had been served with notice of trial. But I was told by the registrar that the practice was to require proof of the service. *Lows, Exp. & Re* (7 L. R., Ch. D., 160; 37 L. T., N. S., 583), however, appears to be a case in point, and upon its authority I now hold that the defendant need not prove that he has been served with notice of trial, and I give judgment for him with costs. Per Fry, J., in *James* v. *Crow*, 7 L. R., Ch. D., 410, 411; 47 L. J., Ch., 200; 26 W. R. 236; 31 L. T., N. S., 649.

2. *Cockshott* v. *London General Cab Co.* (47 L. J., Ch., 126: 26 W. R. 31) overruled in *Chorlton* v. *Dickie*, 13 L. R., Ch. D., 160; 49 L. J., Ch., 40; 28 W. R. 228.

3. *Coffin* v. *Cooper* (34 L. J., Ch., 692; 12 L. T. 106; 13 W. R. 571; 2 Dr. & Sm. 365) approved and followed in *Palmer* v. *Locke*, 15 L. R., Ch. D., 294; 50 L. J., Ch., 113; 43 L. T. 454; 28 W. R. 926.

4 *Cogan* v. *Stevens* (5 L. J., Ch., 17; S. C. Lewin on Trusts, App. 911, 3rd ed.), although as a decision at the Rolls, I am not bound by it, and, if I thought otherwise, I could come to a different conclusion, yet I conceive it is so consistent with all reason and justice, that one would not disturb it, and certainly I should be the very last to disturb or quarrel with it. Per Wood, V.-Ch., in *Reynolds* v. *Godlee*, Johns. 536, 583; 6 Jur., N. S., 495, 506.

5 *Cohen* v. *Wilkinson* (1 Macn. & G. 481; 1 H & Tw. 554; 14 Jur. 491), observed upon in *Hodgson* v. *Powis* (*Earl*), 1 De G. M. & G. 6; 21 L. J., N. S., Ch., 17; 15 Jur 1022.

6. *Cole* v. *Scott* (16 Sim. 259; 1 Macn. & G. 518) distinguished in *Midland Railway Co., Re, Otley & Ilkley Branch, Exp.*, 34 Beav. 525: 6 N. R. 244. S. C. *nom. Otley & Ilkley Railway Co., Re*, 11 Jur., N. S., 818; 34 L. J., Ch., 596; 13 W. R. 851; 12 L. T., N. S., 659.

7. *Cole* v. *Scott* (1 Macn. & G. 518) observed upon in *Langdale* (*Lady*) v. *Briggs*, 3 Sm. & G. 246.

8. *Coleman* v. *Mason* (L. & T. 545; 4 Ir. Eq. R. 421), disapproved of in *Abbott* v. *Stratten*, 3 J. & L. 603; 9 Ir. Eq. R. 233.

9. *Collett* v. *Dickinson* (11 L. R., Ch. D., 687; 40 L. T. 394) distinguished in *Pike* v. *FitzGibbon*, 41 L. T. 148; 28 W. R. 667.

10. *Collier* v. *M'Bean* (34 Beav. 426; 13 W. R. 766; and on appeal, 1 L. R., Ch., 81; 14 W. R. 156). A good many years ago William Collier, the father, attempted to sell the estate; the purchaser objected to the title, and therefore a suit of *Collier* v. *M'Bean* was instituted, which came on to be heard before my predecessor, Lord Romilly. Upon the hearing of that suit, which was for specific performance, his lordship determined two things: first of all that the purchaser was not to take the title, because it was bad; and, secondly, that according to the true construction of the will the estate taken by the trustees was what I may call a determinable fee. His lordship says, at p. 430, "I am of opinion that, though the estate taken by the trustees was a fee simple estate, still that it was one determinable on the payment of the debts and legacies, and the decease of William Collier." So that he decided that the title was bad, and because they took a determinable fee The case went upon appeal, and I am sorry to say the Lords Justices appear to me to come to a decision quite as contrary to law as the decision of Lord Romilly was, because they decided that they could not force the title on the purchaser, one Lord Justice being of opinion that the title was good, and the other not appearing to have dissented. I may say so now without difficulty, because that class of decisions has been since overruled by a decision of the Court of Appeal in *Alexander* v. *Mills* (6 L. R., Ch., 124; 19 W. R. 310), therefore I am entitled to say that the decision in *Collier* v. *M'Bean*, in the Appeal Court, was not according to law. Now comes the singularity of the case. In that state of the authorities, I felt a difficulty (though I thought the decision altogether erroneous) in overruling a decision come to on a former occasion by my predecessor, and I declined to do it. The case was therefore, at my request, taken before the present Court of Appeal, and they gave me leave to consider the case, as if I was not bound by the decisions of Lord Romilly, or the opinion expressed by Knight Bruce, L. J., on appeal. Therefore I was free to consider it as if there were no authority on the question. Now comes another singular point. When the case was on before, the counsel for the plaintiff naturally asserted that I was bound by the decision of Lord Romilly, and I thought I was, until I was freed from it, but when the case came on to be argued, and I was not to be bound by that decision, neither counsel asserts that that decision is right, but both positively abandon it, and the junior counsel on consideration say that they cannot support the decision. That is a very strong and a very peculiar circumstance. His lordship having determined according to the true construction of the will that there was a determinable fee, neither of the counsel for the plaintiff will argue in support of that proposition at all. In fact, there is no case at all to be found like it; no such determinable fee was ever heard of, and it appears to me that the whole decision was founded on a simple misapprehension of what the law as to real property is when applied to the case of such devisees as we are now dealing with. I should not perhaps have expressed myself so strongly if it had not been for the singular fact that neither counsel has even endeavoured to support it. There is not an authority to be found for any such determinable fee. I have looked at an enormous number of cases (I am afraid to count them) to see if I could find it, but I have been quite as unsuccessful as the counsel for the plaintiff, and I think there is no such case to be found. I think, therefore, I may dismiss the interpretation of the will given by Lord Romilly as being utterly untenable. Per Jessel, M. R., in *Collier* v. *Walters*, 29 L. T., N. S., 868, 870; 22 W. R. 239, 210; 17 L. R., Eq., 252; 43 L. J., Ch., 216.

11. *Collins* v. *Lamport* (34 L. J., Ch., 196; 11 L. T. 497; 13 W. R. 283) followed in *The Fanchon*, 5 L. R., P. D., 173; 50 L. J., P., 4; 42 L. T. 483; 29 W. R. 399.

1. *Collins* v. *Shirley* (1 Russ. & M. 638) examined in *Thompson* v. *Kendall*, 9 Sim. 397; 9 L. J., N. S., Ch., 318; 4 Jur. 551.

2. *Colyer, Re* (50 L. J., Ch., 79; 43 L. T. 454), followed in *Aston, Re*, 23 L. R., Ch. D., 217; 48 L. T. 195; 31 W. R. 801.

3. *Compton* v. *Richards* (1 Price 27) distinguished in *Watson* v. *Troughton*, 48 L. T. 508.

4. *Cooke* v. *Chilcott* (3 L. R., Ch. D., 694; 34 L. T. 207) not followed in *Haywood* v. *Brunswick Permanent Building Society*, 8 L. R., Q. B. D., 403; 51 L. J., Q. B., 73; 45 L. T. 699; 30 W. R. 299; and in *London & South-Western Railway Co.* v. *Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 530; 46 L. T. 449; 30 W. R. 620.

5. *Cooke* v. *Crawford* (13 L. J., Ch., 406; 13 Sim. 91) held to be overruled in *Osborne* to *Rowlett*, 13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365. But see *Morton and Hallett, Re*, 15 L. R., Ch. D., 143; 49 L. J., Ch., 559; 42 L. T. 602; 28 W. R. 895.

6. *Cooke* v. *Cramford* (13 Sim. 91) considered in *Macdonald* v. *Walker*, 14 Beav. 556.

7. *Cooke* v. *Crawford* (13 Sim. 91) commented on and held to have been misunderstood in *Wilson* v. *Bennett*, 5 De G. & Sm. 475; 16 Jur. 966; 21 L. J., Ch., 741.

8. *Cooke* v. *Crawford* (13 Sim. 91) distinguished in *Saloway* v. *Strawbridge*, 1 Kay & J. 371; 24 L. J., Ch., 393. Affirmed 1 Jur., N. S., 1194; 25 L. J., Ch., 121; 7 De G. M. & G. 594.

9. *Cooke* v. *Crawford* (13 Sim. 90) observed upon in *Ashton* v. *Wood*, 3 Jur., N. S., 1164, 1167; 3 Sm. & G. 436. The doctrine of this case will not be extended. *Hall* v. *May*, 3 Kay & J. 585.

10. *Cooke* v. *Gittings* (21 Beav. 497). Malins, V.-Ch., said, that it appeared to him that leave to amend ought to have been given in that case. *Rayner* v. *Kochler*, 41 L. J., Ch., 697; 14 L. R., Eq., 438; 27 L. T. 471.

11. *Cooke* v. *Turner* (15 M. & W. 727). There are undoubtedly dicta and even decisions in some of the earlier cases to the effect that conditions of this kind (that a legatee disputing the will should be deprived of its benefits) were to be held to be *in terrorem* only, and, in the language of the Touchstone, "against the liberty of the law." But in the case of personal legacies effect was given to the condition if there was a gift over on the breach of the condition. The whole law on this subject appears to their lordships to have been considered and put upon a sound foundation by the Court of Exchequer in *Cooke* v. *Turner* (15 M. & W. 727), upon the case sent to them by the Court of Chancery. It was suggested at the bar that that ruling was not acted upon by the Court of Chancery in the particular case. But, from the report of that case in the fifteenth volume of Simon's Reports, it appears that though pressed to send the case before another court of law, the Vice-Chancellor of England declined to do so, but directed, in the interest of the unborn issue of a marriage, an issue so framed as not to involve the forfeiture by the legatees of their legacy under the clause assumed to be valid. The case of *Dickson, Exp.* (20 L. J., Ch., 33), which was decided by Lord Cranworth as Vice-Chancellor, after his judgment in *Cooke* v. *Turner*, is supposed to conflict with the latter. But it does not really do so. No doubt the learned judge says of such conditions as the present that they had been "considered (whether justly or not it is unnecessary to inquire) as contrary to the policy of the law." But he was not in any way called upon to decide that question: he was dealing with a condition of a very different kind, to which he gave effect. The real effect of his judgment is only that, if the condition be *conditio rei licitæ*, it ought to be enforced. It does not affect the authority of *Cooke* v. *Turner*. Per Sir Barnes Peacock, P. C., in *Evanturel* v. *Evanturel*, 23 W. R. 32, 36; 31 L. T., N. S, 105, 110, 111; 43 L. J., P. C., 58.

12. *Cooke's Settled Estates, Re* (12 L. R., Eq., 12; 40 L. J., Ch., 400; 19 W. R. 693), inconsistent with his own previous decisions, and, therefore, Lord Romilly, M. R., declined to follow it in *Shaw's Settled Estates, Re*, 14 L. R., Eq., 9; 41 L. J., Ch., 166.

13. *Cookney* v. *Anderson* (1 De G. J. & S. 365). This case has not altered the practice as to serving a defendant out of the jurisdiction. *Curtiss* v. *Grant*, 9 Jur., N. S., 766.

14. *Cookney* v. *Anderson* (1 De G. J. & S. 365; 32 L. J., Ch., 427; 8 L. T., N. S., 295) not followed by Stuart, V.-Ch., in *Drummond* v. *Drummond* (12 Jur., N. S., 581; 35 L. J., Ch., 780; 14 W. R. 828), and expressly overruled on appeal by the full Court of Appeal. See S. C. 15 L. T., N. S, 337; 15 W. R. 267; 36 L. J., Ch., 153, and consequently the Consolidated Orders have a statutory force and effect, and under Consolidated Order X, Rule 7, the Court of Chancery may order service abroad in cases not falling within the 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

15. *Cookson* v. *Cookson* (6 L. J., Ch., 337; 8 Sim. 529) not followed in *Cox* v. *Willoughby*, 13 L. R., Ch. D., 863; 49 L. J., Ch., 237; 42 L. T. 125; 28 W. R. 503.

16. *Coombe, Re* (1 Giff. 91; 5 Jur., N. S., 784; 7 W. R. 609), approved in *Bright's Settlement, Re*, 13 L. R., Ch. D., 413; 42 L. T. 308; 28 W. R. 551.

17. *Coope* v. *Carter* (2 De G. M. & G. 297, 298; 21 L. J., Ch., 570). Dictum of Knight Bruce, L. J., in, explained. Lord Eldon's rule, that in order to obtain an inquiry as to wilful neglect and default against an executor or a trustee, the plaintiff must allege and prove at least one act of wilful neglect or default, is still the rule, and was not intended to be relaxed by *Coope* v. *Carter* (2 De G. M. & G. 292). *Dicta* in that case, from which the contrary has been inferred, explained. *Sleight* v. *Lawson*, 3 Kay & J. 292, 297; 26 L. J., Ch., 553, 556

18. *Coope* v. *Carter* (2 De G. M. & G. 298). The observations in this case were not meant to let in general allegations of default, but to meet the case of specific allegations imperfectly proved at the hearing. See *Massey* v. *Massey*, 2 John. & H. 728; 32 L. J., Ch., 13; 11 W. R. 19; 7 L. T., N. S., 311; 1 N. R. 15.

19. *Coope* v. *Carter* (2 De G. M. & G. 297) discussed in *Sleight* v. *Lawson*, 3 Kay & J. 292; 26 L. J., Ch., 553.

20. *Cooper, Exp. Baum, Re* (10 L. R., Ch. D., 313; 48 L. J., Bky., 1; 39 L. T. 521; 27 W. R. 274), distinguished in *Woodgate* v. *Godfrey*, 5 L. R., Exch. D., 24; 49 L. J., Exch., 1; 42 L. T. 34; 28 W. R. 88.

1. *Cooper* v. *Blissett* (1 L. R., Ch. D., 691; 45 L. J., Ch., 272; 24 W. R. 235). The good sense of the matter is entirely in accordance with the view of V.-Ch Hall in *Cooper* v. *Blissett*, but the rule is express that, when no other provision is made by the Orders, the old procedure and practice remain. The writ had better be amended by making the plaintiff sue on behalf of himself and all other creditors. Per Jessel. M. R., in *Worraker* v. *Pryer*, 2 L. R., Ch D., 109, 111; 45 L. J., Ch., 273; 24 W R. 269.

2. *Cooper* v. *Bockett* (4 Moo. P. C. 419; 10 Jur., 913) considered, and approved. *Greville* v. *Tylee*, 7 Moo. P. C. 320.

3. *Cooper* v. *Hubbuck* (7 Jur., N. S., 457; 9 W. R. 352). Where Romilly, M. R., was supposed to have held that a party having several windows in a house could put an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement appeared to arise therefrom. I wholly dissent from this doctrine. I think that the right to restrict the owner of the adjoining land from building on his own land gained by user or grant, must be confined to the subject matter of such user or grant, and that the restriction on the owner of the servient tenement must be substantially the same, according to the rule as laid down in *Blanchard* v. *Bridges*, 4 A. & E 176; 5 N. & M. 567. Per Crompton, J., in *Hutchinson* v. *Copestake*, 9 C. B., N. S., 863. 867; 31 L. J., C. P., 19.

4. *Coote* v. *Whittington*. See *post*, p. 8333 (6), *Rowsell* v. *Morris*.

5. *Cope* v. *Doherty* (4 Kay & J. 381) commented on in *The Amalia*, 2 N. R. 533.

6. *Copeland* v. *Stephens* (1 B. & Ald. 593), has no application where, by virtue of the Bankruptcy Act, the bankrupt's estate vests in the assignees. *Cartwright* v. *Glover*, 2 Giff. 620.

7. *Coppin* v. *Coppin* (2 P. W. 291) overruled. *Sproule* v. *Prior*, 8 Sim. 189; 6 L. J., N. S., Ch., 1.

8. *Corbett* v. *Baker*, on re-hearing, 3 Anstr. 755, doubted. See arguments to *Ravold* v. *Russell*, Younge 15.

9. *Cordwell* v. *Mackrill* (2 Eden 344; Ambl. 517) observed upon in *Thompson* v. *Simpson*, 1 Dr. & War. 459.

10. *Corner* v. *Hake* (2 Cox 173) overruled. See Beam. Costs 308.

11. *Cornewall* v. *Cornewall* (12 Sim. 298; 10 L. J., N. S., Ch., 364; 5 Jur. 744) overruled. *Gervis* v. *Gervis*, 14 Sim. 654; 16 L. J., N. S., Ch., 422; 11 Jur. 578.

12. *Cornish* v. *Gest* (2 Cox 27) observed on in *Herbert* v. *Eyre*, 2 Jones 803.

13. *Corporation of Sons of Clergy* v. *Sutton* (29 L. J., Ch., 393; 6 Jur., N. S., 84; 8 W. R. 167; 27 Beav. 651) followed in *Royal Society* v. *Thompson*, 17 L. R., Ch. D., 407; 50 L. J., Ch., 344; 44 L. T. 274; 29 W. R. 838.

14. *Cory* v. *Cory* (1 Ves. 19). See as to this case 18 Ves. 12.

15. *Corser* v. *Cartwright* (7 L. R., H. L., 731) followed in *West of England and South Wales Bank* v. *Murch*, 23 L. R., Ch. D., 138; 52 L. J., Ch., 784; 48 L. T. 417; 31 W. R. 467.

16. *Cosgrave* v. *Gannon* (3 Ir. Eq. R.) approved of in *Whaley* v. *Whaley*, 11 Ir. Eq. R. 276.

17. *Costigan* v. *Hastler* (2 Sch. & Lef. 62), where it was held, that if a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it is highly unreasonable; followed in *Hutton* v. *Beeton*, 9 Jur., N. S., 1310.

18. *Cotesworth*, *Exp.* (1 Dea. & Ch. 281; Mont. & Bli. 92; 2 L. J., N. S., Bky., 18), affirmed *Mattos*, *Exp.*, *Vanzeller*, *Re*, 1 Mont. & A. 315.

19. *Cothay* v. *Sydenham* (2 Bro. C. C. 391), distinguished in *Williams* v. *Williams*, 17 L. R., Ch. D., 437; 44 L. T. 573

20. *Cotterell* v. *Strutton* (8 L. R., Ch., 295) followed in *Turner* v. *Hancock*, 20 L. R., Ch D., 303; 51 L. J., Ch., 517; 46 L. T. 750; 30 W. R. 480.

21. *Cottle*, *Exp.*, *Wolverhampton*, *Chester*, *& Birkenhead Railway Junction Co.*, *Re*, 2 Macn. & G 185; 2 H. & Tw. 382; 19 L. J., N. S., Ch., 366; 14 Jur. 655 Reversing 14 Jur. 453. Affirmed *sub. nom. Norris* v. *Cottle*, 2 H. L. Ca. 647; 14 Jur. 703. Followed in *Roberts*, *Exp.*, *Wolverhampton*, *Chester*, *& Birkenhead Junction Railway Co*, *Re*. 2 Macn. & G. 192; 2 H. & Tw. 391; 19 L. J., N. S., Ch., 368; 1 Drew. 204; 16 Jur. 681. Affirming 3 De G. & Sm. 205; 6 Rail. Ca. 310; 14 Jur. 539. n.

22. *Couch* v. *Stratton* (4 Ves. 391) followed in *Salisbury* v. *Salisbury*, 6 Hare 526; 17 L. J., Ch., 480; 12 Jur. 671.

23. *Couldery* v. *Bartrum* (19 L. R., Ch. D., 394; 51 L. J., Ch., 265; 45 L. T. 689; 30 W. R. 141) followed in *Société Générale de Paris* v. *Geen*, 8 L. R., App. Cas., 606; 32 W. R. 97; 53 L. J., Ch., 153; 49 L. T. 750.

24. *Cousens* v. *Cousens* (7 L. R., Ch., 48; 25 L. T., N. S., 719; 41 L. J., Ch., 166). The most important point was that as to the fees of the third counsel. In *Cousens* v. *Cousens*, their lordships affirmed the decision of the Vice-Chancellor, affirming the decision of the taxing-master. In that particular case the Court thought that the defendant must be made to pay the costs occasioned by his opponent having employed three counsel. The arguments addressed to the Court to-day led his lordship to think that they had gone rather too far in that case If *Cousens* v. *Cousens* applied to the present case, it amounted to an extension of the rule as to allowing the costs of three counsel to all cases in which the junior counsel was called within the bar during the progress of a suit. But his lordship thought that the taxing-master was quite right in holding that this case was not brought within *Cousens* v. *Cousens*. Here there was no moral obligation to employ at the hearing a leader who had appeared for the defendants on a mere interlocutory application; while in *Cousens* v. *Cousens* there was a retainer which did impose such a moral obligation. Per James, L. J., in *Betts* v. *Cleaver*, 27 L. T., N. S., 85, 86; 7 L. R., Ch., 513; 41 L. J., Ch., 663; 20 W. R. 732.

25. *Coutts* v. *Acworth* (8 L. R., Eq., 558; 38 L. J., Ch., 694). It has been almost laid down in this case, that, where there is no power of revocation contained in a voluntary settlement, the deed will be set aside; and *Wollaston* v. *Tribe* (9 L. R., Eq., 44), and *Everett* v. *Everett* (10 L. R., Eq., 405) have been relied on as favouring the same view. But whether there

should be a power of revocation or not must depend upon circumstances, and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation. Per Lord Hatherley, C., in *Phillips* v. *Mullings*, 7 L. R., Ch., 244, 247; 41 L. J., Ch., 211, 213; 20 W. R. 129.

1. *Couturier* v. *Hastie* (8 Exch. 40; 22 L. J., Exch., 97, 102), that a contract for a *del credere* agency is not a promise for the debt of another within the 4th section of the Statute of Frauds, observed upon in *Wickham* v. *Wickham*, 2 Kay & J. 478. *Couturier* v. *Hastie* was reversed by Exchequer Chamber (9 Exch. 102); and by House of Lords (25 L. J., Exch., 253).

2. *Coverdale* v. *Charlton* (4 L. R., Q. B. D., 104; 48 L. J., Q. B., 128) explained in *Rolls* v. *St. George, Southwark (Vestry)*, 14 L. R., Ch. D., 785; 49 L. J., Ch., 691; 43 L. T. 140; 28 W. R. 867. Reversing 28 W. R. 366.

3. *Coventry and Dixon's case, Canadian Land Reclaiming and Colonizing Co., Re* (14 L. R., Ch. D., 660; 42 L. T. 559; 28 W. R. 775), discussed in *Fliteroft's case, Exchange Banking Co., Re*, 21 L. R., Ch. D., 519; 31 W. R. 174; 48 L. T. 86; 52 L. J., Ch., 217. Varying 51 L. J., Ch., 525; 46 L. T. 474; 30 W. R. 695.

4. *Coventry and Dixon's case, Canadian Land Reclaiming and Colonizing Co., Re* (14 L. R., Ch. D., 660; 42 L. T. 559; 28 W. R. 775) explained and commented on in *Anglo-French Co-operative Society, Re*, 21 L. R., Ch. D., 492; 47 L. T. 638; 31 W. R. 177; and discussed in *National Funds Assurance Co., Re*, 10 L. R., Ch. D., 118.

5. *Cowan's Estate, Re, Rapier* v. *Wright* (14 L. R., Ch. D., 638; 49 L. J., Ch., 402; 42 L. T. 866; 28 W. R. 827), explained and commented on in *Webb* v. *Stenton*, 11 L. R., Q. B. D., 518; 52 L. J., Q. B., 584; 49 L. T. 432.

6. *Cowell* v. *Simpson* (16 Ves. 275) explained and commented on in *Angus* v. *McLachlan*, 23 L. R., Ch. D., 330; 52 L. J., Ch., 587; 48 L. T. 863; 31 W. R. 641.

7. *Cowx* v. *Foster* (1 Johns. & H. 30) opposed to *Clogstoun* v. *Walcott* (13 Sim. 523). This point has been before two learned judges, whose decisions are in direct opposition to one another. On the bulk of the authorities, I am bound to follow the latter of the two decisions, that in *Cowx* v. *Foster*, by the Lord Chancellor, when Vice-Chancellor, Wood. Although all the authorities do not appear to have been cited in that case, I must assume that the Vice-Chancellor had them all in his mind when he gave that decision. In *Cowx* v. *Foster*, which was precisely the same case as *Clogstoun* v. *Walcott* (13 Sim. 523), Wood, V.-Ch., said that the direction for payment of debts was not sufficient to avoid the exercise of the power. On principle, and on the authority of that case, therefore, I am of opinion that the power was well executed. I am sorry that *Clogstoun* v. *Walcott* was not cited in *Cowx* v. *Foster*, but still I think Wood, V.-Ch., came to a sound conclusion. Per Malins, V.-Ch., in *Ferrier* v. *Jay*, 23 L. T., N. S., 302; 10 L. R., Eq., 550; 39 L. J., Ch., 686; 18 W. R. 1130.

8. *Cox, Sir Charles* (3 P. W. 331) questionable. *Cook* v. *Greyson*, 3 Drew 547. See also Leading Article, 3 Jur., N. S., 429, Part I.

9. *Cox* v. *Hickman* (8 H. L. Ca. 268) followed in *English and Irish Church and University Assurance Society, Re*, 2 N. R. 107.

10. *Cox* v. *Land and Water Journal Co.* (9 L. R., Eq., 324; 39 L. J., Ch., 152; 21 L. T. 548; 18 W. R. 206) not followed in *Walter* v. *Howe*, 17 L. R., Ch. D., 708; 50 L. J., Ch., 621; 44 L. T. 727; 29 W. R. 776.

11. *Cozens* v. *Bognor Railway Co.* (1 L. R., Ch., 594; 12 Jur., N. S., 738; 14 W. R. 1002; 15 L. T., N. S., 168). A railway company having entered into possession of the land and constructed their railway, without having paid the whole of the purchase money, an order was made for payment of the balance, and upon default the company was restrained from using the land. This decision is contrary to *Pell* v. *Northampton & Banbury Junction Railway Co* (12 Jur., N. S., 897; 15 W. R. 27; 15 L. T., N. S., 168), and was not followed by the Lords Justices.

12 *Cradock* v. *Piper* (1 Macn. & G. 664; 19 L. J., Ch., 107) observed upon in *Broughton* v. *Broughton*, 5 De G. M. & G. 160; 1 Jur., N. S., 965; 25 L. J., Ch., 250; 3 W. R. 602. Affirming 3 Eq. Rep. 131; 2 Sm. & G. 422; 24 L. J., Ch., 190; 3 W. R. 130.

13. *Cradock* v. *Piper* (1 Macn. & G. 664; 19 L. J., Ch., 107) questioned by Cranworth, C., and Lord Brougham in *Manson* v. *Baillie*, 2 Macq. H. L. Ca. 80.

14. *Craig* v. *Duffus* (6 Bell's App. Cas. 308) observed upon in *Robin* v. *Hoby*, 2 Jur., N. S., 647.

15 *Crause* v. *Cooper* (1 John. & H. 213). A testator, by reference, gave the income of a fund to M., who was unmarried, for life, with a gift to her husband (if any) for his life; and upon the decease of the longer liver of M. and her husband, he directed his trustees to pay, assign, and transfer the capital to his four children, A. B., C., and D., who should be then living:—Held, that upon the death of any one of the four, A. B., C., and D., whether before or after the determination of the life estates, his children then living took vested interest in the fund; and that his children then dead were wholly excluded. The dictum in *Crause* v. *Cooper*, that in such a case the children must survive the tenants for life, overruled. *Meyricke, Re*, 35 L. J., Ch., 148.

16. *Crawford, Exp.* (28 L. T. 214; 21 W. R. 509) approved and followed in *Moir, Exp. & Re*, 21 L. R., Ch. D., 61; 51 L. J., Ch., 931; 47 L. T. 267; 30 W. R. 738.

17. *Crawshaw* v. *Crawshaw* (14 L. R., Ch. D., 817; 49 L. J., Ch., 662; 43 L. T. 309; 29 W. R. 68) distinguished in *Barker's estate, Re, Hetherington* v. *Longrigg*, 15 L. R., Ch. D., 635; 29 W. R. 281; and in *Savage's Trusts, Re*, 50 L. J., Ch., 131.

18. *Craythorne* v. *Swinburne* (14 Ves. 160) discussed in *Snowdon, Exp. & Re*, 17 L. R., Ch. D., 44; 50 L. J., Ch., 540; 44 L. T. 830; 29 W. R. 654.

19. *Creaton* v. *Creaton* (26 L. J., Ch., 266; 5 W. R. 123; 3 Sm. & G. 386) followed in *Marshall* v. *Gingell*, 21 L. R., Ch. D., 790; 51 L. J., Ch., 818; 47 L. T. 159; 31 W. R. 63.

20. *Crickett* v. *Dolby* (3 Ves. 17) that a wife is within the exception, as to interest on legacies, is overruled. *Stent* v. *Robinson*, 12 Ves. 461. *Lowndes* v. *Lowndes*, 15 Ves. 301; *Raven* v. *Waite*, 1 Swan 553; 1 Wils. 204.

21. *Cripps* v. *Wolcott* (4 Madd. 11) is a

decision binding on the Court of Chancery. *M'Donald* v. *Bryce*, 16 Beav. 581; 1 W. R. 261; 17 Jur. 335; 22 L. J., Ch., 779; and followed in *Hearn* v. *Baker*, 2 Kay & J. 383; and distinguished in *Re Hopkins*, 2 Hem. & M. 411.

1. *Cripps* v. *Wollcott* (4 Madd. 11). The rule in this case is not applicable to a devise of real estate, at least where no personal estate whatever is included in the same gift. In that case the principle laid down in *Wilson* v. *Bailey* (3 Bro. P. C. 195) will be followed, on the ground that the estate is to be vested at the earliest possible moment. *Gregson, Re*, 2 Hem. & M. 504; 33 L. J., Ch., 531; 4 N. R. 222. But on appeal the Lords Justices held that the rule applied as well to real as to personal estate. S. C. 34 L. J., Ch., 41; 2 De G. J. & S. 428; 5 N. R. 99; 10 Jur., N. S., 1138; 13 W. R. 193; 11 L. T., N. S., 460.

2. *Crofts* v. *Middleton* (2 Kay & J. 194; 1 Jur., N. S., 1133; on appeal, 8 De G. M. & G. 192; 2 Jur., N. S., 528; 25 L. J., Ch., 513). I am quite satisfied, with reference to the fines and Recoveries Act, that the course of the observations in *Crofts* v. *Middleton* was intended to displace the error that I fell into, of saying the statute was not intended to give effect to that which could only be operated upon *de facto* if the deed were executed, and not as to matters settled by contract. I am quite satisfied that the reasoning and the decision in *Crofts* v. *Middleton* were intended to dispose of those abuses. Per Lord Hatherley, C., in *Pride* v. *Bubb*, 41 L. J., Ch., 105, 110.

3. *Crofts* v. *Middleton* (2 Kay & J. 194; 1 Jur., N. S., 1103; 25 L. J., Ch., 513; 8 De G. M. & G. 192) commented on in *White and Hindle, Re*, 26 W. R. 124; 7 L. R., Ch. D. 201; 47 L. J., Ch., 85.

4. *Crosbie, Exp., Bedell, Re* (7 L. R., Ch. D., 123; 47 L. J., Bky., 19; 37 L. T. 513; 26 W. R. 119), distinguished, and the judgment of James, L. J., explained in *Hood* v. *Newby*, 21 L. R., Ch. D., 605; 52 L. J., Ch., 204; 47 L. T. 721; 31 W. R. 185.

5. *Crookes* v. *Whitworth* (10 L. R., Ch. D., 289; 39 L. T. 348; 27 W. R. 149) not followed in *Wallace* v. *Greenwood*, 16 L. R., Ch. D., 362; 50 L. J., Ch., 289; 43 L. T. 720.

6. *Cross* v. *Hudson* (3 Bro. C. C. 30). See as to this case *Maundrell* v. *Maundrell*, 10 Ves. 247.

7. *Cross* v. *Sprigg* (6 Hare 552; 18 L. J., N. S., Ch., 204; 13 Jur. 785). *Semble*, the dictum of Wigram, V.-Ch., in this case that, if a debt be not released at law, it cannot be considered as released in equity, is not sustainable. *Hedges* v. *Aldworth*, 13 Ir. Eq. R. 406.

8. *Crossley* v. *City of Glasgow Life Assurance Co.* (4 L. R., Ch. D., 421; 46 L. J., Ch., 65; 36 L. T. 285; 25 W. R. 264) overruled as to part in *Webster* v. *British Empire Mutual Life Assurance Co.*, 15 L. R., Ch. D., 169; 49 L. J., Ch., 769; 43 L. T. 229; 28 W. R. 818.

9. *Crosse* v. *Bedingfield* (12 Sim. 35; 10 L. J., N. S., Ch., 219; 5 Jur. 836) referred to its special circumstances. *Powell's Trust, Re*, 10 Hare 134.

10. *Croughton, Re* (8 L. R., Ch. D., 460; 47 L. J., Ch., 795; 38 L. T. 447; 26 W. R. 574), not followed in *Bown, Re, O'Halloran* v. *King*, 49 L. T. 165, and distinguished in *Clarke's Trusts, Re*, 21 L. R., Ch. D., 748; 51 L. J., Ch., 855; 47 L. T. 43; 30 W. R. 778.

11. *Croughton, Re* (8 L. R., Ch. D., 460; 47 L. J., Ch., 795; 38 L. T. 447; 26 W. R. 574), approved in *O'Halloran* v. *King*, 27 L. R., Ch. D., 411; 53 L. J., Ch., 881; 50 L. T. 796; 33 W. R. 58.

12. *Crowder* v. *Stone* (3 Russ. 217; 7 L. J., Ch., 93), is a questionable authority, or no longer law. It is said that this view is in opposition to the decision of Lord Lyndhurst in *Crowder* v. *Stone*. If that case were to govern this, the decree would be that on the death of each his original share would go to the survivors living at his decease. Now, with every respect for the decision of Lord Lyndhurst, I am of opinion that *Crowder* v. *Stone* can no longer be considered law. Certain it is that *Littlejohns* v. *Household*, 21 Beav. 29, and *Cambridge* v. *Rous*, 25 Beav. 409, which are clear authorities to the contrary, were not cited in that case. As to the case of *White* v. *Baker* (8 W. R. 533; 2 De G. F. & J. 55), I agree with the Lord Chancellor that it was decided on the particular language of the will. Per Malins, V.-Ch., in *Marriott* v. *Abel* or *Abell*, 17 W. R. 569, 570; 20 L. T., N. S., 690; 7 L. R., Eq., 478; 38 L. J., Ch., 451, 453.

13. *Crowe* v. *Del Rio*, stated and observed upon in *Bent* v. *Young*, 9 Sim. 180; 7 L. J., N. S., Ch., 151; 2 Jur. 202.

14. *Crowther* v. *Crowther* (23 Beav. 305; 26 L. J., Ch., 702; 5 W. R. 290). An infant may file a bill in equity to recover land under a legal title. That was established by many early cases, and though there was a recent decision to the contrary (*Crowther* v. *Crowther*), the earlier authorities were not cited in that case, and it was in fact an erroneous decision. The law was laid down correctly by *Wyllie* v. *Ellice* (6 Hare 505), and the authorities cited in *Boddy* v. *Lefevre* (1 Hare 602. n.). Per Jessel, M.R., in *Howard* v. *Shrewsbury (Earl)*, 43 L. J., Ch., 495, 498; 17 L. R., Eq., 378, 398; 29 L. T., N. S., 862, 867; 22 W. R. 290.

15. *Crutwell* v. *Lye* (17 Ves. 335) observed upon in *Ginesi* v. *Cooper*, 14 L. R., Ch. D., 596; 49 L. J., Ch., 691; 42 L. T. 751; but see *Leggott* v. *Barrett*, 15 L. R., Ch. D., 306; 28 W. R. 962.

16. *Cummins (Executors)* v. *Finn*, cited and approved of in *Kirkwood* v. *Lloyd*, 12 Ir. Eq. R. 585; 11 Ir. Eq. R. 561.

17. *Cundy, Exp.* (2 Rose 357), approved in *Salaman, Exp., Taylor, Re*, 21 L. R., Ch. D., 394.

18. *Cunningham, Exp.* (3 Dea. & Ch. 58; Mont. & Bli. 269; 2 L. J., N. S., Bky., 58. Affirmed *nom. Belcher, Exp.*, 3 Dea. & Ch. 87; Mont. & Bli. 286; 2 L. J., N. S., Bky., 62. n.), approved in *Solomon, Exp.*, 3 Dea. & Ch. 77; Mont. & Bli. 308; 2 L. J., N. S., Bky., 62; and in *Wylie, Exp.*, 3 Dea. & Ch. 82.

19. *Cupit* v. *Jackson* (M'Clel. 495; 13 Price 721) followed, notwithstanding observations thereon, in 2 Byth. Conv. 49, 3rd ed. by Sweet. *White* v. *James*, 26 Beav. 191; 28 L. J., Ch., 179; 7 W. R. 35.

"I am bound by *Cupit* v. *Jackson*, and must follow it, notwithstanding any observations in a text-book." Per Romilly, M. R., in S. C., 4 Jur., N. S., 1214.

20. *Curling* v. *Austin* (2 Dr. & Sm. 129). It has been argued before us, and the language of Kindersley, V.-Ch., in the above case, has been relied upon as going to this extent, that where there is an open reference as to title

in the decree, the vendor is precluded from referring to the conditions of sale, or to the contract at all, to show that he has made a good title according to the conditions. I am of opinion that if the Vice-Chancellor's words bear that construction, it is not, and ought not, to be the rule of the Court. Whether there be any waiver otherwise is a question to be determined at the hearing; but the question whether there is a good title appears to me to mean whether there is a good title according to the contract, the specific performance of which is decreed at the hearing, whether those words are in the decree or not; otherwise in every case every stipulation as to evidence, and every stipulation as to the commencement of the title, and matters of that kind, would have to be referred to specially in the decree. Per James, L. J., in *Upperton* v. *Nicholson*, 6 L. R., Ch, 436, 442.

1. *Curnick* v. *Tucker* (17 L. R, Eq, 320) not followed in *Adams* v. *Kensington Vestry, Re, Adams, Re*, 24 L. R., Ch. D., 199; 52 L. J., Ch., 758; 48 L. T. 958; 32 W. R. 120.

2. *Currie, Exp., Great Northern & Midland Coal Co., Re* (3 De G. J. & S. 367; 32 L. J., Ch., 421; 8 L. T., N. S., 472) distinguished in *Roney's case, Llanharry Hematite Iron Ore Co., Re*, 4 De G. J. & S. 426; 33 L. J., Ch., 731; 10 Jur., N. S., 790, 812; 12 W. R. 814, 994; 10 L. T., N. S., 394.

3. *Currie* v. *Gould* (4 Beav. 119) followed in *Rider* v. *Wood*, 1 Kay & J. 644; 24 L. J., Ch., 737; 3 Eq. Rep. 1064.

4. *Curtis* v. *Fulbrook* (8 Hare 25, 29; 19 L. J., N. S., Ch., 65; 13 Jur. 1044), report of, corrected in *Curtis* v. *Fulbrook*, 8 Hare 278.

5. *Custance* v. *Bradsham* (14 L. J., Ch., 358; 4 Hare 315) not followed in *Att.-Gen.* v. *Hubbuck*, 10 L. R., Q. B. D., 488; 52 L. J., Q. B., 464; 48 L. T. 608. Affirmed 13 L. R., Q. B. D., 275; 53 L. J., Q. B., 146; 50 L. T. 374.

6. *Cuthbert* v. *Purrier* (Jac. 415). *Quære*, whether reconcilable with *Doe* v. *Glover*, 1 C. B. 448. *Palmer, Exp.*, 5 De G. & Sm. 649; 17 Jur. 108.

7. *Cuvillier* v. *Aylwin* (2 Knapp 72). But the petitioner is met by the case of *Cuvillier* v. *Aylwin*, in which the very point which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by this decision, his petition must be at once dismissed; but upon turning to the report of the case, their lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the 34 Geo. 3, c. 6 (Lower Canada Act), on the prerogative of the Crown. Their lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. Per Lord Chelmsford, *Marois, Re*, 8 Jur., N. S., 269.

8. *Cuvillier* v. *Aylwin* (2 Knapp's P. C. 72) not followed in *Cushing* v. *Dupuy*, 5 L. R., App. Cas., 409; 42 L. T. 445.

D.

9. *Dady* v. *Hartridge* (1 Dr. & Sm. 236) dissented from in *Clark* v. *Clark*, 34 L. J., Ch., 477.

10. *Dale & Co., Exp.* (11 L. R, Ch. D., 772; 48 L. J, Ch., 600; 40 L. T. 712; 27 W. R. 815), dissented from. *Hallett's Estate, Re, Knatchbull* v. *Hallett*, 13 L. R., Ch. D, 696; 49 L. J., Ch., 415; 42 L. T. 421; 28 W. R. 732. Reversing 41 L. T. 186.

11. *Dale's case* (Reilly 11) decided by Lord Cairns as arbitrator in the Albert Assurance Society, is not citable as an authority. The decision was nothing but an opinion of a living lawyer. Per James, L. J., in *India and London Life Assurance Co, Re, Dyke's case*, 41 L. J., Ch., 601, 603; 7 L. R, Ch., 651; 27 L. T. 191; 20 W. R. 790.

12. As to *Dagley* v. *Tolferry* (1 P W. 285) see *Phillips* v. *Paget*, 2 Atk 81.

13. *Dalgleish's Settlement, Re* (1 L. R., Ch. D., 46; 45 L. J., Ch., 68; 25 W. R. 122), overruled by the Court of Appeal. *Rathbone, Re*, 2 L. R., Ch. D., 483; 45 L. J., Ch., 531; 24 W. R. 566.

14. *Dalgleish's Settlement, Re* (4 L. R., Ch. D., 143), followed in *Crowe's Trusts, Re*, 14 L. R., Ch. D., 304. Corrected, *Id.* 610; 42 L. T. 822; 28 W. R. 885.

15. *Dalton* v. *Angus* (6 L. R., App. Cas., 740; 50 L. J., Q. B., 689; 44 L. T. 844; 30 W. R. 191) explained and commented on in *Tone* v. *Preston*, 24 L. R., Ch. D., 739; 49 L. T. 99; 32 W. R. 166.

16. *Dalton* v. *Hayter* (7 Beav. 586; 15 L. J., N. S., Ch., 33; 9 Jur. 1000), is not overruled by *Arnold* v. *Arnold* (1 Ph. 805; 16 L. J., N. S., Ch., 236; 11 Jur. 360, 484. See *Sprye* v. *Reynell*, 10 Beav. 351; 16 L. J., N. S., Ch., 260; 11 Jur. 360, 484.

17. *D'Angibau, Re, Andrews* v. *Andrews* (15 L. R., Ch. D., 228; 49 L. J., Ch., 756; 43 L. T. 135; 28 W. R. 930), explained and commented on in *Shipway* v. *Ball*, 16 L. R., Ch. D., 376; 50 L. J., Ch., 263; 44 L. T. 49; 29 W. R. 302.

18. *Daniel* v. *Dudley* (1 Phil. 1) observed upon in *Page* v. *Soper*, 17 Jur. 851; 22 L. J., Ch., 1044.

19. *Daniel* v. *Gosset* (19 Beav. 478), Jessel, *amicus curiæ*, stated that he had been counsel in this case, that the decision had been appealed from, and that, under the advice of counsel, the appeal was compromised by the parties who succeeded in the Court below giving up half the fund to their opponents. See *Corneck* v. *Wadman*, 7 L. R., Eq., 80, 81, 82.

20. *Dann, Exp., Parker, Re* (17 L. R., Ch. D., 26; 51 L. J., Ch., 290; 44 L. T. 760; 29 W. R. 771), explained and commented on in *Wilkinson, Exp.*, 22 L. R., Ch. D., 788; 52 L. J., Ch., 657; 48 L. T. 495; 31 W. R. 649.

21. *Darby* v. *Smith* (8 T. R. 82). "Not like any other case which can well happen." Per James, L. J., in *Symmons, Exp., Jordan, Re*, 14 L. R., Ch. D., 693; 42 L. T. 106; 28 W. R. 803.

22. *Darley* v. *Darley* (Ambl. 653; Dick. 397; 3 Wils. 6) observed upon by Lord Eldon in *Southey* v. *Somerville*, 13 Ves. 492.

23. *Daubeny* v. *Cockburn* (1 Mer. 626). The general rule laid down in this case, that where

an appointment is made for a bad purpose, it affects the whole appointment, does not apply to cases in which the evidence enables the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose. *Topham* v. *Portland* (*Duke*), 1 De G. J. & Sm. 517.

1. *Davenport* v. *Rylands* (1 L. R., Eq., 302; 35 L. J., Ch., 204; 14 L. T. 53; 14 W. R. 243) approved in *Fritz* v. *Hobson*, 14 L. R., Ch. D., 542; 49 L. J., Ch., 321; 42 L. T. 225; 28 W. R. 459.

2. *Davers* v. *Dewes* (3 P. W. 40) doubted and not followed in *Blight, Re, Blight* v. *Hartnoll* (45 L. T. 524), 19 L. R., Ch. D. 294; 51 L. J., Ch., 162; 30 W. R. 513. Affirmed 23 L. R., Ch. D., 218; 52 L. J., Ch., 672; 48 L. T. 543; 31 W. R. 535.

3. *David Lloyd & Co., Re* (6 L. R., Ch. D., 339; 37 L. T. 83; 25 W. R. 872), distinguished in *Fell, Exp., Cambrian Mining Co., Re*, 50 L. J., Ch., 836; 45 L. T. 208; 29 W. R. 881.

4. *David Lloyd & Co., Re* (6 L. R., Ch. D., 339; 37 L. T. 83; 25 W. R. 872), explained and commented on in *Jones* v. *Swansea Cambrian Building Society*, 50 L. J., C. P., 428; 44 L. T. 106; 29 W. R. 382.

5. *Davies, Re* (13 L. R., Eq., 163; 41 L. J., Ch., 97; 25 L. T. 785; 20 W. R. 165), distinguished in *Ickeringill's Estate, Re, Hinsley* v. *Ickeringill*, 17 L. R., Ch. D., 151; 50 L. J., Ch., 364; 29 W. R. 500; and followed and approved in *De Lusi, Re*, 3 L. R., Ir., 232.

6. *Davies* v. *Ashford* (15 Sim. 42) commented upon by James, L. J., in *Poole* v. *Heron*, L. J., Ch., 348, 351.

7. *Davies* v. *Evans* (7 Beav. 81) followed in *Re Heiron's Estate, Hall* v. *Ley*, 12 L. R., Ch. D., 795; 48 L. J., Ch., 688; 27 W. R. 750.

8. *Davies* v. *Humphreys* (6 M. & W. 153) followed in *Snowdon, Exp. & Re*, 17 L. R., Ch. D., 44; 50 L. J., Ch., 540; 44 L. T. 830; 29 W. R. 654.

9. *Davies* v. *Thornycroft* (6 Sim. 420; 5 L. J., N. S., Ch., 140) commented on in *Maber* v. *Hobbs*, 2 Y. & Coll. 317; 6 L. J., N. S., Exch. Eq., 12.

10. *Davies* v. *Whitmore* (28 Beav. 617; 8 W. R. 596). I held in *Ford* v. *Chesterfield* (*Earl*) (16 Beav. 516; 1 W. R. 217), that a defendant having an interest, and not having disclaimed before suit, must bear his own costs. I shall follow the rule there laid down, and not *Davies* v. *Whitmore*. Per Lord Romilly, M. R., in *Clarke* v. *Toleman*, 21 W. R. 66; 42 L. J., Ch., 23; 27 L. T. 599.

11. *Davis, Exp., Russ, Re* (45 L. J., Bky., 61; 2 L. R., Ch. D., 231; 24 W. R. 684; 34 L. T., N. S., 259), overruled. *Milward, Exp., Stanley, Re*, 16 L. R., Ch. D., 256; 50 L. J., Ch., 166; 44 L. T. 73; 29 W. R. 167.

12. *Davis* v. *Ashwin* (47 L. J., Ch., 70; 26 W. R. 139) questioned in *London & County Banking Co.* v. *Dover*, 11 L. R., Ch. D., 204; 48 L. J., Ch., 336; 27 W. R. 749.

13. *Davis* v. *Whitmore* (28 Beav. 617) overruled in *Clarke* v. *Toleman*, 42 L. J., Ch., 23.

14. *Dawson, Re* (8 W. R. 554; 2 L. T., N. S., 286), not followed in *Smith, Re*, 32 W. R. 408.

15. *Dawson* v. *Clark* (18 Ves. 247) commented on, and Lord Eldon's opinions adopted, in *Ellcock* v. *Mapp*, 3 H. L. Ca. 492. S. C. *nom. Mapp* v. *Ellcock*, 2 Ph. 793; 18 L. J., N. S., Ch., 217; 13 Jur. 290. Reversing 15 Sim. 568; 16 L. J., N. S., Ch., 425.

16. *Dawson* v. *Jay* (3 De G. M. & G. 764). There is only one other case which I think I am called upon to notice, *Dawson* v. *Jay*, before Lord Chancellor Cranworth. As at first stated at the bar, it certainly seemed closely in point, and it alarmed me much, for we were told that an American infant, who had a guardian regularly appointed by the Supreme Court at New York, having been fraudulently brought to England against the will of the guardian, Lord Cranworth had refused to interfere, and would not order the infant to be delivered up. But, on the case being examined, it turns out that the infant came to England with the entire concurrence of the guardian originally appointed, who continued guardian at the time of the removal, and that it was another guardian, afterwards appointed with doubtful regularity, who wished to get possession of the infant, and carry her back to America, after she had been living several years in England. It further appeared that she was a British subject, although born in America; and the Lord Chancellor was thus called upon, without any offence being imputed to her, to sentence her to transportation to America by the decree of a court of equity. Per Lord Campbell, C., in *Stuart* v. *Stuart*, 4 Macq. H. L. Ca. 1, 64; 7 Jur., N. S., 1129, 1132.

17. *Dawson* v. *Oliver Massey* (2 L. R., Ch. D., 753; 45 L. J., Ch., 519; 34 L. T. 551; 24 W. R. 993) distinguished in *Brown's Trusts, Re*, 18 L. R., Ch. D., 61; 50 L. J., Ch., 724; 44 L. T. 757.

18. *Dawson* v. *Whitehaven* (*Bank of*) (6 L. R., Ch. D., 218; 46 L. J., Ch., 884; 37 L. T. 64; 26 W. R. 34) distinguished in *Meek* v. *Chamberlain*, 8 L. R., Q. B. D., 31; 51 L. J., Q. B., 99; 46 L. T. 344; 30 W. R. 228.

19. *Day* v. *Day* (1 Drew. 569). I am bound to say my judgment is opposed to that of the V.-Ch. Kindersley, and though I have no power to overrule that decision, I entirely dissent from it and decline to follow it. Per Malins, V.-Ch., in *Power* v. *Hayne*, 8 L. R., Eq., 262, 270.

20. *Day* v. *Duberley* (16 Beav. 33; 5 H. L. Ca. 388, n.). Appeal dismissed, no one appearing on either side.

21. *Dearman* v. *Wyche* (9 Sim. 570) questioned in *Bolding* v. *Lane*, 8 Jur., N. S., 407; 10 W. R. 556.

22. *Dearman* v. *Wyche* (9 Sim. 570) shaken as an authority by Lord St. Leonards in his "Practical Treatise on the New Statutes relating to Property." 2d edit., p. 139, sect. 51.

23. *Dearman* v. *Wyche* (9 Sim. 590; 9 L. J., N. S., Ch., 70) impeached in *Wrixon* v. *Vize*, 3 Dr. & War. 104; 2 Con. & L. 133; 5 Ir. Eq. R. 173. But see *Henry* v. *Smith*, 2 Dr. & War. 387; 1 Con. & L. 506; 4 Ir. Eq. R. 502.

24. *Deare* v. *Hall* (3 Russ. 1) followed in *Freshfield's Trust, Re*, 11 L. R., Ch. D., 198; 40 L. T. 57; 27 W. R. 375; distinguished in *Scott* v. *Hastings* (*Lord*), 4 Kay & J. 633; 5 Jur., N. S., 450; 6 W. R. 862.

25. *Deere* v. *Guest* (1 Macn. & G. 516) referred to as an authority, to show that Lord Cottenham decided that the Court will not

interfere by injunction to restrain the use of work constructed, on land which has been taken possession of, where that possession has been obtained even by fraud. The marginal epitome of the report of that case is inaccurate. There is not one word of Lord Cottenham's judgment to justify so extraordinary a proposition as that the Court will not interfere against a possession fraudulently taken, whether the works are constructed or not. Looking at the report of Lord Cottenham's judgment, the grounds of it are plain. The case was decided on demurrer, and the only question was, whether, on the allegations in the bill, there was enough to show that the plaintiff would be entitled, on the case stated in his bill, to relief in a court of equity; and Lord Cottenham thought not, because what the defendants claimed was simply a right of way, and the case stated by the bill was a case of mere trespass; and upon that ground, on demurrer, he affirmed the judgment of the Vice-Chancellor of England, by whom the demurrer was allowed.—Per Stuart, V.-Ch., in *Perks* v. *Wycombe Railway Co.*, 3 Giff. 662, 673; 7 L. T., N. S., 150, 153.

1. *Delaney* v. *Delaney* (27 Sol. J. 418) distinguished in *Burstall* v. *Fearon*, 24 L. R., Ch. D., 126; 31 W. R. 581; 53 L. J., Ch., 144.

2. *De Mattos* v. *Gibson* (4 De G. & J. 276). As I understand the law to be as laid down in *De Mattos* v. *Gibson*, if a charter party is *bonâ fide* entered into between the owner of a vessel and the charterer, either party is entitled to an injunction to restrain the other from doing anything inconsistent with the contract entered into. If nothing can be adduced by the defendant to show that this charter party ought not to be acted upon, it is a case in which the charterer is entitled to an injunction to restrain the defendant from doing anything inconsistent with the rights which he has given to the plaintiffs under the charter party which he has executed. Per Romilly, M. R., in *Sevin* v. *Deslandes*, 7 Jur., N. S., 837, 838.

3. *Dench* v. *Bampton* (4 Ves. 700), deciding that a lord of a manor is confined to his legal remedy for waste committed by copyholder, and has no equity for an injunction and account, is overruled by *Richards* v. *Noble*, 3 Meriv. 673.

4. *Dendy* v. *Dendy* (5 W. R. 221) is *contrà* to *Jackson* v. *Ward* (1 Giff. 30), and *Gilbert* v. *Tomlinson* (6 Jur., N. S, 532), which decide that the devisee of a deceased plaintiff may obtain a common order to revive under the 15 & 16 Vict., c. 86, s. 52.

5. *Dennis* v. *Deane* (6 L. Rec, N. S., 378) doubted in *Goggin* v. *Downing*, 13 Ir. Eq. R. 60.

6. *Denton* v. *Stewart* (1 Cox 258). I certainly recollect the time at which there was a floating idea in the profession, that the Court might award compensation for the injury sustained by the non-performance of a contract, in the event of the pecuniary relief for a specific performance failing; and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord Kenyon, in *Denton* v. *Stewart*, had not been formerly overruled; but at that time very little weight was attached to it, and very few instances occurred in which plaintiffs were advised to ask any such relief, and, for a short time, Sir W Grant's decree, in *Greenaway* v. *Adams* (1 Cox 258), added something to the authority of *Denton* v. *Stewart*, although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for *Greenaway* v. *Adams* (12 Ves. 395) occurring in 1806, Lord Eldon, in 1810, in *Todd* v. *Gee* (17 Ves. 273), expressly overruled *Denton* v. *Stewart*, and from that time there has not, I believe, been any doubt upon the subject. Per Lord Cottenham, C., in *Sainsbury* v. *Jones*, 5 Myl. & Cr. 3.

7. *Denyssen* v. *Mostert* (4 L. R., P. C., 236; 41 L. J., P. C., 41; 20 W. R. 1017; 8 Moo. P. C. C., N. S., 502) approved in *Dias* v. *De Livera*, 5 L. R., App. Cas., 123; 49 L. J., P. C., 26; 42 L. T. 267.

8. *De Pass's case, Mexican and South American Co., Re* (5 Jur., N. S., 1191; 28 L. J., Ch., 769; 7 W. R. 681; 33 L. T. 322; 4 De G. & J. 452). I confess I should have hesitated before I concurred in these decisions, because I think there might have been a considerable difference drawn between the analogy of an assignee of a lease assigning the lease to a man of straw, and a shareholder who has become a partner with others, and who has incurred a joint liability at a time when the property had ceased to be of any value, and his sole object being to throw the liability entirely on his co-partners; but I most respectfully bow to the decisions of this Court. Per Campbell, C., in *Hyam's case, Mexican and South American Co., Re*, 1 L. T., N. S., 115; 1 De G. F. & J. 75; 29 L. J., Ch., 243; 6 Jur, N. S., 181.

9. *De Pass's case, Mexican and South American Co., Re* (4 De G. & J. 452; 5 Jur., N. S., 1191), recognised by Knight Bruce, L. J., and Turner, L. J., as rightly decided in *Costello, Exp., Mexican and South American Co., Re*, 6 Jur., N. S., 1270, 1272; 9 W. R. 6; 3 L. T., N. S., 421; 30 L. J., Ch., 113; 2 De G. F. & J. 302.

10. *De Pereda* v. *De Mancha* (19 L. R., Ch. D., 451; 51 L. J., Ch., 204; 30 W. R. 226) not followed in *Brown* v. *Collins*, 25 L. R., Ch. D., 56; 49 L. T. 329; 53 L. J., Ch., 368.

11. *Dering* v. *Winchelsea* (*Lord*) (2 Cox 318) considered in *Pendlebury* v. *Walker*, 4 Y. & Coll. 424.

12. *De Rochefort* v. *Dawes* (12 L. R., Eq, 540; 40 L. J., Ch., 625; 25 L. T. 456) questioned in *Leonino* v. *Leonino*, 10 L. R., Ch. D., 460; 48 L. J., Ch., 217; 27 W. R. 388; 40 L. T. 359.

13. *De la Viesca* v. *Lubbock* (10 Sim. 629) followed in *Eames* v. *Hacon*, 18 L. R., Ch. D, 347; 50 L. J., Ch., 740; 45 L. T. 196; 29 W. R. 877.

14. *De Visme* v. *De Visme* (1 Macn. & G. 336; 1 Hall & Tw. 408), principle of the decision in, explained in *Sherwin* v. *Shakespeare*, 17 Beav. 267.

15. *De Visme* v. *De Visme* (1 Macn. & G. 336). This case must be acted on with some caution; and it is not in every case of delay in the delivering of a sufficient abstract that a vendor is to lose the interest which he has

stipulated for. *Rouley* v. *Adams*, 12 Beav. 476.

The rule that, where a vendor fails to complete at the time agreed upon, the purchaser, by providing himself with the money, and giving notice that it is lying idle, may free himself from payment of subsequent interest, is settled by well-established authorities, and could not have been intended to be rendered doubtful by the dicta in *De Visme* v. *De Visme* (1 Macn. & G. 352). *Dyson* v. *Hornby*, 4 De G. & Sm. 481.

1. *De Visme* v. *De Visme* (1 Macn. & G. 336), overruled. In *De Visme* v. *De Visme* Lord Cottenham held, that if the delay arises from the default of the vendor, the purchaser is not bound to pay interest; and that as the vendor had not performed his part of the contract with regard to the delivery of the abstract, he could not insist on the purchaser performing his part with regard to the payment of interest, and that to hold otherwise would be encouraging negligence and delay on the part of the vendor, who alone being acquainted with his own title, was, as Lord Cottenham thought, bound to make such conditions only as he knew he could comply with. In *Sherwin* v. *Shakespeare* (18 Beav. 527) I followed this decision, which was binding on me, as the decision of Lord Cottenham. On appeal (5 De G. M. & G. 517), however, the Lords Justices dissented from Lord Cottenham, and reversed my decision, and the only question is whether they have overruled *De Visme* v. *De Visme*, because if they have, I am bound to follow that decision. (Reads judgment of Knight Bruce, L. J., in *Sherwin* v. *Shakespeare*, and proceeds.) Hence, as I read the judgment of Knight Bruce, L. J., which is concurred in by Turner, L. J., if the state of the title is such that, without fraud or wilful delay, the abstract, which contains a statement of the deeds necessary to deduce the title, is not delivered within the time specified in the contract, this does not relieve the purchaser from his obligation of paying the interest specified in the contract from the time therein mentioned. Per Romilly, M. R., in *Vickers* v. *Hand*, 26 Beav. 630, 633.

2. *Devoy* v. *Devoy* (3 Sm. & Giff. 403; 5 W. R. 222). But it is also contended that, whatever may have been the rule of law before, it has been altered by V.-Ch. Stuart's decision in *Devoy* v. *Devoy*, which it is said is an express authority to compel me to admit this document of April 1871 in evidence, and the following passage in the judgment of the V.-Ch. Stuart is referred to. He says (3 Sm. & Giff. 405), "In support of that argument it has been said, that if the father had died before he gave evidence of the nature of the transaction, no record would have been preserved of the transaction, and the Court must then have given effect to it as an advancement to the child. The circumstance that if the father had died, the evidence would have been lost, cannot in the slightest degree affect the truth of the case, where the evidence is not lost." And then it is said, that the evidence here is not lost, and that we have it under the hand of the man himself that he made the lodgment for the purpose stated in the memorandum. It would appear to me, assuming *Devoy* v. *Devoy* to have been rightly decided, that there is a marked distinction between the evidence of a living man on his oath, and a scrap of paper written by him, and found among his papers after his death. In the former case you can probe his conscience and examine him as to the truth and grounds of his statement. That case was followed in *Stone* v. *Stone* (2 Jur., N. S., 708); and it came again before the same judge in *Forrest* v. *Forrest* (13 W. R. 380). Now the last case was a very peculiar case. Two points arose in it; first, whether certain transactions of the testator in relation to certain shares, he standing *in loco parentis* at the time, were to be considered as amounting to an advancement. These the Vice-Chancellor considered did not amount to an advancement, and it is unnecessary that I should go into the grounds on which he so decided . . . In the very valuable Treatise of Mr. Lewin on Trusts, p. 137 (4th edit.), is this passage: "Of course the father cannot defeat the advancement by any subsequent declaration of intention. But his evidence is admissible for the purpose of showing what was the intention at the time."

The only authority for that latter proposition was the case of *Devoy* v. *Devoy*. That was a very difficult case. There the father was living, and he had admitted his evidence as to the nature of the transaction. He still thought that he was justified in admitting the evidence of the father in that case, but he was not sure that the case went quite so far as to support the proposition of Mr. Lewin. After those observations I do not think that *Devoy* v. *Devoy* can be fairly cited as an authority that declarations of the father subsequently to the advancement are admissible. I say nothing about the actual decision in *Devoy* v. *Devoy*, I have no such case before me here; but I must say that it is no authority whatever for the admission in evidence of mere declarations of the father subsequent to the advancement. V.-Ch. Stuart himself, in *Forrest* v. *Forrest*, states the rule of law to be otherwise. Per Sullivan, M. R., in *O'Brien* v. *Sheil*, 7 Ir. R., Eq., 255, 261, 262.

3. *Dew* v. *Clarke* (1 Sim. & S. 108) followed in *Lindesay* v. *Lindesay*, 12 Ir. Eq. R. 508.

4. *De Witte* v. *De Witte* (11 Sim. 41). This case is approved of by Lord Cottenham, or, at all events, mentioned by him without disapproval in *Crockett* v. *Crockett* (2 Ph. 553; 17 L. J., Ch., 230); and I do not think it right to overrule it, recognised as that case has been by Lord Cottenham. Per Lord Hatherley, C., in *Newell* v. *Newell*, 41 L. J., Ch., 432, 433, 434; 7 L. R., Ch., 253; 26 L. T. 175; 20 W. R. 308.

5. *Dickens' Reports.* See opinion as to in 1 Sch. & Lef. 240: and per Stuart, V.-C., in *Stutely* v. *Kepp*, 20 L. T., N. S., 58, 59 & 60 *ante*, p. 8243 (20).

6. *Dickin, Exp., Waugh, Re* (4 L. R., Ch. D., 524; 46 L. J., Bky., 26; 35 L. T. 769; 25 W. R. 258), distinguished in *Jay, Exp., Harrison, Re*, 14 L. R., Ch. D., 19; 42 L. T. 600; 28 W. R. 449. Reversing S. C. *nom. Meade, Exp., Harrison, Re*, 49 L. J., Bky., 47; 41 L. T. 560; 28 W. R. 308.

1. *Dickson* v. *Harrison* (9 L. R., Ch. D., 243; 47 L. J., Ch., 761; 38 L. T. 794; 26 W. R. 730) explained in *Heatly* v. *Newton*, 45 L. T. 455; 30 W. R. 72; 19 L. R., Ch. D., 326; 51 L. J., Ch., 225.

2. *Diggle* v. *Higgs* (2 L. R., Exch. D., 422; 46 L. J., Exch., 721; 37 L. T. 27; 25 W. R. 777) approved in *Trimble* v. *Hill*, 5 L. R., App. Cas., 343; 49 L. J., P. C., 49; 42 L. T. 103; 28 W. R. 479.

3. *Dillon* (*Lord*) v. *Alvares* (4 Ves. 357) doubted and not followed under the present practice in *McHenry* v. *Lewis*, 22 L. R., Ch. D., 397; 52 L. J., Ch., 325; 47 L. T. 549; 31 W. R. 305

4. *Dimes* v. *Scott* (4 Russ. 195) followed in *Morgan* v. *Morgan*, 14 Beav. 72.

5. *Ditcher* v. *Denison* (4 L. R., Q. B. D., 273) commented on and explained in *Julius* v. *Oxford* (*Bishop*), 5 L. R., App. Cas., 214; 49 L. J., Q. B., 577; 42 L. T. 546; 28 W. R. 726.

6. *Ditton, Exp., Woods, Re* (11 L. R., Ch. D., 56; 40 L. T. 297; 27 W. R. 401), observed upon in *Sidebotham, Exp. & Re*, 14 L. R., Ch. D., 458; 49 L. J., Bky., 41; 42 L. T. 783; 28 W. R. 715.

7. *Ditton, Exp., Woods, Re* (3 L. R., Ch. D., 459), followed in *Sadler, Exp., Hawes, Re*, 19 L. R., Ch. D., 122; 51 L. J., Ch., 201; 30 W. R. 173.

8. *Dixon* v. *Gayfere* (17 Beav. 421), where it was held, that although the right of the true owner is extinguished at the end of twenty years, still adverse possession by a succession of trespassers for a period exceeding twenty years, confers no right upon any of them who has not himself been in uninterrupted possession for twenty years, except as furnishing a defence to a trespasser in possession against an action by the true owner. Per Cockburn, C. J., I am bound to say, that I question the propriety of that decision. If it be law, it would lead to this extraordinary state of things—that, where a person encloses land, and continues in possession for nineteen years, at the expiration of which he is turned out by another wrongdoer, who holds for a year longer, the latter would in such case acquire the freehold. *Asher* v. *Whitelock*, 11 Jur., N. S., 925, 926.

9. *Dixon* v. *Holden* (7 L. R., Eq., 488). But for this case I should have considered it perfectly well settled that the Court of Chancery will not restrain by injunction the publication of a libel. What was said by Lord Ellenborough in *Dubois* v. *Beresford* (2 Camp. 511), "that the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," has been expressly disavowed by Lord Campbell in the case of the *Austria* (*Emperor of*) v. *Kossuth* (3 De G. F. & J. 217, 239; 30 L. J., Ch., 690; 7 Jur., N. S., 639; 9 W. R. 712; 42 L. T., N. S., 494), and is inconsistent with the dictum of Lord Eldon in the case of *Gee* v. *Pritchard* (2 Swans. 414), with what Lord Langdale said in *Clark* v. *Freeman* (11 Beav. 112; 17 L. J., Ch., 142), and with that of Sir Lancelot Shadwell, in *Martin* v. *Wright* (6 Sim. 297); and, lastly, it seems to me inconsistent with what may be clearly discovered to have been Lord Cottenham's opinion in *Fleming* v. *Newton* (1 H. L. Ca. 366); for which opinion, it may be observed, he gives very strong reasons. The case of *Dixon* v. *Holden* has introduced a rule which, if not contrary to the doctrine of these cases, affords at least a very material qualification of it. It was laid down in that case that the Court will restrain the publication of a libel where it affects property, or the potentiality of acquiring property, at least where the potentiality of acquiring property is professional or commercial. It is not for me to say that the rule so laid down is erroneous; but I think it was wholly new, and that nothing whatever was said in the case of the *Austria* (*Emperor of*) v. *Kossuth*, or in any other case, except possibly in the peculiar and very different case of *Springhead Spinning Co.* v. *Riley* (6 L. R., Eq., 551; 37 L. J., Ch., 889), which supports it in any way. In *Dixon* v. *Holden*, what was restrained was (as the Court considered) an advertisement of an absolutely false statement, calculated to injure a merchant carrying on a large business, and which emanated from a discharged solicitor, who had probably acquired his knowledge of the facts while in the employment of the firm, and who appeared to have been actuated by no motive but a malicious one. Per Wickens, V.-Ch., in *Mulkern* v. *Ward*, 13 L. R., Eq., 619, 621; 41 L. J., Ch., 464, 465; 26 L. T. 831.

10. *Dixon* v. *Holden* (7 L. R., Eq., 488). The only shadow of authority otherwise is in the case of *Dixon* v. *Holden*, which was decided by V.-Ch. Malins in 1869. I say nothing about the decision in that particular case; I do not mean to say that it is not capable of being maintained. It professes to proceed mainly upon the decision in *Routh* v. *Webster* (10 Beav. 561), because I observe the Vice-Chancellor says: "The case of *Routh* v. *Webster* is an authority going the whole length of what is asked here." Now, the case of *Routh* v. *Webster*, if I may say so, appears to me to have been perfectly rightly decided. . . . It was upon the authority of that case that the case of *Dixon* v. *Holden* was professedly decided. But the Vice-Chancellor went further, and said this: "Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and, therefore, to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property. In this case, I go on general principle, and I am fortified by authority. General principle is in favour of it, but authority is not wanting." And further on the Vice-Chancellor says: "In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." Now, in those opinions the Vice-Chancellor conceived that he was fortified by authority. The only authorities cited were *Fleming* v.

Newton (1 H. L. Ca. 363), which appears to me to be an authority exactly to the contrary; *Routh* v. *Webster* (10 Beav. 561), which I have already mentioned, which is an authority for preventing the improper use of a man's name against his will; *Clark* v. *Freeman* (11 Beav. 112; 17 L. J., Ch., 142), where an injunction was refused, and where Lord Langdale said that the Court would not interfere to prevent a libel; and the only other case mentioned was *Springhead Spinning Co.* v. *Riley* (37 L. J., Ch., 889; 6 L. R., Eq., 551), decided by the Vice-Chancellor himself. I have not before me the facts of that case, but of course it must be taken to have expressed the same opinion which the learned judge expressed in *Dixon* v. *Holden*. I am unable to accede to those general propositions, which appear to me to be at variance with the settled practice and principles of this court, and I cannot accept them as an authority for the present application. Per Lord Chancellor Cairns, in *Prudential Insurance Co.* v. *Knott*, 44 L. J., Ch., 192, 194; 23 W. R. 249; 10 L. R., Ch., 142; 31 L. T. 866.

I think that the V.-Ch. Malins in *Dixon* v. *Holden* was led, by his desire to do what was right in that case, to exaggerate the jurisdiction of this Court to an extent for which there is no authority in any reported case, and no foundation in principle. I think it right to say, that in my opinion that is not a true statement of the law of this Court. Per Lord Justice James. *Ib.*

1. *Dobbs, Re, Jones, Exp.* (15 L. T., N. S., 74). Creditors under 10*l.* have no right of voting in the choice of assignees, overruled. *Moss, Exp., Cooper, Re*, 17 L. T., N. S., 279.

2. *Dobson* v. *Faithwaite* (30 Beav. 228) followed in *Burstall* v. *Fearon*, 24 L. R., Ch. D., 126; 31 W. R. 581; 53 L. J., Ch., 144.

3. *Docksey* v. *Docksey* (3 Bro P. C. 39) explained in *Barrs* v. *Fewkes*, 34 L. J., Ch., 522; 11 Jur., N. S., 669; 13 W. R. 987; 12 L. T., N. S., 727; 6 N. R. 355.

4. *Doddington* v. *Hallet* (1 Ves. 497) overruled by *Young, Exp.*, 2 Ves. & B. 242; 2 Rose 78. n. See *Buxton* v. *Snee*, 1 Ves. 154.

5. *Dodds* v. *Shepherd* (1 L. R., Exch. D., 75) considered in *Streeter, Exp*, *Morris, Re*, 19 L. R., Ch. D., 216; 45 L. T. 634; 30 W. R. 127.

6. *Dodson* v. *Sammell* (6 Jur., N. S., 137; 29 L. J., Ch., 235; 8 W. R. 252). Kindersley, V.-Ch., decided that the statute 22 & 23 Vict., c. 35, s. 27, was not retrospective; but in *Smith* v. *Smith* (9 W. R. 406), Kindersley, V.-Ch., said that, upon communication with the other judges, he had found that he was in error, in that case, in holding that the Act was not retrospective, the intention being that it should be retrospective, and that case, therefore, was no longer an authority.

7. *Dodson* v. *Sammell* (8 W. R. 252; 6 Jur., N. S., 137; 29 L. J., Ch., 335) overruled as to s. 27 of the 22 & 23 Vict., c. 38, being not retrospective. See *Green, Re*, 2 De G. F. & J. 121; *Dodson* v. *Sammell*, 9 W. R. 887.

8. *Doe* v. *Brindley* (12 Moo. P. C. 37) not followed in *Newitt, Exp., Garrud, Re*, 16 L. R., Ch. D., 531; 51 L. J., Ch., 381; 44 L. T. 5; 29 W. R. 344.

9. *Doe* v. *Biggs* (2 Taunt. 109) considered and distinguished in *Tangueray-Willaume and Landau, Re*, 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

10. *Doe* v. *Cooke* (7 East 269). The doctrine therein that a gift of a term of years, though only for a day, is a gift of the whole term, in case the limitations over are void, cannot be sustained. *Ker* or *Kerr* v. *Dungannon (Lord)*, 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.

11. *Doe* v. *Eyre* (5 C. B. 746) followed in *Robinson* v. *Wood*, 6 W. R. 728; 4 Jur., N. S., 625; 27 L. J., Ch., 726; 1 L. T., N. S., 311.

12. *Doe* v. *Glover* (1 C. B. 448) doubted in *Holmes* v. *Godson*, 2 Jur., N. S., 383; 8 De G. M. & G. 152.

13. *Doe* v. *Jessop* (12 East 288), decision in approved, as opposed to that in *Brownsword* v. *Edwards* (2 Ves. 242), in *Pearson* v. *Rutter*, 3 De G. M. & G. 398; and in S. C. *nom. Gray* v. *Pearson*, 6 H. L. Ca. 61; 3 Jur., N. S., 823; 26 L. J., Ch, 473; 5 W. R. 454.

14. *Doe* d. *Jones* v. *Hughes* (6 Exch. Rep. 223), observed upon in *Robinson* v. *Lowater*. 17 Beav. 592. Affirmed 18 Jur. 363; 23 L. J., Ch., 641.

15. *Doe* v. *Walker* (12 M. & W. 591) followed in *Langdale (Lady)* v. *Briggs*, 2 Jur., N. S., 35; 25 L. J., Ch., 100; 4 W. R. 144; 3 Sm. & G. 246. Affirmed 2 Jur., N. S., 982; 26 L. J., Ch., 27; 8 De G. M. & G. 391; 4 W. R. 783.

16. *Doe* v. *Withers* (2 B. & Ad. 896) doubted in *Truscott* v. *Diamond Rock Boring Co*, 20 L. R., Ch. D., 251; 51 L. J., Ch., 259; 46 L. T. 7; 30 W. R. 277.

17. *Dommett* v. *Bedford* (6 T. R. 684) approved of in *Rochford* v. *Hackman*, 9 Hare 475; and in *Joel* v. *Mills*, 3 Kay & J. 458, 468.

18. The doctrine deduced from *Don* v. *Watt* (26th May 1812, F. C., vol. xvi., 647) and *Watters' Petition* (7th March 1818, F. C., vol. xix., 489), by Bell in his Commentaries, vol. i. (7th ed.), p. 425, that in Scotland a signature as an acceptor by a person not a drawee "is held to import a joint undertaking as acceptor of the bill or maker of the note," not approved of. *Steele* v. *McKinlay*, 5 L. R., App. Cas. (Sc.), 754; 43 L. T. 358; 29 W. R. 17.

19. *Donegal* v. *Berry* (1 Hog. 46) observed on in *O'Beirne* v. *O'Beirne*, 1 Ir. Ch. R. 158.

20. *Donegal's (Lord) case* (2 Ves. 407), overruled in principle. See note there.

21. *Donne* v. *Hart* (2 Russ. & M. 360) approved of in *Duberly* v. *Day*, 16 Jur. 581.

22. *Douglas (Lord)* v. *Chalmer* (2 Ves. J. 501). That case must be considered to have been decided upon its own special circumstances, and appeared never to be cited except for the purpose of being distinguished. Per Wood, V.-Ch., in *Schenk* v. *Agnew*, 4 Kay & J. 406.

23. *Douglas* v. *Congreve* (1 Keen 410) not followed in *Morgan* v. *Morgan*, 14 Beav. 72.

24. *Douglas* v. *London & North-Western Railway* (3 Kay & J. 173; 3 Jur., N. S, 181) distinguished in *Chamberlain, Exp., Metropolitan Street Improvement Act* 1887, *Re*, 14 L. R., Ch. D., 323; 49 L. J., Ch., 354; 28 W. R. 565; 42 L. T. 358.

25. *Dovaston* v. *Payne* (2 H. Bl. 527), there can be no easement, properly so called, unless there is both a servient and a dominant tenement. It is true that in the well-known case of *Dovaston* v. *Payne*, which is reported, or

rather reprinted in Smith's Leading Cases, Mr. Justice Heath is reported to have said, with regard to a public way, that the freehold continued in the owner of the adjoining land, subject to an easement in favour of the public, and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to the civil law, as what I may term an easement in gross. The case must be connected with the two tenements which I have described. In truth, a public road or highway is a dedication of that extent of ownership or of occupancy to the public consistent with the freehold or the solum of the land remaining in the original owner; it is not an easement, it is a dedication of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement where the occupation remains in the owner of the servient tenement subject to the right of affording the same. Per Lord Cairns, C., in *Rangley* v. *Midland Railway Co.*, 37 L. J., Ch., 313, 316.

1. *Downe* (*Viscount*) v. *Morris* (3 Hare 394) observed upon in *Beale* v. *Symonds*, 16 Beav. 406; 22 L. J., Ch., 708.

2. *Downes* v. *Grazebrook* (3 Meriv. 200) commented on in *Warner* v. *Jacob*, 20 L. R., Ch. D., 220; 51 L. J., Ch., 642; 46 L. T. 656; 30 W. R. 721.

3. *Drew* v. *Bidgood* (2 Sim. & S. 424) disapproved in *Hayes* v. *Garvey*, 2 J. & L. 268; 8 Ir. Eq. R. 90; 4 Jur. 819.

4. *Drew* v. *Collins* (6 Exch. 670; 15 Jur. 584; 20 L. J., Exch., 369) affirmed in *Tetley* v. *Taylor* (1 El. & Bl. 521; 17 Jur. 130; 21 L. J., Q. B., 346. Reversing 16 Jur. 59; 21 L. J., Q. B., 2).

5. *Drewry* v. *Barnes* (3 Russ. 94; 5 L. J., Ch., N. S., 47) in my opinion is beyond the possibility of question. Per Bacon, V.-Ch., in *Preston* v. *Great Yarmouth* (*Mayor*), 41 L. J., Ch., 310, 317; 26 L. T. 225.

6. *Drinkwater* v. *Ratcliffe* (20 L. R., Eq., 528; 44 L. J., Ch., 605; 33 L. T. 417; 24 W. R. 25) approved in *Pitt* v. *Jones*, 5 L. R., App. Cas., 651; 49 L. J., Ch., 795; 43 L. T. 385; 29 W. R. 33.

7. *Driver* v. *Frank* (3 M. & S. 25; 8 Taunt 468). The effect of a devise to A. (an unmarried man) for life, with remainder to his wife in fee, is, I believe, unsettled by authority. Mr. Jarman thought that such a devise would give an absolute interest to the first person who acquired the title of his wife (1 Powell on Devises, 340. n.), but he cites no authority for this except *Driver* v. *Frank*, notwithstanding that *Peppin* v. *Bickford* (3 Ves. 570) (which he refers to some special circumstances) is in some degree inconsistent with his view, and the passage in the note in Powell on devises seems to have been preserved in all the editions of Jarman on Wills, up to and including the last, without any addition of authority. *Driver* v. *Frank* does not seem to warrant the general proposition deduced from it; that case I think must be taken to have proceeded on the simple principle, that the second son of A. on the body of B. begotten means, the second son born of A. and B., as held in *Trafford* v. *Ashton* (2 Vern. 660), and no other person. It is unnecessary for the present purpose to determine whether it is or is not true as a general proposition that a gift to A. for life with remainder to a person who may afterwards bear a given relation to A., the relation being one which may be borne by numerous persons successively, by virtue of the rule of law which favours the earliest possible vesting, is a gift to A and to the first person who shall bear that relation. Per Wickens, V.-Ch., in *Radford* v. *Willis*, 19 W. R. 845, 846; 40 L. J., Ch., 484; 12 L. R., Eq., 105.

8. *Drummond* v. *St. Albans* (*Duke*) (5 Ves 433) held not to be law in *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; 18 Jur. 915; 23 L. J., Ch., 571.

9. *Drury* v. *Drury* (2 Eden 39) reversed on appeal by the House of Lords S. C. *nom. Buckingham* (*Earl*) v. *Drury*, 3 Bro. P. C. 492; 2 Eden 60; where Lord Hardwicke reviewed the synonymous authorities. Lord Thurlow, however (as was observed by Eldon, Ch., in *Milner* v. *Harewood* (*Lord*) (18 Ves. 275), said great doubts had been entertained as to the propriety of the decision of the Lords, and expressed himself strongly in favour of Lord Northington's opinion. The result of the subsequent authorities (which are collected, 2 Eden 75), however, is, that an infant cannot be bound by any article entered into during the minority as to her own real state, which nothing but her own act when of age can fetter or affect. 2 Bridg. 86. See also *Drury* v. *Drury*, 4 Bro. C. C. 505. n.

10. *Drysdale* v. *Piggott* (22 Beav. 238). See *Courtenay* v. *Wright*, 6 Jur., N. S., 1283.

11. *Dudgeon* v. *Thomson* (1 Macq. H. L. Ca. 714) followed in *Renfrew* (*Provost*) v. *Hoby*, 4 W. R. 632; 1 Jur., N. S., 617.

12. *Dudgeon* v. *Thomson* (1 Macq. H. L. Ca. 714), approved of in *Robin* v. *Hoby*, 2 Jur., N. S., 647.

13. *Duffield* v. *Elwes* (1 Sim. & S. 239) reversed by the House of Lords (1 Bli. N. S. 497). See *Veal* v. *Veal*, 27 Beav. 303, 307.

14. *Dugdale* v. *Robertson* (3 Kay & J. 695). In *Shafto* v. *Johnson* (8 B. & S. 252. n.) V.-Ch. Wood came to a different conclusion from that which he had arrived at in *Dugdale* v. *Robertson*, and though there were no words distinctly reserving the right to support, he held in effect that the lessees were not responsible for the subsidence caused by getting the minerals. He commences his judgment as follows: "I have carefully considered the lease, and I cannot arrive at the conclusion that any act has been done by the lessees which is unlawful and contrary to the stipulations contained in it."

This embodies the view which we take of such a case as the present. In the subsequent part of the same judgment, in which the subject is gone into very fully, and the whole of which is well worthy of consideration, the learned judge refers to the case of *Dugdale* v. *Robertson* as one which went to the full extent of the authorities, and in which the case was put as strongly as it well could be against the view which he was entertaining in the case under consideration. No doubt the case of *Dugdale* v. *Robertson* is not disap-

proved of, but it does appear to us that the principle of the two decisions is not the same, and that the correct view is that taken at the beginning of the judgment in *Shafto* v. *Johnson*, which we have given above.

The judgment of the Exchequer Chamber in *Taylor* v. *Shafto* (8 B. & S. 228) agrees with that of the Vice-Chancellor in making the terms of the lease decisive as to the extent to which the lessees were justified in going in working the mines. The case is not referred to as decisive of the present case, because the terms of the lease were different, and there were other covenants, but as showing the proper principle of decision. Per Cleasby, B., in *Eadon* v. *Jeffcock*, 42 L. J., Exch., 36, 45; 7 L. R., Exch., 379; 28 L. T. 273; 20 W. R. 1033.

1. *Duggan, Re* (8 L. R., Eq., 697), not followed by Lord Romilly, M. R., in *Wood* v. *Boucher*, 19 W. R. 88; 23 L. T., N. S., 522.

2. *Duke* v. *Doidge* (2 Ves. 203. n.) commented on in *Collingwood* v. *Stanhope*, 4 L. R., H. L., 43; 38 L. J., Ch., 421; 17 W. R. 537. Affirming S. C. *nom. Stanhope* v. *Collingwood*, 36 L. J., Ch., 894; 4 L. R., Eq., 286.

3. *Duncan* v. *Chamberlayne* (11 Sim. 123; 10 L. J., N. S., Ch., 307; 4 Jur. 189) overruled by *Thompson* v. *Speirs*, 13 Sim. 469; 14 L. J., N. S., Ch., 453; 9 Jur. 933.

4. *Duncan* v. *Findlater* (6 Cl. & F. 894). Dictum of Lord Cottenham, that persons incorporated for the purpose of executing works, are not in their official or corporate capacity liable for damages at all for wrong or neglect, overruled. See *Mersey Docks and Harbour Board* v. *Gibbs*, 12 Jur., N. S., 571; 35 L. J., Exch., 225; 14 W. R. 872; 14 L. T., N. S., 677.

5. *Dunch* v. *Kent* (1 Vern. 260). With regard to the authorities, I had occasion to review them in the case of *Ranorth* v. *Parker* (2 Kay & J. 163; 25 L. J., Ch., 117), and it appeared to me that nothing very decisive was come to on the subject, except in the case of *Dunch* v. *Kent*. I am obliged to Mr. James for his exposition of the case, and I am certainly bound to retract the observation I made that *Dunch* v. *Kent* must be overruled if it were held that deeds of this kind must be executed within the limited period, because, looking at all the facts of the case, which, although it was a simple grant from the Crown to the husband of the executrix of the deceased creditor of the Crown, was yet coupled with a trust for the benefit of all creditors who should come in within twelve months, the case seems to me to have been properly determined, for in reality this comes in substitution of assets, and must be regarded in truth as assets of the original testator, so that the executor could not claim as he claimed in that case, to set up debts of his own against creditors of the testator, although the creditors had not come in within the period specified. Per Wood, V.-Ch., in *Whitmore* v. *Turquand*, 30 L. J., Ch., 345, 350.

On appeal, Campbell, C., said, "I think it unnecessary again to go over the long list of cases cited in the argument, and most minutely analysed and commented upon by the Vice-Chancellor. I content myself with saying that I concur with his remarks upon them, except the leading case of *Dunch* v. *Kent*, and of that I think the first view taken by his Honour is the sounder one. I likewise place great reliance on his own previous decision in *Nicholson* v. *Tutin*, 2 Kay & J. 18." Per Lord Campbell, C., 30 L. J., Ch., 354.

6. *Dunch* v. *Kent* (1 Vern 260) observed upon in *Ranorth* v. *Parker*, 2 Kay & J. 163.

7. *Dundas* v. *Dutens* (1 Ves. 196; 2 Cox 240) overruled in *Nurse* v. *Durnford*, 13 L. R., Ch. D., 764; 49 L. J., Ch., 229; 41 L. T. 611; 28 W. R. 145.

8. *Dundonald* (*Earl*) v. *Masterman* (7 L. R., Eq., 504) referred to in *Cleather* v. *Twisden*, 24 L. R., Ch. D., 731; 49 L. T. 633; 32 W. R. 198. Reversed 78 L. T. 148.

9. *Dunn* v. *Ferrior* (3 L. R., Ch., 719; 37 L. J., Ch, 569) is no longer law. *Berry* v. *Keen*, 51 L. J., Ch., 912.

10. *Dunn* v. *Snowden* (2 Dr. & Sm. 201). The marginal note to the report of this case contains an inaccuracy. Per Kindersley, V.-Ch., in *Thomas* v. *Thomas*, 2 Dr. & Sm. 202.

11. *Dunne* v. *Doran* (13 Ir. Eq. R. 545) not followed by Giffard, V.-Ch., in *Brittlebank* v. *Goodwin*, 5 L. R., Eq., 545; 37 L. J., Ch., 377. See *Brereton* v. *Hutchinson*, 2 Ir. Ch. R. 648; 3 Ir. Ch. R. 361.

12. *Dunlop* v. *Higgins* (1 H. L. Ca. 381) is no authority for the proposition for which it is usually cited, that a contract is completed by the posting of a letter accepting the offer; it is not so unless the letter containing the acceptance of the offer is received by the party to whom it is addressed, and for whom it is intended. *British & American Telegraph Co* v. *Colson*, 6 L. R., Exch., 108; 40 L. J., Exch., 97; 23 L. T. 868.

13. *Du Vigier* v. *Lee* (2 Hare 326) shaken as an authority by Lord St. Leonards in his "Practical Treatise on the New Statutes relating to Property," 2nd edit., p. 139, sect. 51. See *Bolding* v. *Lane*, 3 Giff. 561.

14. *Dymond* v. *Croft* (36 L. T. 786) considered in *Livesey, Re, Fish* v. *Chatterton*, 47 L. T. 328; 31 W. R. 87.

E.

15. *Eade* v. *Jacobs* (3 L. R., Exch. D., 335) observed upon in *Johns* v. *James*, 13 L. R., Ch. D., 370.

16. *Eaden* v. *Firth* (1 Hem. & M. 573). I confess I do not quite understand the case of *Eaden* v. *Firth*, which is opposed to every other decision of Lord Hatherley, and to the practice of Lord Hatherley himself, and I must therefore conclude that it proceeded upon some special circumstance which does not appear. Per Malins, V.-Ch., in *Inchbald* v *Robinson*, 17 W. R. 272, 273.

17. *Eagle, Exp., Gibbins, Re* (Mont. & M. 422; 8 L. J., Ch., 96), overruled by *Tindall, Exp., Gibbins, Re*, 1 M. & Scott 607; 8 Bing. 402; 1 Mont. 462; 1 Mont. & M. 415; 1 Dea. & Ch. 291; 1 L. J., N. S., Ch., 193.

18. *Earlom* v. *Saunders* (Ambl. 241) distinguished in *Evans* v. *Ball*, 47 L. T. 165; 30 W. R. 899.

19. *Early, Exp., Golding, Re* (13 L. R., Ch. D., 300; 42 L. T. 298; 28 W. R. 310), followed in *Matthews, Exp.*, 16 L. R., Ch. D., 655; 50 L. J., Ch., 284; 44 L. T. 117.

20. *East Botallack Consolidated Mining Co., Re* (11 L. T. 408; 13 W. R. 197; 34 Beav. 82),

not followed in *Silver Valley Mines, Re*, 18 L. R., Ch. D., 472; 45 L. T. 104; 30 W. R. 36.

1. *East, Re* (8 L. R., Ch., 735), not followed in *Chell, Re*, 49 L. T. 196; 31 W. R. 898.

2. *East* v. *Cook* (2 Ves. 30) was relied upon as applicable. It appeared difficult to understand that case. But it seemed to have been determined upon its own special circumstances, the Court coming to the conclusion that there was an apparent intention on the part of the testator to exclude the application of the doctrine of election. Per James, L. J., in *Wilkinson* v. *Dent*, 19 W. R. 611, 612; 6 L. R., Ch., 340; 40 L. J., Ch., 253; 25 L. T. 142.

3. *East and West India Dock Co.* v. *Hill* (22 L. R., Ch. D., 14; 52 L. J., Ch., 44; 47 L. T. 270; 31 W. R. 55) followed in *Harding* v. *Preece*, 9 L. R., Q. B. D., 281; 51 L. J., Q. B., 515; 47 L. T. 100; 31 W. R. 42.

4. *Eccleshill Local Board, Re* (13 L. R., Ch. D., 365; 49 L. J., Ch., 214; 28 W. R. 536), in *Pigott* v. *Great Western Railway Co.*, 18 Ch. D. 146; 50 L. J., Ch., 682; 44 L. T. 794; 29 W. R. 729.

5. *Eden* v. *Smyth* (5 Ves. 341). I do not dispute the authority of this case, but I think it very dangerous to carry the principle a step further; the result would be, that in most cases, you would completely alter the effect and operation of a will by parol evidence. Per Romilly, M. R., in *Chester* v. *Urwick* (No. 2), 23 Beav. 404, 406.

6. *Eddells* v. *Johnson* (1 Giff. 29; 4 Jur., N. S., 255; 27 L. J., Ch., 202) followed in *Pearman* v. *Twiss*, 6 Jur., N. S., 337; 2 Giff. 130; 29 L. J., Ch., 802; 8 W. R. 329.

7. *Edwards, Exp.* (6 Ves. 4), cited in *Scarth, Exp.*, 15 Ves. 293.

8. *Edwards, Exp.* (1 Atk. 100), seems overruled. Eden, B. L., 197.

9. *Edwards, Exp.* (Buck 322), overruled. 1 Dea. & Ch. 443.

10. *Edwards, Re* (9 L. R., Ch., 97; 22 W. R. 144), the rule laid down in this case that in a marriage settlement a covenant to settle after-acquired property applies only to property acquired during the coverture, governs those cases in which the settlement contains an assignment of after-acquired property. *Holloway* v. *Holloway*, 25 W. R. 575.

11. *Edwards* v. *Alliston* (4 Russ. 78) expressly overruled by *Doe* d. *Clift* v *Birkhead*, 4 Exch. 110.

12. *Edwards* v. *Batley* (19 Beav. 457; 23 L. J., Ch., 872). The form of order in this case calling on the executors to admit assets on accounts, does not deprive the suitor of the right to file a bill, where there is a risk that he may, by adopting the ordinary practice, fail to obtain redress. See *Collard* v. *Roe*, 5 Jur., N. S., 1242; 1 Giff. 311; 29 L. J., Ch., 329.

13. *Edwards* v. *Burt* (2 De G. M. & G. 46) commented upon in *Willoughby* v. *Brideoke*, 11 Jur., N. S., 524; 13 W. R. 515; 12 L. T., N. S., 173.

14. *Edwards* v. *Edwards* (15 Beav. 357; 16 Jur., 259; 21 L. J., Ch., 324), not followed by the House of Lords in *Ingram* v. *Soutten* (7 L. R., H. L., 408; 23 W. R. 363; 44 L. J., Ch., 55; 31 L. T., N. S., 215), though the canons in that case were approved of by the Lords Justices in that case, *sub nom. Heathcote's Trust, Re*, 9 L. R., Ch., 45; 43 L. J., Ch., 259; 29 L. T., N. S., 445; 22 W. R. 42; which reversed 21 W. R. 862; 29 L. T., N. S., 161.

15. *Edwards* v. *Edwards* (15 Beav. 357). It has been stated that these decrees proceed mainly, if not entirely, on the authority of the case of *Edwards* v. *Edwards*; and unquestionably, reading the marginal note of that case, and taking it to express the settled law on the subject, it would follow as a necessary consequence that the decision below was right. The fourth proposition in that marginal note is, that in a gift to "X. for life, with remainder to A, and if he shall die without leaving children, to B," the contingency has reference to the death of the tenant for life. When I first saw that proposition so stated, it certainly struck me as one plainly adverse to the course and current of the authorities on the subject. It is not necessary for me to examine them *in extenso*, but it is quite plain that no such principle of construction has ever been previously established. When, however, we come to examine *Edwards* v. *Edwards*, it seems to be a very plain decision, and perfectly right with respect to the subject matter submitted to the consideration of the Court.... The case before Sir John Romilly is perfectly right when considered in reference to the subject matter of which he was speaking, the cases in which a declaration was required. . . . The marginal note of *Edwards* v. *Edwards* is, in my apprehension, mistaken, and is not borne out by the case when examined. I think, therefore, that this order, which appears to have been made on the supposed decision in *Edwards* v. *Edwards*, cannot be supported. Per Brady, C., in *O'Mahony* v. *Burdett*, 10 Ir. Ch. R. 14, 19, 21.

16. *Edwards* v. *Edwards* (15 Beav. 357). The fourth rule laid down in this case applies to the case where a life estate is given in a portion of the income of the estate, but the whole, together with the accumulation of income, is given, subject to a gift over on death without issue, upon the determination of that estate. *Dean* v. *Handley*, 2 Hem. & M. 635; 6 N. R. 95; 11 Jur., N. S., 686; 13 L. T., N. S., 89.

17. *Eduards* v. *Edwards* (2 L. R., Ch. D., 291; 45 L. J., Ch., 391; 34 L. T. 472; 24 W. R. 713) "related to chattels not land," *Evans, Exp., Watkins, Re*, 13 L. R., Ch. D., at p. 255; 49 L. J., Bky., 7; 41 L. T. 565; 28 W. R. 127.

18. *Edwards* v. *Fidel* (3 Madd. 237) overruled by *Lewis* v. *Lane*, 2 Myl. & Keen 449. Per Romilly, M. R., in *Jeans* v. *Cooke*, 4 Jur., N. S., 958; 27 L. J., Ch., 202.

19. *Edwards* v. *Grand Junction Canal Co.* (1 Myl. & Cr. 650; 1 Rail. Ca. 173; 6 L. J., Ch., 47; 7 Sim. 337) impugned in *Preston* v. *Liverpool, Manchester, & Newcastle-upon-Tyne Junction Railway Co.*, 5 H. L. Ca. 605; 2 Jur., N. S., 241; 25 L. J., Ch., 421; 4 W. R. 383; *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Ca. 331; *Caledonian and Dumbartonshire Junction Railway Co.* v. *Helensburgh* (*Magistrates*) or *Helensburgh* (*Harbour Trustees*), 2 Macq. H. L. Ca. 391; 2 Jur., N. S., 695.

20. *Edwards* v. *Grand Junction Railway Co.* (1 Myl. & Cr. 650) observed upon in *Lindsay* (*Earl*) v. *Great Northern Railway*

Co., 10 Hare 679; 17 Jur. 522; 22 L. J., Ch., 995.

1. *Edwards* v. *M'Leay* (G. Cooper's Rep. 308). The report in Cooper of this case is imperfect, but a full and authentic report, with an instructive comment on Lord St. Leonards, is given in his valuable book on the Law of Property as administered by the House of Lords (p. 649). Per Lord Commissioner Napier, in *Sankey* v. *Alexander*, 9 Ir. L. R, Eq, 285.

2. *Edwards* v. *West* (7 L. R, Ch. D., 858; 33 L T. 481; 26 W. R. 507) approved in *Adams and Kensington Vestry, Re*, 27 L. R., Ch. D, 394; 51 L T. 382; 32 W. R. 883.

3. *Elliott* v. *Hancock* (2 Vern 143) observed upon in *Peacock* v. *Peacock*, 11 Jur., N. S., 280; 34 L. J., Ch., 315; 13 W. R. 516; 12 L. T., N. S., 299.

4. *Ellis, Re* (17 L. R., Eq., 409; 43 L. J., Ch, 44; 22 W. R. 448), approved in *O'Halloran* v. *King*, 27 L. R, Ch. D., 411; 53 L. J., Ch., 881; 50 L. T. 796; 33 W. R. 58; and followed in *Clarke's Trusts, Re*, 21 L. R., Ch. D., 748; 51 L. J., Ch, 885; 47 L. T. 43; 30 W. R. 778.

5. *Ellis* v. *Nimmo* (Ll. & G. *temp.* Sugd. 333) observed upon and refused to be followed in *Holloway* v. *Headington*, 8 Sim. 325; 6 L. J., N. S., Ch., 199; and in *Moore* v. *Crofton*, 3 J. & L. 438; 9 Ir. Eq. R. 344.

6. *Ellis* v. *Robins* (50 L. J, Ch, 512) commented on in *FitzWater, Re*, *FitzWater* v. *Waterhouse*, 52 L. J, Ch, 83.

7. *Ellison* v. *Ellison* (6 Ves. 656) distinguished in *Simmonds* v. *Palles*, 8 Ir. Eq. R. 335; 2 J. & L. 489

8. *Elmsley* v. *Young* (2 Myl. & K. 82) in part overruled. See that case on appeal. *Id.* 780. S. C. 4 L. J., N. S., Ch., 200.

9. *Elphinstone, Exp., Native Iron Ore Co., Re* (2 L. R., Ch. D., 345; 45 L. J., Ch., 517; 24 W. R. 503; 34 L. T., N. S., 77), distinguished in *Smith's case, South Durham Iron Co., Re*, 11 L. R., Ch. D., 579; 48 L. J., Ch., 480; 27 W. R. 845; 40 L. T. 572.

10. *Elsee, Exp.* (Mont. 1), overruled. *Joyner, Exp.*, 2 Mont. & A. 1

11. *Elworthy, Exp. & Re* (20 L. R., Eq., 742; 44 L. J., Bky., 123; 32 L. T. 699; 23 W. R. 790), commented on in *Ball, Exp., Parnell, Re*, 20 L. R., Ch. D., 670; 51 L. J., Ch., 911; 47 L. T. 213; 30 W. R. 738.

12. *Elworthy, Exp. & Re* (20 L. R., Eq, 742; 44 L. J., Bky, 123: 32 L. T. 699; 23 W. R. 790), not followed in *Williams, Exp. & Re*, 18 L. R., Ch. D., 495; 50 L. J., Ch., 741; 45 L. T. 96.

13. *Emanuel, Exp.* (17 L. R., Ch. D., 35; 50 L J., Ch., 305; 44 L. T. 832; 29 W. R. 526), explained and commented on in *Cocks, Exp., Poole, Re*, 21 L. R., Ch. D, 397; 52 L. J., Ch., 63; 47 L. T. 496; 31 W. R. 105.

14. *Emma Silver Mining Co.* v. *Grant* (11 L. R., Ch. D., 918; 40 L. T. 804) observed upon in *Piercy* v. *Young*, 15 L. R., Ch. D., 475; 42 L. T. 292.

15. *Emery* v. *Wase* (8 Ves. 505), *Morris* v. *Stephenson* (7 Ves. 474) overruled. *Martin* v. *Mitchell*, 2 Jac. & Walk. 425-6.

16. The rule in *Emperor* v. *Rolfe* (1 Ves. 208) applies to the will of a person *in loco parentis*. The Court will apply this rule in cases where the language of the testator does not necessarily imply an intention to benefit children dying before the tenant for life. *Jackson* v. *Dover*, 4 N. R. 136.

17. *Emperor* v. *Rolfe* (1 Ves. 208), followed in *Swallow* v. *Binns*, 1 Kay & J. 417; 1 Jur., N. S., 843.

18. *Emuss* v. *Smith* (2 De G. & Sm. 722) not followed in *Saxton* v. *Saxton*, 13 L. R., Ch. D., 359; 49 L. J., Ch., 128; 41 L. T. 648; 28 W. R. 294.

19. *England* v. *Downes* (1 Beav. 96) not to be followed, so far as to require security for future costs to be given, where it is sought to withdraw a co-plaintiff from the record. *Ring* v. *Nettles*, 3 Ir. Eq. R. 54.

20. *England* (*Bank of*) v. *Morrice* (3 Swan. 573) followed in *Dollond* v. *Johnson*, 18 Jur. 767; 23 L. J., Ch., 637.

21. *Eno* v. *Tatham* (3 De G. J. & S. 443; 32 L. J., Ch., 311; 9 Jur., N. S., 481; 11 W. R. 475; 8 L. T., N. S, 117. Affirming 9 Jur., N. S., 225; 32 L. J., Ch, 159; 11 W. R. 227; 7 L. T., N S., 664; 4 Giff. 181). A higher authority, that of Parliament, has decided that the case of *Eno* v. *Tatham* is not to be considered as law. Per Malins, V.-Ch, in *Lewis* v. *Lewis*, 12 L. R., Eq, 218, 224; 41 L. J., Ch., 105; 25 L. T. 555; 20 W. R. 141.

22. *Enohin* v. *Wylie* (31 L. J., Ch., 402; 10 W.R. 467; 10 H. L. Ca. 1) (dicta of Westbury, Lord), followed in *Eames* v. *Hacon*, 16 L. R., Ch D, 407; 50 L. J., Ch., 182; 43 L. T. 567; 29 W. R. 259.

23 *Enohin* v. *Wylie* (10 H. L. C. 1). Dicta of Lord Westbury disapproved in *Ewing* v. *Orr-Ewing*, 9 L. R., App. Cas., 34; 53 L. J., Ch, 435; 50 L. T. 401; 32 W. R. 573.

24. *Ernest* v. *Nicholls* (6 H. L. Ca. 401; 3 Jur., N. S, 919), notwithstanding dicta of Lord Wensleydale, the Queen's Bench adhere to doctrine propounded in *Henderson* v. *Australian Royal Mail Steamer Navigation Co.*, 5 El & Bl. 409; 1 Jur., N. S., 830, and *Reuter* v. *Electric Telegraph Co.*, 6 El. & Bl. 341; 2 Jur., N. S., 1248. See *London Dock Co.* v. *Sinnott*, 8 El. & Bl. 347, 351; 4 Jur., N. S., 70, 71. We are of course bound by the judgment of the House of Lords in that case, and we should all most heartily have concurred in it, the question having been as to a special contract to do the very unusual thing of purchasing by one company the trade of another. But we are not bound by the extrajudicial observations of any noble and learned lord delivered in that assembly, although they are no doubt entitled to high consideration. *Smith* v. *Hull Gas Co.*, 8 C. B. 688; 11 C. B. 897, seems to us to be at variance with the dicta quoted to us. Per Campbell, C. J., in *Prince of Wales Insurance Co* v. *Harding*, 4 Jur., N. S., 851; 27 L. J., Q. B, 297.

25. *Esdaile* v. *Visser* (13 L. R., Ch. D., 421; 41 L. T. 745; 28 W. R. 281) commented on in *Chard* v. *Jervis*, 9 L. R., Q. B. D., 178; 51 L. J., Ch., 429; 51 L. J., Q. B., 442; 30 W. R. 504.

26. *Espin* v. *Pemberton* (3 De G. & J. 547; 28 L. J., Ch., 308; 33 L. T., N. S., 345; 7 W. R. 221) observed upon in *Cave* v. *Cave*, 15 L. R., Ch. D., 639; 49 L. J., Ch., 505; 42 L. T. 730; 28 W. R. 798.

27. *Essex* v. *Essex* (20 Beav. 442) approved and followed in *Cox* v. *Willoughby*, 13 L. R., Ch. D., 863; 49 L. J., Ch., 237; 42 L. T. 128; 28 W. R. 503.

1. *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (4 Kay & J. 676 ; 5 Jur., N. S., 310). I cannot concur in the unlimited right of the mortgagee to use the ship as the owner might do, notwithstanding the dicta of Wood, V.-Ch., in *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co*, which have produced this marginal note, "A mortgagee of a ship has power, under the 70th section of the Merchant Shipping Act 1856, to use as well as sell the ship, *semble*." I doubt whether the enactment in the statute referred to, as to the rights and liabilities of the mortgagee of the ship, which regulate the relation between the mortgagee and third persons, and protect him both from claims founded on contract and on tort till he has taken possession, are intended to vary or regulate the power of the mortgagee as between him and the mortgagor. At any rate, they cannot be intended to empower the mortgagee, at the expense and risk of the mortgagor, to send the ship to any quarter of the globe, and to employ her in any trade for which she may be adapted, for any indefinite length of time. Is the burden of repairs, and of paying the master and seamen, and of all the ship's disbursements, to be borne by the mortgagor? Is he to be charged for insurance? And if the ship is wrecked uninsured, is the loss to fall upon him, he being still liable for the balance of the unpaid mortgage money? Nor can I lay down the strict rule that the mortgagee can never lawfully employ the ship to earn freight, or that after taking possession he must allow her to lie idle till he may prudently sell her. He may take possession when she is prosecuting a voyage under a charter-party, and at the end of the voyage it is easy to conceive circumstances which would justify him in a temporary employment of the ship while waiting for a favourable opportunity to sell her. Per Lord Campbell, C., in *Marriott* v. *Anchor Reversionary Co.* 7 Jur., N. S., 713.

2. *European Central Railway Co., Re* (4 L. R., Ch. D., 33 ; 46 L. J., Ch., 57 ; 35 L. T. 583 ; 25 W. R. 92), distinguished in *Popple* v. *Sylvester*, 22 L. R., Ch. D., 98 ; 52 L. J., Ch. D., 54 ; 47 L. T. 329 ; 31 W. R. 116.

3. *Evans Re*, (2 C. M. & R. 206), held by Lord St. Leonards not to have been overruled by *Att.-Gen.* v. *Simcox* (1 Exch. 749), or by *Att.-Gen.* v. *Mangles* (5 M. & W. 120). *Advocate-General* v. *Smith*, 1 Macq. H. L. Ca. 760.

4. *Evans* v. *Charles* (1 Anst. 128) is not law. *Long* v. *Watkinson*, 17 Beav. 471.

5. *Evans* v. *Charles* (1 Anstr. 128) has been doubted repeatedly, and has been denied by the Lord Chancellor. *Wellman* v. *Bowring*, 1 Sim. & S. 35 ; 1 L. J., Ch., 27.

6. *Evans* v. *Crosbie* (15 Sim. 600). I own I have some difficulty in understanding that case before Shadwell, V.-Ch., because that learned judge seems to me to have been a little distrustful, as I infer, of his own opinion, for he refers to arguments of which I confess I am unable to see the force. Per Cranworth, C., in *Windus* v. *Windus*, 6 De G. M. & G. 549, 562.

7. *Evans* v. *Evans* (17 Sim. 108) overruled in *Williams* v. *Evans*, 1 El. & Bl. 727.

8. *Evans* v. *Hellier* (5 Cl. & F. 111) observed upon in *Barrington* v. *Liddell*, 2 De G. M. & G. 480 ; 17 Jur. 241 ; 22 L. J., Ch., 1.

9. *Evans* v. *Hughes* (5 Sim 666) overruled in *Att.-Gen.* v. *Nethercoat*, 2 Myl. & C. 604 ; 7 L. J., N. S., Ch., 75 ; 1 Jur 635.

10. *Evans* v. *Salt* (6 Beav. 266). I do not consider that is a decision which ought to govern subsequent cases, inasmuch as the report gives only the decision, and not one word as to the reasons upon which it is founded. Per Kindersley, V.-Ch., *Roots, Re*, 1 Dr. & Sm. 228, 230.

11. *Evans* v. *Walker* (3 L. R., Ch. D., 211 ; 25 W. R. 7) not followed in *Blight, Re, Blight* v. *Hartnoll*, 19 L. R., Ch. D., 294 ; 51 L. J., Ch., 162 ; 45 L. T. 524 ; 30 W. R. 513.

12. *Everett, Re* (12 Beav. 485), observed upon in *Hodgshon's Trusts, Re*, 2 W. R. 539.

13. *Ewart* v. *Graham* (7 H. L. Ca. 331 ; 29 L. J., Exch., 88) distinguished in *Bruce* v. *Hellewell*, 29 L. J., Exch., 297.

14. *Ewin* v. *Obaldiston* (6 Sim. 608) disapproved of in *Two Sicilies (King)* v. *Wilcox*, 1 Sim., N. S, 301 ; 20 L. J., N. S., Ch., 417 ; 15 Jur. 214.

15. *Exeter & Crediton Railway Co.* v. *Buller* (5 Rail. Ca. 211 ; 16 L. J., N. S., Ch., 449 ; 11 Jur. 527, 532) followed in *Edwards* v. *Shrewsbury & Birmingham Railway Co.*, 2 De G. & Sm. 537.

16. *Eyre* v. *Marsden* (2 Keen 564) observed upon in *Barrington* v. *Liddell*, 2 De G. M. & G. 480 ; 17 Jur. 241 ; 22 L. J., Ch., 1.

17. *Eyre* v. *Marsden* (4 Myl. & Cr. 231) followed in *Luckcraft* v. *Pridham*, 48 L. J., Ch., 936.

18. *Eyre* v. *Salt* (6 Beav. 266) cannot be treated as law after the decision of the House of Lords in *De Beauvoir* v. *De Beauvoir* (3 H. L. Ca. 557). Per Romilly, M. R., in *Hamilton* v. *Mills*, 29 Beav. 198.

F.

19. *Faithfull* v. *Ewen* (7 L. R., Ch. D., 495 ; 47 L. J., Ch., 457 ; 37 L. T. 805 ; 26 W. R. 270) approved in *Shippey* v. *Grey*, 49 L. J., C. P., 524 ; 42 L. T. 673 ; 28 W. R. 877.

20. *Farebrother* v. *Gibson* (1 De G. & J. 602) distinguished in *Cato* v. *Thompson*, 9 L. R., Q. B. D., 616 ; 47 L. T. 491.

21. *Farebrother* v. *Wodehouse* (26 L. J., Ch., 81, 210 ; 23 Beav. 18) not followed in *Forbes* v. *Jackson*, 19 L. R., Ch. D., 615 ; 51 L. J., Ch., 690 ; 48 L. T. 722 ; 30 W. R. 652.

22. *Farina* v. *Silverlock* (6 De G. M. & G. 124). Observations of Lord Cranworth, C., in this case explained in *Farina* v. *Silverlock*, 4 Kay & J. 650.

23. *Farnham* v. *Phillips* (2 Atk. 215) can hardly be considered of much authority, as Lord Hardwicke himself expressed doubts as to the correctness of the doctrine there laid down per Turner, L. J., in *Montefiore* v. *Guedalla*, 6 Jur., N. S., 329, 330.

24. *Farrow* v. *Austin* (18 L. R., Ch. D., 58 ; 45 L. T. 227 ; 30 W. R. 50) followed in *Turner* v. *Hancock*, 20 L. R., Ch. D., 303 ; 51 L. J., Ch., 517 ; 36 L. T. 750 ; 30 W. R. 480.

25. *Farthing* v. *Allen* (2 Madd. 310) strongly disapproved of by Malins, V.-Ch. The decision was irrational and opposed to the current of modern decisions. *Bowers* v. *Bowers*, 17 W. R. 1004 ; 38 L. J., Ch., 596. But on appeal

the case of *Bowers* v. *Bowers* was reversed, and Giffard, L. J., said, that in *Edwards* v. *Edwards* (15 Beav. 357), the Master of the Rolls then did not dissent from *Farthing* v. *Allen*, from the decision in which I do not see any reason to dissent now. *Bowers* v. *Bowers*, 5 L. R., Ch., 244, 251; 18 W. R 301.

1. *Farthing* v. *Allen* (2 Madd. 310) was referred to in *Bowers* v. *Bowers* (5 L. R., Ch., 244; 39 L. J., Ch., 351; 23 L.T. 35; 18 W. R. 301) in the Appeal Court, and Giffard, L. J. expressed his full approval of that decision. Malins, V.-Ch., said, in *Clark* v. *Henry* (11 L. R., Eq, 222. 225 : 40 L. J., Ch.. 151 ; 24 L T. 256; 19 W. R. 319), "And I have expressed my full disapproval of it. What I said in *Bowers* v. *Bowers* (8 L. R., Eq., 283) was, I should arrive at the same conclusion in the absence of authority, and if I found such a case as *Farthing* v. *Allen* in my way, I should have decided in direct contradiction." *Farthing* v. *Allen* is more fully reported in 2 Jarman on Wills, 3rd ed, p. 730.

2. *Faussett* v. *Carpenter* (2 Dow & Cl 232) is strongly animadverted on by Lord St. Leonards, Sug. V. & P. 1022. . . . The case as it stands is an authority for the proposition, that where a trustee and *cestui que trust* join in a conveyance, the legal estate will not pass at law. If that case should come to be reconsidered, there will be great difficulty in supporting it. Lord St. Leonards suggests (3 Jones & Latouche 284), that a short Act of Parliament should be passed to overrule it But none having been passed, I should feel bound by that decision, with all its insuperable difficulty, if the present case were on all fours with it. But that is not the case. Per Wood, V.-Ch., in *Carter* v. *Carter*, 4 Jur., N. S., 65; 27 L. J., Ch., 74, 80, 81.

3. *Fawcett* v. *Hodges* (3 Ir. Eq. Rep. 232) overruled. *O'Flaherty* v. *M'Dowell*, 6 H. L. Ca. 142; 4 Jur., N. S., 33.

4. *Fazakerley* v. *Ford* (4 Sim. 390) approved of in *Harrison* v. *Round*, 17 Jur. 563; 22 L. J., Ch., 322; 2 De G. M. & G. 190; 1 W. R. 26.

5. *Fearon* v. *Bowers* (1 H. Bl. 364) not followed in *Glyn, Mills, & Co.* v. *East and West India Dock Co.*, 7 L. R., App. Cas., 591; 52 L. J., Q. B., 146; 47 L. T. 309; 31 W. R. 201, 580. Affirming 6 L. R., Q. B. D., 475; 50 L. J., Q. B., 62; 43 L. T. 584; 29 W. R. 216.

6. *Featherstonhaugh* v. *Fenwick* (17 Ves. 298) distinguished in *Cassels* v. *Stewart*, 6 L. R., App. Cas., 64; 29 W. R. 636.

7 *Felton's Executors' case*, or *Felton, Exp., East of England Bank, Re* (1 L. R., Eq., 219; 35 L. J., Ch., 196; 14 W. R. 247; 12 Jur., N. S., 291; 13 L. T., N. S., 741) approved and followed in *British Guardian Life Assurance Co., Re*, 14 L. R., Ch. D., 335; 49 L. J., Ch., 446; 28 W. R. 945.

8. *Fenn* v. *Edmonds* (5 Hare 314) overruled. *Desborough* v. *Harris*, 5 De G. M. & G. 439; 1 Jur., N. S., 986.

9. *Fennall* v. *Brown* (18 Jur. 1051). I do not decline to follow the case cited because it is reported in the unauthorised reports. It is of such materials that the law of England is made up, and I should be denying myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in those useful publications. But I cannot, for the reason I have mentioned, accept the case in question as an authority. Per Lord Westbury, C., in *Francome* v. *Francome*, 11 Jur., N. S, 123, 124. S. C. *nom. Francombe* v. *Francombe*, 11 L T., N. S., 757; 5 N. R. 289; 12 L. T., N. S., 123.

And Stuart, V.-Ch., by whom the case of *Fennall* v. *Brown* was decided, said, "I cannot act upon that report as an authority. I wish, however, to take this opportunity of stating that I am not one of those who have lately made a raid against the ephemeral reports. Any gentleman whom it may please to do so is at perfect liberty to report whatever cases he thinks proper, and the ephemeral reports are, in my opinion, most useful; but, nevertheless, I consider them useful rather for the purpose of intelligence and of suggesting inquiry, than of authority That, in my opinion, was the intention in which they were originated, but I think the original intention has, of late years, been somewhat abused, and I, for my part, cannot act upon them as binding authorities." Per Stuart, V.-Ch., in *Francombe* v. *Francombe*, 11 L. T., N. S, 666.

10. *Fenning, Exp, Wilson and Armstrong, Re*, (3 L. R, Ch. D, 455; 35 L. T. 830; 25 W. R. 185), explained and commented on in *Credit Co, Exp., McHenry, Re*, 24 L. R., Ch. D., 353; 49 L. T. 385; 32 W. R 47; 53 L. J., Ch., 161.

11. *Quære* as to *Fearns* v. *Young* (9 Ves. 549). See *Houghton* v. *Franklin*, 1 Sim. & S. 391.

12. *Fenton* v. *Hughes* (7 Ves. 280), the report of enlarged and observed upon in *Irving* v. *Thompson*, 9 Sim. 17; 8 L. J., N. S., Ch., 357; 3 Jur. 1071.

13. *Ferguson* v. *Gibson* (14 L. R., Eq., 379; 41 L. J., Ch., 640) explained in *Davidson* v. *Illidge*, 27 L. R., Ch. D., 478; 53 L. J., Ch., 991; 33 W. R. 18.

14. *Ferrand* v. *Bradford (Mayor)* (21 Beav. 422; 8 De G. M. & G. 63), followed in *Moss* v. *Syers*, 2 N. R. 572.

15 *Ferrao's case, Paraguassu Steam Tramway Co., Re* (9 L. R., Ch., 355; 43 L. J., Ch., 482; 30 L. T. 211; 22 W. R. 386. Affirming 43 L. J., Ch., 264; 29 L. T., N. S., 876; 22 W. R. 229), approved in *Barrow-in-Furness Investment and Northern Counties Land and Investment Co., Re*, 14 L. R, Ch. D., 400; 42 L. T. 888.

16. *Festing* v. *Allen* (12 M. & W. 279; 5 Hare 573; 13 L. J., Exch., 74). It is very like a case of *Festing* v. *Allen* which I argued many years ago. This was a decision of the Court of Exchequer, which was afterwards affirmed by Sir James Wigram (5 Hare 573), that a gift to A. for life, and to the children who should attain twenty-one, was a contingent remainder. And where the life estate had failed while the children were in their minority, they would fail to take the estate altogether. I consider that that case was properly overruled in a case which I argued before V.-Ch. Stuart, of *Browne* v. *Browne*, 3 Sm. & Giff. 568. I believe it has been the subject of strife since. My opinion was always against *Festing* v. *Allen*, though it was the judgment of the Court of Exchequer delivered by a very eminent judge, Lord Cranworth. Per Malins, V.-Ch., in *Jull* v. *Jacobs*, 3 L. R., Ch. D., 703, 713; 35 L. T. 153; 24 W. R, 947.

17. *Festing* v. *Allen* (13 L. J., Exch., 74; 2

L. T., N. S., 150; 12 M. & W. 279; 5 Hare 573) distinguished in *Marshall* v. *Gingell*, 21 L. R., Ch. D., 790; 51 L. J., Ch., 818; 47 L. T. 159; 31 W. R. 63.

1. *Festing* v. *Allen* (12 M. & W. 279; 5 Hare 573) commented on and discussed. Per Wood, V.-Ch., *Styan, Exp.*, Johns. 387.

2. *Festing* v. *Allen* (12 M. & W. 279; 5 Hare 573; 13 L. J., Exch., 74); which has been followed in some more recent cases, but in other recent cases has not been followed. The reports of the two other cases, in which the decision in *Festing* v. *Allen* has been followed, afford nothing to increase the inadequate weight of that case. It is satisfactory to find that there are at least two subsequent cases in which it has not been followed, and that Knight Bruce, V.-Ch., in the case of *Riley* v. *Garnett*, 2 De G. & Sm. 629, preferred adhering to older authorities so often affirmed by the House of Lords." Per Stuart, V.-Ch., in *Browne* v. *Browne*, 3 Sm. & G. 568, 582, 591; 3 Jur., N. S., 728, 736; 26 L. J., Ch., 635, 643; 5 W. R. 777.

3. *Festing* v. *Allen* (12 M. & W. 279) followed in *Holmes* v. *Prescott*, 2 N. R. 559; 1 W. R. 636: 10 Jur., N. S., 587; 33 L. J., Ch., 264; 12 W. R. 636; 11 L. T., N. S., 38.

4. *Festing* v. *Allen* (12 M. & W. 279) commented on in *Astley* v. *Micklethwaite*, 15 L. R., Ch. D., 59; 49 L. J., Ch., 672; 43 L. T. 58; 28 W. R. 811.

5. *Festing* v. *Allen* (12 M. & W. 279). The rule laid down in this case that in a devise to the children of A. "who shall attain the age of twenty-one" the words "who shall attain the age of twenty-one" are part of the description of the devisees, gives way to a contrary direction expressed in the devise. *Muskett* v. *Eaton*, 24 W. R. 52; 1 L. R., Ch. D., 435; 45 L. J., Ch., 22; 33 L. T., N. S., 716.

6. *Field* v. *Brown* (27 Beav. 90), read "with" for "without" impeachment of waste, and "Esther" for "Sarah" in the 14th line of the report in that case. See 34 Beav. 508. n.

7. *Field* v. *Evans* (15 Sim. 375), reported decision in, ascertained to be erroneous. *Baker* v. *Bradley*, 2 Sm. & G. 531; 1 Jur., N. S., 489.

8. *Field* v. *Moore* (19 Beav. 176; 2 Jur., N. S., 145; 25 L. J., Ch., 66) explained in *Barrow* v. *Barrow*, 4 Kay & J. 409; 4 Jur., N. S., 1049.

9. *Fielding* v. *Preston* (1 De G. & J. 438) questioned in *Cook* v. *Drew*, 2 N. R. 437.

10. *Filkin* v. *Hill* (4 Bro. P. C. 640) observed on in *Watts* v. *Hyde*, 2 Ph. 406; 17 L. J., N. S., Ch., 39; 11 Jur. 979. Reversing 2 Colly. 368; 10 Jur. 127; and in *Watts* v. *Eglington* (*Lord*), 1 Coop. C. C. 432.n.

11. *Filley* v. *Bridger* (2 Vern. 519) doubted. See *Curtis* v. *Curtis*, 2 Bro. C. C. 620.

12. *Finch* v. *Hattersley* (3 Russ. 345. n.). Judges have expressed doubts whether this case ought to be followed. See *Cook* v. *Dawson*, 8 De G. F. & J. 127.

13. *Finch* v. *Squire* (10 Ves. 41) not followed in *Jervois* v. *Lawrence*, 22 L. R., Ch. D., 209; 52 L. J., Ch., 242; 47 L. T. 428; 31 W. R. 267.

14. *Fisher, Exp., Ash, Re* (7 L. R., Ch., 636; 41 L. J., Bky., 62; 26 L. T. 931; 20 W. R. 849), explained in *Kilner, Exp., Barker, Re*, 13 L. R., Ch. D., 245; 41 L. T. 520; 28 W. R. 269, and in *Burton, Exp., Tunstall, Re*, 13 L. R., Ch. D., 102; 41 L. T. 471; 28 W. R. 268.

15. *Fisher* v. *Ronalds* (17 Jur. 393). Judgment in this case observed upon in *Sidebottom* v. *Adkins*, 5 W. R. 743; 3 Jur., N. S., 631.

16. *Fishmongers' Co.* v. *East India Co.* (1 Dick. 163) observed upon by Lord Westbury, C., in *Jackson* v. *Newcastle* (*Duke*), 10 Jur., N. S., 688; 10 L. T., N. S., 635.

17. *Fishmongers' Co.* v. *Robertson* (5 M. & G. 131). In considering this case, however, we have been obliged to direct our attention to the case of the *Fishmongers' Co.* v. *Robertson*, on account of a dictum which forms part of the elaborate judgment of the learned Lord Chief Justice Tindal. He says (at p. 192): "Even if the contract put in suit by the corporation had been on their part executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them, that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up an objection in a cross-action that it was not sealed with their common seal." The *Mayor of Thetford's case* (1 Salk. 192) is cited as an authority for this proposition, but it does not support it in any degree whatever. It was a case of mandamus, and it was held that the return did not require to be sealed. There is no authority for saying that a record binds a plaintiff in such a manner, and the doctrine has been completely overruled in the *Copper Miners' Co.* v. *Fox* (16 Q. B. 229), although the observations of Chief Justice Tindal are entitled to very great respect. Per Kelly, C. B., in *Kidderminster Corporation* v. *Hardwick*, 22 W. R. 160, 162.

18. *Fitzgerald* v. *O'Flaherty* (1 Moll. 347) reviewed in *Garrett* v. *Besborough* (*Earl*), 2 Dr. & Wal. 441; 2 Ir. Eq. R. 180.

19 *Fitzsimon* v. *Burton*, *quære* as to the dictum of Lord Eldon in, as to a party losing his right to renew, in the event of all the lives dropping prior to his taking any steps to enforce a renewal. *Butler* v. *Portarlington* (*Lord*), 1 Dr. & War. 20; 1 Con. & L. 1; 4 Ir. Eq R. 1.

20. *Fleetwood, Re* (15 L. R., Ch. D., 594), observed upon in *Scott* v. *Brownrigg*, 9 L. R., Ir., 246

21. *Fleming* v. *Self* (3 De G. M. & G. 997; 1 Jur., N. S., 25. Affirming Kay 518; 19 Jur. 25; 24 L. J., Ch., 29) as to mortgages to building societies, is binding on the Court, and extends to the deduction of redemption moneys paid in by the mortgagor, although that point is not expressly referred to in the judgment. *Smith* v. *Pilkington*, 1 De G. F. & J. 120. And see *Archer* v. *Harrison*, 7 De G. M. & G. 404; 3 Jur., N. S., 194; 29 L. J., Ch., 227; 4 Jur., N. S., 58.

22. *Fletcher* v. *Fletcher* (4 Hare 67) distinguished in *Scales* v. *Maude*, 1 Jur., N. S., 1147.

23. *Fletcher* v. *Moore* (3 Jur., N. S., 458; 26 L. J., Ch., 530; 29 L. T. 173) rightly decided, though the grounds of the decision cannot be supported. *Wardroper* v. *Cutfield*, 10 Jur., N. S., 194; 33 L. J., Ch., 605; 9 L. T., N. S., 753.

24. *Fletcher* v. *Rylands* (3 L. R., H. L., 330; 37 L. J., Exch., 161) distinguished in *Anderson* v. *Oppenheimer*, 5 L. R., Q. B. D., 602; 49 L. J., Q. B., 708.

1. *Fletcher* v. *Rylands* (3 L. R., H. L, 330; 35 L. J., Exch., 155). The foundation of the doctrine there laid down is derived from an old case (*Tenant* v. *Goldwin*, 1 Salk. 21, 360; 2 Lord Raym. 1089) in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on to his neighbour's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew trees growing on his own land which are clipped by some means, he must prevent the clippings from escaping on to his neighbour's land, and from being placed there by a stranger. Per Mellor, J., in *Wilson* v. *Newbury*, 7 L. R., Q. B., 31, 33; 41 L. J., Q. B., 31, 32; 25 L. T. 695; 20 W. R. 111.

2. *Flight* v. *Bentley* (7 Sim. 149; 4 L. J., N. S, Ch., 262) observed on in *Moore* v. *Greg*, 2 Ph. 717; 18 L. J., N. S., Ch., 15; 12 Jur. 952.

3. *Flight* v. *Bentley* (7 Sim. 149; 4 L. J., N. S., Ch., 262) overruled, or its authority displaced by *Moores* v. *Choat*, 8 Sim. 508; 8 L. J., N. S., Ch., 128, 131; 3 Jur. 220. Per Turner, L. J., in *Cox* v. *Bishop*, 3 Jur., N. S., 499, 500; 26 L. J., Ch, 389, 394.

4. *Flight* v. *Robinson* (8 Beav. 22) observed upon in *Manser* v. *Dix*, 3 W. R 313; 1 Kay & J. 451; 1 Jur, N. S., 466; 3 Eq. Rep. 650.

5. *Flower* v. *Buller* (15 L. R, Ch., D, 665; 49 L. J., Ch., 784; 43 L. T. 311; 28 W. R. 948) not followed in *Pile* v. *Fitzgibbon*, 17 L. R., Ch. D., 454; 50 L. J, Ch., 394; 44 L. T. 562; 29 W. R. 551.

6. *Flower* v. *Gedye* (23 Beav. 449; 5 W. R. 747) not followed by Malins, V.-Ch., in *Birch* v. *Williams*, 24 W. R. 700.

7. *Flower* v. *Lloyd* (10 L. R., Ch. D., 327; 39 L. T. 613; 27 W. R. 496) explained and commented on in *Abouloff* v. *Oppenheimer*, 10 L. R., Q. B. D., 308; 52 L. J, Q B., 7; 47 L. T. 328; 31 W. R. 57. Per Brett, L. J.

8. *Foden* v. *Finney* (4 Russ 428) disapproved of in *Cutler, Re*, 14 Beav. 220; 20 L. J., N. S., Ch., 504; 15 Jur. 911; and overruled by *Bailey* v. *Dennett*, 3 Y. & Coll. 459; 3 Jur. 844.

9. *Foley* v. *Maillardet* (1 De G. J. & S. 365; 33 L. J., Ch., 335; 11 W. R. 628; 9 L. T., N. S., 643) (service of bills in equity out of the jurisdiction of the Court of Chancery) not followed in *Drummond* v. *Drummond*, 12 Jur., N. S., 581; 35 L. J., Ch., 780; 14 W. R. 828, by Stuart, V.-Ch., and expressly overruled S. C. on appeal 15 L. T., N. S., 337; 15 W. R. 267; 36 L. J., Ch., 153.

10. *Folkes* v. *Western* (9 Ves. 456) maintained and shown to be consistent with *Pitt* v. *Jackson* (2 Bro. C. C. 51). *Lee* v. *Head*, 1 Kay & J. 620; 1 Jur., N. S., 722; 24 L. J., Ch., 569; 3 W. R. 591; 3 Eq. Rep. 1046.

11. *Folkes* v. *Western* (9 Ves. 496) approved of in *Brownlow* v. *Meath* (*Earl*), 2 Dr. & Wal. 674; 2 Ir. Eq. R. 393.

12. *Forbes* v. *Moffatt* (18 Ves. 393), dictum of Sir William Grant in this case, explained in *Horton* v. *Smith*, 4 Kay & J. 624.

13. *Forbes* v. *Peacock* (12 Sim. 528; 13 L. J., Ch., 46; 15 L. J., Ch., 371). The doctrine of this case amounts only to this, that where prior to 22 & 23 Vict., c. 35, and 23 & 24 Vict., c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power to the trustees to give receipts for the purchase money. There is nothing in that case authorising trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon* v. *Trustcott*, 20 L. R., Eq, 348; 44 L. J., Ch., 186; 32 L. T., N S., 50.

14. *Ford* v. *Chesterfield* (*Earl*) (16 Beav. 520). The rules laid down in as to costs of disclaiming defendants in suits for foreclosure or redemption approved. *Bellamy* v. *Brickenden*, 4 Kay & J. 670.

15. *Forth*, *Exp* (Mont. & M. 10), varied in *Palmer*, *Exp.*, *id.* 211.

16. *Forth* v. *Chapman* (1 P. W. 666) the dictum therein as to a bequest of leasehold estate questioned in *Kerr* or *Ker* v. *Dungannon* (*Lord*), 1 Dr. & War. 509; 1 Con & L. 335; 4 Ir. Eq R 343.

17. *Forth* v. *Chapman* (1 P. W. 664). According to Lord Hardwicke's note of this case Lord Macclesfield held, that the words "leave no issue" must relate to the time of the deaths of the testator's two nephews, and could not be extended to a dying without issue generally. See *Beauclerk* v. *Dormer*, 2 Atk. 308.

18. The doctrine of *Foss* v. *Harbottle* (2 Hare 492), as to the interference of this Court in the internal administration of incorporated companies, confirmed in *Lord* v. *Governor and Company of Copper Miners*, 2 Ph. 740; 1 H. & Tw. 85; 18 L. J., N. S., Ch., 65; 12 Jur. 1059. Reversing 2 De G. & Sm. 308; and in *Macdougall* v. *Gardiner*, 45 L. J., Ch, 27; 1 L. R., Ch. D., 13; and in *Edwards* v. *Shrewsbury & Birmingham Railway Co*, 2 De G. & Sm. 537.

19. *Foss* v. *Harbottle* (2 Hare 461) approved and followed in *Duckett* v. *Gover*, 25 W. R. 554 6 L. R., Ch. D., 82; 46 L. J., Ch, 407.

20. *Foster* v. *Great Western Railway Co.* (8 L. R, Q. B. D., 25, 215) distinguished in *Butcher* v. *Pooler*, 24 L. R., Ch. D., 273; 52 L. J., Ch. 930; 49 L. T. 573

21. *Foster* v. *Hayes* (4 E. & B. 717, 734) approved and followed in *Smyth* v. *Power*, 10 Ir. R., Eq., 192.

22. *Foster* v. *Roberts* (29 Beav. 467; 4 L. T., N. S., 760; 30 L. J., Ch, 666; 9 W. R. 605; 4 L. T., N. S., 760) commented upon in *Willoughby* v. *Bridcoake*, 11 Jur., N. S, 524; 13 W. R. 515; 12 L. T., N. S, 173. Affirmed 11 Jur., N. S., 706; 13 W. R. 1056; 13 L. T., N. S., 141.

23. *Fourdrin* v. *Gowdey* (3 Myl. & K. 383) overruled in part by *Du Hourmelin* v. *Sheldon*, 4 Myl. & C. 525. S. C. *nom. Du Hourmelin* v. *Att.-Gen*, 9 L. J., N. S., Ch, 25. Affirming *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 8 L. J., N. S., Ch., 133; 3 Jur. 69.

24. *Fowle* v. *Freeman* (9 Ves. J. 351) "appears to me to be correctly decided whether at law or in equity." Per Cranworth, C., in *Ridgway* v. *Wharton*, 4 Jur., N. S., 175. "The case of *Fowle* v. *Freeman* does not touch the present case. There can be no objection whatever, I apprehend, to that judgment." Per Lord Brougham. *Ib.*

25. *Fowle* v. *Freeman* (9 Ves. 351) distinguished in *Chinnock* v. *Ely* (*Marchioness*), 6 N. R. 1; 11 Jur., N. S., 329; 13 W. R. 597; 12 L. T., N. S., 251; 4 De G. J. & S. 638; 6

N. R. 1. Reversing 13 W. R. 176; 11 L. T N. S., 536.

1. *Fowler* v. *Richards* (5 Russ. 39; 6 L. J., Ch., 185), as to who is the proper legal representative, doubted by Vice-Chancellor in *Jernegan* v. *Baxter*, 5 Sim. 568.

2. *Fowler's case*, *British and American Telegraph Co.*, *Re* (27 L. T., N. S., 748; 14 L. R, Eq, 316; 21 W. R. 37; 42 L. J., Ch., 9). Speaking with great respect for the decision in *Fowler's case*, I should have some difficulty in following it; in fact, I could not follow it. I could distinguish the two cases, but I do not think it is desirable for a judge to go out of his way to find distinctions. It is better to say at once that he does not agree with a case. In *Fowler's case*, each director agreed to take twenty-five shares of 20*l.* each, so that he was to contribute to the funds of the company 500*l.* for the benefit of the creditors of the company. But Mr. Fowler made a mistake; he thought that the qualification was twenty shares of 25*l.* each. Under that mistake, and in ignorance that any shares had been allotted to him, he applied for and was allotted other shares of exactly the same amount. The liquidator insisted on his taking, in addition to the shares allotted to him, twenty-five of 20*l.* each. He said, "I have done so already in substance though not in form." A very technical judge might have insisted on this number, but there was no justification for making him take both. With all my respect for V.-Ch. Bacon, I am utterly unable to agree with *Fowler's case*. I should not have followed it if this had been the same case, but this is fairly distinguishable. Per Sir George Jessel, M R, in *New Buxton Lime Co.*, *Re*, *Duke's case*, 33 L. T., N. S, 776; 1 L. R., Ch. D., 620, 622; 45 L. J., Ch, 389; 24 W. R. 341.

3. *Fox*, *Exp.* (1 Ves. & B. 67). The case relied on is *Fox*, *Exp.*, where Lord Eldon laid down the rule that the specification must be complied with, irrespective of the drawing; and if not the patent is bad. Now, of course I should be most reluctant to suppose that anything laid down by Lord Eldon was wrong, but I confess, although that was the rule then, the great improvements of science since that time, as instanced by the inventions of locomotives, electric telegraphs, etc., have made it impossible that it can be now adhered to. Look at any of these modern inventions, they are utterly unintelligible, even to a skilful engineer, without the drawings; and therefore it is not surprising that that rule can be no longer the law. A specification may consist of figures or one figure only; or it may consist of a description aided by the figure or figures. [The Vice-Chancellor then referred to Coryton on Patents, 140.] That rule, therefore, is no longer a rule, and a specification may be good although it consists of a drawing only. The specification here, although it has had various objections made to it, is very short. I do not think that any ordinarily skilled workman upon perusing it would have any difficulty in reproducing the article for which the plaintiff claims a patent. The specification is therefore, I consider, sufficient, and there is nothing in it calculated to mislead the public. I cannot come to the conclusion that the addition of the words at the end vitiate the patent, although, perhaps, they had been better omitted. On the rule, therefore, laid down in *Lewis* v. *Marling* (10 B. & C. 27), the specification complies with the law, and the plaintiff is entitled to a decree for a perpetual injunction, with an account and a reference as to damages. Per Malins, V.-Ch., in *Poupard* v. *Fardell*, 21 L. T., N. S., 699; 18 W R. 127.

4. *Fox* v. *Fox* (19 L. R., Eq., 572; 23 W. R. 314) in conflict with *Ashmore*, *Re* (9 L. R., Eq., 99; 39 L. J, Ch., 202), observed upon and distinguished in *Dewar* v. *Brooke* or *Brock*, 14 L. R, Ch. D., 529; 49 L J., Ch., 374; 28 W. R. 613.

5. *Fox* v. *Fox* (19 L. R, Eq., 286; 23 W. R. 314) in *Parker*, *Re*, *Barker* v. *Barker*, 16 L. R., Ch. D., 44.

6. *Fox* v. *Gregg* (2 Sugd. Pow. App., No. 213) distinguished in *Neatherway* v. *Fry*, 1 Kay 172; 23 L. J., Ch. 222.

7. *Fox* v. *Hawks* (13 L. R., Ch. D., 822) observed upon in *Breton's Estate*, *Re*, *Breton* v. *Woolven*, 17 L. R., Ch. D., 416; 50 L. J., Ch., 369; 44 L. T. 337; 29 W. R. 777.

8. *Fox's case* (5 L. R., Eq., 118; 37 L. J., Ch., 257) overruled in *Scottish Petroleum Co.*, *Re*, *Wallace's case*, 23 L. R., Ch. D., 413; 49 L. T. 348; 31 W. R. 846.

9. *Foxley*, *Exp.*, *Nurse*, *Re* (3 L. R., Ch., 515; 16 W. R. 831; 18 L. T., N. S., 862), observed upon in *Field*, *Exp*, 13 L. R., Ch. D., 106. n.; 28 W. R. 267.

10. *Foxley*, *Exp.* (3 L. R., Ch., 515) explained in *Burton*, *Exp*, *Tunstall*, *Re*, 13 L. R., Ch. D., 102; 41 L. T. 571; 28 W. R. 268.

11. *Foy's Trusts*, *Re* (33 L. T. 161; 23 W. R. 744), not followed in *St. Mary's*, *Wigton* (*Vicar*), *Exp.*, 18 L. R., Ch. D., 646; 45 L. T. 134; 29 W. R. 883.

12. *Foy* v. *Foy* (1 Cox 163; 1 Bro. C. C. 393) not to be found in Reg. Book. 2 Rop. Leg. 23. n.

13 *Frame* v. *Dawson* (14 Ves. 386). With regard to this case, the actual decision was no doubt correct, but as to the unqualified terms in which the general principle was there stated, Malins, V.-Ch., in *Williams* v. *Evans* (44 L. J., Ch, 319, 323; 19 L. R., Eq., 547; 32 L. T. 359; 23 W. R. 466), was of opinion that subsequent authorities negatived them altogether.

14. *France* v. *France* (13 L. R., Eq., 173) Form of decree in this case not adopted in *Davey* v. *Wietlisbach*, 15 L. R, Eq., 269.

15. *Francis* v. *Clemow* (Kay 435) followed. *Wheeler* v. *Howell*, 3 Kay & J. 198.

16. *Francis* v. *Rucker* (Ambl. 672). According to a law in Pennsylvania, bills of exchange drawn or indorsed on persons in England, and protested, should be paid to the holder, with 20*l.* per cent. for damage; and where bills drawn on a merchant in England were accepted by him, and he afterwards became bankrupt before they were due, and they were protested for non-payment, the drawer having paid the money due on the bills, and the 20*l.* per cent. to the holder, he was permitted to prove under the commission. *Francis* v. *Rucker* was well considered by Lord Camden, C., who so felt the great importance of it, that, in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed, so that his opinion might be reviewed, and the opinion of

the House of Lords, if necessary, taken upon it. His decision however, was not appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense, per Campbell, C., in *Walker* v. *Hamilton*, 1 De G. F. & J. 602, 610, 611.

I say nothing as to how this case would stand, as between a holder and the acceptors, because this is not the case before us; but as between the drawer and the acceptors, in my opinion, there is a liability in the acceptors, which would have been provable under a bankruptcy. Therefore, the case of *Francis* v. *Rucker*, is distinct upon the point, and I do not think that that authority, after having examined the petition which was presented in bankruptcy, is confined at all to the special circumstances of the particular case, per Turner, L. J. *Ib.*

1. *Frank* v. *Frank* (1 Ch. Ca. 84). A., seised in tail of freehold lands, and in fee of copyhold lands, devised the copyholds to defendant, who was entitled to the remainder of the freehold lands, and devised the freehold to plaintiff. Defendant apprehending that A. had suffered a recovery, agreed with plaintiff, without consideration, that each should enjoy according to the will, but discovering afterwards that no recovery had been suffered, he sued for the freehold lands. Plaintiff brought his bill to establish the agreement, and it was decreed to him accordingly. See *Leonard* v. *Leonard*, 2 Ball & B. 183, where Manners, Ch., said this was a very unsatisfactory decision, and in a book of very doubtful authority.

2. *Frankland* v. *Lucas* (4 Sim. 586). The judgment of the Vice-Chancellor in this case does not justify the statement in the marginal note of the reporter. Per Stuart, V.-Ch., in *Chapman* v. *Chapman*, 18 W. R. 533, 537; 9 L. R., Eq., 276; 22 L. T. 145.

3. As to *Franklin* v. *Thornebury* (1 Vern. 132). See per Lord Henley in *Drury* v. *Drury*, 2 Eden. 58.

4. *Franklyn, Exp., Franklyn's Settlement, Re, and Great Northern Railway Act, Re* (1 De G. & Sm. 528; 17 L. J., Ch., 166; 12 Jur. 642; 5 Rail. Ca. 206). (Interim investments.) I think this case carries the doctrine to an extent not warranted by the modern practice of the Court. Per Malins, V.-Ch., in *Wilkinson, Re*, 37 L. J., Ch., 384.

5. *Fraser* v. *Pigott* (1 Younge 354) stated to have been overruled. *Overhill's Trust, Re*, 1 Sm. & G. 362; 17 Jur. 342; 22 L. J., Ch., 485; 1 W. R. 208.

6. *Fraser* v. *Pigott* (1 Younge 354) is a case in which Lord Lyndhurst obviously misapprehended the interpretation of the will then before him. Per Stuart, V.-Ch., in *Holt* v. *Sindrey*, 38 L. J., Ch., 126, 131.

7. *Fraser* v. *Pigott* (1 Younge 354) inconsistent with the other authorities upon the subject. Per Stuart, V.-Ch., in *Crook* v. *Hill*, 38 L. J., Ch., 579, 582.

8. *Fream* v. *Dowling* (20 Beav. 624), is not reported on appeal, but it would appear from a note of the case in 4 L. R., Eq., 145. n., that the decision on that part of the will on which the case is reported, is not overruled. I have to thank Mr. Turner for giving me a note of the judgment of the lords justices on the appeal in *Fream* v. *Dowling*, which shows very clearly that their lordships proceeded on the ground of the residue being given, and not on the ground that they differed from me on that part of the case on which I gave my judgment, as reported by Mr. Beavan. Per Lord Romilly in *Hodges* v. *Grant*, 4 L. R., Eq., 140, 149; 36 L. J., Ch., 935; 15 W. R. 607.

9. *Freeman, Exp.* (Buck 471), said to be overruled, 1 G. & J. 96; 2 Mont. & A 88. n. (*a*); 4 Dea. & Ch. 608; 1 Mont. & Ch. 235; and notes (*n*) and (*d*).

10. *Freeman* v. *Cook* (2 Exch. 654) Dictum of Parke, B., as to estoppel in this case, approved of in *M'Kenzie* v. *British Linen Co.*, 6 L. R., App. Cas., 82; 44 L. T. 431; 29 W. R. 477.

11. *Freeman* v. *Cooke* (2 Exch. 654) approved in *Miles* v. *McIlwraith*, 8 L. R., App. Cas., 120; 52 L. J., P. C., 17; 48 L. T. 689; 31 W. R. 591.

12. *Freeman's Reports.* As to these reports see 1 Meriv. 87.

13. *Freemantle* v. *Bankes* (5 Ves. 79) heard only as a short cause. Per Turner, L. J., in *Montefiore* v. *Guedalla*, 6 Jur., N. S., 329, 330.

14. *French* v. *French* (6 De G. M. & G. 95. Reversing 1 Jur., N. S., 840) commented on and doubted in *Wakefield* v. *Gibbon*, 3 Jur., N. S., 353; 2 Jur., N. S., 169; 25 L. J., Ch., 612.

15. *Freshney* v. *Carrick* (1 H & N. 653), held, on the authority of this case, that although the possession of the engine was in accordance with the *bonâ fide* agreement between the plaintiff and L., it was in the possession, order, and disposition of the bankrupt, with the consent of the true owner, within the meaning of the Bankruptcy Act of 1849, s. 125. *Hornsby* v. *Miller*, 5 Jur., N. S., 938; 28 L. J., Exch., 99; 7 W. R. 53; 32 L. T. 125; 1 El. & Bl. 92. S. P. *Murray, Re, Tickell, Exp.*, 9 Ir. Ch. R. 281.

16. *Friar* or *Fryer* v. *Wilkinson* is not reported either in print or in MS.; the case is cited from the proceedings in the cause filed in the chancery offices, but it is extremely difficult to rest safely on a case not reported by any competent person, and in which the grounds of the decision are to be picked out of the facts appearing on the recorded proceedings; while, if the case had been reported, it might appear that, in truth, some other matter than the reason supposed was the principal cause of the dismissal of the bill. If the case had been seriously argued it would probably have been reported, and being a question of law, it would probably have been sent for the decision of a court of common law, as was done in the case of *Bleamire* v. *Barfoot* (6 Taunt. 504), by Sir William Grant. Per Romilly, M. R., in *Knight* v. *Bowyer*, 23 Beav. 627; 3 Jur., N. S., 968, 969.

17. *Frodsham* v. *Frodsham* (15 L. R., Ch. D., 317; 43 L. T. 558; 29 W. R. 165) explained and commented on in *Moate's Trusts, Re*, 22 L. R., Ch. D., 634; 31 W. R. 497.

18. *Fry* v. *Noble* (20 Beav. 598; 1 Jur., N. S., 767; 24 L. J., Ch., 591. Affirmed 2 Jur., N. S., 128; 25 L. J., Ch., 144; 7 De G. M. & G. 687) followed in *Clarke* v. *Franklin*, 4 Kay & J. 266.

19. *Fryer* v. *Morland* (3 L. R., Ch. D., 675; 45 L. J., Ch., 817; 35 L. T. 458; 25 W. R. 21; approved in *Att.-Gen.* v. *Dowling*, 5 L. R.,

Exch. D., 139; 49 L. J., Exch., 621; 42 L. T. 378; 28 W. R. 673.

1. *Fryer's Settlement, Re* (20 L. R., Eq., 468; 45 L. J., Ch., 96), not followed in *St. Mary's, Wigton (Vicar), Exp.*, 18 L. R., Ch. D, 646; 45 L. T. 134; 29 W. R. 883; and *Kirksmeaton (Rector), Exp.*, 20 L R., Ch. D., 203.

2. *Fullerton* v. *Martin* (1 Dr. & Sm. 31) followed in *Edmunds* v. *Waugh*, 2 N. R. 408.

3. *Furber* v. *Finlayson* (24 W. R. 370). This case is opposed to the current of authority. Per Mellish, L. J., in *Fletcher, Exp., Henley, Re*, 5 L. R., Ch. D, 809, 813; 46 L. J., Bky., 93; 37 L. T. 758; 25 W. R. 573.

4. *Furtado* v. *Furtado* (6 Jur. 227). As to the necessity that an infant must be represented by a next friend on every application by an infant, explained in *Cox* v. *Wright*, 9 Jur., N. S., 981; 2 N. R. 436.

5. *Fussell* v. *Dowding* (14 L. R., Eq, 421; 41 L. J., Ch., 716; 27 L. T. 406; 20 W. R. 881) not followed by the Master of the Rolls in *Fitzgerald* v. *Chapman*, 1 L. R., Ch. D, 563; 45 L. J., Ch., 23; 33 L. T. 587; 24 W. R. 130.

G.

6. *Gabriel* v. *Sturges* (5 Hare 97). I cannot take this case as an authority; there it was merely a matter of arrangement. Per Kindersley, V.-Ch., in *Kell* v. *Nokes*, 12 Jur., N. S., 780.

7. *Gaffee, Re* (1 Macn. & G. 541), discussed in *King* v. *Lucas*, 23 L. R., Ch. D, 712; 49 L. T. 216; 31 W. R. 904; 53 L. J., Ch., 64.

8. *Gaitskell, Exp* (1 Ph. 576; 14 L J, N. S., Ch., 450; 9 Jur. 909), in which it was held that applications for the taxation of bills, in the second class of cases provided for by the 37th section of the statute, do not require notice, approved in *Pender, Re*, 2 Ph. 69; 16 L. J., N. S., Ch., 25; 10 Jur. 891 Affirming 8 Beav. 299; 14 L. J., N. S., Ch., 277; 9 Jur. 339.

9. *Gale* v. *Bennet* (2 Ambl. 681). The report of this case corrected by the Court in *Pride* v. *Fooks*, 3 De G. & J. 275.

10. *Gale* v. *Gale* (21 Beav. 349) observed upon in *Blake* v. *Blake*, 15 L. R., Ch. D., 481; 49 L. J., Ch., 393; 42 L. T. 724; 28 W. R. 647.

11. *Gallagher* v. *Humphrey* (dictum) (10 W. R. 664) not followed in *Murley* v. *Grove*, 46 J. P. 360.

12. *Galliers* v. *Moss* (9 B. & C. 762) must be treated as overruled by subsequent decisions. *Knight* v. *Robinson*, 2 Kay & J. 563.

13. *Galloway* v. *London (Mayor)* (1 L. R., H. L., 34; 14 L. T. 865) distinguished in *Gard* v. *Sewers Commissioners*, 49 L. T. 325.

14. *Garde* v. *Garde* (4 L. R., N. S., 115) followed in *Goggin* v. *Downing*, 13 Ir. Eq. R. 60.

15. *Gardiner* v. *Gardiner* (12 Ir. Ch., L. R., 565) followed in *Lee* v. *Matthews*, 6 L. R., Ir., 530.

16. *Gardner* v. *Barker* (18 Jur., 508; 2 W. R. 407; 23 L. T., N. S., 128) observed upon in *Wilkins* v. *Jodrell*, 13 L. R., Ch. D., 564; 49 L. J., Ch., 26; 41 L. T. 649; 28 W. R. 224.

17. *Garland, Exp.* (10 Ves. 110), followed in *Fraser* or *Robinson* v. *Murdock*, 6 L. R., App. Cas. (Sc.), 855; 45 L. T. 417; 30 W. R. 162.

18. *Garland, Re* (10 Ves. 110), commented on in *Strickland* v. *Symons*, 26 L. R., Ch. D., 245; 53 L. J., Ch., 582; 31 L. T. 406; 32 W. R. 889.

19. *Garrard, Exp., Lewer, Re* (5 L. R., Ch. D., 61; 25 W. R. 364; 37 L. T, N. S, 42), distinguished in *Cochrane, Exp., Sendell, Re*, 9 L. R., Ch. D., 698; 38 L. T., N. S., 820; 26 W. R. 818.

20. *Garrard* v. *Lauderdale (Lord)* (3 Sim. 1. S. C. on appeal 2 Russ. & M. 451). That case has been questioned by Lord St. Leonards upon the facts in *Simmonds* v. *Palley* (2 J. & L. 489); but in point of principle and law, I apprehend there is no doubt that if the matter is a simple transaction between assignee and assignor, that the assignee is to take the property, no creditor can take advantage of that, except by communication made to him of the nature and effect of that deed. Per Lord Hatherley, C., in *Glegg* v. *Rees*, 41 L. J., Ch., 243. 244, 245; 7 L. R., Ch., 71, 74; 20 W. R. 198; 25 L. T. 612.

21. *Garrard* v. *Lauderdale (Lord)* (2 Russ. & M. 451. Affirming 3 Sim. 1) observed upon in *Simmonds* v. *Palles*, 2 J. & L. 489; 8 Ir. Eq. R. 335.

22. *Garth* v. *Ersfield* (Sir J. Bridgman's Reports, 22). I am bound to say that I do not at all feel confident that the case in Bridgman would be so decided at the present day. Per Cranworth, C., in *Beavan* v. *Oxford (Earl)*, 6 De. G. M. & G. 507, 519, 520.

23. *Garthwaite* v. *Robinson* (2 Sim. 43). With regard to the case of *Garthwaite* v. *Robinson*, decided by V.-Ch. Shadwell. I must confess I should not have decided that case in the same way that he did. It was decided as a pure and simple question of the construction of a will. The will there reads different from the will now before me, and no general rule of law was laid down. I must say the Vice-Chancellor came to the conclusion he did for reasons which I am unable to appreciate. It cannot be expected that the minds of any two judges will always adopt the same view of the construction of particular words used by a testator, and, therefore, a decision on the mere meaning of such words is of little value. Words which strike one mind as of great importance, do not strike another mind in the same way, and possibly the Vice-Chancellor attached greater weight to particular words than I should have done. In that case the power was to appoint among the testator's present or future grandchildren, or their respective issue, and the Vice-Chancellor held that the power had been badly executed on account of the exclusion of the children of a deceased grandchild, who were living at the donee's death. I should be entirely unable, on that will, to arrive at that conclusion, and if I had to construe the same words, I should feel myself at liberty, according to the rule laid down by the House of Lords in *Jenkins* v. *Hughes* (8 H. L. Ca. 571), that one judge is not bound to follow the decisions of another on questions of mere verbal interpretation, to decline following that decision. Per Jessel, M. R., *Veale, Re*, 4 L. R., Ch. D., 61, 68; 46 L. J., Ch., 799; 36 L. T. 634.

24. *Gaskell* v. *Gaskell* (2 Y. & J. 502) explained in *Vandenberg* v. *Palmer*, 4 Kay & J. 204.

25. *Gay's case, Re London, Birmingham, &*

Northampton, Daventry, Leamington, & Warwick Railway Co. (1 De G. M. & G. 347; 21 L. J., N. S., Ch., 284; 16 Jur. 185. Affirming 16 Jur. 34) observed on in *Greenwood's case*, 3 De G. M. & G. 459; 18 Jur. 387; 23 L. J., Ch., 966.

1. *Gedge, Exp.* (3 Ves. 349), overruled. See note in 1 Ves. J. 158.

2. *Geils* v. *Geils* (1 Macq. H. L. Ca. 255) followed in *Harvey* v. *Farnie*, 8 L. R., App. Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433. Affirming 6 L. R., P. D., 35; 50 L. J., P., 17; 43 L. T. 737; 29 W. R. 409.

3. *Genery* v. *Fitzgerald* (Jac. 468) followed in *Dumble, Re, Williams* v. *Murrell*, 23 L. R., Ch. D, 360; 52 L. J, Ch., 631; 48 L. T. 661; 31 W. R. 605.

4. *German Mining Co., Re* (4 De G. M. & G. 19), observed upon in *Catholic Publishing and Bookselling Co., Re* (No. 1), 3 N. R. 551. But see S. C. 3 N. R. 655.

5. *Gibbs* v. *Glamis* (11 Sim. 584) observed upon in *Simmonds* v. *Palles*, 2 J. & L. 489; 8 Ir. Eq. R. 335.

6. *Gibbs* v. *Rumsay* (2 Ves. & B. 294) observed upon in *Buckle* v. *Bristow*, 10 Jur., N. S., 1095, and in *Ellis* v. *Selby*, 1 Myl. & Cr. 286.

7. *Gibson* v. *Fisher* (5 L. R., Eq, 1; 37 L. J., Ch., 67; 16 W. R. 115) doubted in *Parker* v. *Winder, Wilson, Re*, 24 L. R., Ch. D., 664; 53 L. J., Ch., 130.

8. *Gibson* v. *Patterson* (1 Atk 12) is said by Lord Roslyn to be a totally false report. *Harrington* v. *Wheeler*, 4 Ves. 690.

9. *Gifford, Exp.* (6 Ves. 805), not followed in *Evans* v. *Bremridge*, 2 Kay & J. 174; 2 Jur., N. S., 134; 25 L. J., Ch., 102; 4 W. R. 161. And see 4 W. R. 350; 25 L. J., Ch., 334; 2 Jur., N. S., 311.

10. *Gifford* v. *Hart* (1 Sch. & Lef. 386) not to be extended further. *Lansdowne* v. *Beauman*, 1 Moll. 89.

11. *Gilbert on Uses.* The proposition rests very much on Chief Baron Gilbert's sole authority; I do not place much reliance on that, for it is known that the book was a posthumous work, and not presented in the form in which he intended it to be made public, and it is possible he might have made considerable alterations if published in his lifetime; and it bears marks, particularly in the latter part of it, of being incomplete. Per Romilly, M. R., in *Barrow* v. *Wadkin*, 27 L. J., Ch., 134.

12. *Gilbert* v. *Lewis* (1 De G. J. & S. 38; 11 W. R. 223; 32 L. J., Ch., 347; 9 L. T., N. S., 541). In regard to the application of authorities to ascertain the meaning of the word "sole" in a gift to a female, there is a marked distinction between a gift to an unmarried woman and one to a married woman, or in contemplation of marriage. Sir Edward Williams, in his book on Executors, last edition, p. 668, states fully and accurately the doctrine on the subject, that, to exclude marital right, it must be done in express terms. The dictum of Lord Westbury in *Gilbert* v. *Lewis* is recognised by Wood, V.-Ch., and Kindersley, V.-Ch., and followed by the latter in *Lewis* v. *Matthews*, 2 L. R., Eq., 177; 14 W. R. 682. Per Blackburne in *Massey* v. *Hayes*, 15 W. R. 376, 377.

The case of *Gilbert* v. *Lewis* has been cavilled at, but the dictum of Lord Westbury has lost nothing in point of reason. The word "sole" is a shifting and varying term, taking sense and colour from the relation in which it is used. In relation to marriage it means separate; in relation to property, several; and is used both as to males and females in wills in the sense of own, *i.e.*, her use, and nobody's else. The intention to exclude the marital right must be expressed beyond doubt. In *Green* v. *Marsden* (1 Drew. 647; 1 W. R. 511) sole use and benefit was decided not to mean separate, but belonging to no other person. The word "sole" is midway between separate and own, and must be controlled by the context. The dictum of Lord Westbury is a landmark in the quicksands of conflicting decisions. Though the interposition of trustees sometimes has been held to show that it was intended to give separate estate, the mind of the Court must be clearly satisfied that that was the single purpose of the interposition. Per Christian, J. *Ib.*

13. *Gilbert* v. *Lewis* (1 De G. J. & S. 38) distinguished in *Tarsey, Re*, 1 L. R., Eq., 561; 12 Jur., N. S., 370; 35 L. J., Ch., 452; 14 W. R. 474; 14 L. T., N. S., 15.

14. *Gilbertson* v. *Richards* (4 H. & N. 277, 297). The dictum in this case dissented from in *London & South-Western Railway Co.* v. *Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 530; 46 L. T. 449; 30 W. R. 620. Reversing 45 L. T. 505.

15. *Gilbey, Exp., Bedell, Re* (8 L. R., Ch. D., 248: 47 L. J., Bky., 49; 26 W. R. 768), followed in *Quilter, Exp., Barnes, Re*, 30 W. R. 739.

16. *Gill* v. *Cubitt* (3 B. & C. 466) observed on, and declared to be no longer law in *Cutler, Re*, 14 Beav. 220; 15 Jur. 911; 20 L. J., Ch., 504.

17. *Gill* v. *Shelley* (2 Russ. & M. 336). I wish to make this observation on *Gill* v. *Shelley*, which I have looked at carefully. The Master of the Rolls evidently took a great deal of interest in the matter before him, and I wanted to observe that Mr. Jarman, in his book, seems to have fallen into an error. I have not got the last edition of his book, and it may be different in that, but I do not understand on what authority the following remark rests. At p. 187 of the 2nd vol. (2nd edit.) he makes this remark on *Gill* v. *Shelley*: "Sir John Leach, M. R., said that if *Swaine* v. *Kennerley* (1 Ves. & B. 469) and *Hart* v. *Durrand* (3 Anst. 684) had not been distinguishable from the case before him (that is, *Gill* v. *Shelley*), he should have felt no hesitation in overruling them, and decreed that the illegitimate child was entitled to share in the residue." I do not know what the authority for that is. There is no such statement in the report, which I have gone through as carefully as possible. The observation throws a considerable amount of doubt upon the matter, to persons who do not look into the cases. The cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand* both appear to me to be remarkably good law. The decision of *Swaine* v. *Kennerley* is by Lord Eldon, and that of *Hart* v. *Durand* is in 3 Anst. 684, and is, I think, the decision of Chief Baron Macdonald. I only wish to state that I do not know that there is anything to throw a doubt on these cases. Per Lord

Romilly, M. R., in *Adney* v. *Greatrex*, 38 L. J., Ch., 414, 416; 20 L. T., N. S., 647, 648.

1. *Gillespie* v. *Alexander* (3 Russ. 130). The rule applied in this case is not applicable where the estate has not been administered by the Court. *Davies* v. *Nicholson*, 2 De G. & J. 693; 5 Jur., N. S., 49; 27 L. J., Ch., 719.

2. *Gilman* v. *Hoare* (1 Salk. 275) is differently reported by the name of *Holman* v. *Hoare*, in 3 Salk. 152, and therefore it is impossible to treat it as an authority. *Langford* v. *Selmes*, 3 Kay & J. 220, 227; 3 Jur., N. S., 859.

3. *Ginesi* v. *Cooper* (in part) (14 L. R., Ch. D., 596; 49 L. J., Ch., 601; 42 L. T. 751) not followed in *Leggott* v. *Barrett*, 15 L. R., Ch. D., 306; 51 L. J., Ch., 90; 43 L. T. 641; 28 W. R. 962.

4. *Girling* v. *Lowther* (2 Ch. R. 136) "is exceedingly loosely reported; and if it means that which Mr. Walker contends it means, as very likely it does, all I can say is that it is inconsistent with what has been taken to be the state of the law in the subsequent cases." Per Cranworth, C. *Beavan* v. *Oxford* (*Earl*), 6 De G. M. & G. 507, 520.

5. *Gisborne* v. *Gisborne* (2 L. R., App. Cas., 300) distinguished in *Weaver*, *Re*, 21 L. R., Ch. D., 615; 48 L. T. 93; 31 W. R. 224.

6. *Glegg*, *Exp.* (19 L. R., Ch. D., 7), explained in *Allen*, *Exp.*, *Fussell*, *Re*, 20 L. R., Ch. D., 346; 51 L. J., Ch., 724; 47 L. T. 65; 30 W. R. 601.

7. *Glissen* v. *Ogden* cited and commented on in *Young* v. *Peachy*, 2 Atk. 254.

8. *Glossop* v. *Heston Local Board* (12 L. R., Ch. D., 102; 49 L. J., Ch., 89; 40 L. T. 736) distinguished in *Charles* v. *Finchley Local Board*, 23 L. R., Ch. D., 767; 52 L. J., Ch., 554; 48 L. T. 569; 31 W. R. 717.

9. *Glossop* v. *Heston Local Board* (12 L. R., Ch. D., 102; 49 L. J., Ch., 89; 40 L. T. 736; 28 W. R. 111) followed in *Att.-Gen* v. *Dorking* (*Guardians*), 20 L. R., Ch. D., 596; 51 L. J., Ch., 585; 46 L. T. 573; 30 W. R. 579.

10. *Godfrey* v. *Davis* (6 Ves. 43). That case was in my opinion, in the opinion of Sir Thomas Plumer, and I should have said in the opinion of almost every lawyer, well decided; but unfortunately, in the report (6 Ves. 43) of what was said by Lord Alvanley on that occasion, his language is certainly too unqualified. Upon that want of strictly accurate language Mr. Jarman, in his very valuable treatise, has founded some criticisms upon the judgment in that case which seems to me far less happily made than most of Mr Jarman's observations on the cases which he has collected (2 Jarm. Wils, 135-140, last edit.). Mr. Jarman's work is one of great value. It has followed what was begun by Mr Roper, begun by Mr. Powell, improved by Mr. White, and by Mr. Jarman himself brought to a surprising degree of perfection. Mr. Jarman has, upon a deliberate consideration of cases in his chambers, endeavoured to extract certain rules of construction to guide in considering the language of testators; but it is quite possible to attempt to do a great deal more than it is in the power of any human being to accomplish in that respect. Lord Eldon, I recollect, said of Lord Redesdale's Treatise on Pleading, that it was not surprising that there should be some mistakes in it, but it was surprising there should be so few; that is to say, whoever attempts to deduce certain artificial rules of construction from what has been delivered by various judges, upon the consideration of various cases, is very apt to make a mistake. I do not think Mr. Jarman has gone very far wrong, and I think he has done very good service, even in this part of his work which has been considered during this argument, very good service indeed, because, although he has done some injustice to Lord Alvanley, I think he has directed attention to niceties and distinctions which are of great importance to consider. . . . Sir T. Plumer, in *Hutcheson* v. *Jones* (2 Madd. 130), completely explains the principle of the decision in *Godfrey* v. *Davis*, for he says, "It was decided upon the principle of the period being distinctly fixed when the distribution was to take place. The children born after that period were not entitled. That was the principle of the decision in *Godfrey* v. *Davis*." Per Stuart, V.-Ch., in *Conduitt* v. *Soane*, 4 Jur., N. S., 502, 504.

11. *Godfrey* v. *Harben* (13 L. R., Ch. D., 216; 49 L. J., Ch., 3; 28 W. R. 73) explained and not followed in *Pike* v. *Fitzgibbon*, 17 L. R., Ch. D., 454; 50 L. J., Ch., 394; 44 L. T. 562; 29 W. R. 551.

12. *Golding*, *Exp.*, *Knight*, *Re* (13 L. R., Ch. D., 628; 42 L. T. 270; 28 W. R. 451), approved and followed in *Falk*, *Exp.*, *Kiell*, *Re*, 14 L. R., Ch. D., 446; 42 L. T. 780; 28 W. R. 785. Affirmed *sub nom. Kemp* v. *Falk*, 7 L. R., App. Cas., 573; 52 L. J., Ch., 167; 47 L. T. 454; 31 W. R. 125.

13. *Goldsmid*, *Exp.* (1 De G. & J. 257; 25 L. J., Bky., 25) had been relied on by the appellants, but I do not think that case in point; and even if it were in point, so far as it went, it was of but little authority, considering that the Court was divided in opinion, and that an appeal was now pending in the House of Lords. Per Turner, L. J., in *Thornton*, *Exp.*, 5 Jur., N. S., 211, 214; 28 L. J., Bky., 7.

14 *Goldsmid* v. *Stonehewer* (9 Hare (App.) xxxviii.; 1 W. R. 91) distinguished in *Mills* v. *Jennings*, 13 L. R., Ch. D., 639; 49 L. J., Ch., 209; 42 L. T. 169; 28 W. R. 549.

15. *Goodall* v. *Gawthorne* (2 Sm. & Giff. 375), which decided that a posthumous heir was entitled to the rents of a descended estate, not followed by Wood, V.-Ch., in *Richards* v. *Richards*, Johns. 754; 6 Jur., N. S., 1145.

16. *Goodall* v. *Little* (1 Sim., N. S., 155; 20 L. J., N. S., Ch., 132; 15 Jur. 309) approved in *Glyn* v. *Caulfeild*, 3 Macn. & G. 463; 15 Jur. 807.

17. *Goodman* v. *Goodman* (3 Giff. 643; 6 L. T. 641) considered in *Goodman's Trusts*, *Re*, 14 L. R., Ch. D., 619; 49 L. J., Ch., 805; 43 L. T. 14; 28 W. R. 902. Reversed 17 L. R., Ch. D., 266; 50 L. J., Ch., 425; 44 L. T. 527; 29 W. R. 586.

18. *Gordon*, *Re* (37 L. J., Ch., 408; 6 L. R., Eq., 335). Costs of all parties of a petition for payment to the tenant for life of the income of a fund paid into court, not payable out of income, per Malins, V.-Ch.; not followed in *Whitton*, *Re* (8 L. R., Eq., 352), by James, V.-Ch., or by the Master of Rolls in *Smith*, *Re* (9 L. R., Eq., 374; 18 W. R. 513; 22 L. T., N. S., 220), or by Malins, V.-Ch., himself in

Munton, Re (39 L. J., Ch., 764), and such costs are payable out of income.

1. *Gordon, Re* (6 L. R., Eq, 335), disapproved of and overruled in *Evans, Re*, 26 L. T., N. S., 815; 20 W. R. 695; 7 L. R., Ch., 609; 41 L. J., Ch., 512.

2. *Gordon* v. *Gordon* (3 Swan. 400). *Quære*, whether Lord Eldon meant what is there ascribed to him as to directing issue in. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637; 6 Jur. 177.

3. *Gordon* v. *Graham* (7 Vin. Ab. 52, Creditors, E. pl. 3; 2 Eq. Ab. 598, pl. 16). "The authority of that case has always been considered extremely questionable." Per Chelmsford, C., in *Shaw* v. *Neale*, 6 H. L. Ca. 608; 4 Jur., N. S., 695, 698; 27 L. J, Ch., 444, 447, and by the Master of the Rolls S. C. 20 Beav. 157.

4. *Gordon* v. *Graham* (2 Eq. Cas. Abr. 598, pl. 16; 7 Vin. Abr. 52, Creditor, E., pl. 3), inaccurately reported and the doctrine laid down therein overruled in *Rolt* v. *Hopkinson*, 3 De G. & J. 177; 4 Jur., N. S, 1119; 28 L. J., Ch., 41; 7 W. R. 27; and *Hopkinson* v. *Rolt*, 9 H. L. Ca. 514; 34 L. J., Ch., 468; 7 Jur., N. S., 1209; 5 L. T., N. S., 90.

5. *Gottlieb* v. *Cranch* (4 De G. M. & G. 440; 1 Eq. Rep. 341). See *Courtenay* v. *Wright*, 6 Jur, N. S., 1283; 9 Giff. 337; 30 L. J., Ch., 131; 9 W. R. 153; 3 L. T., N. S., 433.

6. *Goudy* v. *Duncombe* (1 Exch. 430) discussed in *Anglo-French Co-operative Society, Re*, 14 L. R., Ch. D., 533; 49 L. J., Ch., 388; 28 W. R. 580.

7. *Gough* v. *Hayward* (3 Bulstrode 121). It is laid down in Jarman's Conveyancing, vol. 2, p. 12, that an annuity charged upon a term of years, where there are no words of limitation, is an annuity co-extensive with the duration of the term; and a distinction is drawn between an annuity granted expressly for the life of A. B. and an annuity granted to A. B. where there are no words defining his estate. For that proposition certain passages are referred to from 1 Rolle's Abridgment, 831, pl. 5, and 10 Viner's Abridgment, 219, pl. 5. On looking, however, to the passages referred to from 1 Viner's Abridgment to see on what authority the proposition is based, I find cited as the authority the case of *Gough* v. *Hayward*, of which there are several reports. In 3 Bulstrode's Reports, part 3, at page 121 *et seq.*, there is a very full and very accurate report, giving a narrative of the discussion that took place on the case. . . . I find, also, in Sheppard's Touchstone (Mr. Preston's edition), at page 448, the principle laid down in the same way as in Jarman's Conveyancing, viz, that an annuity charged upon a term of years, without any words of limitation, is co-extensive with the term: and the case of *Gough* v. *Hayward* is again cited as the authority. But I find that in the Touchstone this is put with a query; "sed quære," says Sheppard, "for the judges were divided on this point;" and I find also a note by Mr. Preston, expressing his own opinion that upon the second question that arose in that case Lord Coke was wrong and the other judges were right, but expressing no opinion upon the abstract question whether an annuity charged upon a term of years simpliciter, without any words of limitation, was or was not to continue for the entire duration of the term. I confess that, if that abstract question were presented to me to decide, I should incline to the opinion that the annuity was not to continue during the entire term, notwithstanding the dictum of Lord Coke to the contrary, but that it was an annuity determinable by the death of the original grantee of the annuity, according to the opinion of the other judges. Per Flanagan, J., *Gillman, Re*, 10 Ir. R., Eq., 92, 95, 96.

8. *Gould* v. *Gould* (2 Jur, N. S., 484) not followed in *Wood* v. *Wood* by Lord Romilly, 23 L. T., N. S., 295; 10 L. R., Eq, 220; 18 W. R. 819; 39 L. J., Ch., 790.

9. *Gover's case, Coal Economising Gas Co., Re* (1 L. R., Ch. D., 182; 45 L. J, Ch., 83; 33 L. T. 619; 24 W. R. 125), observed upon in *Sullivan* v. *Metcalf*, 5 L. R., C. P. D., 455; 49 L. J, C. P., 815.

10. *Gowan* v. *Broughton* (19 L. R., Eq., 77; 31 L. T., N. S, 533). *Semble*, the rule laid down in this case is merely that lapse of the residue does not exonerate it from the expenses of administration. *Jones, Re, Jones* v. *Caless*, 10 L. R., Ch. D., 40; 27 W. R. 108; 39 L. T. 287.

11. *Gonland* v. *De Faria* (17 Ves. 20). The rule laid down in this case, as explained in *Headen* v. *Rosher* (1 M'Clel. & Y. 89), and *Potts* v. *Curtis* (1 Younge 543), imposing upon the purchaser of an expectancy the burden of proving that he gave the proper value, does not import that the value is to be calculated according to the tables, but that it must be the fair market value, with reference to the circumstances of the case. So explained in *Aldborough (Earl)* v. *Tyre*, West 221; 7 Cl. & F. 436

12. *Grabowski, Re* (37 L. J, Ch., 926; 6 L. R., Eq., 12), as to the apportionment of interest between tenant for life and remainderman. There must have been some slip in this case, and it was not followed in *Cox* v. *Cox*, 38 L. J., Ch, 569, 8 L. R., Eq, 343.

13. *Grace* v. *Newman* (19 L. R., Eq., 623; 44 L. J., Ch., 298; 23 W. R. 517) followed in *Maple* v. *Junior Army and Navy Stores*, 21 L R, Ch D, 369; 52 L. J., Ch, 67; 47 L. T. 589; 31 W. R. 70.

14. *Grafftey* v. *Humpage* (1 Beav. 46; 8 L. J., Ch., 98) observed upon in *Wilton* v. *Colvin*, 25 L. J., Ch., 850; 3 Drew. 617, 624; 2 Jur., N. S. 867; 4 W. R. 759.

15. *Grefftey* v. *Humpage* (1 Beav. 46) not approved of by Knight Bruce, V.-Ch., in *Hoare* v. *Hornby*, 2 Y. & C. C. C. 129, or by Kindersley, V.-Ch., in *Archer* v. *Kelly*, 6 Jur, N S., 814.

16. *Grafftey* v. *Humpage* (1 Beav. 46; 8 L. J., Ch., 98) followed. The criticisms made on this case are not, in my opinion, well founded, and I do not feel myself justified, on such grounds, in shaking the authority of that case, which, in my opinion, is in accordance with the laws of this court. Per Stuart, V.-Ch., *Hughes, Re*, 4 Giff. 432, 436.

17. *Graham, Exp.* (5 De G. M. & G. 356). In that case the Lords Justices asked if there was any authority to show that knowledge acquired subsequently to the engagement would fix upon the creditors the obligation of seeing to the interests of the surety; and counsel citing none, it seems to have been held that in that case the discharge did not take place.

But *Oakeley* v. *Pasheller* (10 Bligh 548; 4 Cl. & F. 207) is a precise and direct authority upon the point, and being in the House of Lords, is of course above that of this court or that of the Lords Justices. Per Lord Hatherley, C., in *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, 7 L. R., Ch., 142, 152; 41 L. J., Ch., 332; 25 L. T. 813; 20 W. R. 253.

1. A bill of sale to secure an existing debt and a present advance, which assigns the whole of the grantor's property, including that which he may purchase by means of the advance, is not necessarily void as an act of bankruptcy. *Graham* v. *Chapman* (12 C. B. 85) on this point overruled. *Haurwell, Exp., Hemingway, Re*, 23 L. R., Ch. D., 626; 52 L. J., Ch., 737; 48 L. T. 742; 31 W. R. 711.

2. *Grainge* v. *Warner* (13 W. R. 833) inconsistent with *Bartlett* v. *Bartlett* (1 De G. & J. 127; 26 L. J., Ch., 577), and with the current of modern practice. Per Malins, V.-Ch., in *Stuart* v. *Cockerell*, 39 L. J., Ch., 127, 128.

3. *Grant* v. *Grant* (5 L. R., C. P., 727; 18 W. R. 951; 39 L. J., C. P., 272; 22 L. T., N. S., 233). The only difficulty in the case arises from the decision of the Exchequer Chamber in *Grant* v. *Grant*. But that case only decided that the primary meaning of the word "nephew" included not only the child of the testator's own brother, but also the child of his wife's brother. That is a question not of law, but of the English dictionary, and according to my view of the English language, the ordinary meaning of the words "nephews and nieces" is a man's own nephews and nieces, that is, by consanguinity and not affinity; and therefore I am of opinion (as I must decide between the judgments of the two courts) that the decision of the Court of Appeal in Chancery (*Blower, Re*, 6 L. R., Ch., 351; 19 W. R. 666, 42 L. J., Ch., 24; 25 L. T. 181; and *Sherratt* v. *Mountford*, 8 L. R., Ch., 928, 42 L. J., Ch., 688; 29 L. T. 284; 21 W. R. 818) is to be preferred. That being my view, as it was the view of Wood, V.-Ch., in *Smith* v. *Lidiard* (3 Kay & J. 252), I hold that the nephews and nieces of the testatrix by blood are the only persons entitled to take. Per Sir George Jessel, M. R., in *Wells* v. *Wells*, 18 L. R., Eq., 504, 506; 22 W. R. 893; 43 L. J., Ch., 681; 31 L. T. 16.

4. *Grant* v. *Grant* (5 L. R., C. P., 180, 727) dissented from in *Foster, Re, Merrill* v. *Morton*, 17 L. R., Ch. D., 382: 50 L. J., Ch., 239; 43 L. T. 750; 29 W. R. 394.

5. *Grant* v. *Grant* (22 L. T., N. S., 233; 18 W. R. 576; 5 L. R., C. P., 727; 39 L. J., C. P., 272) discussed in *Parker, Re, Bentham* v. *Wilson*, 17 L. R., Ch. D., 262; 50 L. J., Ch., 639; 44 L. T. 885; 29 W. R. 855.

6. *Gray* v. *Lewis* (8 L. R., Eq., 526; 17 W. R. 431). There the committee of the Stock Exchange had, upon the faith of the statement made to them as to Laffitte & Co.'s balance, granted the settling day. This fact is not distinctly stated in the report of *Gray* v. *Lewis*, in the Law Reports, though it might be inferred from that report that it was so. In the report in the Weekly Reporter (17 W. R. 433) the fact is distinctly stated. Per Bramwell, B., in *British and American Telegraph Co.* v. *Albion Bank*, 7 L. R., Exch., 119, 126; 41 L. J., Exch., 67, 72; 26 L. T. 257; 20 W. R. 413.

7. *Graydon* v. *Hicks* (2 Atk. 16). I think there must be something omitted in the report of this case before Lord Hardwicke. It is one on which the Court could not act without further inquiry. Per Wood, V.-Ch., in *Ewens* v. *Addison*, 4 Jur., N. S., 1034.

8. *Great Australian Gold Mining Co.* v. *Martin* (5 L. R., Ch. D., 1; 46 L. J., Ch., 289; 35 L. T. 874; 25 W. R. 246) not followed in *Fowler* v. *Barstow*, 20 L. R., Ch. D., 240; 51 L. J., Ch., 103; 45 L. T. 603; 30 W. R. 112

9. *Greated* v. *Greated* (26 Beav. 621) questioned. If it were necessary for us to deal with this case, I should be slow to express my assent to it. Per James, L. J., in *Shaw* v. *Jones-Ford*, 6 L. R., Ch. D., 1, 15; 37 L. T. 233; 25 W. R. 815.

10. *Great Western Railway of Canada* v. *Braid* (1 Moo. P. C., N. S., 101; 8 L. T., N. S., 31). That an accident may be of such a nature that negligence may be presumed from the mere fact of the accident. That case has been much doubted on that very point, and Erle, C. J., protested against it, per Willes, J., in *Czech* v. *General Steam Navigation Co.*, 17 L. T., N. S., 246, 247.

11. *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.* (17 L. R., Ch. D., 493) explained in *Stannard* v. *St. Giles (Camberwell)*, 20 L. R., Ch. D., 190; 51 L. J., Ch., 629; 46 L. T. 243; 30 W. R. 693.

12. *Greedy* v. *Lavender* (11 Beav. 417) overruled by *Coates* v. *Coates* (12 W. R. 634; 33 Beav. 249; 3 N. R. 355). (Costs of inquiries as to incumbrances): see per Hall, V.-Ch., in *Gee* v. *Mahood*, 23 W. R. 71.

13. *Green* v. *Britten* (42 L. J., Ch., 187; 27 L. T. 811) followed in *Guthrie* v. *Walrond*, 22 L. R., Ch. D., 573; 52 L. J., Ch., 165; 47 L. T. 614; 31 W. R. 285.

14. *Green* v. *Low* (4 W. R. 669; 22 Beav. 625) distinguished in *Adams and Kensington Vestry, Re*, 27 L. R., Ch. D., 394; 51 L. T. 382; 32 W. R. 883.

15. *Greenough* v. *Gaskell* (1 Myl. & K. 98) not followed by Romilly, M. R., in *Ford* v. *Tennant*, 9 Jur., N. S., 292.

16. *Greenway, Exp., Adams, Re* (16 L. R., Eq., 619; 42 L. J., Bky., 110; 29 L. T. 75; 21 W. R. 866), contrary to *Holmes* v. *Tutton*, 5 El. & Bl. 65; 1 Jur., N. S., 975; 24 L. J., Q. B., 346, and disapproved of in *Joselyne, Exp., Watt, Re*, 8 L. R., Ch. D., 327; 47 L. J., Bky., 91; 38 L. T. 661; 26 W. R. 645.

17. *Greenwell* v. *Greenwell* (5 Ves. 194), The extension of rule as to giving interest by way of maintenance disapproved. See this case *id.* 199. a. n. (50).

18. *Greenwood* v. *Roberts* (15 Beav. 92) not followed in *Wilson* v. *Wilson*, 4 Jur., N. S., 1076.

19. *Greenwood* v. *Taylor* (1 Russ. & M. 185) questioned in *Mason* v. *Bogg*, 2 Myl. & C. 443; 1 Jur. 330.

20. *Greenwood* v. *Taylor* (1 Russ. & M. 185). The principle laid down in *Greenwood* v. *Taylor* has always seemed to me consistent with justice and good sense, and I should be very glad if Mr. De Gex's argument was correct when he contended that that case, though questioned, had never been overruled; however, I do not think it necessary further to direct his attention to that authority on the present occasion, for I consider that the rules

of bankruptcy must be applied to the winding up of companies, and not the rules adopted by a court of equity in administering the estates of deceased persons. Per Malins, V.-Ch., in *Xerez Wine Shipping Co., Re, Alliance Bank, Exp.*, 16 W. R. 479.

1. *Gregg* or *Glegg, Exp., Latham, Re* (19 L. R., Ch. D., 7; 51 L. J., Ch., 367; 45 L. T. 484; 30 W. R. 144), commented on in *Allen, Exp., Fussell, Re*, 20 L. R., Ch. D., 341; 51 L. J., Ch., 724; 47 L. T. 65; 30 W. R. 601.

2. *Gregory* v. *Williams* (3 Meriv. 582) explained in *Empress Engineering Co., Re*, 16 L. R., Ch. D., 125; 43 L. T. 742; 29 W. R. 342.

3 *Greisley* v *Chesterfield (Earl)* (13 Beav. 288) not followed by Hall, V.-Ch., in *Marshall* v. *Crowther*, 2 L. R., Ch. D., 199; 23 W. R. 210.

4. *Grellier, Exp., Macniel, Re* (Mont. & M. 95), reversed S. C. Mont. 264.

5. *Greville* v. *Browne* (7 H. L. Ca. 689; 34 L. T., N. S., 8; 5 Jur., N. S., 849) distinguished in *Elliott* v. *Dearsley*, 16 L. R., Ch. D, 322; 44 L. T. 198; 29 W. R. 494.

6. *Greville* v. *Browne*, (7 H. L. Ca. 689; 3 Jur. N. S. 849). I think there is no getting over the case in the House of Lords (*Greville* v. *Browne*). It was formerly thought that where there was a specific devise followed by a residuary devise, legacies were not a charge on the residuary real estate; but *Greville* v. *Browne* settled that in such a case legacies are a charge on the real estate. I will, therefore, make a declaration in this case to that effect. Per Lord Romilly, M. R., in *Skiller* v. *Haisman*, 25 L. T., N. S., 745; 19 W. R. 693.

7. *Greville* v. *Browne* (7 H. L. Ca. 689; 34 L. T., N. S., 8) distinguished in *Browning* v. *French*, 24 L. T., N. S., 649.

8. *Greville* v. *Browne* (7 H. L. Ca. 689) followed in *Gaisford* v. *Dunn*, 17 L. R., Eq., 405; 43 L. J., Ch, 403; 30 L. T. 283; 22 W. R. 499.

9. *Grey* v. *Ellison* (2 Jur, N. S., 511) observed upon in *Fitzwilliam (Earl)* v. *Price*, 4 Jur., N. S., 889.

10. If a father purchases land in the name of his eldest son, this shall be an advancement for the son, and not a trust for the father, though the father had been in possession, and had received the rents and profits. *Grey* v. *Grey*, 1 Ch. Ca. 296; Finch 338; *Scroope* v. Scroope, 1 Ch. Ca. 27; *Elliot* v. *Elliot*, 2 Ch. Ca. 231, where this was said to be the constant rule; but Lord Chancellor, in that case, took this distinction; where a parent made a purchase in the name of an unadvanced child, and where in the name of one already advanced; for in the former case it should be considered as an advancement, and in the latter a trust for the parent. See *Shales* v. *Shales*, 2 Freem. 252, where this rule is said to have been so settled before the Statute of Frauds, and it is stronger since; and in *Redington* v. *Redington*, 3 Ridgw. P. C. 181, it was said by Fitzgibbon, Ch., that the rule laid down in *Grey* v. *Grey*, *supra*, and also in *Lamplugh* v. *Lamplugh*, 1 P. W. 111, and in *Taylor* v. *Taylor*, 1 Atk. 386, has this strong additional circumstance in the two latter cases, that parol evidence was there held admissible on the part of the advanced son or his heir to rebut a claim of trust, because although improper against the legal operation of a deed, yet in the case of an advanced son, it is in support of the deed, and of law and equity too. Bridgm. Ind.

11. *Grey* v. *Kentish*, as stated in 1 Atk. 280, is arrant nonsense: corrected in Register Book, 21st July 1743, fol. 522. *Garner* v. *Wilkinson*, Dick. 494.

12. *Griffin, Exp., Adams, Re* (12 L. R., Ch. D., 480; 48 L., J., Bky., 107; 41 L. T. 515; 28 W. R. 208) approved and followed in *Harper, Exp., Pooley, Re*, 20 L. R., Ch. D., 685; 51 L. J., Ch., 108; 47 L. T. 177; 30 W. R. 650.

13. *Griffith* v. *Pownall* (13 Sim. 393). It was supposed that *Greenwood* v. *Roberts*, 15 Beav. 92, was in conflict with that decision; and it has even been treated as wrongly decided, on the ground that the Master of the Rolls did not advert to it (1 Jarm. on Wills, 2nd ed., p. 216; see p. 241 of 3rd ed.), where it was alleged that the case of *Leake* v. *Robinson* (2 Mer. 363) was wrongly applied in it. However, Sir John Romilly, in *Webster* v. *Boddington*, 26 Beav. 133, holds the former opinion, and says it is consistent with *Griffith* v. *Pownall*. Per Maziere Brady, C., in *Bell* v. *Bell*, 13 Ir. Ch. R. 517, 529.

14. *Griffiths* v. *Wood* (1 Ves. & B. 307) followed in *Wood* v. *Dyneley*, 1 Madd. 32.

15. *Grimmett* v. *Grimmett* (Ambl. 210; Dick. 251), followed in *English* v. *Orde*, Highm. Mortm. 82.

16. *Grimstone's case* (Ambl. 706) doubted in *Wild* v. *Tew*, Beat. 276. But see *Newcombe* v. *Newcombe*, 3 Ir. Eq. R. 414.

17. *Grissell, Exp., Overend, Gurney & Co., Re* (1 L. R., Ch., 528; 15 L. T., N. S., 494; 12 Jur., N. S., 718; 35 L. J., Ch., 752; 14 W. R. 1015; 14 L. T., N. S., 843). The decision does not apply to the case of a bankrupt shareholder in a company in process of being wound up. See per Winslow, Com., in *Cooper, Exp.*, 15 W. R. 363; 15 L. T., N. S., 637.

18. *Groves* v. *Groves* (3 Y. & J. 163). With deference to the Lord Chief Baron Alexander, who was a very considerable lawyer, I should have arrived at an opposite conclusion upon the facts as stated, that the defendant had not paid anything for the estate, and did not say who had, and that the plaintiff had always been in possession. Per Jessel, M. R., in *Cave* v. *Mackenzie*, 46 L. J., Ch., 564, 565; 37 L. T., N. S., 218, 219.

19. *Grunnell* v. *Garner* (39 L. J., Ch., 77) overruled by *Scott* v. *Duncombe*, 9 L. R., Eq., 665; 39 L. J., Ch., 644; 22 L. T., N. S., 540

20. *Grundy, Kershaw, & Co., Re* (17 L. R., Ch. D, 108; 50 L. J., Ch., 467; 44 L. T. 541; 29 W. R. 581) followed in *Cordell, Re*, 52 L J., Ch, 246; 31 W. R. 335.

21. *Gullin* v. *Gullin* (7 Sim. 236) overruled in *Abraham* v. *Newcombe*, 12 Sim. 566; 6 Jur. 433.

22. *Gulliver* v. *Wickett* (1 Wils. 105). Mr. Fearne's commentary on this case (C. R. & E. D., 9th edit., p. 306) not acquiesced in. See per Lord Cranworth, in *Evers* v. *Challis* (in error), 7 H. L. Ca. 549, 550.

23. *Gurney* v. *Gurney* (1 Hem. & M. 413; 32 L. J., Ch., 456; 2 N. R. 106) dissented from in *Cooke* v. *Cooke*, 11 Jur., N. S., 533; 34 L. J., Ch., 459; 12 L. T., N. S., 408; 13 W. R. 697;

4 De G. J. & S. 704, 710; 6 N. R. 134. Per Lord Westbury, C.: "I cannot at all assent to the principles or reasoning on which the decision of Wood, V.-Ch., in *Gurney* v. *Gurney*, was founded.

1. *Gwillim* v. *Stone* (14 Ves. 128) observed upon in *Onions* v. *Cohen*, 2 Hem. & M. 354; 11 Jur., N. S., 198; 34 L. J., Ch., 338; 13 W. R. 426.

H.

2. *Hackett* v. *Baiss* (20 L. R., Eq., 495; 45 L. J., Ch., 13) explained and commented on in *Parker* v *First Avenue Hotel*, 24 L. R., Ch. D. 282; 49 L. T. 318; 32 W. R. 105.

3. *Hackett* v. *Baiss* (20 L. R., Eq., 494; 45 L. J., Ch., 13). The regulation as to the angle of 45° is to be found, I believe, only in that provision of the Metropolis Local Management Act in which the width of a street is spoken of, and which of itself, measuring the width of a street and the height of the house, furnishes an angle of 45°. That, be it observed, is from the street, as Mr. Kay said, and if he had not said it, the Act of Parliament has said it; for the statute enacts that, "in determining the height of such building, the measurement shall be taken from the level of the centre of the street;" and that must be so, because the position of the windows is so different in various buildings that if you were to search for the point from which to measure your angle of 45°, it would be as various as the buildings to which it would be applied. It is said that the Master of the Rolls on a recent occasion, in *Hackett* v. *Baiss*, applied this rule about 45°. This, however, he did not do; on the contrary, he quoted the decision in the *City of London Brewery Co.* v. *Tennant* (9 L. R., Ch., 220), in which Lord Selborne said, there is no positive rule of law on the subject. The regulation may be an illustration or a guide, but rule there is none. It is said that the Master of the Rolls applied that rule and applied it by measuring through the middle of the window. No doubt the Master of the Rolls did what was suitable in the case before him, having regard to the arguments addressed to him, but that he laid down any rule of law I am by no means convinced, and I should be very much surprised to find that that was his intention, when I find him at the same time referring to a decision which lays down that there is no rule on the subject. He was deciding what was right between the parties before him, but a positive rule he never in any respect laid down. Per Bacon, V.-Ch., in *Theed* v. *Debenham*, 2 L. R., Ch. D., 165, 170; 24 W. R. 775.

4. *Haines* v. *Burnett* (27 Beav. 500). That case appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson* v. *Crowe* (10 L. R., Ch., 622; 44 L. J., Ch., 680; 33 L. T. 388; 23 W. R. 885). In *Haines* v. *Burnett*, Lord Romilly, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee or on his making any arrangement for the benefit of his creditors. That was, in fact, nothing less than a variation of the contract. I cannot see any reason for holding such a covenant to be usual. Yet it is rather difficult, in looking at the case, to understand how it was decided. Lord Romilly seems to have thought that in considering general covenants, and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property. But I cannot find any evidence on that point mentioned in the report, and it would seem that the judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of V.-Ch. Bacon in *Hodgkinson* v. *Crowe* (19 L. R., Eq., 593), I think it is conclusive against any judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal affirmed that decision, and went further, and held that under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent. Per Jessel, M. R., in *Hampshire* v. *Wickens*, 7 L. R., Ch. D., 555, 560; 47 L. J., Ch., 243; 38 L. T. 408; 26 W. R. 491.

5. *Haldenby* v. *Spofforth* (9 Beav. 195) explained and commented on in *Gurney* v. *Gurney*, 48 L. T. 529.

6. *Hale* v. *Hale* (3 L. R., Ch. D., 643; 35 L. T. 933; 24 W. R. 1065) approved and followed in *Pearks* v. *Moseley*, 5 L. R., App. Cas., 714; 43 L. T. 449; 29 W. R. 1; 50 L. J., Ch., 57. Affirming S. C. *nom. Moseley's Trusts, Re*, 11 L. R., Ch. D., 555; 27 W. R. 896; 41 L. T. 9.

7. *Halfhide* v. *Robinson* (22 W. R. 448; 9 L. R., Ch., 373; 43 L. J., Ch., 398; 20 L. T. 216) is no longer law. Per Malins, V.-Ch., in *Watt* v. *Leach*, 26 W. R. 475.

8. *Hall's Estate, Re.* The report of this case (in 17 Jur. 29; 22 L. J., Ch., 177) approved of, and the contradictory report of the same case (in 2 De G. M & G 748) disapproved of. *Porter, Re*, 2 Jur., N. S., 249; 25 L. J., Ch., 688.

9. *Hall* v. *Hill* (1 Dr. & War. 94) observed upon in *Parker* v. *Sowerby*, 18 Jur. 523; 23 L. J., Ch., 623.

10. *Hall* v. *Hugonin* (14 Sim. 595; 10 Jur. 940) and similar cases overruled. *Whittle* v. *Henning*, 11 Beav. 222; 17 L. J., N. S., Ch., 151; 12 Jur. 298; *id.* 1079.

11. *Hall* v. *Macdonald* (14 Sim. 1). There is a difficulty created by the case of *Hall* v. *Macdonald*, but I am bound to say that for a great many years I have thought that case was not law. I remember making a note against the case when it was first reported. I have no doubt whatever that the V.-Ch. Shadwell's decision was right, but I cannot help thinking that Mr. Simons has misconceived what was precisely the point of the case, and, in fact, he did not report the case for that point. It is mentioned incidentally, and I can easily conceive certain states of circumstances in which the decision would have been perfectly right, without that precise expression having been necessary, or having been used. It seems to me that the case, in fact, is settled by principle, and the principle is so well established that I may venture to depart even from so great an authority as the V.-Ch. Shad-

well in that case. There is no doubt as to the right of retainer as against legal assets on the part of an executor; and there is also, I think, such a preponderance of authority in favour of holding that assets like these are equitable; that, notwithstanding the decision in *Lovegrove* v. *Cooper* (2 Sm. & G. 271), I may so hold them. Per Wickens, V.-Ch., in *Bain* v. *Sadler*, 19 W. R. 1077; 12 L. R., Eq., 570; 25 L. T. 202; 40 L. J., Ch., 791.

1. *Hall* v. *Macdonald* (14 Sim. 1) questioned in *Davidson* v. *Illidge*, 27 L. R., Ch. D., 484; 53 L. J., Ch., 991; 33 W. R. 18.

2. *Hall* v. *Maltby* (6 Price 240) reviewed in *Garrett* v. *Besborough* (*Earl*), 2 Dr. & Wal. 441; 2 Ir. Eq. R. 180.

3. *Hall* v. *Smith* (1 B. & C. 407) questioned in *Buckley, Exp., Clarke, Re*, 15 L. J., N. S., Bky., 3; 1 Ph. 562. S. C. *nom. Clarke, Re*, 1 De G. 153; 9 Jur. 931. Affirming *Christie, Exp., Clarke, Re*, 3 M. D. & De G. 736; 13 L. J., N. S., Bky., 23; 8 Jur. 919. S. C. at law, 14 M. & W. 469; 14 L. J., N. S., Exch., 341. And see S. C. *nom. Buckle, Exp., Clarke, Re*, 8 Jur. 608.

4. *Hallows* v. *Fernie* (3 L. R., Ch., 467; 18 L. T. 340; 16 W. R. 873), distinguished in *Scottish Petroleum Co., Re*, 17 L. R., Ch. D., 373; 50 L. J., Ch., 269; 43 L. T. 723; 29 W. R. 372.

5. *Halstead United Charities, Re* (20 L. R., Eq., 48), followed in *Artizans' and Labourers' Dwellings Improvement Act* 1875, *Re, Jones, Exp.*, 14 L. R., Ch. D., 624; 43 L. T. 84.

6. *Hambly* v. *Trott* (1 Cowp. 371) explained and commented on in *Phillips* v. *Homfray*, 24 L. R., Ch. D., 439; 59 L. J., Ch., 833; 49 L. T. 5; 32 W. R. 6.

7. *Hamer* v. *Giles* (11 L. R., Ch. D., 942; 48 L. J., Ch., 508; 27 W. R. 834) explained in *Jackson* v. *Smith, Digby, Exp.*, 53 L. J., Ch., 972; 51 L. T. 72.

8. *Hamilton* v. *Denny* (1 Ball & B. 199) commented on in *Leslie, Re, Leslie* v. *French*, 23 L. R., Ch. D., 552; 52 L. J., Ch., 762; 48 L. T. 564; 31 W. R. 561.

9. *Hamilton* (*Duke*) v. *Meynal* (2 Dick. 788; 2 Ves. 497) approved in *Moggridge* v. *Hall*, 13 L. R., Ch. D., 380; 28 W. R. 487.

10. *Hamilton* v. *Patten* (Cr. & D. Ab. Ca. 203) observed upon in *O'Beirne* v. *O'Beirne*, 1 Ir. Ch. R. 158. Reversing *id.* 152.

11. *Hamilton* v. *Wright* (9 Cl. & F. 111) followed in *Bennett* v. *Gas Light and Coke Co*, 52 L. J., Ch., 98; 48 L. T. 156.

12. *Hammersley* v. *De Biel* (*Baron*) (12 Cl. & F. 45) observed upon in *Alderson* v. *Maddison*, 5 L. R., Exch. D., 293; 49 L. J., Exch., 801; 43 L. T. 349; 29 W. R. 105.

13. *Hammond* v. *Anderson* (1 B. & P., N. R., 69) observed upon in *Kemp* v. *Falk*, 7 L. R., App. Cas., 573; 52 L. J., Ch., 167; 47 L. T. 454; 31 W. R. 125. Affirming S. C. *sub. nom. Falk, Exp., Kiell, Re*, 14 L. R., Ch. D., 446; 42 L. T. 780; 28 W. R. 785.

14. *Hampden* v. *Hampden* (3 Bro P. C. 551) followed in *Williams* v. *Williams*, 33 Beav. 306; 9 Jur., N. S., 1267; 3 N. R. 100; 12 W. R. 140; 9 L. T., N. S., 566.

15. *Hampson* v. *Fellows* (6 L. R., Eq., 575; 37 L. J., Ch., 694; 19 L. T. 6) not followed in *Harrison, Exp., Betts, Re*, 18 L. R., Ch. D., 127; 50 L. J., Ch., 832; 45 L. T. 290; 30 W. R. 38.

16. *Hampson* v. *Price's Patent Candle Co.* (45 L. J., Ch., 437; 34 L. T. 711; 24 W. R. 754) distinguished in *Hutton* v. *West Cork Railway Co.*, 23 L. R., Ch. D., 654; 52 L. J., Ch., 689; 49 L. T. 420; 31 W. R. 827.

17. *Hancock* v. *Guerin* (4 L. R., Exch. D. 3) considered in *Union Bank of London* v. *Manby*, 13 L. R., Ch. D., 239; 49 L. J., Ch., 106; 41 L. T. 393; 28 W. R. 23.

18. *Handcock* v. *Handcock* (10 Ir. Law Rep.) doubted in *Handcock* v. *Handcock*, 11 Ir. Eq. R. 472.

19. *Hankey* v. *Hammock* (3 Madd. 148. n.; Buck 210) observed upon in *M'Neillie* v. *Acton*, 17 Jur. 1041; 4 De G. M. & G. 744.

20. *Hanley* v. *Cassan* (11 Jur. 1088). Payment by the defendant to the London agent of the plaintiff's attorney is a payment to the plaintiff. *Hanley* v. *Cassan*, 11 Jur. 1088. This should be, is not a payment to the plaintiff, 12 Jur. 44.

21. *Hannay* v. *Basham* (23 L. R., Ch. D., 195; 52 L. J., Ch., 408; 48 L. T. 476; 31 W. R. 743) followed in *McEwan* v. *Crombie*, 25 L. R., Ch. D., 175; 53 L. J., Ch., 24; 49 L. T. 499; 32 W. R. 115.

22. *Harden* v. *Parsons* (1 Eden 145) has not been followed. S. C. 3 Madd. 63. n.

23. *Hardman* v. *Ellames* (2 Myl. & K. 732) commented on in *Howard* v. *Robinson*, 5 Jur., N. S., 136.

24. *Hardwick* v. *Thurston* (4 Russ. 380; 6 L. J., Ch., 114), followed in *Edwards* v. *Saloway*, 2 Ph. 625; 17 L. J., N. S., Ch., 329; 12 Jur. 493. Affirming 2 De G. & Sm. 248; 12 Jur. 487.

25. *Hardy* v. *Smith* (Buck 368). The dicta of Sir John Leach therein commented upon and doubted. *Cattell* v. *Corrall*, 4 Y. & Coll. 228.

26. *Harford's Trusts, Re* (13 L. R., Ch. D., 135; 41 L. T. 382; 28 W. R. 239), not followed in *Aston, Re*, 23 L. R., Ch. D., 217; 48 L. T. 195; 31 W. R. 801.

27. *Harford's Trusts, Re* (13 L. R., Ch. D., 135; 41 L. T. 382; 28 W. R. 239), not followed in *Colyer, Re*, 43 L. T. 454; 50 L. J., Ch., 79.

28. *Hargrave* v. *Holland* (5 Ir. Eq. R. 169) overruled in *Doorley* v. *Power*, 11 Ir. Eq. R. 577.

29. *Hargreave's Tracts*, "*De Jure Maris*," commented on in *Smith* v. *Her Majesty's Officers of State for Scotland*, 13 Jur. 713. S. C. *nom. Smith* v. *Stair* (*Earl*), 2 H. L. Ca. 807.

30. *Harnett* v. *Yielding* (2 Sch. & Lef. 549) observed upon in *Dyas* v. *Cruise*, 2 J. & L. 460; 8 Ir. Eq. R. 407.

31. *Harper* v. *Scrimgeour* (5 L. R., C. P. D., 366) observed upon in *Chard* v. *Jervis*, 51 L. J., Ch., 429; 30 W. R. 504; 9 L. R., Q. B. D., 978; 51 L. J., Q. B., 442.

32. *Harrington* v. *Long* (2 Myl. & K. 590). "I agree in the observations made upon that case, by Sir James Wigram," V.-Ch., in *Hunter* v. *Daniel*, 4 Hare 420. Per Turner, L. J., in *Knight* v. *Bowyer*, 4 Jur., N. S., 569, 573.

33. *Harris's case, Imperial Bank of Marseilles, Re* (7 L. R., Ch., 593; 41 L. J., Ch., 621; 26 L. T. 781; 20 W. R. 690). But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter in a drawer, completes a contract, I

must say I differ from that. It appears from the Year Books, that as long ago as the time of Edward IV. (17 Edw. IV., T. Pasch. Cas. 2), Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops, because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2*s.* 6*d.* for them, he might take them: that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on The Contract of Sale (pages 190, *et seq.*), and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien as early as that time, exactly as the law now stands, and he consequently says, "This plea is clearly bad, as you have not shown the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that that if in his offer to you he had said, Go and look at them, and if you are pleased with them, signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my lords, that that, which was said 300 years ago and more, is the law to this day, and it is quite what Lord Justice Mellish, in *Harris's case*, accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject. Per Lord Blackburn, in *Brogden* v. *Metropolitan Railway Co.*, 2 L. R., App. Cas., 666, 692.

1. *Harris* v. *Fergusson* (16 Sim. 308) explained in *Robinson* v. *Preston*, 4 Kay & J. 505.

2. *Harris* v. *Watkins* (Kay, 438), dictum of Hatherley (Lord) not followed in *Tanqueray-Willaume and Landau, Re*, 20 L R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

3. *Harrison* v. *Cornwall Minerals Co.* (18 L. R., Ch. D., 334; 51 L. J., Ch, 98; 45 L. T. 498) distinguished and not followed in *Robinson* v. *Drakes*, 23 L. R., Ch. D., 98; 48 L. T. 740; 31 W. R. 871.

4. *Harrison* v. *Guest* (6 De G. M. & G. 424) commented on and explained in *Denton* v. *Donner*, 23 Beav. 285.

5. *Harrison* v. *Wearing* (11 L. R., Ch. D., 206; 48 L. J., Ch., 365; 41 L. T. 376; 27 W. R. 526) approved in *The Neera*, 5 L. R., P. D., 118; 42 L. T. 743; 28 W. R. 816.

6. *Harrison* v. *Wearing* (11 L. R., Ch. D., 206; 48 L. J., Ch., 365; 41 L. T. 376; 27 W. R. 526) followed in *Brown* v. *Sewell*, 16 L. R., Ch. D. 517; 44 L. T. 41; 29 W. R. 295.

7. *Hart* v. *Durand* (3 Anst. 684). While I concur in the argument, that the authority of *Hart* v. *Durand* must be considered to have been shaken by subsequent decisions, I cannot get over the difficulty that there were persons living sufficient to satisfy the plaintiff. Per Romilly, M. R., in *Edmunds* v. *Fessey*, 7 Jur., N. S., 282.

8. *Hartley, Re* (30 Beav. 620), explained and commented on in *Grundy, Kershaw, & Co., Re*, 17 L. R., Ch. D., 108; 50 L. J., Ch., 467; 44 L. T. 541; 29 W. R. 581.

9. *Hartley* v. *O'Flaherty* (Ll. & G. *temp.* Plunk. 208) considered in *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444

10. *Harvey* v. *Ashton* (1 Atk. 375). The opinion attributed to Chief Baron Comyns in this case that the consent of the majority of the trustees is sufficient, is spurious. That was never held sufficient without more, as where one withholds his consent from a vicious or unreasonable cause. *Clarke* v. *Parker*, 19 Ves. 15.

11. *Harvey* v. *Shelton* (7 Beav. 455) not followed, and contrary to *Evans and Howell, Re*, 4 Macn. & G. 762. See *Huddersfield Corporation and Jacomb, Re*, 29 L. T., N. S., 824; 17 L. R., Eq., 476; 43 L. J., Ch., 748; 22 W. R. 255. Malins, V.-Ch.

12. *Harvey's Estate, Re* (13 L. R., Ch. D., 216; 49 L. J., Ch., 3; 28 W. R. 73) followed in *Hodges* v. *Hodges*, 20 L. R., Ch. D., 749; 51 L. J., Ch., 549; 46 L. T. 366; 30 W. R. 483.

13. *Hastie* v. *Hastie* (1 L. R., Ch. D., 562; 45 L. J., Ch., 298; 34 L. T. 13; 24 W. R. 564) distinguished in *Dicks* v. *Brooks*, 13 L. R., Ch. D., 652; 28 W. R. 525.

14. *Hatton* v. *Haywood* (9 L. R., Ch., 229; 43 L. J., Ch., 372; 30 L. T. 279; 22 W. R. 356) approved in *Evans. Exp., Watkins, Re*, 13 L. R., Ch. D, 252; 49 L. J., Bky., 7; 41 L. T. 565; 28 W. R. 127.

15 *Haswell* v. *Haswell* (2 De G. F. & J. 456; 28 Beav. 26) observed upon in *Wickham* v. *Wing*, 2 Hem. & M. 436; 6 N. R. 21; 11 Jur., N. S., 424; 34 L. J., Ch., 425; 13 W. R. 650; 13 L. T., N. S., 37.

16. *Hawkes* v. *Eastern Counties Railway Co.* (1 De G. M. & G. 737) is not inconsistent with *Shrewsbury & Birmingham Railway Co.* v. *London & North-Western Railway Co.*, 4 De G. M. & G. 115, 17 Jur. 845; 22 L. J., Ch., 682; 6 H. L. Ca. 113.

17. *Hawkins* v. *Crook* (2 P. W. 556) erroneous, per Lord Hardwicke in *Turner* v. *Turner*, Dick 316.

18. *Hawkins* v. *Gathercole* (1 Sim., N. S., 63; 20 L. J., Ch., 59; 14 Jur. 113), observed upon in *Bates* v. *Brothers*, 18 Jur. 715; 23 L. J., Ch., 150, 782; 17 Jur. 1174; 2 W. R. 116; 2 Eq. Rep. 321.

19 *Hawksworth* v. *Hawksworth* (6 L. R., Ch., 539; 40 L. J., Ch., 534; 25 L. T., N. S, 115; 19 W. R. 735), considered in *Clarke, Re*, 21 L. R., Ch. D., 817; 51 L. J., Ch., 762; 47 L. T. 84; 31 W. R. 37.

20 *Hawthorn* v. *Sheddon* (3 Sm. & G. 293; 2 Jur., N. S, 749). I was surprised, however, to find the decision of *Hawthorn* v. *Sheddon*, and also to find it approved by Lord St. Leonards in his book on Powers, p. 310, 8th ed.; and I should have had great difficulty in deciding this case if it had been on all fours with that one. But there the gifts were all pecuniary, while here there is a gift of Indian stock, and the case is, therefore, not so strong, though there is an appointment of executors. And in *Shelford* v. *Ackland* 23 Beav. 10; 3 Jur., N. S.,

8, a doubt is expressed whether the words of the 7 Will. 4 & 1 Vict., c. 27, s. 27, go to the full extent which V.-Ch. Stuart seemed to think they did in *Hawthorn* v. *Sheddon*. Here I am asked to say that a gift of Indian stock ought to be considered an appointment of a sum of Consolidated Bank Annuities. No doubt, if you describe the fund in a manner applicable to pass it, it will do so, but if you give a sum of 1,000*l*., that gift will not pass leaseholds. Per Wood, V.-Ch., in *Hurlstone* v. *Ashton*, 11 Jur. N. S., 725, 726.

1. *Hay* v. *Fairbairn* (2 B. & Ald. 193) affirmed in *Monkhouse* v. *Hay*, 4 Moore 549; 2 B. & B. 114; 8 Price 256.

2. *Haycock's Policy, Re* (1 L. R., Ch. D., 611), followed in *Sutton's Trusts, Re*, 12 L. R., Ch. D., 175; 48 L. J., Ch., 350; 27 W. R. 529.

3. *Hayden* v. *Carroll* (3 Ridgw. P. C. 545) questioned in *O'Flaherty* v. *M'Dowell*, 6 H. L. Ca. 142.

4. *Hayes* v. *Hayes* (4 Russ. 311) is not sound law. Per Jessel, M.R., in *Hampton* v. *Holman*, 5 L. R., Ch. D., 183, 190; 36 L. T., N. S., 287; 46 L. J., Ch., 248; 25 W. R. 459.

5. *Haynes* v. *Haynes* (3 De G. M. & G. 590), whether this case is consistent with *Banks* v. *Braithwaite* (32 L. J., Ch., 35; 7 L. T., N. S., 149). It is unnecessary for me to consider; I am bound to follow the former, which is the decision of the Court of Appeal, and in the good sense of which, moreover, I entirely concur. Per Malins, V.-Ch., in *Coles' Will, Re*, 8 L. R., Eq., 271, 272; 22 L. T., N. S., 221, 222.

6. *Haynes* v. *Mico* (1 Bro. C. C. 129). See *Adams* v. *Lavender*, M'Clel. & Y. 41. *See also* Romilly's Notes of Cases 41.

7. *Hays* v. *Bailey* (Sugd. Vend., vol. 3, p. 4) observed upon in *Leech* v. *Leech*, 2 Dr. & War. 568; 5 Ir. Eq. R. 69.

8. *Head* v. *Egerton* (3 P. W. 280), which has been called a landmark of the law, determined that where one man has the legal estate but not the title deeds, and the other the title deeds but not the legal estate, the Court will not assist either party. This case was followed in *Thorpe* v. *Holdsworth*, 7 L. R., Eq., 139. Per Malins, V.-Ch., *Russell Road Purchase Moneys, Re*, 12 L. R., Eq., 81; 40 L. J., Ch., 673; 23 L. T. 839; 19 W. R. 520, 706.

9. *Head* v. *Massey* (2 Moll. 467) overruled in *Hughes* v. *Nash*, 3 Ir. Eq. R. 495.

10. *Hearle* v. *Greenbank* (3 Atk. 695) observed upon in *D'Angibau, Re, Andrews* v. *Andrews*, 15 L. R., Ch. D., 228; 43 L. T. 135; 28 W. R. 930; 44 L. T. 49.

11. *Heath* v. *Bucknall* (38 L. J., Ch., 372; 8 L. R., Eq., 1; 17 W. R. 755; 20 L. T., N. S., 549). I come, then, to the remaining part of the case founded upon the authority of *Heath* v. *Bucknall*. With respect to that case, I cannot come to any conclusion but that it was decided upon its particular circumstances, which were, as I gather it, that a very small and unappreciable proportion of the ancient window was preserved, and the rest was new; if so, there would have been no material damages at law. But if the case is supposed to lay down the proposition that a plaintiff, who, according to *Tapling* v. *Jones* (20 C. B., N. S., 1; 34 L. J., C. P., 342; 11 H. L. Ca. 290; 13 W. R. 617; 12 L. T., N. S., 555) has substantial rights, cannot come to this Court and obtain protection for those rights, I entirely demur to such a conclusion. If, for instance, there be a house with three ancient windows, and it be desirable to add at no great distance from those windows two other windows, the plaintiff is not to come to this court to preserve what, according to *Tapling* v. *Jones*, is his clear legal right. I think such a conclusion would be neither according to the principle nor practice of this Court. The course of the Court is, that where there is a material injury to what is a clear legal right, and it appears that damages from the nature of the case would not be a complete remedy, this Court will interfere by injunction. Per Giffard, L. J., in *Staight* v. *Burn*, 39 L. J., Ch., 289, 290; 18 W. R. 243, 245; 22 L. T., N. S., 831, 833.

12. *Heath* v. *Bucknall* (8 L. R., Eq., 1) overruled by *Staight* v. *Burn* (5 L. R., Ch., 163). Per Jessel, M. R., in *Aynsley* v. *Glover*, 18 L. R., Eq., 544; 43 L. J., Ch., 777; 31 L. T. 219.

13. *Heather, Re* (5 L. R., Ch., 694; 39 L. J., Ch., 781; 18 W. R. 1079) followed in *Holroyde and Smith, Re*, 43 L. T. 722; 29 W. R. 599.

14. *Heathe* v. *Heathe* (2 Atk. 122, 123) observed on in *Hodgson's Trusts, Re*, 1 Kay & J. 178.

15. *Heather* v. *Webb* (2 L. R., C. P. D., 1; 25 W. R. 253; 46 L. J., C. P., 89) distinguished in *Jakeman* v. *Cook*, 4 L. R., Exch. D., 26; 48 L. J., Exch., 165; 27 W. R. 171.

16. *Heathorn's Patent, Re* (19 W. R. 1068), overruled in *Vincent's Patent, Re*, 15 W. R. 524.

17. *Hebbert* v. *Purchas* (4 L. R., P. C., 301) approved in *Mackonochie* v. *Penzance (Lord)*, 6 L. R., App. Cas., 424; 50 L. J., Q. B., 611; 44 L. T. 479; 29 W. R. 633.

18. *Hedges* v. *Harpur* (9 Beav. 479) overruled in *Hedges* v. *Blicke*, 4 Jur., N. S., 1209; 27 L. J., Ch., 742.

19. *Hedges* v. *Harpur* (9 Beav. 479) overruled by *Hedges* v. *Harpur*, 3 De G. & J. 129, 138.

20. *Hedley* v. *Bates* (13 L. R., Ch. D., 498; 49 L. J., Ch., 170; 42 L. T. 41; 28 W. R. 365) commented on in *Standard* v. *St. Giles, Camberwell*, 20 L. R., Ch. D., 190; 51 L. J., Ch., 629; 46 L. T. 243; 30 W. R. 693.

21. *Hellawell* v. *Eastwood* (6 Exch. Rep. 295) commented on and followed in *Humphreys, Exp., Gibbs, Re*, 1 Bank. & Ins. R. 68.

22. *Hemming, or Heming, Re* (3 Kay & J. 40; 26 L. J., Ch., 106; 5 W. R. 33; 2 Jur., N. S., 1186), the opinion of Wood, V.-Ch., that the Court of Chancery has no jurisdiction under the Trustee Relief Act, 10 & 11 Vict., c. 96, to order a trustee, paying or transferring money or funds into court, to pay the costs of that proceeding, overruled. *Woodburn, Re*, 3 Jur., N. S., 799; 26 L. J., Ch., 522; 5 W. R. 423, 642; 1 De G. & J. 333.

23. *Hencliffe, Exp.* (1 Mont. 24), followed in *Fairlie, Exp., Christie, Re*, 1 Mont. 17.

24. *Henderson, Exp.* (4 Ves. 163), is overruled. See 6 Geo. 4, c. 16, s. 16.

25. *Henderson* v. *Stephenson* (2 L. R., H. L. (Sc.), 470; 32 L. T. 709) distinguished in *Burke* v. *South-Eastern Railway Co.*, 5 L. R., C. P. D., 1; 49 L. J., C. P., 107; 41 L. T. 554; 28 W. R. 306.

26. *Hensman* v. *Fryer* (3 L. R., Ch., 420; 37 L. J., Ch., 97; 17 L. T., N. S., 394). The point

as to marshalling the deficiency between the legacy and the real estate was decided in *Hensman* v. *Fryer*, under a misapprehension as to the effect of the decision in *Tombs* v. *Roche*, 2 Colly. 490, 502, and I must refuse to follow it. The Court is not bound to follow a decision even of the Court of Appeal if clearly erroneous. There were in my recollection no less than three decisions of Lord Westbury which V.-Ch. Stuart declined to follow. One of the cases in which he did so was *Drummond* v. *Drummond*, 2 L. R., Eq., 335; 36 L. J., Ch., 153; 14 L. T., N. S., 822, which afterwards went to the Court of Appeal (2 L. R., Ch., 32; L. T., N. S., 337), and the decision was affirmed. Per Malins, V.-Ch., in *Dugdale* v. *Dugdale*, 14 L. R., Eq., 234, 235; 41 L. J., Ch., 565; 27 L. T., N. S., 705, 706.

1. *Hensman* v. *Fryer* (3 L. R., Ch., 420; 37 L. J., Ch., 97; 17 L. T, N. S., 394). The decision in this case is clearly a mistaken decision; I must therefore decline to follow it. Per Stuart, V.-Ch., in *Collins* v. *Lewis*, 8 L. R., Eq., 708, 709; 17 L. T, N. S., 394. And see *Gibbins* v. *Eyden*, 20 L. T., N. S., 516, 517, where Malins, V.-Ch., treats the decision of Lord Chancellor Chelmsford as of no authority.

2. *Hensman* v. *Fryer* (3 L. R., Ch., 420; 17 L. T., N. S., 394; 37 L. J., Ch., 97) not followed in *Lancefield* v. *Iggulden*, 17 L. R., Eq., 556; 43 L. J., Ch., 570; 30 L. T. 156; 22 W. R. 726.

3. *Hensman* v. *Fryer* (3 L. R., Ch., 420; 37 L. J., Ch., 97; 17 L. T., N. S., 394). Then, with regard to the state of the authorities, it appears that V.-Ch. Kindersley and the late Master of the Rolls (Lord Romilly) took a different view from that which I have expressed, and that V.-Ch. Stuart, V.-Ch. Hall, and Lord Hatherley, when Vice-Chancellor, took the opposite view. But I feel bound to say that I look upon *Hensman* v. *Fryer*, decided by Lord Chelmsford, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the judge, who was then the head of this Court, that the Wills Act had made no alteration in the law in this respect. Per Lord Chancellor Cairns, in *Lancefield* v. *Iggulden*, 10 L. R., Ch., 136, 141; 44 L. J., Ch., 203; 31 L. T. 813; 23 W. R. 223.

4. *Herbert* v. *Sayer* (8 Jur. 812; 5 Q. B. 965) followed in *Jameson* v. *Brick and Stone Co.*, 4 L. R., Q. B. D., 208; 48 L. J., Q. B., 249; 27 W. R. 221; 39 L. T. 594.

5. *Hereford and South Wales Waggon and Engineering Co., Re, Head and Walter's Claims* (2 L. R., Ch. D., 621; 45 L. J., Ch., 461; 35 L. T. 40; 24 W. R. 953) commented on in *Rotherham Alum and Chemical Co., Re, Peace, Exp.*, 25 L. R., Ch. D., 103; 53 L. J., Ch., 290; 50 L. T. 219; 32 W. R. 131.

6. *Heron* v. *Stokes* (12 Cl. & F. 161). The opinions of Lord Plunkett and Lord Brougham in this case, that the rule in *Wild's case* (6 Rep. 17) applied to personalty, are not correct. Per Lord Campbell, C., in *Audsley* v. *Horn*, 6 Jur., N. S., 205, 206.

7. *Hertford (Marquis)* v. *Suisse* (13 Sim. 489) overruled. *Zulueta* v. *Vinent*, 3 Macn. & G. 246; 20 L. J., N. S., Ch., 474; 15 Jur. 277.

8. *Hertfordshire Brewery Co., Re* (2 L. R., Ch. D., 611). With regard to that case, considering the way in which the order in that case appears to have been made, without discussion and substantially by consent, I cannot consider it an authority binding upon me. Per Hall, V.-Ch., *Nassau Phosphate Co., Re*, 24 W. R. 692, 693; 2 L. R., Ch. D., 611, 615; 45 L. J., Ch., 584.

9. *Heslop, Exp.* (1 De G. M. & G. 477), not followed. The date of an order is the day when it is made; and the time for appealing under 12 & 13 Vict., c. 106, s. 12, runs from that day, and not from the day when the order was drawn up. *Dudley & West Bromwich Banking Co., Exp., Hopkins, Re*, 32 L. J., Bky., 68.

10. *Heslop, Exp.* (1 De G. M. & G. 477), followed in *Lucas, Exp., Gwyer, Re*, 3 De G. & J. 113; and in *Rutledge* v. *Rutledge*, 2 Ir. Eq. Rep. 290; and in *Wilson* v. *Emmett*, 19 Beav. 233.

11. *Hewitt* v. *Kaye* (6 L. R., Eq., 198; 16 W. R. 835) approved in *Mead, Re, Austin* v. *Mead*, 15 L. R., Ch. D., 651; 43 L. T. 117; 28 W. R. 891.

12. *Hewitt* v. *Loosemore* (9 Hare 449; 21 L. J., Ch., 69). Now, in the case of *Hewitt* v. *Loosemore*, it appears that Turner, L. J., then Vice-Chancellor, came to the conclusion, in a similar case to the present, where a mortgagor was himself a solicitor, and no solicitor was acting for the mortgagee, that there the mortgagor *quâ* solicitor was to be considered as solicitor of the mortgagee. I confess, I think I am bound to state that if it were not for the opinion expressed in that case, I doubt whether I should arrive at a similar conclusion, but the long experience and ability of that learned judge are such, that although I should consider it probable that his opinion is right and mine wrong, yet I should hesitate to apply the principle in every case. Per Kindersley, V.-Ch., in *Espin* v. *Pemberton*, 28 L. J., Ch., 308, 310. Then it appears to me, the case of *Hewitt* v. *Loosemore* is a clear and distinct authority. It is said that Sir George Turner, then Vice-Chancellor, in that case laid down a new doctrine when he held that where a *bonâ fide* inquiry is made for the deeds, and a reasonable excuse is given for their not being forthcoming, there is no ground for imputing knowledge which a further and fuller inquiry might have imparted, and this decision was said not to have given satisfaction to the profession. But it would appear that Sir George Turner founded himself on a long course of prior authorities, examined them all with his usual care, and arrived at his conclusion only after the most full and careful examination. I think that judgment is consonant with the prior decisions, which will govern me in this case. Per Chelmsford, C., in *Espin* v. *Pemberton*, 5 Jur., N. S., 157; 28 L. J., Ch., 311, 314.

13. *Hicks* v. *Sallitt* (3 De G. M. & G. 782) distinguished in *Hope* v. *Liddell*, *Liddell* v. *Norton*, 21 Beav. 183; 2 Jur., N. S., 105; 25 L. J., Ch., 90.

14. *Higginson* v. *Blockley* (1 Jur., N. S., 1104). I cannot accede to the principle which was laid down by V.-Ch. Kindersley in this case, that because an exception is bad in part therefore it is bad in the whole. Per Giffard, L. J., in *Hoffmann* v. *Postill*, 4 L. R., Ch., 673, 681; 17 W. R. 901; 20 L. T., N. S., 893.

1. *Hildick, Re, Hipkins* v. *Hildick* (44 L. T. 547; 29 W. R. 733), not followed in *Murray, Re*. 45 L. T. 707; 30 W. R. 283.

2. *Hildyard* v. *South Sea Co.* (2 P. W. 76) questioned in *Ashby* v. *Blackwell*, 2 Eden 299; Ambl. 503.

3. *Hill* v. *Audus* (1 Kay & J. 263; 24 L. J., Ch., 229). So far as applies to proceedings in the Court of Chancery under these Acts, I may observe that in *Hill* v. *Audus*, the bill does not appear to have been dismissed, though it seems as if Wood, V.-Ch., was ready to dismiss the bill because there was no admission of liability. But the decision was simply that no injunction ought to be granted to restrain the trial of a particular cause. That is perfectly intelligible, because the Court of Chancery would have had no ordinary jurisdiction to try such a cause; but to treat it as a dismissal of the bill, and a refusal to interfere altogether, unless there was a general admission of liability in the first instance, would lead to the most serious consequences, because, except by means of the intervention of the Court of Chancery, there is no mode of arriving at the amount at which the limitation of liability is to be fixed, or of making the distribution of the amount when fixed. But, whatever may be the jurisdiction of the Court of Chancery with respect to such matters, it is not material in this case to define that jurisdiction of the Court of Chancery, because the defendants have here first of all to establish the jurisdiction of the Court of Admiralty, before any difficulty has to be dealt with as to the mode by which that jurisdiction is to be enforced. Per Willes, J, in the Exchequer Chamber, in *James* v. *London & South-Western Railway Co.*, 41 L. J., Exch, 186, 187, 188; 7 L. R, Exch., 287, 291; 27 L. T. 382; 21 W. R. 25.

As far as *Hill* v. *Audus* is concerned, I agree with my brother Willes, that the Vice-Chancellor was right in refusing an injunction, though as to concurring in what he is reported to have said I entertain very considerable difficulty. Per Blackburn, J., S. C., 41 L. J., Exch., 190, 191; 7 L. R., Exch., 287, 295.

4. *Hill* v. *Hill* (10 W. R. 400) considered in *Clarke, Re*, 21 L. R., Ch. D., 817; 51 L. J., Ch., 762; 47 L. T. 84; 31 W. R. 37.

5. *Hill* v. *Kirkwood* (42 L. T. 105; 28 W. R. 358), examined and commented on in *Hickson* v. *Darlow*, 23 L. R., Ch. D., 690; 48 L. T. 449; 31 W. R. 417.

6. *Hills* v. *Croll* (2 Phil. 60). In my opinion, it is very difficult to reconcile that case with *Lumley* v. *Wagner* (1 De G. M. & G. 604), which has been repeatedly followed; and if *Hills* v. *Croll* is to stand with that case at all it can only be upon its particular circumstances. Per Selwyn, L. J., in *Catt* v. *Tourle*, 4 L. R., Ch., 654, 660.

With respect to *Hills* v. *Croll*, as was said by Lord St. Leonards, in his judgment in *Lumley* v. *Wagner*, decided according to its particular circumstances, unless it is to be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length, it is contrary to *Lumley* v. *Wagner*, and must be considered as overruled. Per Giffard, L. J. *Ib.*

7. *Hilton* v. *Jones* (9 L. R., Ch. D., 620; 47 L. J., Ch., 740; 38 L. T. 415; 26 W. R. 556) overruled by *Sherwin* v. *Selkirk*, 12 L. R., Ch. D., 68; 27 W. R. 842; 40 L. T. 701.

8. *Hinchinbroke (Lord)* v. *Seymour* (1 Bro. C. C. 395) considered and examined in *Henty* v. *Wrey*, 21 L. R., Ch. D., 332; 47 L. T. 231; 30 W. R. 850. Reversing 19 L. R., Ch. D., 492; 51 L. J., Ch., 422; 45 L. T. 752; 30 W. R. 317.

9. *Hinckley* v. *Maclarens* (1 Myl. & K. 27) overruled in *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J, N S, Ch., 200. Reversing 2 Myl. & K. 82; 3 L. J., N. S., Ch., 17.

10. *Hind* v. *Whitmore* (27 L. T., N. S., 55; 4 W. R. 379; 2 Kay & J. 458) considered in *Payne, Re, Randle* v. *Payne*, 23 L. R., Ch. D., 288; 52 L. J., Ch., 544; 48 L. T. 194; 31 W. R. 509.

11. Held, that the Bills of Exchange Act of 1878 was in effect a declaration by the Legislature, that the decision in the case of *Hindlaugh* v. *Blakey*, 3 L. R., C. P. D., 136, was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded. *Steele* v. *McKinlay*, 5 L. R., App. Cas., 754; 43 B. T. 358; 29 W. R. 17.

12. *Hinder* v. *Streeten* (10 Hare 18) followed in *Midland Counties Railway Co.* v. *Rice*, 2 Eq. Rep. 1109.

13. *Hindle* v. *Taylor* (5 De G. M. & G. 577) followed in *Boyd* v. *Boyd*, 2 N. R. 486; 9 L. T., N. S., 166.

14. *Hindman* v. *Taylor* (2 Bro. C. C. 7) not to be relied on as to the statement, per Vice-Chancellor in *Robertson* v. *Lubbock*, 4 Sim. 173; 9 L. J., Ch, 138.

15. *Hindmarsh, Re* (1 Dr. & Sm. 129; 8 W. R. 203), must be taken to depend upon the special facts disclosed in the report. It seems to me that the decision could not be justified if it were simply the case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding and retaining them for the benefit of the person who so intrusted him with them; but the report shows that it was not a case of that description. Per Lord Hatherley, C., in *Burdick* v. *Garrick*, 39 L. J., Ch., 369, 372; 18 W. R. 387, 388; 5 L. R., Ch., 223.

16. *Hinton, Exp.* (De G. 550), confirmed in *Goldsmid* v. *Cuzenove*, 7 H. L. Ca. 785.

17. *Hinton, Exp.* (De G. 550). See *Moult Exp. post*, p. 8319 (18).

18. *Hirst* v. *Tolson* (2 Macn. & G. 134; 19 L. J., Ch., 441). With regard to the equity case the Lord Chancellor refers to two former decisions in the time of Vernon and Finch, which appear to be *Soam* v. *Bowden* (Finch 396) and *Newton* v. *Rouse* (1 Vern. 496). On referring to the report of the former case in Finch, it appears that there the master had received a premium of 250*l.*, and died within two years, and a bill having been filed against the executors for the return of a portion of the premium, it is stated that the executors said that they would be willing to do whatever the Court should direct in the matter. It is quite

consistent with this report that the executors really did not contest the point, but submitted to what the Court might, under the circumstances, think just. The case of *Newton* v. *Rouse* (1 Vern. 460) is certainly a very remarkable case, because there the agreement contained an express provision that in the event of death 60*l.* should be returned, and on a bill being filed, the Court decreed the return of 100*l.* This is certainly wholly inconsistent with the principles regulating the interpretation of contracts both at law and equity. The only possible ground on which the decision can be explained is that mentioned by the note to the case in the 3rd edition of Vernon, by Mr. Raithby, and referred to in 1 Story's Equity Jurisprudence, 10th edition, p. 472, viz., that it must have been the case of mutual mistake, misapprehension, or unconscientious advantage taken by one side of the other. Under these circumstances it does not appear to me that the case of *Hirst* v. *Tolson* is a satisfactory authority or one by which we are bound. It appears to be based on a misapprehension of the law on the subject, and is distinctly contrary to the opinion of the Court of Exchequer in the case of *Thompson* (1 Exch. 864). Per Bovill, C. J., in *Whincup* v. *Hughes*, 6 L. R., C. P., 78, 83; 40 L. J., C. P., 104; 24 L. T. 74; 19 W. R. 439.

The decision in the case of *Hirst* v. *Tolson* does not appear satisfactory, for the authorities given by my lord. With the utmost respect to the authority of the eminent Chancellor (Lord Cottenham) who decided it, with regard to the question of equity, I must confess that the justice of that decision appears to me very doubtful. The executors there seem to have offered to get the clerk placed in the office of another attorney without premium, and that having been declined they were made to refund money which the testator had probably spent long before his death without ever contemplating the necessity of refunding it. I must say that the doctrine of the common law which, except in the instance of the paternal or masterful jurisdiction of the Court over its own officers, does not compel any return on the partial failure of consideration, appears to me on the whole preferable to an equity so doubtful as this. . . . In 2 Williams on Executors, 6th ed., p. 1631, the case of *Hirst* v. *Tolson* is treated as applicable to attorneys only, and being an exercise of the equitable jurisdiction of the Court of Chancery. Per Willes, J., *Ib.*

1. *Hitchman* v. *Stewart* (3 Drew. 271) approved and followed in *Bishop, Exp., Fox, Re*, 15 L. R., Ch. D., 400; 50 L. J., Ch., 18; 43 L. T. 165; 29 W. R. 144.

2. *Hoare* v. *Osborne* (33 L. J., Ch., 586; 10 L. T. 258; 12 W. R. 661) not followed in *Willoughby Osborne* v. *Holyoake*, 22 L. R., Ch. D., 238; 52 L. J., Ch., 331; 48 L. T. 152; 31 W. R. 236.

3. *Hobart's Reports* good. *Troward* v. *Cailland*, 6 Term. R. 441.

4. *Hocking* v. *Acraman* (12 M. & W. 170) commented on in *Lucas* v. *Dicker*, 6 L. R., Q. B. D., 84; 50 L. J., Q. B., 190; 43 L. T. 429; 29 W. R. 115. Affirming 5 L. R., C. P. D., 150; 49 L. J., C. P., 415; 42 L. T. 627; 28 W. R. 537.

5. *Hodgson* v. *Bective* (*Earl*) (1 Hem. & M. 376, 391; 9 L. T., N. S., 18; 34 L. J., Ch., 489). It is impossible for any serious purpose to distinguish this case from *Hodgson* v. *Bective* (*Earl*). The same point arose there, and the same law must be applied as has been there laid down as being the law from the highest authority which we know of, namely, the House of Lords. In another case referred to, a case decided by one of the same judges who decided *Hodgson* v. *Bective* (*Earl*) in the House of Lords, I mean *Sidney* v. *Wilmer* (4 De G. J. & S. 84; 9 L. T., N. S., 18), a direct and contrary decision was arrived at, the Court in that case being influenced to some extent, no doubt, by the construction that was put upon the will, and a great deal more by the general principle found in the judgment. And if there was no such case as *Hodgson* v. *Bective* (*Earl*), I do not hesitate to say that I would rather adopt the decision in *Sidney* v. *Wilmer* than the principle of the decision in *Hodgson* v. *Bective* (*Earl*). But I am bound by *Hodgson* v. *Bective* (*Earl*), and have no alternative. The law is plainly decided, and I must obey the law, and I should be outraging and acting contrary to the decision in *Hodgson* v. *Bective* (*Earl*) if I yielded to the strong temptation which I feel, and to the strong solicitations which have been presented to me, not to leave the income of this property any longer in suspense, to wait for an event which may never happen, and in all probability never will happen, and not to hand over the income of the property in the meantime to the person whom the law has designated as being entitled to that intermediate enjoyment, if the testator has not taken it away from him. If he has given it to nobody else, he has not taken it away from him. In my opinion the heir-at-law and the next of kin are, therefore, entitled to the intermediate proceeds of this estate, real and personal, until it shall be ascertained whether the contingency, which in any event will put the plaintiff in possession, has happened. Per Bacon, V.-Ch., in *Wade-Gery* v. *Handley*, 34 L. T., N. S., 233, 235; 1 L. R., Ch. D., 653, 663; 45 L. J., Ch., 457.

It is utterly impossible to say that the case before Lord Westbury (*Sidney* v. *Wilmer*), which is so entirely different from all the other cases, would justify us in departing from the rule which was so well settled long before *Hodgson* v. *Bective* (*Earl*), and so clearly established by that case as to the title of the heir-at-law and next of kin respectively. I think the Vice-Chancellor could not do otherwise than follow that decision. Per James, L. J., S. C. on appeal, 35 L. T., N. S., 85, 86; 3 L. R., Ch. D., 374, 375; 45 L. J., Ch., 712.

6. *Hogg* v. *Jones* (32 L. J., Ch., 361; 32 Beav. 45) distinguished in *Cresswell, Re, Parkin* v. *Cresswell*, 24 L. R., Ch. D., 102; 52 L. J., Ch., 798; 49 L. T. 590.

7. *Hoghton* v. *Hoghton* (5 Beav. 278). The doctrine laid down in the judgment of this case adhered to in *Potts* v. *Surr*, 34 Beav. 543.

8. *Hodgkinson* v. *Kelly* (37 L. J., Ch., 837; 6 L. R., Eq., 496; 16 W. R. 1078) followed in *Fenwick* v. *Buck*, 19 W. R. 597; 24 L. T., N. S., 274.

9. *Holden* v. *Weeks* (1 John. & H. 278) not followed in *Sowerby* v. *Fryer*, 8 L. R., Eq., 417, 423; 38 L. J., Ch., 617.

1. *Holdich* v. *Holdich* (2 Y. & Coll. C. C. 22) observed upon in *Grayson* v. *Deakin*, 3 De G. & Sm. 298; 18 L. J., N. S., Ch., 114; 13 Jur. 145.

2. *Holdsworth* v. *Wilson* (4 B. & S. 1) approved of in *Metropolitan District Railway Co.* v. *Sharpe*, 5 L. R., App. Cas., 425; 50 L. J., Q. B., 14; 43 L. T. 130; 28 W. R. 617.

3. *Hole* v. *Bradbury* (12 L. R., Ch. D., 886; 48 L. J., Ch., 673; 41 L. T. 153; 28 W. R. 39) not followed in *Isaacs* v. *Fiddeman*, 49 L. J., Ch., 412; 42 L. T. 395.

4. *Hollawell* v. *Eastwood* (6 Exch. 313). Dictum in this case observed upon in *Mather* v. *Fraser*, 2 Kay & J. 536; 2 Jur., N. S., 900; 25 L. J., Ch., 361.

5. *Holloway* v. *Cheston* (19 L. R., Ch. D., 516; 51 L. J., Ch., 208; 30 W. R. 120) not followed in *Anderson* v. *Butler's Wharf Co.*, 21 L. R., Ch. D., 131; 51 L. J., Ch., 694; 30 W. R. 723.

6. *Holme* v. *Guy* (46 L. J., Ch., 648; 25 W. R. 547; 36 L. T., N. S., 600; 5 L. R., Ch. D., 901. Affirming 46 L. J., Ch., 223; 36 L. T., N. S., 306; 25 W. R. 390) observed upon in *Att.-Gen.* v. *Manchester* (*Dean and Canons*), 18 L. R., Ch. D., 596; 50 L. J., Ch., 562; 44 L. T. 868. Affirmed 18 L. R., Ch. D., 612.n.; 45 L. T. 184.

7. *Holmes* v. *Holmes* (1 Bro. C. C. 555) explained and commented on in *Lawes, Re*, 45 L. T. 453; 30 W. R. 33.

8. *Hollyford Copper Mining Co., Re* (5 L. R., Ch., 93; 21 L. T. 734), followed in *City of Glasgow Bank, Re*, 14 L. R., Ch. D., 628; 43 L. T. 279.

9. *Holroyd* v. *Marshall* (10 H. L. Ca. 191; 7 Jur., N. S., 319; 30 L. J., Ch., 385; 7 L. T. 172; 11 W. R. 171) distinguished in *D'Epineuil, Re Tadman* v. *D'Epineuil* (No. 2), 20 L. R., Ch. D., 758; 47 L. T. 157; 30 W. R. 702.

10. *Holt* v. *Holt* (2 Vern. 322). The form in this case cannot be supported (See *Pembroke* v. *Ford*), 3 Swans. 437, per Lord Romilly, M. R., in *Cooper* v. *Jarman*, 12 Jur., N. S., 956, 957.

11. *Home* v. *Pillans* (2 Myl. & K. 15). There a gift to a female, when and if she should attain twenty-one, to her sole and separate use, and in case of her death, leaving children, her share to go to her children, was held to vest an absolute interest in the legatee on her attaining twenty-one. Mr. Jarman, in his book (3rd ed, vol. ii., p. 737), refers to this case as a doubtful case. Malins, V.-Ch., said in *Clark* v. *Henry* (11 L. R., Eq., 222, 225), "In the course of my professional life I have cited *Home* v. *Pillans* scores of times, and I do not remember one occasion upon which it was spoken of with disapprobation. I think it has stood the test of time remarkably well." And in the course of his final decision the learned Vice-Chancellor said, "Then as to the case of *Home* v. *Pillans;* it seems that Mr. Jarman thought that *Home* v. *Pillans* was a doubtful case. I am happy to find indeed, I have had my attention called to it before, that the Master of the Rolls, in the case of *Edwards* v. *Edwards* (15 Beav. 357), said that he found no difficulty about *Home* v. *Pillans*. That case is a distinct authority, and as sound a decision as was ever pronounced by any judge, because it proceeds upon the broad principle of giving a rational interpretation to words and making property available as early as possible." *Clark* v. *Henry*, 11 L. R., Eq., 230, 231.

12. *Home Investment Society, Re* (14 L. R., Ch. D., 167), considered in *Dronfield, Silkstone Coal Co., Re* (No. 2), 23 L. R., Ch. D., 511; 52 L. J., Ch., 963; 31 W. R 671.

13. *Hookey, Exp.* (4 D. F. & J. 456; 6 L. T. 567; 1 W. R. 701), approved and followed in *Whitton, Exp., Greaves, Re*, 13 L. R., Ch. D., 881; 49 L. J., Bky., 31; 42 L. T. 63; 28 W. R. 432.

14. *Hopgood* v. *Parkin* (11 L. R., Eq., 74; 22 L. T. 772) questioned and not followed in *Speight, Re, Speight* v. *Gaunt*, 22 L. R., Ch. D., 727; 52 L. J., Ch., 503; 48 L. T. 279; 31 W. R. 401. Affirmed 9 L. R., App. Cas., 1; 53 L. J., Ch., 419; 50 L. T. 330; 32 W. R. 335. Reversing 51 L. J., Ch., 715; 46 L. T. 726; 30 W. R. 785.

15. *Hopkins* v. *Hopkins*, 1 Atk. 593. See *Cholmondeley* (*Lord*) v. *Clinton* (*Lord*), 2 Meriv. 173, 358; 2 Jac. & Walk. 18, where the report of this case is corrected from an MS. note. So also by Lord Loughborough in *Habergham* v. *Vincent*, 4 Bro. C. C. 390.

16. *Hopkins* v. *Hopkins* (1 Atk. 581; Reg. Lib. 734 A., fo. 111; Reg. Lib. 1738 A., fo. 367; and Reg. Lib. 1748 A., fo. 644) overruled, so far as the decision affected income of residuary personal estate in *Bective* (*Earl*) v. *Hodgson*, 10 Jur., N. S., 373; 33 L. J., Ch., 601; 12 W R. 625; 10 L. T., N. S., 202.

17. *Hopkins* v. *Hopkins* (1 Atk. 580; 1 Ves. 268; Ca. *temp.* Talb. 44). See *Habergham* v. *Vincent*, 4 Bro. C. C. 390, where Lord Loughborough has stated this case from a corrected copy.

18. *Hopkinson* v. *Rolt* (9 H. L. Ca. 514; 34 L. J., Ch., 468). *Semble*, that there is not, as between brewers and distillers, any custom of trade affecting their priorities as mortgagees in a manner different from the rules laid down in the above case. Per James, V.-Ch., in *Dawn* v. *City of London Brewery Co*, 38 L. J., Ch., 454; 8 L. R., Eq., 155; 20 L. T., N. S., 601.

19. *Hopkinson* v. *Rolt* (9 H. L. Ca. 514), principle of applied in *London & County Banking Co.* v. *Radcliffe*, 6 L. R., App. Cas., 722; 51 L. J., Ch., 28; 45 L. T. 322; 30 W. R 109.

20. *Hore* v. *Becher* (12 Sim. 465) can scarcely be reconciled with the doctrines of a court of equity as to the inalienable character of a wife's reversionary interest. Per Wood, L. J., and P. C. in *Fitzgerald* v. *Fitzgerald*, 2 L. R., P. C., 83, 87; 37 L. J., P. C., 44.

21. *Hornby* v. *Hunter* (1 Russ. 89) observed upon in *Tomlin* v. *Tomlin*, 1 Hare 236.

22. *Hornby* v. *Matcham* (16 Sim. 327) followed in *Brown* v. *Sewell*, 17 Jur. 708; 22 L. J., Ch., 1063; 11 Hare 49.

23. *Hort's case, Grain's case, European Assurance Society, Re* (1 L. R., Ch. D., 307; 45 L. J., Ch., 321; 33 L. T., N. S., 766) distinguished in *Dowse's case, European Assurance Society, Re*, 3 L. R., Ch. D., 384; 35 L. T., N. S., 653; 46 L. J., Ch., 402.

24. *Horwood, Exp.* (1 Mont. & M.), followed in *Fairlie, Exp., Christie, Re*, 1 Mont. 17.

25. *Hotham's* (*Lord*) *Trusts, Re* (12 L. R., Eq., 76), not followed by Lord Selborne in *Brunskill* v. *Caird*, 16 L. R., Eq., 493; 21 W. R. 943; 43 L. J., Ch., 163.

26. *Hotten* v. *Arthur* (32 L. J., Ch., 771; 9

L. T. 199; 11 W. R. 934; 2 N. R. 485; 1 Hem. & M. 603) followed in *Maple* v. *Junior Army and Navy Stores*, 21 L. R., Ch D., 369; 52 L. J., Ch, 67; 47 L. T. 589; 31 W. R. 70.

1. *Hoskin, Re* (6 L. R., Ch. D., 281; 46 L. J., Ch., 817; 25 W. R. 779), not followed in *Turner* v. *Hancock*, 20 L. R., Ch. D., 303; 51 L. J., Ch., 517, 46 L. T. 750; 30 W. R. 480.

2. *Hotten* v. *Arthur* (11 W. R. 934; 1 H. & M. 603; 2 N. R. 485), followed in *Maple* v. *Junior Army & Navy Stores*, 21 L. R, Ch. D., 369; 31 W. R. 70.

3. *Houldsworth* v. *City of Glasgow Bank* (5 L. R., App. Cas., 317; 42 L. T. 194; 28 W. R. 677), dictum of Cairns, L. C., approved in *Hull & County Bank, Re, Burgess's case*, 15 L. R., Ch. D., 507; 49 L. J., Ch., 541; 43 L. T. 45; 28 W. R. 792.

4. *Houldsworth* v. *City of Glasgow Bank* (5 L. R., App. Cas., 317; 42 L. T. 194; 28 W. R. 677), distinguished in *Appleyard's case, Great Australian Gold Mining Co., Re*, 18 L. R., Ch. D., 587; 50 L. J., Ch., 554; 30 W. R. 147; 45 L. T. 552.

5. *How* v. *Kirchner* (11 Moo. P. C. 21) upheld in *Kirchner* v. *Venus*, 12 Moo P. C. 361.

6. *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137). The rule laid down in this case prevails, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, and which it is incumbent on those contesting the application of the rule to point out. *Morgan* v. *Morgan*, 14 Beav. 72.

7. *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137) observed upon in *Baud* v. *Fardell*, 25 L. J., Ch., 21; and in *Leonard, Re, Theobald* v. *King*, 43 L. T. 664; 29 W. R. 234.

8 *Howe* v. *M'Kernan* (30 Beav. 547) not followed as an authority in *Carver* v. *Pinto Leite*, 41 L. J., Ch., 92; 7 L. R., Ch., 90; 26 L. T. 722.

9. *Howell* v. *Young* (5 B. & C. 259) acted on in *Smith* v. *Fox*, 6 Hare 386; 17 L. J, N. S., Ch., 170; 12 Jur. 130.

10. *Howkins* v. *Jackson* (2 Macn. & G. 372), distinguished in *Turner* v. *Turner*, *Hall* v. *Turner*, 14 L. R., Ch. D., 829; 28 W. R. 859; 42 L. T. 495.

11. *Hucks* v. *Hucks* (2 Ves. 568) as to limitation of estate for life to an unborn child, is overruled by *Routledge* v. *Dorill*, 2 Ves. J. 357.

12. *Huddersfield Corporation and Jacomb, Re* (10 L. R., Ch, 92; 44 L. J., Ch., 96; 31 L. T. 466; 23 W. R. 100), followed in *Smith* v. *Parkside Mining Co.*, 6 L. R, Q. B. D., 67; 50 L. J., Q. B., 144; 29 W. R. 154.

13. *Hudson's case, Contract Corporation, Re* (12 L. R., Eq., 1; 24 L. T., N. S., 534; 40 L. J., Ch., 444; 19 W. R. 691). The observations of the M. R. in this case dissented from so far as they are irreconcilable with the observations of the Lords Justices in *Nevill's case, Natal Investment Co., Re* (6 L. R., Ch., 43; 19 W. R. 36; 23 L. T., N. S., 577; 40 L. J., Ch., 1). See *Roberts* v. *Crowe*, 27 L. T., N. S., 238; 41 L. J., C. P., 198; 7 L. R. 629.

14. *Hughes* v. *Ellis* (20 Beav. 193). If it were necessary to deal with this case I should be slow to express my assent to it. Per James, L. J., in *Shaw* v. *Jones-Ford*, 6 L. R., Ch. D., 1. 15; 46 L. J., Ch., 633; 37 L. T. 233; 25 W. R. 815.

15. *Hughes* v. *Pritchard* (6 L. R., Ch. D., 24) distinguished in *Methuen and Blore's Contract, Re*, 16 L. R., Ch. D., 696; 50 L. J., Ch., 464; 44 L. T. 332; 29 W. R. 656.

16. *Humberston* v. *Humberston* (1 P. W. 332) commented on and distinguished in *Mortimer* v. *West*, 2 Sim. 274, 286.

17. *Humberston* v. *Humberston* (1 P. W. 332) commented on and followed in *Parfitt* v. *Hember*, 4 L. R., Eq., 443.

18 *Humble* v. *Shore* (7 Hare 247; 1 Hem. & M. 550. n.) approved in *Hetherington* v. *Longrigg*, 15 L. R., Ch. D., 635.

19. *Humble* v. *Shore* (7 Hare 247; 1 Hem. & M. 550. n.) observed upon in *Crawshaw* v. *Crawshaw*, 14 L. R., Ch. D., 817; 49 L. J., Ch., 662; 43 L. T. 309; 29 W. R. 68.

20. *Humble* v. *Shore* (7 Hare 247; 1 Hem. & M. 550. n.) followed in *Savage's Trusts, Re*, 50 L. J., Ch., 131; and in *Barker's Estate, Re, Hetherington* v. *Longrigg*, 15 L. R., Ch. D., 635; 29 W. R. 281.

21. *Humble* v. *Shore* (7 Hare 247) approved of in *Lightfoot* v. *Burstall*, 33 L. J., Ch., 188; 3 N. R. 112; 12 W. R, 148; 10 Jur., N. S., 308; 1 Hem. & M. 546.

22. *Humphrey* v. *Arabin* (Ll. & G. *temp.* Plunk. 318) approved of in *Bell* v. *Ahearne*, 12 Ir. Eq. R. 576.

23. *Hunt* v. *Hunt* (31 L. J., Ch., 161; 4 De G. F. & J. 221) examined and commented on in *Cahill* v. *Cahill*, 8 L. R., App. Cas., 420; 49 L. T. 605; 31 W. R. 861. Reversing 7 L. R., Ir., 361.

24. *Hunt* v. *Hunt* (31 L. J., Ch., 161; 31 Beav. 89; 5 L. T., N. S., 412, 778; 4 De G. F. & J. 221). In this case there have been contrary decisions, one by Lord Romilly at the Rolls, on appeal, reversed by Lord Chancellor Westbury. That case had been appealed to the House of Lords, but was not proceeded with, it having been terminated by a compromise. I am bound by the decision in that case of Lord Westbury, as Chancellor. Per Malins, V.-Ch., in *Kitchin* v. *Kitchin*, 19 L. T., N. S., 674, 675.

25. With regard to the propriety of this court interfering to restrain proceedings in the Divorce Court, the counsel for the plaintiff rely upon *Hunt* v. *Hunt* (*supra*), in which Lord Westbury, overruling the Master of the Rolls, decided that where parties have entered into a contract to do or not to do certain things, and they proceed to act in contravention of those stipulations in the Divorce Court, this Court will interfere to prevent them by injunction. Whatever my private opinion may be, of course I must take the law from the Lord Chancellor, although I may concur with the Master of the Rolls, whose decision was overruled; but I am told, as a matter of fact, that there was an appeal to the House of Lords, and I am informed that no judgment was ever given, in consequence of the death of one of the parties, Mrs. Hunt. I cannot tell what the House of Lords might have done, and I must assume, for the purpose of my present decision, that it is within the jurisdiction of this Court to restrain proceedings in the Divorce Court in contravention of the terms of a deed of separation, though I confess I can see no impropriety in such proceedings being taken, because all these things can be made a defence in that court. Per Malins, V.-Ch., in *Brown* v. *Brown*, 7 L. R., Eq., 85, 190, 191; 38 L. J., Ch., 153, 157.

1. *Hunt* v. *Matthews* (1 Vern. 408) affirming that the settlement in this case was made after the treaty for marriage; it is difficult to reconcile it with Lord Thurlow's observations in *Strathmore* v. *Bowes* (1 Ves. J. 28; 2 Bro. C. C. 345; 2 Cox 28). Per Romilly, M. R., in *Downes* v. *Jennings*, 32 Beav. 290; 32 L. J., Ch., 643, 646.

2. *Hunt* v. *Wimbledon Local Board* (4 L. R., C. P. D., 48) approved of in *Young* v. *Leamington (Mayor)*, 8 L. R., App. Cas., 517; 52 L. J., Q. B., 713; 49 L. T. 1; 31 W. R. 925. Affirming 8 L. R., Q. B. D., 579; 51 L. J., Q. B., 292; 46 L. T. 555; 30 W. R. 500.

3. *Hunter* v. *Nocholds* (1 Macn. & G. 640; 1 H. & Tw. 614; 19 L. J., N. S., Ch., 177; 14 Jur. 256. Reversing 18 L. J., N. S., Ch., 407). See *Cox* v. *Dolman*, 2 De G. M. & G. 592; 17 Jur. 97; 22 L. J., Ch., 427.

4. *Hunter* v. *Nockolds* (1 Macn. & G. 640). All that this case determined was, that in a suit for the administration of the assets of a grantee of an annuity the annuitant cannot prove, as a personal debt, for more than six years' arrears. If the decision went beyond that, it is overruled by *Cox* v. *Dolman* (2 De G. M. & G. 592). Per Wood, V.-Ch. *Snow* v. *Booth*, 2 Kay & J. 132; and explained, 2 Jur., N. S., 244; 25 L. J., Ch., 417; 8 De G. M. & G. 69. And see Leading Article, 2 Jur., N. S, 175, Part 2.

5. *Hurst* v. *Beach* (2 Madd. 356) followed in *Sayre* v. *Cramp*, 2 W. R. 438.

6. *Hurst* v. *Beach* (3 Madd. 351) considered in *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

7. *Husham* v. *Dixon* (1 Y. & Coll. C. C. 203) overruled by *Hudson* v. *Martin*, 1 Y. & Coll. C. C. 551; 6 Jur. 1121. Reversing 6 Jur. 387.

8. *Hussey* v. *Horne Payne* (4 L. R., App. Cas., 311; 48 L. J., Ch., 352; 41 L. T. 1; 27 W. R. 585) distinguished in *Wilcox* v. *Redhead*, 49 L. J., Ch., 539; 28 W. R. 795.

9. *Hutcheon* v. *Mannington* (1 Ves. J. 366) explained and commented on in *Chaston, Re, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

10. *Hutchins* v. *Hutchins* (1 Hog. 315) approved and adopted in *Little* v. *Kingswood Collieries Co.*, 20 L. R., Ch. D., 733; 52 L. J., Ch., 56; 47 L. T. 323; 31 W. R. 178. Reversing 51 L. J., Ch., 498.

11. *Hutchinson* v. *Gillespie* (4 Moo. P. C. 378) approved in *Symes* v. *Cuvillier*, 5 L. R., App. Cas., 138; 49 L. J., P. C., 54; 42 L. T. 198.

12. *Hutchinson and Tenant, Re* (8 L. R., Ch. D., 540; 39 L. T. 86; 26 W. R. 904), commented on and followed in *Adams* v. *Kensington Vestry, Re, Adams, Re*, 24 L. R., Ch. D., 199; 52 L. J., Ch., 758; 48 L. T. 958; 32 W. R. 120.

13. *Hutton* v. *Cooper* (6 Exch. 159; 20 L. J., Exch. 153; 2 Prac. Rep. 104) approved in *Young* v. *Roebuck*, 2 N. R. 362; 33 L. J., Exch., 260; 8 L. T., N. S., 453; 2 H. & C. 297.

14. *Hutton* v. *Scaley* (4 Jur., N. S., 450): that case is misreported. Per Stuart, V.-Ch., in *Macrae* v. *Ellerton*, 4 Jur., N. S., 968.

15. *Hutton* v. *Upfill* (2 H. L. Ca. 674; 14 Jur. 843). This case does not establish, as a general rule, that because a man agrees to become a provisional committee-man, and accepts shares without doing any other act, or incurring any other liability, he is to be a contributory. *Sharp and James's case, Oxford & Worcester Extension Railway Co., Re*, 1 De G. M. & G. 565; 16 Jur. 579; 21 L. J., N. S., Ch., 767.

16. *Huxstep* v. *Brooman* (1 Bro. C. C. 437) doubted in *Wills* v. *Wills*, 1 Dr. & War. 439; 4 Ir. Eq. R. 531.

17. *Hyde* v. *Foster*, as reported in Dick. 102, overruled. *Smith* v. *Hibernian Mine Co.*, 1 Sch. & Lef. 240.

18. *Hyde* v. *Morley* (Cro. Eliz. 40; And. 133) considered in *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

19. *Hyde* v. *Price* (8 Sim. 578) referred to its special circumstances. *Powell, Re*, 10 Hare 131.

20. *Hylay* v. *Hylay* (3 Mod. 228) doubted in *Chester* v. *Chester*, Fitzg. 152.

I.

21. *Irby, Re* (17 Beav. 334), not followed by Wood, V.-Ch., in *Macfarlane, Re*, 2 John. & H. 673.

22. *Iredell* v. *Iredell* (23 Beav. 485). I cannot agree to the ruling in *Iredell* v. *Iredell*. Per Bacon, V.-Ch., in *Gimblett* v. *Purton*, 24 L. T., N. S., 793; 12 L. R., Eq., 427; 40 L. J., Ch., 556.

23. *Irnham* v. *Child* (1 Bro. C. C. 92; Dick. 554). See observations per Lord Eldon, C., in *Townshend (Marquis)* v. *Stangroom*, 6 Ves. 332-3, upon the points in this case.

24. *Irving* v. *Thompson* (9 Sim. 17; 8 L. J., N. S., Ch., 357; 3 Jur. 1071) approved of by the Lord Chancellor in *Kerr* v. *Rew*, 10 Sim. 370; 9 L. J., N. S., Ch., 148; 4 Jur. 525.

25. *Isherwood, Exp., Knight, Re* (22 L. R., Ch. D., 384) explained in *Izard, Exp., Bushell, Re* (No. 2), 23 L. R., Ch. D., 115; 48 L. T. 502.

26. *Isherwood, Exp., Knight, Re* (22 L. R., Ch. D., 484). The rule as laid down by Cotton, L. J., in this case adopted in preference to that expressed by Jessel, M. R., in *Izard, Exp., Bushell, Re*, 23 L. R., Ch. D., 115; 48 L. T. 502. *Arnal, Exp., Witton, Re*, 24 L. R., Ch. D., 26; 49 L. T. 221; 53 L. J., Ch., 134.

27. *Islington Market case* (12 M & W. 20. n.; 3 Cl. & F. 513) considered in *Goldsmid* v. *Great Eastern Railway Co*, 25 L. R., Ch. D., 510; 53 L. J., Ch., 371; 49 L. T. 717; 32 W. R. 341. Affirmed 9 L. R., App. Cas., 927; 33 W. R. 81. Varying 47 L. T. 727.

28. *Israel* v. *Douglas* (1 H. Black. 239) is relied upon as an authority, but the correctness of that decision has been doubted in several subsequent cases. In order to maintain an action for money paid and received, the money must have been actually or constructively received for the use of the plaintiff. Per Watson, B., in *Liversidge* v. *Broadbent*, 4 H. & N. 603, 614.

29. *Iveson* v. *Moore* (1 Ld. Raym. 486; 1 Salk. 15). The facts in this case are best stated in 1 Ld. Raymond, at page 488, from which report Willes, J., appears to have taken his judgment in *Ricket's case* (2 L. R., H. L., 175; 10 L. T., N. S., 542). That judgment reads like a careful and elaborate argument to save *Iveson* v. *Moore* from being overruled by the House of Lords. Per Brett, J., in *Benjamin* v. *Storr*, 30 L. T., N. S., 362, 363.

1. *Izard. Exp.*, *Bushell, Re* (No. 2) (23 L. R., Ch. D., 115; 48 L. T. 502), dicta in, not approved in *Arnal, Exp., Witton, Re*, 24 L. R., Ch. D., 26; 49 L. T. 221; 53 L. J., Ch., 134.

J.

2. *Jackson, Exp., Bowes, Re* (14 L. R., Ch. D., 725; 43 L. T. 272; 29 W. R. 253), explained and commented on in *Voisey, Exp., Knight, Re*, 21 L. R., Ch. D., 442; 52 L. J., Ch., 121; 47 L. T. 362; 31 W. R. 19.

3. *Jackson* v. *Newcastle* (*Duke*) (3 De G. J. & S., 275) overruled by *Yates* v. *Jack* (1 L. R., Ch., 295). Per Jessel, M. R., in *Aynsley* v. *Glover*, 18 L. R., Eq., 544; 43 L. J., Ch., 777; 31 L. T. 219.

4. *Jackson* v. *Noble* (2 Keen 590; 7 L. J., Ch., 133) extremely difficult to reconcile with *Doe* d. *Bloomfield* v. *Eyre* (5 C. B. 713; 18 L. J., C. P., 284). Per Kindersley, V.-Ch., in *Robinson* v. *Wood*, 27 L. J., Ch., 726, 728.

5. *Jacobs* v. *Richards* (18 Beav. 308. n.; on appeal, 5 De G. M. & G. 55; 2 Eq. Rep. 299) observed upon in *Campbell* v. *Hooper*, 3 Sm. & G. 153; 3 Eq. Rep. 727; 1 Jur., N. S., 670; 24 L. J., Ch., 644.

6. *Jacques* v. *Chambers* (2 Colly. 435). It appears to me to be a just principle, which the Master of the Rolls recognised in *Armstrong* v. *Burnett* (20 Beav. 424), that where a testator purports to bequeath shares in a company, if at his death any payments remain to be made which are necessary for constituting him a complete shareholder, those payments must be made out of the general estate; but I do not see any reason to put on the same footing calls made after the testator's death, which are necessary, not for constituting the testator a complete shareholder, but for rendering the undertaking itself a working concern. Having regard to the cases, I cannot help thinking that if the learned judge who decided *Jacques* v. *Chambers* had not thought himself bound by *Blount* v. *Hipkins* (7 Sim. 43), he would not have arrived at the conclusion that he did arrive at. I think the Master of the Rolls, in *Armstrong* v. *Burnett*, felt some difficulty in reconciling the decision in that case with that which he felt to be the best principle, and upon which he decided *Addams* v. *Ferick* (28 Beav. 384), namely, that the question depends entirely upon this, whether the call was made before or after the testator's death. Per Kindersley, V.-Ch., in *Day* v. *Day*, 1 Dr. & Sm. 261, 263, 264.

7. *Jakeman* v. *Cook* (4 L. R., Exch. D., 26; 48 L. J., Exch., 165; 27 W. R. 171), distinguished in *Burrow, Exp., Andrews, Re*, 18 L. R., Ch. D., 464; 50 L. J., Ch., 821; 45 L. T. 197.

8. *James* v. *Durant* (2 Beav. 177). The criticisms made on this case are not well founded. Per Stuart, V.-Ch., in *Hughes, Re*, 4 Giff. 432, 436.

9. *James* v. *James* (13 L. R., Eq., 421; 41 L. J., Ch., 353; 26 L. T. 568; 20 W. R. 434) not followed in *Massam* v. *Thorley's Cattle Food Co.*, 14 L. R., Ch. D., 748; 42 L. T. 851; 28 W. R. 366.

10. *James* v. *Litchfield* (39 L. J., Ch., 248; 9 L. R., Eq., 51). I am not prepared to follow the dicta in that case, which support the notion that the doctrine of *Daniels* v. *Davison* (16 Ves. 249), applies as between vendor and purchaser, whilst the matter still rests in contrast. Such a notion does not seem to me to be deducible from the previous authorities. These decisions apply only to certain equities between the purchaser and the tenant when the purchase has been completed, and have nothing to do with the rights and liabilities of vendors and purchasers. Per James, L. J., in *Caballero* v. *Henty*, 43 L. J., Ch., 635, 637; 9 L. R., Ch., 447; 30 L. T. 314; 22 W. R. 446.

11. *James* v. *Whitworth* (2 L. R., Eq., 692) explained in *Macnee* v. *Gorst*, 4 L. R., Eq., 351; 15 W. R. 1197.

12. *Jaques* v. *Millar* (6 L. R., Ch. D., 153; 47 L. J., Ch., 544; 37 L. T. 151; 25 W. R. 846), not followed in *Marshall* v. *Berridge*, 30 W. R. 93; 19 L. R., Ch. D., 233; 51 L. J., Ch., 329; 45 L. T. 599; 30 W. R. 93.

13. *Jefferys* v. *Boosey* (4 H. L. Ca. 815). I think that the opinion of the six judges in this case was correct, that since the 54 Geo. 3, c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses. I think the receipt in writing for the price of the copyright would operate as an effectual assignment. Per Lord Wensleydale, in *Kyle* v. *Jeffreys*, 3 Macq. H. L. Ca. 611, 617.

14. *Jefferys* v. *Boosey* (4 H. L. Ca., 815) Great reliance was placed by the appellant's counsel on the decision of the House of Lords in *Jefferys* v. *Boosey*, reversing a unanimous decision of the Court of Exchequer Chamber, in which I had concurred. That high tribunal must, of course, be considered as having decided rightly; but the ratio decidendi was merely that an absolute assignment, executed abroad, of all an author's copyright in a musical composition, gave no title to the assignee beyond the territory of the state in which the assignment was executed. And this is no authority for saying that the assignee could not have maintained an action in England for an injury to the copyright within the limits of that territory. Per Campbell, C., in *Austria* (*Emperor*) v. *Kossuth*, 7 Jur., N. S., 642; 9 W. R. 712; 4 L. T., N. S., 494; 4 De G. & J. 217; 30 L. J., Ch., 690.

15. *Jeffries* v. *Alexander* (7 Jur., N. S., 221; 31 L. J., Ch., 9; 2 L. T., N. S., 768; 8 H. L. Ca. 594. And see S. C. *nom. Alexander* v. *Brame*, 1 Jur., N. S., 1032; 7 De G. M. & G. 525; 2 W. R. 633) considered in *Robson, Re, Emley* v. *Davidson*, 19 L. R., Ch. D., 156; 51 L. J., Ch., 337; 45 L. T. 418; 30 W. R. 257.

16. *Jegon* v. *Vivian* (6 L. R., Ch., 742; 40 L. J., Ch., 389; 19 W. R. 365) approved in *Livingstone* v. *Rawyards Coal Co.*, 5 L. R., App. Cas., 25; 42 L. T. 334; 28 W. R. 357.

17. *Jenkes's case* (reported 6 Howell's State Trials, 1189, cited 3 Bla. Com. 132) overruled. *Crowley's case*, 2 Swan. 67; Buck. 264.

18. *Jenkins* v. *Herries* (4 Madd. 67), decision upheld in *Jenkins* v. *Clinton* (*Lord*), 26 Beav. 108, 124.

19. *Jenner's case, Percy and Kelly Nickel Cobalt and Chrome Iron Mining Co., Re* (7 L. R., Ch. D., 132; 47 L. J., Ch., 201; 37 L. T. 807; 26 W. R. 291), distinguished in *Purcell's case, Hampshire Co-operative Milk Co., Re*, 29 W. R. 170.

20. *Jervis* v. *Berridge* (8 L. R., Ch., 351; 42

L. J., Ch., 518; 21 W. R. 96; 27 L. T., N. S., 436). The observation stated in this case that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. Per Lord Selborne. *Hussey* v. *Horne-Payne*, 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 41 L. T. 1; 27 W. R. 585.

1. *Jessel* v. *Chaplin* (4 W. R. 610; 2 Jur., N. S., 931) followed in *Smith* v. *Smith*, 23 W. R. 771; 32 L. T., N. S., 787; 44 L. J., Ch., 630; 20 L. R., Eq., 500.

2. *Jessop* v. *Blake* (3 Giff. 639) not followed by the Master of the Rolls in *Fitzgerald* v. *Chapman*, 1 L. R., Ch. D., 563; 45 L. J., Ch., 23; 33 L. T. 587; 24 W. R. 130.

3. *Job* v. *Job* (6 L. R., Ch. D., 562; 26 W. R. 206) commented on in *Symons, Re*, 21 L. R., Ch. D., 757; 46 L. T. 684; 30 W. R. 874.

4. *Jolly* v. *Rees* (15 C. B., N. S., 628; 33 L. J. C. P., 177) approved of in *Debenham* v. *Mellon*, 5 L. R., Q. B. D., 394; 49 L. J., Q. B., 497.

5. *Johnson* v. *Crook* (12 L. R., Ch. D., 639; 48 L. J., Ch., 777; 41 L. T. 300; 28 W. R. 12) not followed in *Roberts* v. *Youle*, 49 L. J., Ch., 744, and in *Bubb* v. *Padwick*, 13 L. R., Ch. D., 517; 42 L. T. 111; 28 W. R. 382; 49 L. J., Ch., 178.

6. *Johnson* v. *Crook* (12 L. R., Ch. D., 639; 48 L. J., Ch., 777; 41 L. T. 300; 28 W. R. 12), followed in *Chaston, Re, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716: 45 L. T. 20; 29 W. R. 778; and in *Wilkins, Re, Spencer* v. *Duckworth*, 18 L. R., Ch. D., 634; 50 L. J., Ch., 774; 45 L. T. 244; 29 W. R. 911.

7. *Johnson* v. *Gallagher* (3 De G. F. & J. 494; 4 L. T., N. S., 77; 7 Jur., N. S., 273; 30 L. J., Ch., 298; 9 W. R. 506). The dictum of Turner, L. J., as to the liability of the separate estate of a married woman for debts contracted with reference to such estate, approved and adopted in *London Chartered Bank of Australia* v. *Lempriere*, 4 L. R., P. C., 572; 9 Moo. P. C., N. S., 426; 29 L. T., N. S., 186; 21 W. R. 513.

8. *Johnson* v. *Routh* (27 L. J., Ch., 305) approved and distinguished in *Harrington (Countess)* v. *Atherton*, 4 N. R. 206.

9. *Johnson, Re, Wigg, Exp.* (12 L. R., Ch. D., 905; 40 L. T. 529; 27 W. R. 804), distinguished in *Geisel, Exp., Stanger, Re*, 22 L. R., Ch. D., 436; 48 L. T. 405; 31 W. R. 264; 53 L. J., Ch., 349.

10. *Johnston* v. *Swann* (3 Madd. 457). "The marginal note to this case is not quite correct. Per Romilly, M. R., in *Hartshorne* v. *Nicholson*, 4 Jur., N. S., 864; 27 L. J., Ch., 810; 26 Beav. 58.

11. *Johnstone* v. *Beattie* (10 Cl. & F. 42) explained in the case of *Stuart* v. *Bute (Marquis)*, 9 H. L. Ca. 440.

12. *Johnstone* v. *Beattie* (10 Cl. & F. 87). I must use the freedom to observe, that whatever opinion the Scotch judges may justly form of the decision of this House in *Johnstone* v. *Beattie*, they would have acted with more dignity and more magnanimously, as well as more judicially, if they had calmly considered what was for the benefit of the infant, and had recollected that a Court may not only be censured for exceeding its jurisdiction, but for declining to exercise its jurisdiction for the relief of a suitor, from the apprehension that in another case its jurisdiction has been unjustifiably encroached upon by another Court. I can take upon myself to say, that *Johnstone* v. *Beattie*, whether properly or improperly decided, is no authority whatever for the interlocutor appealed against. Per Campbell, C. in *Stuart* v. *Stuart*, 4 Macq. H. L. Ca. 1, 64; 7 Jur., N. S., 1129, 1132.

I would make a passing observation upon *Johnstone* v. *Beattie*. Perhaps it might have been more consonant to the principles of general law to have held there that every country would recognise the status of guardian, in the same way as they would undoubtedly recognise the status of parents, or the status of husband and wife. But supposing that not to have been the view taken by the House, yet there is nothing in that decision of *Johnston* v. *Beattie* in other respects that could at all interfere with or touch the present question; for all that was decided there was, that, the status of guardian not being a status recognised by the law of this country, unless constituted in the country, it was not a matter of course to appoint a foreign guardian to be an English guardian, but that was only a matter to be taken into consideration. That was all that was decided in that case. Per Lord Cranworth. *Ib.*

13. *Johnstone* v. *Beattie* (10 Cl. & F. 83) followed in *Finnie* v. *Glasgow and South Western Railway Co*, 2 Macq. H. L. Ca. 177.

14. *Joint Stock Discount Co.* v. *Brown* (8 L. R., Eq., 381; 17 W. R. 1037) approved in *Railway and General Light Improvement Co., Re, Marzetti's case*, 42 L. T. 206; 28 W. R. 541.

15. *Jones* v. *Campbell*, 1 Sch. & Lef. 341. See a corrected note, 3 Bli. N. S. 110.

16. *Quære*, the accuracy of the report of *Jones* v. *Clough*, 2 Ves. 365. See Belt's Supplt. 360.

17. *Jones* v. *Colbeck* (8 Ves. 38). With respect to the authority of *Jones* v. *Colbeck*, which in the course of the argument was so much insisted upon on the one side, and impeached on the other, it is not, I think, necessary for us to give any opinion; but I have no hesitation in saying that the ground on which the decision in that case rested seems to me to have been perfectly sound. The case, as I understand it, proceeded upon this—that the testator had by his will sufficiently indicated his intention that the property should go to his next of kin at the death of his daughter. Whether that conclusion was right or not, it cannot, as I think, be disputed, that if it was correct the decision was well founded. In these cases, no less than in other cases of dispositions by will, the intention of the testator, if sufficiently expressed or indicated, must govern, and the question in each case must be, whether the intention is sufficiently expressed or indicated. It is not a question which can be measured by rule. In determining it in cases of this nature the question must often be whether the testator has intended to give to those who may fill a particular character at a particular time, or whether he has meant that the property should go as the law would give it—a question not, as I venture to think, to be determined, at all events, when the disposition is of personal estate, without taking into consideration the distinction between gifts to next of kin simply, and to next of kin accord-

ing to the Statute of Distributions, and without bearing in mind also that if the property was meant to go as the law would give it, it might not have been necessary for the testator to express that intention. Per Turner, L. J., in *Lees* v. *Massey*, 7 Jur., N. S., 534, 535.

1. *Jones* v. *Foxall* (15 Beav. 388). The only case that was referred to which, as it appeared to me, involved circumstances at all similar to these, was the case of *Jones* v. *Foxall*. What was actually done by the decree in that case prevents it from being an authority for the proposition for which it was cited; because the trustee there, being by the terms of his trusts bound to accumulate the interest of the trust fund for the benefit of the *cestui que trust*, was charged simply with compound interest, which the very existence of a trust for accumulation might make proper. It is true that in the course of the judgment, the late Master of the Rolls did, in that case, say that there might have been a right on the part of the *cestui que trust* to claim the profits made by the use of the money in the business in which the executor was a partner, if that had appeared to be more for his interests. My lords, with great respect and deference to the authority of that learned judge, I am not prepared to follow in this case, or in any other that is exactly similar, that dictum in *Jones* v. *Foxall*. The circumstances of that case, as I recollect them, were these: there was a common loan of small amount, by the owner of the money, to certain bankers, and afterwards a trust of that debt due from the bankers was constituted, one of the partners in the bank being made the trustee, and undoubtedly it became his duty to call in the money, which he did not do. As far as the other partners were concerned, they were not treated as in any way otherwise liable, by reason of what had taken place, than they had originally been as mere debtors. I cannot agree that, in those circumstances, the liability of the trustee who was a partner in the bank with respect to profits would be established, his co-partner not being liable. There was another ground, entirely depending upon the terms of the trust deed, on which he might be charged with compound interest, and it may be that even independently of anything in the terms of the trust deed, a trustee who suffers money which he ought to call in to be used in a business in which he has any interest, may be chargeable with compound interest. Of that I say nothing. But that being the only authority cited as a case, the circumstances of which at all resemble the present, I must say that, unless the case can be distinguished on some other grounds than any which I am aware of, I cannot agree with what was said by the Master of the Rolls on that point; and not agreeing with what was then said, I know of no authority whatever which would be reasonably referred to in support of the argument of the present appellant. Per Lord Selborne, in *Vyse* v. *Foster*, 31 L. T., N. S. 177, 182; 7 L. R., H. L., 318; 44 L. J., Ch., 37; 23 W. R. 355.

2. *Jones* v. *Green* (*dictum*) (5 L. R., Eq., 555; 37 L. J., Ch., 603; 16 W. R. 603) observed upon in *Freer, Re, Freer* v. *Freer*, 22 L. R., Ch. D., 622; 52 L. J., Ch., 301; 31 W. R. 426.

3. *Jones* v. *How* (7 Hare 267; 19 L. J., Ch., 324) was relied upon to show that, inasmuch as these marriage articles are a contract to provide for the husband and wife and the issue of the marriage, no person can take by virtue of these articles who did not survive the testator, because no person can take under the will of a man unless he be in existence at the time of the death of the testator, with the single exception that is made by the 33rd section of the Wills Act (7 Will. 4 & 1 Vict., c. 26). In *Jones* v. *How*, the question was simply this: the testator, by a contract made on the marriage of his daughter, covenanted to leave to his daughter absolutely, or to her and her children, "one equal eighth part, or such other part as shall be an equal share with all and each of his children and child of all estates, moneys, real and personal estate, of which he should die possessed" The daughter died in the testator's lifetime; by will, therefore, she was of course incapable of taking anything; had the testator made a will, and had the Wills Act not been in operation, there would have been simply an intestacy. The case being sent by Sir James Wigram, according to the unfortunate practice of the day, for the opinion of a court of law, a question was submitted to the Court of Common Pleas, whether on the events which had happened there was any subsisting contract on the part of the testator, the contract being that he would leave an equal share to her as well as the other children, and the answer of the court of law was, that there was no breach of contract, inasmuch as he had only contracted to leave by will; and there being no person to take under the will, the contract had no operation. Now, what ought to have been the decision there? There was a contract by a man for valuable consideration, that he would, by his will, leave to his daughter an equal provision with his other children. If he had performed that covenant, which he ought to have been compelled to do, or his estate left to bear the consequence, what would have been the result? You would have found in that will a bequest to the daughter of one-fourth of his property; if she had left children, the 33rd section of the Wills Act would have come into operation, which would have made the bequest to the daughter take effect; and what would have been the consequence? The property would have vested in her; if the husband had survived her he would have taken it and have provided for his family; and if he had died in her lifetime, her children as next of kin would have taken it, or, if the covenantor had died intestate, her children as her representatives would have taken her share under her intestacy, and the object would have been secured; instead of which, by the narrow construction put upon it by a court of law and acquiesced in by Sir James Wigram, the whole object was defeated and came to an end. I entirely dissent from that case, which I should myself have decided in a directly contrary manner, and I decline to follow it in the present instance. Per Malins, V.-Ch., in *Brookman, Re*, 38 L. J., Ch., 585, 589.

4. *Jones* v. *Lane* (3 Y. & C. 281, 294; 3 Jur. 365) deciding that when an over-due bill or note is indorsed after action brought, the indorsee, with notice of the action, has no

right of action upon it, overruled in *Deuters* v. *Townsend*, 10 Jur., N. S., 1072; 33 L. J., Q. B., 301; 12 W. R. 1002; 10 L. T., N. S., 602. His remedy is to apply to the Court to stay proceedings in the second action.

1. *Jones* v. *Lloyd* (18 L. R., Eq., 265; 43 L. J., Ch., 826; 30 L. T. 487; 22 W. R. 785) followed in *Wilder* v. *Pigott*, 22 L. R., Ch. D., 263; 52 L. J., Ch., 141; 48 L T. 112; 31 W. R. 377.

2. *Jones* v. *Randall* (1 Jac. & Walk. 100) and *Armstrong* v. *Eldridge* (3 Bro. C. C. 215) reconciled in *Pearson* v. *Cranswick*, 9 Jur., N. S., 397.

3. *Jones* v. *Smith* (2 Ves. J. 372) as to redemption of one part of a security without the other, reversed. See *Id.* 300, note.

4. *Jordan* v. *Lowe* (6 Beav. 350) observed upon in *Wynch*, *Exp.*, or *Wynch's Trusts*, *Re*, 5 De G. M. & G. 188; 18 Jur. 659; 23 L. J., Ch., 930; 17 Jur. 588; 22 L. J., Ch., 750; 1 W. R. 426; 2 W. R. 570; 1 Eq. Rep. 521; 2 Eq. R. 1025; 1 Sm. & G. 427.

5. *Jorden* v. *Money* (5 H. L. Ca. 185). Although the decision in this case is no doubt binding, it cannot be considered as a reversal of the decision of the H. of L. in *Hammersley* v. *De Biel* (*Baron*), 12 Cl. & F. 45; and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation of what a person intends or does not intend is not sufficient, and seems irreconcilable with the decision of the House of Lords in *Hammersley* v. *De Biel* and with the law as laid down by all the judges of the highest authority. It is remarkable that *Hammersley* v. *De Biel* was not referred to by any of the counsel or law lords in *Jorden* v. *Money*. Per Stuart, V.-Ch., in *Loffus* v. *Maw*, 3 Giff. 604.

6. *Jorden* v. *Money* (5 H. L. Ca. 185). I am bound to suppose this case to have been properly decided by the majority of the members of the House who voted upon it; but on considering the doctrine of law which it establishes, I must look to the facts which those that decided it considered to be proved by the evidence. I cannot look at that evidence and say that different inferences are to be drawn from it, and that the law laid down is accommodated to those inferences. The majority of the Lords thought that nothing more was proved than the declaration of a present intention not to enforce the bond. Therefore it is not legitimate reasoning, after comparing the evidence there with the evidence in this case, to argue that there, as much as here, a positive assertion of a fact had been made. The doctrine there laid down and acted upon was, that where a person possesses a legal right, a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. This is the ratio decidendi, and this only is binding upon us. We are not called upon to give any opinion upon the point of law on which the law Lords were divided as to the difference between a misrepresentation of a fact as it actually existed and a misrepresentation of an intention to do, or to abstain from doing, an act which would lead to the damage of the party thereby induced to do an act on the faith of the representation. Taking the law as there laid down, that a mere expression of intention, although acted upon, is no ground for equitable interference, we are to say whether in this case, considering the evidence, we come to the conclusion that there was here a mere expression of an intention not to do an act. Per Campbell, C., in *Piggott* v. *Stratton*, 1 De G. J. & F. 33, 51, 52.

7. *Jorden* v. *Money* (5 H. L. Ca. 185). I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a court of equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts. The limits of that doctrine, and the distinction between it and contract, were carefully examined, and, I think, well pointed out in the judgment of Lord Cranworth in this House in the case of *Jorden* v. *Money* (*supra*), where, after referring to the cases of *Pickard* v. *Sears*, 6 Ad. & Ell. 469, and *Freeman* v. *Cooke*, 2 Exch. 654, which latter case Lord Cranworth thought had stated the doctrine somewhat more accurately than it had been expressed in *Pickard* v. *Sears*, he says he takes this to be the general result of the rule. Per Lord Chancellor Selborne in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 6 L R. H. L., 352, 360; 43 L. J., Ch., 269; 22 W. R. 194.

8. *Josselyn* v. *Josselyn* (9 Sim. 63). Maintenance of infants as fixed by a testator. There is an error in that report, which was discovered by Mr. Macpherson, and made public by him in his work on the Law relating to Infants, p. 229. n. It appeared from Mr. Macpherson's correction that the additional money allowed for the infant's maintenance in that case was paid, not out of the property in which the infant had only a contingent interest, but out of the rents of real estate in which the infant had a vested interest. Per Walford *arguendo*, in *Griggs* v. *Gibson*, 14 W. R. 539.

9. *Joys*, *In Goods of* (4 Sw. & Tr. 214), considered in *Sotheran* v. *Dening*, 20 L. R., Ch. D., 99.

K.

10. *Kay* v. *Marshall* (1 Myl. & C. 373) followed in *Westhead* v. *Keene*, 1 Beav. 287; 8 L. J., N. S., Ch., 89; 2 Jur. 1061.

11. *Kay* v. *Smith* (20 Beav. 566; 24 L. J., Ch., 788; 3 W. R. 622) overruled. *Manby* v. *Bewicke*, 2 Jur., N. S., 672; 26 L. J., Ch., 20; 8 De G. M. & G. 470; 4 W. R. 757.

1. *Kay's Trusts, Re* (23 W. R. 744), not followed in *St. Mary, Wigton (Vicar of), Exp.*, 18 L. R., Ch. D., 646; 45 L. T. 134; 29 W. R. 883.

2. *Keane, Re* (12 L. R., Eq., 115; 40 L. J., Ch., 617; 24 L. T. 780; 19 W. R. 1025), explained and commented on in *Greer* v. *Young*, 24 L. R., Ch. D., 545; 52 L. J., Ch., 915; 49 L. T. 224; 31 W. R. 930.

3. *Kearnan* v. *Fitzsimon* (3 Ridgw. P. C. 16). The dictum of Lord Clare in this case that the rule of marshalling assets holds only where it is proper to be done at the death of the party whose assets are to be marshalled, and can never arise upon any subsequent fact or accident, considered. *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

4. *Keble.* With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, of Philadelphia, The Reporters, 3rd. ed., pp. 207, 208, from which it appears that more is to be said for the character of this reporter as "a tolerable historian of the law," than from the remarks made upon him from time to time might have been supposed. Per Willes, J., in *Farrall* v. *Hilditch*, 5 C. B., N. S., 855.

5. *Kellett* v. *Kellett* (3 Dow 248). If *Kellett* v. *Kellett* were before me, I should decide it exactly the other way. Per Jessel, M. R., in *Hughes* v. *Pritchard*, 25 W. R. 761, 762; 6 L. R., Ch. D., 24; 46 L. J., Ch., 840; 37 L. T. 259.

6. *Kelly, Exp., Simmons, Re* (7 L. R., Ch. D., 161; 47 L. J., Bky., 30; 37 L. T. 581; 26 W. R. 120), commented on in *Green* v. *Smith*, 24 L. R., Ch. D., 672; 52 L. J., Ch., 921; 49 L. T. 297.

7. *Kemble* v. *Farren* (6 Bing. 141) commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 319; 31 W. R. 214.

8. *Kemble* v. *Kean* (6 Sim. 333) overruled. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J., N. S., Ch., 898; 16 Jur. 871.

9. *Kennard* v. *Kennard* (8 L. R., Ch., 227; 42 L. J., Ch., 280; 28 L. T. 83; 21 W. R. 206) commented on in *Kirwan's Trusts, Re*, 25 L. R., Ch. D., 373; 52 L. J., Ch., 952; 49 L. T. 292; 32 W. R. 581.

10. *Kennedy* v. *Green* (3 Myl. & K. 699). As to the extent of the doctrine laid down in this case, see *Atterbury* v. *Wallis*, 2 Jur., N. S., 313. S. C. on appeal 4 W. R. 734; 2 Jur., N. S., 1177; 25 L. J., Ch, 792; 8 De G. M. & G. 454; and *Kettleworth* v. *Watson*, 21 L. R., Ch. D., 685; 51 L. J., Ch., 281; 46 L. T. 83; 30 W. R. 482.

11. *Kennedy* v. *Green* (3 Myl. & K. 699). I entirely assent to the law there laid down. Per Campbell, C., in *Perry* v. *Holl*, 2 De G. F. & J. 54; 6 Jur., N. S., 661, 663.

12. *Kennedy* v. *Green* (3 Myl. & K. 699). The doctrine of this case requires to be administered with the greatest care and delicacy, and to be so acted on as, on the one hand, to protect a purchaser for valuable consideration against all the world, and, on the other, so as not to encourage fraud, by permitting a purchaser to disregard the plain and obvious marks and symbols of it. *Greenslade* v. *Dare*, 20 Beav. 284; 1 Jur., N. S., 294; 24 L. J., Ch., 490.

13. *Kennedy* v. *Green* (3 Myl. & K. 718), and *Vorley* v. *Cooke* (1 Giff. 230). These cases, where deeds were said to be void as being procured by misrepresentation, though sufficient ground for the relief granted, could not have sustained a plea of *non est factum* at law. Per James, L. J., in *Hunter* v. *Walters*, 20 W. R. 218; 7 L. R., Ch., 75; 41 L. J., Ch., 175; 25 L. T. 765.

14. *Kensington (Lord)* v. *Bouverie* (19 Beav. 39). I see that the Master of the Rolls is reported to have said (page 54), "Nothing is better settled than that, if the remainderman allows the tenant for life to receive the rents without keeping down the interest, he cannot, after the death of the tenant for life, ask for an account of the rents, and seek to establish a debt against his assets, on the ground that the rents were sufficient for this purpose." How is that? How is the one to know, as of course, what the other is doing? Per Lord Brougham, in *Kensington (Lord)* v. *Bouverie*, 7 H. L. Ca. 564. Whereupon the counsel for the respondent said that that passage had excited attention in Ireland in a case of *Baldwin* v. *Baldwin*, which twice came before Lord Chancellor Brady, see 4 Ir. Ch. R. 505; 6 Ir. Ch. R. 156. On the first occasion his lordship described himself as "coerced" by that statement, but on the second occasion he said that he had communicated with the Master of the Rolls on the subject, when his Honour stated, "that some error must have occurred in the report, which he was not prepared to say was strictly in accordance with what he had said on the occasion."

15. *Kensington* v. *White* (3 Price 164) is too loosely reported to afford any principle. *Shackell* v. *Macaulay*, 2 Sim. & S. 87; 3 L. J., Ch., 27.

16. *Keppell* v. *Bailey* (2 Myl. & K. 517). The principle that incidents of a novel kind cannot be devised and attached to property, at the fancy or caprice of the owner, enunciated by Lord Brougham, C., in this case, was recognised and adopted in *Ackroyd* v. *Smith*, 10 C. B. 164, and *London Loan and Discount Co.* v. *Drake*, 6 C. B., N. S., 803, 804.

17. *Keppell* v. *Bailey* (2 Myl. & K. 517), so far as it is a decision that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, has been overruled by recent cases. Per Fry, J., in *Luker* v. *Dennis*, 7 L. R., Ch. D., 227; 37 L. T., N. S., 827; 47 L. J., Ch, 174.

18. *Kerrick* v. *Bransby* (7 Bro. P. C. 437) is no authority for the proposition that a court of equity has no jurisdiction to try the validity of a will of real or personal estate. *Middleton* v. *Sherburne*, 4 Y. & Coll. 358.

19. *Kerrick* v. *Bransby* (7 Bro. P. C. 437). Previously to the Statute of Frauds the Court of Chancery frequently took upon itself to determine the validity of wills by inquiry before some of the Masters of the Court, a practice which has ceased since the case of *Kerrick* v. *Bransby* (7 Bro. P. C. 437, A.D. 1727). But as early as the time of James I. it appears to have been considered that the proper mode of trying the validity or invalidity of a will of real estate was by a trial at law, the Court of Chancery reserving power to deal with the case as justice might require.

Boyse v. *Rossborough*, 1 Kay 71; 2 W. R. 91, 290; 23 L. J., Ch., 305; 18 Jur. 205; 2 Eq. Rep. 675; 3 De G. M. & G. 817.

1. *Key* v. *Key* (4 De G. M. & G. 73). According to the ordinary rule this Court will not decide a legal question as to a right to real estate in remainder; and will not try the legal title to real estate in possession of a person who is out of possession. Both propositions are elementary. As regards the former, *De Windt* v. *De Windt* (1 L. R., H. L., 87) was referred to during the argument as giving the highest sanction to what was said in *Greenwood* v. *Sutherland* (10 Hare (App.) xii.), and *Garlick* v. *Lawson* (10 Hare (App.) xiv.). But, in fact, no authority is required for either. It is said that the Court is asked to do no more here than was done in *Key* v. *Key* (*supra*), and (by means of an artifice suggested by the Court), as in *Forsbrook* v. *Forsbrook*, 14 L. T., N. S., 282; 3 L. R., Ch., 93). If *Key* v. *Key* be law, the amendment in *Forsbrook* v. *Forsbrook* seems to have been unnecessary, so that the cases are not quite consistent. And notwithstanding my unfeigned respect for the judges who decided *Key* v. *Key*, and notwithstanding the fact (which, though not appearing in the report, was stated to me by Mr. Dickinson) that the point was considered, I must decline to follow it as regards the question of jurisdiction in any case not absolutely similar, which this is not. Per Wickens, V.-Ch., in *Pryse* v. *Pryse*, 27 L. T., N. S., 575, 577; 15 L. R., Eq., 86; 42 L. J., Ch., 253; 21 W. R. 219.

2. Lord Brougham's observation in *Keys, Exp.* (1 Mont. & A. 242; 3 Dea. & Ch. 275), as to the Lord Chancellor's jurisdiction in all matters relating to the fiat being wholly untouched by the provision of that statute, corrected. *Stubbs, Exp., Hall, Re*, Mont. & Ch. 489, 511; 3 Dea. 549; 3 Jur. 427.

3. *Kilner, Exp.* (13 L. R., Ch. D., 245; 41 L. T. 520; 28 W. R. 269), distinguished in *Haxwell, Exp., Hemingway, Re*, 23 L. R., Ch. D., 626; 52 L. J., Ch., 737; 48 L. T. 742; 31 W. R. 711.

4. *Kilvington* v. *Parker* (21 W. R. 121) followed in *Bristow* v. *Masefield*, 52 L. J., Ch., 27; 31 W. R. 88.

5. *Kimberley* v. *Jennings* (6 Sim. 340) overruled. *Lumley* v. *Wagner*, 1 De G. M. & G., 604; 21 L. J., N. S., Ch., 898; 16 Jur. 871.

6. *King, Exp.* (20 L. R., Eq., 273; 44 L. J., Bky., 92; 32 L. T. 505; 23 W. R. 681). "May require further consideration:" in *Bagshaw, Exp., Ker, Re*, 13 L. R., Ch. D., 304; 41 L. T. 743; 28 W. R. 403.

7. *King* v. *Burchell* (Ambl. 379; 1 Eden 424; 4 T. R. 296. n.) observed upon in *Woodhouse* v. *Herrick*, 1 Kay & J. 352; 24 L. J., Ch., 649; 3 W. R. 303; 3 Eq. Rep. 317.

8. *King* v. *Hoare* (13 M. & W. 494; 14 L. J., Exch., 29). All the authorities on the subject were brought to the attention of the Court of Exchequer, and fully considered by that court in the case of *King* v. *Hoare* in a judgment pronounced by one of the most distinguished judges who ever sat in Westminster Hall. I need not go into the elaborate reason assigned by Lord Wensleydale in that judgment, which enters into the whole law on the subject, but the result is, that the law, as there laid down, and I hope I may say as finally established, is that judgment recovered against one of two or more joint debtors, or of two or more wrongdoers, is a bar to an action against the others for the same cause. Under these circumstances, having, as we have, not only principle but a long series of authorities in favour of this being law, affirmed by Lord Chief Baron Comyns in his Digest (tit. Action, K. 4), and lastly, recognised and affirmed by the Court of Exchequer in *King* v. *Hoare*, I think we are bound to act according to these English authorities, notwithstanding American decisions to the contrary, and the respect I have for those decisions. Per Kelly, C. B., in the Exchequer Chamber, in *Brinsmead* v. *Harrison*, 41 L. J., C. P., 190, 192; 7 L. R., C. P., 547; 27 L. T. 99; 20 W. R. 784.

9. *King* v. *Hoare* (13 M. & W. 494; 14 L. J., Exch., 29). By a highly artificial chain of reasoning, the justice of which I could never comprehend, it was there held that a plaintiff, issuing execution against one of two defendants, abandoned his right against the other, because the consideration for the original contract became merged in what is called a contract of record, and therefore, though he never recovered a penny from the defendant against whom he first proceeded, he could not get his money from the other. Per Blackburn, J., in *Baker* v. *Sayers*, 17 L. T., N. S., 579, 580.

10. *King* v. *Hoare* (13 M. & W. 494; 14 L. J., Exch., 29) adopted in *Kendall* v. *Hamilton*, 4 L. R., App. Cas., 504; 48 L. J., C. P., 705; 41 L. T. 418; 28 W. R. 97.

I see nothing I confess in the case of *King* v. *Hoare*, which would lead one to doubt that this case was one, as the law stood, legally decided; and if there be any consequential injustice arising from any particular circumstances to persons similarly situated to Messrs. King & Hoare, the evil would preponderate over any advantage there might be in requiring all co-contractors to be made parties liable. If there is any injustice in it, it can only be remedied by the legislature, should it think fit to afford this remedy. At this distance of time after so much reliance has been placed from time to time in other cases upon the law as laid down in *King* v. *Hoare*, it cannot be now altered by a decision of your Lordships' House. Per Lord Hatherley, S. C., 4 App. Cas. 523.

But in such a case as *King* v. *Hoare*, where the plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances against one should be without satisfaction a bar as to all the others. This hardship is very much removed by the provisions of the existing law, by which the plaintiff recovers judgment against those whom he proves to be his debtors; though he has joined others as defendants he has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever

been expressed, unless perhaps in *Exp. Waterfall* (4 De G. & Sm. 199), that *King* v. *Hoare* does truly state the law as it existed before the Judicature Acts, and it was not doubted in the courts below, or I think seriously questioned at the bar that it did so. Per Lord Blackburn. S. C., 4 App. Cas. 545.

1. *King* v. *Malcott* (9 Hare 692) observed upon in *Atkinson* v. *Grey*, 18 Jur. 282.

2. It is a rule of construction, particularly in wills, that where words are of an ambiguous signification, or are of such a nature as that they may be sometimes considered as words of purchase, and sometimes as words of limitation, the intent of the devisor must fix the meaning of those words. The word "issue" is of this nature. In deeds it is a word of purchase, and technically speaking it is so. The case of *King* v. *Melling* (2 Lev. 58) was the first case where it was taken and considered as a word of limitation. *Mandeville* v. *Carrick*, 3 Ridgw. P. C. 365.

3. *Kingsbridge Flour Mill Co.* v. *Plymouth Grinding and Baking Co.* (2 Exch. Rep. 718) observed upon in *Greenwood's case*, 3 De G. M. & G. 459; 18 Jur. 387; 23 L. J., Ch., 669.

4. *Kinsey* v. *Kinsey* (2 Ves. 577; 3 Atk. 809). Though the marginal notes lay down the general rule (adopted by text-writers) that a decree in one suit cannot be pleaded in bar of another suit, unless such decree has been signed and inrolled, the decision of Lord Hardwicke in that case was apparently made under special circumstances, the bills in the two suits being in the nature of bill and cross-bill, and the cross-bill having been filed before the decree in the first suit was made. *Pearse* v. *Dobinson*, 1 L. R., Eq., 241; 14 W. R. 121; 35 L. J., Ch., 110; 13 L. T., N. S., 519.

5. *Kirksmeaton* (*Rector*), *Re* (20 L. R., Ch. D., 203; 51 L. J., Ch., 581; 30 W. R. 539), not followed in *St. John's College, Oxford Exp.*, 22 L. R., Ch. D., 93; 31 W. R. 55; 48 L. T. 331; 52 L. J., Ch., 268.

6. *Kirkwood, Exp., Mason, Re* (11 L. R., Ch. D., 724; 40 L. T. 566; 27 W. R. 806), explained and commented on in *Bagster, Exp.*, 24 L. R., Ch. D., 477; 49 L. T. 272; 32 W. R. 215.

7. *Knapp* v. *Noyes* (Ambl. 661) observed upon in *Wilkins* v. *Jodrell*, 13 L. R., Ch. D., 564; 49 L. J., Ch., 26; 41 L. T. 649; 28 W. R. 224.

8. *Knatchbull* v. *Fearnhead* (3 Myl. & Cr. 122) followed in *Story* v. *Gape*, 2 Jur., N. S., 706.

9. *Knatchbull* v. *Grueber* (3 Meriv. 124) explained and distinguished in *Colby* v. *Gadsden*, 11 Jur., N. S., 760; 12 L. T., N. S., 197; 5 N. R. 456.

10. *Knatchbull* v. *Hallett, Hallett's Estate, Re* (13 L. R., Ch. D., 696; 49 L. J., Ch., 415; 42 L. T. 451; 28 W. R. 732) distinguished in *New Zealand Land Co.* v. *Watson*, 7 L. R., Q. B. D., 374; 50 L. J., Q. B., 433; 44 L. T. 675; 29 W. R. 694.

11. *Knight* v. *Bulkeley* (27 L. J., Ch., 592) not followed in *Lloyd* v. *Cheetham*, 3 Giff. 171; 30 L. J., Ch., 640. And see *Heald* v. *Hay*, 5 L. T., N. S., 740.

12. *Knight* v. *Ellis* (2 Bro. C. C. 570) approved of in *Wynch, Exp.*, or *Wynch's Trusts, Re*, 5 De G. M. & G. 188; 18 Jur. 659; 23 L. J., Ch., 930; 22 L. J., Ch., 750; 17 Jur., 588; 1 W. R. 426; 2 W. R. 570; 1 Eq. Rep. 521; 2 Eq. Rep. 1025; 1 Sm. & G. 427.

Knight v. *Ellis* (2 Bro. C. C. 569) is good law, and has never been overruled, but Lord Langdale's decision, in *Att.-Gen.* v. *Bright*, 2 Keen 57, is inconsistent with it. *Ib.*

13. *Knight* v. *Majoribanks* (2 Macn. & G. 10) approved in *Melbourne Banking Corporation* v. *Brougham*, 7 L. R., App. Cas., 307; 51 L. J., P. C., 65; 46 L. T. 603; 30 W. R. 925.

14. *Knight* v. *Moseley* (Ambl. 176) and *Holden* v. *Weeks* (1 John. & H. 278). It is laid down in these cases that a patron cannot file a bill for an account. I confess that doctrine has always seemed to me to be utterly unintelligible. I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson; it being conceded that the patron is entitled to the specific timber. Per James, V.-Ch., in *Sowerby* v. *Fryer*, 8 L. R., Eq., 417, 423; 38 L. J., Ch., 617.

15. *Knight* v. *Selby* (3 Mann. & Gr. 92; 3 Scott, N. R., 409) commented on and followed in *Moore* v. *Cleghorn*, 17 L. J., N. S., Ch., 400; 12 Jur. 591. Affirming 10 Beav. 423; 16 L. J., N. S., Ch., 469, 11 Jur., 958.

16. *Knowles* v. *Greenhill* (30 L. J., Ch., 670), where a petition of re-hearing on the signature of one counsel was admitted, observed upon in *Buckeridge* v. *Whalley*, 8 Jur., N. S., 473; 31 L. J., Ch., 416; 10 W. R. 513.

17. *Knowles* v. *McAdam* (3 L. R., Exch. D., 23) held wrongly decided. *Coltness Iron Co.* v. *Black*, 6 L. R., App. Cas. (Sc.), 315; 51 L. J., Q. B., 626; 45 L. T. 145; 29 W. R. 717.

18. *Knox* v. *Kelly* (1 Dr. & Wal. 542) commented on in *Hickson* v. *Collis*, 6 Ir. Eq. Rep. 524; 1 J. & L. 94.

19. *Krehl* v. *Burrell* (10 L. R., Ch. D., 420; 48 L. J., Ch., 252; 39 L. T. 461; 27 W. R. 234) "not to be extended," in *Potter* v. *Cotton*, 5 L. R., Exch. D., 137; 49 L. J., Exch., 158; 41 L. T. 460; 28 W. R. 160.

20. *Krehl* v. *Burrell* (10 L. R., Ch. D., 420) distinguished in *Dollman* v. *Jones*, 12 L. R., Ch. D., 553; 27 W. R. 877.

21. *Krehl* v. *Burrell* (10 L. R., Ch. D, 420) explained in *Lowe* v. *Lowe*, 10 L. R., Ch. D., 432; 48 L. J., Ch., 383; 27 W. R. 309; 40 L. T. 236.

L.

22. *Labouchere* v. *Dawson* (13 L. R., Eq., 322; 41 L. J., Ch., 427; 25 L. T. 894; 20 W. R. 309) considered in *Leggott* v. *Barrett*, 15 L. R., Ch. D., 306; 51 L. J., Ch., 90; 43 L. T. 641; 28 W. R. 982). Per Brett, L. J.; and in *Walker* v. *Mottram*, 19 L. R., Ch. D., 355; 51 L. J., Ch., 108; 45 L. T. 659; 30 W. R. 165. Per Lindley and Lush L.JJ.; and not followed in *Walker* v. *Mottram* (*supra*), Per Baggallay, L. J.

The rule of *Labouchere* v. *Dawson*, which precludes the vendor of the good-will of a business from soliciting the former customers, is not to be extended to the case of a compulsory alienation. *Walker* v. *Mottram* (*supra*).

The decision of *Labouchere* v. *Dawson* is

founded on an implied contract by the vendor of the good-will of a business not to injure the property for which he has received consideration, but the obligation enforced by that case is purely personal, and not a mere incident to the transfer of property. *Ib.*

The decision of *Labouchere* v. *Dawson* held to apply to the cases of voluntary sales. *Semble, Ib.*

1. *Ladbury, Exp., Turner, Re* (17 L. R., Ch. D., 532; 50 L. J., Ch., 838; 45 L. T. 5), explained and commented on in *Isherwood, Exp*, 22 L. R., Ch. D., 384; 52 L. J., Ch, 370; 48 L. T. 398; 31 W. R. 442.

2. *Lake* v. *Presley* (1 L. R, Eq, 173) (as to making order to read depositions in bankruptcy at the hearing) overruled in *Allen* v. *Bonnett*, 6 L. R., Eq., 522.

3. *Lambe* v. *Eames* (6 L. R., Ch., 597; 40 L. J, Ch., 447; 25 L. T. 175; 19 W. R. 659). Affirming 10 L. R, Eq, 267; 18 W. R. 972; 40 L. J., Ch., 15, commented on in *Adams and Kensington Vestry, Re, Adams, Re*, 27 L. R., Ch. D., 394: 51 L. T. 382; 32 W. R. 883; 52 L. J., Ch., 758.

4. *Lambert, Exp.* (13 Ves. 179), is no longer law, and a person taking up a bill for value for the honour of the drawer may sue the acceptor, though the bill was an accommodation bill as between the acceptor and drawer. A person taking up a bill supra protest, stands in the place of the holder from whom he receives it, and not in the place of the person for whom he takes it up. *Swan, Exp.*, 16 W. R. 560; 18 L. T., N. S, 230; 6 L. R., Eq., 344. Malins, V.-Ch.

5. *Lampley* v. *Blower* (3 Atk. 398). See *Lee* v. *Prieaux*, 3 Bro. C. C. 381, where this case is stated from the Register Book.

6. *Land Credit Co.* v. *Fermoy* (*Lord*) (5 L. R., Ch., 763; 39 L. J., Ch., 477; 23 L. T. 439; 18 W. R. 393) distinguished in *Railway and General Light Improvement Co., Re, Marzetti's case*, 42 L. T. 206; 28 W. R. 541.

7. *Landore Siemens Steel Co., Re* (10 L. R., Ch. D, 489; 40 L. T. 35; 27 W. R. 304), not followed in *Madras Irrigation and Canal Co., Re*, 16 L. R., Ch. D., 702; 29 W. R. 520.

8. *Lane* v. *Horlock* (1 Drew. 587) observed upon in *Bates* v. *Brothers*, 17 Jur. 1174; 18 Jur. 715; 23 L. J., Ch., 150, 782; 2 W. R. 116; 2 Eq. Rep. 321.

9. *Lane* v. *Horlock* (1 Drew. 587) followed in *Thomas* v. *Cooper*, 18 Jur. 688; 2 Eq. Rep. 1185.

10. *Lane* v. *Husband* (14 Sim. 656) was a case which seemed to stand by itself, and was not in accordance with the other authorities. Per Malins, V.-Ch., in *Baber, Re*, 40 L. J., Ch., 144; 10 L. R., Eq., 554; 18 W. R. 1131.

11. *Lang, Exp.* (5 L. R., Ch. D., 971; 37 L. T. 449; 26 W. R. 68, approved and followed in *Oppenheim* v. *Jackson*, 48 L. J., C. P., 441; 41 L. T., N. S., 193. Affirmed 49 L. J., C. P., 216.

12. *Langdale* (*Lady*) v. *Briggs* (3 Sm. & G. 254) followed in *Heyburn* v. *Skirving*, 4 Jur., N. S., 651.

13. *Langley* v. *Baldwin* (1 Eq. Cas. Abr., pl. 29, cited in 1 P. W. 759; 1 Ves. 26) followed in *Stanley* v. *Lennard*, Ambl. 355; 1 Eden 87.

14. *Langmead* v. *Cockerton* (25 W. R. 315) not followed in *St. John's College, Oxford, Exp.*, 22 L. R, Ch. D, 93; 31 W. R. 55; 48 L. T. 331; 52 L. J, Ch., 268.

15. *Langridge* v. *Payne* (2 John. & H. 423; 10 W. R. 726). It is said that the case is governed by the decision in *Langridge* v. *Payne*. And if this question was really there decided, I should certainly follow that decision; but that case is one which I cannot help regretting to find reported, because the judgment does not tell the reader upon what principle it proceeded, and it is merely a judgment restraining an ejectment until the hearing. The case was this: There was an agreement in writing that the mortgagee would not call in the money for two years, the mortgagor fulfilling the covenants. The mortgagor forgot to pay the interest, and the mortgagee gave him notice that in consequence of his failure to pay interest the mortgagee would not be bound as to the two years, but would exercise his discretion, and the latter requested payment of interest due and costs. The interest and costs were paid, and then the mortgagee issued a writ in ejectment. He was restrained until the hearing. Now the Vice-Chancellor might have thought that the notice was a conditional demand, and that the mortgagee in fact said, "If you make this payment I will for the present waive my right;" and if that was so there was ground for the injunction. It is worthy of note that when that case was called to the attention of the judge of the Landed Court in Ireland (Mr. Justice Hargreave), in *Taaffe's Estate, Re*, 14 Ir. Ch. R. 347, he spoke in very strong terms, and said that the case would be overruled, and that he could not conjecture the ground of the doctrine on which it was decided. In other words, he thought it a mere determination on the balance of convenience till the hearing, and not on any doctrine. There is no principle in *Langridge* v. *Payne* inconsistent with my decision. Per Fry, J., *Keene* v. *Biscoe*, 8 L. R., Ch. D, 201, 203, 204; 26 W. R. 552, 553; 47 L. J., Ch., 644, 646; 38 L. T. 286.

16. *Largan* v. *Bowen* (1 Sch. & Lef. 296). The order made in this case is not to be reconciled with the rules of pleading in equity. It is not an authority by which the Court will be governed. *White* v. *Westmeath* (*Marquis*), 2 Moll. 128, 129.

17. *Large's case* (3 Leon. 182) explained in *Rosher* v. *Rosher*, 26 L. R., Ch. D., 801; 53 L. J., Ch., 723; 32 W. R. 821.

18. *Larner* v. *Larner* (3 Drew. 704; 5 W. R. 513) not followed in *Cadogan* v. *Palagi*, 32 W. R. 57.

19. *Lassance* v. *Tierney* (1 Macn. & G. 551; 2 Hall & T. 115) explained in *Barrow* v. *Barrow*, 4 Kay & J. 409; 4 Jur., N. S., 1049.

20. *Latimer* v. *Neate* (4 Cl. & F. 570; 11 Bli. N. S. 112. Affirming *Neate* v. *Latimer*, 2 Y. & Coll. 257) explained in *Browne* v. *Lockhart*, 10 Sim. 420; 9 L. J., N. S., Ch., 167; 4 Jur. 167.

21. *Latouche O'Brien* (10 Ir. Eq. R. 112) observed on in *Huthwaite, Re*, 2 Ir. Ch. R. 54.

22. *Laurie* v. *Crush* (32 Beav. 117) overruled. See *Eyre* v. *Brett*, 34 Beav. 441, and *Durham* (*Earl*) v. *Legard*, 34 Beav. 442.

23. *Law* v. *Hunter* (1 Russ. 100) observed upon in *Tomlin* v. *Tomlin*, 1 Hare 236.

24. *Lawes* v. *Bennett* (1 Cox 167) doubted,

though followed as an authority in *Collingwood* v. *Row*, 2 Jur., N. S., 785, 786.

1. *Lawes* v. *Bennett* (1 Cox 167) distinguished in *Adams and Kensington Vestry, Re*, 27 L. R., Ch. D, 394; 51 L. T. 382; 32 W. R. 883.

2. *Lawless* v. *Mansfield* (1 Dr. & War. 557) "contains nothing to show that any other rules than those of ordinary evidence are applicable to cases of solicitor and client." Per Stuart, V.-Ch., in *Judd* v. *Ollard*, 5 Jur., N. S., 755, 758.

3. *Lawless* v *Mansfield* (1 Dr. & War. 557). *Semble*, that what was said in this case does not apply to a mortgage for bill of costs. *Blagrave* v. *Routh*, 8 De G. M. & G. 620; 3 Jur., N. S., 399; 26 L. J., Ch., 86; 5 W. R. 95.

4. *Lawless* v. *Mansfield* (1 Dr. & War. 557): the proposition in this case, that a general charge is sufficient to open accounts between a solicitor and his client, is in conflict with the rule of the Court of Chancery in England. *Blagrave* v. *Routh*, 2 Kay & J. 509.

5. *Lawless* v. *Mansfield* (1 Dr. & War. 557). Wood, V.-Ch., from his observations in *Blagrave* v. *Routh* (2 Kay & J. 509), seems to have thought that Lord St. Leonards, in the case of *Lawless* v. *Mansfield*, laid down the doctrine that, if there be an account settled between solicitor and client, the bare existence of the relation of solicitor and client is enough to induce the Court to open the account, without proof of any erroneous items or the proof of anything more than the existence of the relation of solicitor and client. That is a misapprehension of the language of Lord St. Leonards, who says the account will be opened "if sufficient cause be shown." These important words, "if sufficient cause be shown," seem to have escaped the notice of Wood, V.-Ch. Per Stuart, V.-Ch., in *Morgan* v. *Higgins*, 1 Giff. 270, 277, 278.

6. *Lawrence* v. *Lawrence* (1 Bro P. C. 591), followed in *Incledon* v. *Northcote*, 3 Atk. 436

7. *Lea* v. *Hinton* (5 De G. M. & G. 823; 19 Beav. 324) followed in *Courtenay* v. *Wright*, 6 Jur., N. S., 1283; 2 Giff. 337; 9 W. R. 153; 3 L. T., N. S., 433; 30 L. J., Ch., 131.

8. *Leake* v. *Leake* (10 Ves. 477). I cannot help noticing, in addition to the observations of the Lord Chancellor, that it is very singular that the case having been left in the position in which it was by Lord Eldon, with two judgments singularly inconsistent with each other, namely, *Leake* v. *Leake* (*supra*) and *Twisden* v. *Twisden* (9 Ves. 413), as far back as the years 1804 and 1805, there never has been any opportunity for the Court of Chancery to make any comment on those cases except in *Onslow* v. *Michell* (18 Ves. 490), before Sir William Grant in 1812, where he felt himself obliged, in order to arrive at a conclusion consistent with what was decided in *Leake* v. *Leake*, to place the whole of the judgment on the meaning of the words "give and settle." Lord Eldon lived himself a great many years afterwards, and held the great seal, but he appears never to have had an opportunity of again expressing his opinion upon the subject, or of explaining those two decisions. Under these circumstances, I agree with the Lord Chancellor in thinking that we are not obliged to extend the doctrine, such as it is, any further. Per Lord Justice James, in *Cooper* v. *Cooper*, 8 L. R., Ch., 813, 829; 29 L. T. 321; 21 W. R. 921; 43 L. J., Ch., 158.

9. *Leake* v. *Robinson* (2 Mer. 203) observed upon in *James* v. *Wynford* (*Lord*), 1 Sm. & G. 40; 17 Jur. 17; 22 L. J., Ch., 450; 1 W. R. 61; and in *Walker* v. *Mower*, 16 Beav. 365.

10. *Leather Cloth Co.*, v. *Lorsont* (9 L. R., Eq., 345; 39 L. J., Ch., 86; 21 L. T. 661; 18 W. R. 572) approved in *Rousillon* v. *Rousillon*, 14 L. R., Ch. D., 351; 49 L. J., Ch., 388; 42 L. T. 679; 28 W. R. 623.

11. *Lechmere* v. *Brotheridge* (32 Beav. 353; 9 Jur., N. S., 705; 32 L. J., Ch., 587; 11 W. R. 814; 8 L. T., N. S., 751) has been overruled by Lord Westbury, C., in *Taylor* v. *Meads*, 13 W. R. 394; 11 Jur., N. S., 166; 34 L. J., Ch., 203; 4 De G. & Sm. 597.

12. *Lechmere* v. *Carlisle* (*Lord*), 3 P. W. 215. The opinion of Sir Joseph Jekyll in this case, that the forbearance of trustees in not doing what it was their office to do, shall not prejudice the *cestui que trust*, denied, being contrary to many decisions. *Pentland* v. *Stokes*, 2 Ball & B. 74.

13. *Lechmere* v. *Clamp* (31 Beav. 578; 7 L. T., N. S., 411) followed by *London Monetary Advance Co.* v. *Bean*, 18 L. T., N. S., 349.

14. *Lechmere and Lloyd*, *Re* (18 L. R., Ch. D., 524; 45 L. T. 551), followed in *Miles* v. *Jarvis*, 24 L. R., Ch. D., 633; 52 L. J., Ch., 796; 49 L. T. 162.

15. *Lee* v. *Moorhead* (2 Moll. 509) overruled in *Doorley* v. *Power*, 11 Ir. Eq. R. 577.

16. *Leeds* (*Duke*) v. *Amherst* (*Earl*) (14 Sim. 357; 15 L. J., Ch., 351; 16 L. J., Ch., 5. S. C. on appeal 2 Ph. 117; 16 L. J., Ch., 5) had been referred to, and in that case the Court went, there could be no doubt, to a most extraordinary length, a length unprecedented in any previous case, and it would remain without being followed until another case as extraordinary should occur. Per Stuart, V.-Ch., in *Morris* v. *Morris*, 4 Jur, N. S, 964, 966.

17. *Leeds* v. *Barnardiston* (4 Sim. 538) disapproved of in *Cooke*, *Re*, 21 L. J., N. S., Ch., 145; 15 Jur. 765.

18. *Leeds* v. *Cheetham* (1 Sim. 146). The decision in this case is not accepted as law by Lord St. Leonards, who, in his Handy Book on Property Law, p. 101, 1st edit., p 106, 6th edit, says to the landlord: "If, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent, if you decline to lay out the money in rebuilding." Upon this passage being cited, Lord Campbell, C. J., said: "With regard to the opinion expressed by Lord St. Leonards, his book is a most valuable publication, and I pay respect to it; if it were proposed to make it law, I might be ready to support it; but it is only the opinion of a most learned judge, and it is contrary to a solemn decision, and to my own opinion." *Lofft* v. *Dennis*, 5 Jur., N. S., 727, 729.

19. *Leeming*, *Re* (30 L. J., Ch., 263; 9 W. R. 403; 3 De F. & J. 43), observed upon in *Freer*, *Re*, *Freer* v. *Freer*, 22 L. R., Ch. D., 622; 52 L. J., Ch., 301; 31 W. R. 426; and followed in *Melly*, *Re*, 49 L. T. 429; 53 L. J., Ch., 248.

20. *Lees* v. *Marton* (1 M. & Rob. 210). The marginal note is, "*Semble*, that a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act

of bankruptcy." Upon this case being cited, Macan, J., observed. "I have never been able to see the difference between breaking an appointment at the house of the creditor and breaking an appointment at the house of the trader himself. The latter has been always held to be an act of bankruptcy; and I am of opinion that where a trader makes an express appointment to meet his creditor, at a particular hour, at the creditor's house, for the purpose of paying a debt, and fails to keep the appointment, he thereby commits an act of bankruptcy." *O'Neil, Re*, 9 Ir. Ch. R. 281.

1. *Legge* v. *Asgill* (T. & R. 465). As to the authorities, I need only refer to *Legge* v. *Asgill*, on which doubt has never been cast, that I am aware of, a decision of Lord Eldon's, and which I should not presume to act against. It has been thrown out in the argument that the report of that case is inaccurate. There is not a shadow of foundation for that statement; I cannot for a moment entertain such a notion. In that case Lord Eldon decided that, under the words, "if there is money left unemployed I desire it may be given in charity," the general residue of the personal estate passed. The words here are, "whatever money is left after my burial." In my opinion, that case, followed as it has been by a long series of authorities, *Kendall* v. *Kendall* (4 Russ. 360), and the two cases in Keen, *Rogers* v. *Thomas* (2 Keen 8) and *Dowson* v. *Gaskom* (2 Keen 14), is a clear authority for holding, on the context of this will, that money was used in a sense capable of embracing stocks. I think I should be violating the testatrix's intention if I came to any other conclusion. Under what circumstances did she die? She had no money whatever—not one penny, but she had 492*l.* 8*s.* 11*d.* stock. Unless I put the construction on the word "money" which was put on it in *Kendall* v. *Kendall* and *Legge* v. *Asgill*, I must declare that she died intestate as to the greater portion of her property, in the face of a will which, in my opinion, clearly indicates that she intended to dispose of all her property. Per Sullivan, M. R., in *Boardman* v. *Stanley*, 7 Ir. R., Eq., 342, 346.

2. *Le Grice* v. *Finch* (3 Meriv. 50) doubted by Malins, V.-Ch., in *Oliver* v. *Oliver*, 40 L. J., Ch., 189; 11 L. R., Eq., 506; 24 L. T. 350; 19 W. R. 432, as to whether it would have been so decided at the present day, and was distinguishable from the case of *Gardner* v. *Hatton*, 6 Sim. 93.

3. *Leigh* v. *Leigh* (17 Beav. 605) not followed by Malins, V.-Ch., in *Spencer* v. *Wilson*, 16 L. R., Eq., 501, 509; 42 L. J., Ch., 754; 29 L. T. 19.

4. *Leigh* v. *Leigh* (15 Ves. 92) distinguished in *Roberts, Re, Repington* v. *Roberts-Gawen*, 19 L. R., Ch. D., 520; 45 L. T. 450. Affirming on this point 50 L. J., Ch., 265; 44 L. T. 300.

5. *Le Marchant* v. *Le Marchant* (18 L. R., Eq., 414; 22 W. R. 839) commented on in *Adams and Kensington Vestry, Re, Adams, Re*, 24 L. R., Ch. D., 199; 52 L. J., Ch., 758; 48 L. T. 958; 32 W. R. 120.

6. *Lennon* v. *Napper* (2 Sch. & Lef. 682) considered and not followed in *Nicholson* v. *Smith*, 22 L. R., Ch. D., 640; 52 L. J., Ch., 191; 47 L. T. 550; 31 W. R. 471.

7. *Les Sœurs Hospitalières de St Joseph* v *Middlemiss* (3 L. R., App. Cas., 1102; 47 L. J., P. C., 89; 38 L. T. 899) approved in *Symes* v. *Cuvillier*, 5 L. R., App. Cas., 138; 49 L. J., P. C., 54; 42 L. T. 198.

8. *Lester* v. *Bond* (1 De G. & Sm. 392) overruled in *Cohen* v. *Alcan*, 1 De G. J. & Sm. 398; 12 W. R. 678; 10 L. T., N. S., 284.

9. *Lester* v. *Foxcroft* (Colles's P. C. 108) distinguished in *Harris* v. *Horwell*, Gilb. Eq. Rep. 11.

10 *Lett* v. *Randall* (3 Eq. Rep. 1034; 6 Jur., N. S., 1359; 9 W. R. 130; 3 L. T., N. S., 455; 30 L. J., Ch., 110; 3 Sm. & G. 83; 2 De G. F. & J. 388) questioned in *Tavernor* v. *Grindley*, 32 L. T., N. S., 424.

11. *Leving* v. *Caverley* (Pre. Ch. 229), the reasoning in which case is so unsatisfactory, not to say absurd, that I think it would be impossible to follow it. Per Cranworth, C., *Stanton* v. *Percival*, 5 H. L. Cas. 257, 273; but see, per Lord St. Leonards, *Id.* 286.

12. *Levy* v. *Lovell* (14 L. R., Ch. D., 234; 49 L. J., Ch., 305; 42 L. T. 242; 28 W. R. 602) followed in *Sear, Exp. Price, Re*, 17 L. R., Ch. D., 74; 44 L. T. 887; 51 L. J., Ch., 448.

13. *Lewes* v. *Morgan* (3 Y. & J. 230). The general expressions of Lord Redsdale in this case are not to be construed to mean that accounts settled between parties standing in the relation of solicitor and client are to be disregarded. It would be absurd that a solicitor, however accurately his accounts were settled, and however plainly his books show *primâ facie* that the accounts were regular, should more than any other man be put to vouch his account over again. *Hickson* v. *Aylward*, 3 Moll. 1, 15.

14. *Lewin* v. *Lewin* (2 Ves. 415) observed on in *Miller* v. *Huddlestone*, 3 Macn. & G. 513; 21 L. J., N. S., Ch., 1; 15 Jur. 1043.

15. Where bankrupt's reversionary estate was offered for sale by auction, and 950*l.* bid, and the same was bought in for 1,000*l.* upon a reserved bidding to that amount, and afterwards, when reduced into possession, sold for 510*l.*:—Held, under the circumstances, not within the rule established in *Lewis, Exp.*, 1 G. & J. 69, so as to make the assignee liable for the difference. *Buxton, Exp.*, 1 G. & J. 355.

16. *Lewis Bowle's case* (11 Rep. 79) considered and explained in *Creagh* v. *Blood*, 3 J. & L. 133; 8 Ir. Eq. R. 688.

17. *Lewis* v. *Chace* (1 P. W. 621) is overruled *Sumner* v. *Brady*, 1 H. Bla. 647.

18. *Lewis* v. *Duncombe* (29 Beav. 175). The marginal note is in these terms:—"Upon the grant of an annuity, secured on real estate, a term was vested in trustees in trust, to raise and pay the arrears, and hold the surplus of the proceeds in trust for the grantor:—Held, that the relation of trustee and *cestui que trust*, being created as between the trustee and the grantor and grantee, the case is within the 25th section of the 3 & 4 Will. 4, c. 27. If that were a correct note, the case would be directly in point, and would be conclusive. On reading the report of the case, however, it will be seen that the facts as stated in it, and in the judgment and the marginal note, are not consistent with each other; and from the report of the same case in 7 Jurist, N. S., 695, it is evident that the marginal note in 29 Beav. is incorrect. No

term of years was created, but the entire estate was conveyed in fee simple and otherwise to the trustee. Per Flanagan, J., *Bermingham, Re*, 4 Ir. R., Eq., 187, 195, 196.

1. *Lewis* v. *Fothergill* (8 L. R., Ch., 103) approved in *Rokeby (Lord)* v. *Elliot*, 13 L. R., Ch. D., 277; 49 L. J., Ch., 163; 41 L. T. 537; 28 W. R. 282.

2. *Lewis* v. *Freke* (2 Ves. 507) distinguished in *Balfour* v. *Cooper*, 23 L. R., Ch. D, 472; 52 L. J., Ch., 495; 48 L. T. 323; 31 W. R. 569.

3. *Lewis* v. *Maddocks* (17 Ves. J. 48) approved in *Cave* v. *Cave*, 15 L. R., Ch. D, 639; 49 L. J., Ch., 505; 42 L. T. 730; 28 W. R. 798.

4. *Lewis* v. *Trask* (21 L. R., Ch. D., 862) followed in *Basham, Re, Hannay* v. *Basham*, 23 L. R., Ch. D., 195; 52 L. J., Ch., 408; 48 L. T. 476; 31 W. R. 743.

5. *Lewis* v. *Trask* (21 L. R., Ch. D., 862) followed in *McEwan* v. *Crombie*, 25 L. R., Ch. D., 175; 53 L. J., Ch., 24; 49 L. T. 499; 32 W. R. 115.

6. *Leyland* v. *Illingworth* (2 De G. F. & J. 248) distinguished in *Cato* v. *Thompson*, 9 L. R., Q. B. D., 616; 47 L. T. 491.

7. *Lightfoot* v. *Burstall* (33 L. J., Ch., 188; 9 L. T. 711; 12 W. R. 148; 3 N. R. 112; 10 Jur., N. S., 308; 1 Hem. & M. 546) approved in *Barker's Estate, Re, Hetherington* v. *Longrigg*, 15 L. R., Ch. D., 635; 29 W. R. 281.

8. *Lightfoot* v. *Burstall* (1 Hem. & M. 546; 33 L. J., Ch., 188; 9 L. T. 711; 12 W. R. 148) observed upon in *Crawshaw* v. *Crawshaw*, 14 L. R., Ch. D., 817; 49 L. J., Ch., 662; 43 L. T. 309; 29 W. R. 68.

9. *Lightfoot* v. *Burstall* (33 L. J., Ch., 188; 9 L. T. 711; 12 W. R. 148; 1 Hem. & M. 546) followed in *Savage's Trusts, Re*, 50 L. J., Ch, 131.

10. *Liley* v. *Hey* (1 Hare 580; 11 L. J., Ch., 415). I have unwillingly come to the conclusion that I am bound by the cases of the *Att.-Gen.* v. *Price*, 17 Ves. 371, and *Isaac* v. *De Friez*, Ambler 595 sed compare 17 Ves. 373, note, and that I must treat this as a charitable bequest. It is remarkable that those cases do not appear to have been cited before Wigram, V.-Ch., in *Liley* v. *Hey* (*supra*). The true rule in all these instances is to do what Sir William Grant did in the case of the *Att.-Gen.* v. *Price*, 17 Ves. 371, namely, to ascertain, as near as possible, what the true intention of the testator was. . . . If the case of the *Att.-Gen.* v. *Price*, and the other case which I have mentioned, had been cited before Wigram, V.-Ch., in *Liley* v. *Hey*, I should have followed the more recent decision. As it is I am not entitled to dissent from authorities so much in point. Per Wickens, V.-Ch., in *Gillam* v. *Taylor*, 42 L. J., Ch., 674, 675; 21 W. R. 823; 16 L. R., Eq., 581; 28 L. T. 833.

11. *Lincoln* v. *Windsor* (9 Hare 158) observed upon in *Broughton* v *Broughton*, 5 De G. M. & G. 160; 1 Jur., N. S., 965; 25 L J., Ch., 250; 3 W. R. 602. Affirming 3 Eq. Rep. 131; 2 Sm. & G. 422; 24 L. J., Ch., 190; 3 W. R. 130.

12. *Lindsay* v. *Gibbs* (22 Beav. 522; 28 L. J., Ch., 692). It is very true that the Master of the Rolls, in this case, says that where there is a charter-party inquiries should be made, and notice should be given. I am rather disposed to think that that is rather dangerous doctrine, because I think the mortgagee of a ship has a right to say: "I am going to take the ship: I am going to realise my security: I know nothing whatever besides, for nobody has given me any notice." I am rather disposed to think that if he takes a mortgage of the ship, and registers it, he is not bound to make further inquiries; but however that may be, what the Master of the Rolls says is, that where the mortgagee knows there is a charter-party he should inquire of the charterer whether he has received notice of any incumbrance. That may be so, but it was impossible for this defendant to do that, because here there was no charter-party. Per Malins, V.-Ch., in *Wilson* v. *Wilson*, 41 L. J., Ch., 423, 427; 14 L. R., Eq., 32; 20 W. R. 436; 26 L. T., N. S., 346.

13. *Lipscomb* v. *Lipscomb* (7 L. R., Eq., 501; 38 L. J., Ch., 90) questioned in *Leonino* v. *Leonino*, 10 L. R, Ch. D., 460; 48 L. J., Ch., 217; 27 W. R. 388; 40 L. T. 359.

14. *Little's case, West Jewell Tin Mining Co., Re* (8 L. R., Ch. D., 806), considered and distinguished in *New Callao Co., Re*, 22 L. R., Ch. D., 484; 52 L. J., Ch., 283; 48 L. T. 251; 31 W. R. 185.

15. *Litton* v. *Litton* (3 L. R., Ch. D., 793; 46 L. J., Ch., 64; 24 W. R. 962) explained and commented on in *Pascoe* v. *Richards*, 50 L. J., Ch., 337; 44 L. T. 87; 29 W. R. 330.

16. *Liverpool Borough Bank* v. *Turner* (30 L. J., Ch., 379; 9 W. R. 292; 1 John. & H. 159) explained and commented on in *Batthyany* v. *Bouch*, 50 L. J., Q. B., 421; 44 L. T. 177; 29 W. R. 665.

17. *Lloyd* v. *Collett* (4 Bro. C. C. 459) is as nearly as possible this case, and I cannot find that *Lloyd* v. *Collett* has been overruled or objected to in any authority or any text book on the subject. I think the Lord Chancellor's judgment in that case is a very striking one. The judgment is not given where the case is reported, but is set out in a note to *Harrington* v. *Wheeler*, in 4 Vesey, jun. The facts of the case are stated in 4 Brown; and in a note in 4 Vesey, jun., at page 689, it is stated that the Lord Chancellor in *Lloyd* v. *Collett*, which was cited, pronounced judgment. Per Lord Romilly, M. R., in *Venn* v. *Cattell*, 27 L. T., N. S., 469, 470.

18. *Lloyd* v. *Harvey* (2 Russ. & M. 310) considered in *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

19. *Lock* v. *De Burgh* (4 De G. & Sm., 470; 15 Jur. 961; 20 L. J., Ch., 384) doubted and not adopted, for the purpose of being reviewed. *Fletcher* v. *Moore*, 3 Jur., N. S., 458; 26 L. J., Ch., 530.

20. *Lock* v. *De Burgh* (5 De G. & Sm. 470) before Knight Bruce, L. J., when Vice-Chancellor, but it is so shortly reported, that it is impossible to say what were the grounds of his honour's judgment; it is, however, an express decision on the case now before me. The last case is that of *Fletcher* v. *Moore* (3 Jur., N. S., 458; 26 L. J., Ch., 530) before Kindersley, V.-Ch., in which, having *Lock* v. *De Burgh* before him, that learned judge came to a conclusion opposed to that case. . . . The more I consider it, the more I think the view a reasonable and just one; that the first branch of the commencement of the 2nd section of the 4 & 5 Will. 4, c. 22, refers to two classes of subjects, to each of which the enacting words are applicable; that, in fact,

the section must be read thus: in the first place, that after the passing of the Act all rents reserved by tenants in fee or for life, or by donees of powers of leasing, such leases being granted after the passing of the Act, shall be apportioned; and, in the next place, that all other rent charges and other rents, etc., made payable or coming due at fixed periods, under an instrument executed after the passing of the Act, shall also be apportioned. According to this construction, the former portion of the section provides for interests existing at the passing of the Act, whilst the latter looks to and provides for the future. I think that this is a rational interpretation of the statute, and although open to the objection that to a certain extent it renders the statute *ex post facto* legislation, I think it must have been the ground upon which *Lock* v. *De Burgh* was decided. I shall therefore follow that decision in deciding the present case, and declare that the rents in question ought to be apportioned. Per V.-Ch. Wood in *Plummer* v. *Whiteley*, Johns. 585, 589; 5 Jur., N. S., 1416.

1. *Lockett* v. *Carey* (10 Jur., N. S., 144) not followed in *Pratt* v. *Pratt*, 51 L. J., Ch., 838; 47 L. T. 249; 30 W. R. 837.

2. *Loffus* v. *Maw* (3 Giff. 592; 32 L. J., Ch., 49; 6 L. T. 346; 10 W. R. 513) observed upon in *Alderson* v. *Maddison*, 5 L. R., Exch. D., 293; 49 L. J., Exch., 801; 43 L. T. 349; 29 W. R. 105.

3. *Loffus* v. *Maw* (32 L. J., Ch., 49; 6 L. T. 346; 10 W. R. 513; 3 Giff. 592) not followed in *Maddison* v. *Alderson*, 8 L. R., App. Cas., 467; 52 L. J., Q. B., 737; 49 L. T. 303; 31 W. R. 820.

4. *Lolley's case* (2 Cl. & F. 567; Russ. & Ry. 237) approved in *Briggs* v. *Briggs*, 5 L. R., P. D., 163; 49 L. J., P., 38; 28 W. R. 702.

5. *Lolley's case* (2 Cl. & F. 567; Russ. & Ry. 237). "Only applicable where facts are similar," in *Harvey* v. *Farnie*, 5 L. R., P. D., 153; 49 L. J., P., 33; 42 L. T. 482; 28 W. R. 723. Not to be extended in *Harvey* v. *Farnie*, 6 L. R., P. D., 35; 50 L. J., P., 17; 43 L. T. 737; 9 W. R. 409, and in *Harvey* v. *Farnie*, 8 L. R., App Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433.

6. *London* (*Bishop*), *Exp.* (2 De G. F. & J. 14). The rule in this case as to the payment in equal shares by several railway companies of the costs of a petition for a single investment in land of several sums of money paid in by them respectively, will be observed in all cases, except where it is shown that the application is made in a form intentionally to injure a particular railway company. *Merton College, Re*, 11 W. R. 237.

7. *London* (*Bishop*) v. *Fytche* (1 Bro. C. C. 96), the report of, corrected in *Irving* v. *Thompson*, 9 Sim. 17; 8 L. J., N. S., Ch., 357; 3 Jur. 1071.

8. *London* (*Corporation*) v. *Att.-Gen.* (1 H. L. Ca. 471) observed upon, on the question of costs in *Att.-Gen.* v. *London* (*Corporation*), 2 Macn. & G. 247; 2 H. & Tw. 1; 19 L. J., N. S., Ch., 314; 14 Jur. 205. Affirming 12 Beav. 171; 18 L. J., N. S., Ch., 339; 13 Jur. 973.

9. *London Chartered Bank of Australia* v. *Lempriere* (4 L. R., P. C., 572; 42 L. J., P. C., 49; 29 L. T. 186; 21 W. R. 513; 9 Moo. P. C. C., N. S., 426), approved in *Godfrey* or *Gilbert* v. *Harben*, 13 L. R., Ch. D., 216; 49 L. J., Ch., 3; 28 W. R. 73.

10. *Brander, Re, London Cotton Mills Co., Re* (25 W. R. 109), overruled in *Levy* v. *Lovell*, 14 L. R., Ch. D., 234; 42 L. T. 242; 28 W. R. 602.

11. *London* (*Mayor*) v. *Cox* (2 L. R., H. L., 239; 16 W. R. 44; 36 L. J., Exch., 225. Affirming 1 H. & C. 338; 32 L. J., Exch., 64, 282; 6 L. T., N. S., 497; 8 Jur., N. S., 342; 10 W. R. 694; 2 H. & C. 401; 9 Jur., N. S., 800; 11 W. R. 969; 8 L. T., N. S., 700). In the copy of the Law Reports in this court (Common Pleas), I find in the handwriting of my late brother Willes the following addition to the head-note to *London* (*Mayor*) v. *Cox*:—"The cause of action must arise and the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction." We have repeatedly held since that that means substantially the whole cause of action. Per Keating J., in *Cooke* v. *Gill*, 8 L. R., C. P., 107, 110; 21 W. R. 334; 42 L. J., C. P., 98; 28 L. T., N. S., 32.

I believe that to be the meaning of Willes, J., in the MS. note referred to; and I have heard him say so very many times since. Per Brett, J. *Ib.*

12. *London & Manchester Direct Independent Railway Co, Re, Barber, Exp.* (1 Macn. & G. 176). That case is inconsistent with the decision of this Court (Common Pleas), and of the majority of the Exchequer Chamber, in *Hickman* v. *Cox* (18 C. B. 617; 3 C. B., N. S., 523). Per Willes, in *Moore* v. *Rawlings*, 6 C. B., N. S., 289, 314.

13. *London & North-Western Railway Co.* v. *Smith* (1 Macn. & G. 216; 19 L. J., Ch., 193) is not law, for it is quite clear that that case was dissented from by Lord Truro, by the late Jord Justice Turner and by Lord Cranworth, in the plainest possible language. Per Giffard, V.-Ch., in *Abrahams* v. *London* (*Mayor*), 37 L. J., Ch., 732, 736; 6 L. R, Eq., 625, 633.

14. *Long* v. *Burton* (2 Atk. 218) explained in *Gray* v. *Haig*, 13 Beav. 65; 19 L. J., N. S., Ch., 446; 14 Jur. 561.

15. *Long* v. *Gray* (*Cape Town Bishop*) (9 Jur., N. S., 805; 11 W. R. 900; 8 L. T., N. S., 738; 1 Moo. P. C., N. S., 411) explained in *Colenso* v. *Gladstone*, 13 L. R., Eq., 1; 12 Jur., N. S., 971; 36 L. J., Ch., 2; 15 W. R. 29; 15 L. T., N. S., 465.

16. *Long* v. *Storie* (3 De G. & Sm. 308) observed upon in *Bates* v. *Brothers*, 7 Jur. 1174; 18 Jur. 715; 23 L. J., Ch., 150, 782; 2 W. R. 116; 2 Eq. Rep. 321.

17. *Loscombe* v. *Wintringham* (12 Beav. 46) commented upon by the Court, in *Att.-Gen.* v. *Loscombe*, 29 L. J., Exch., 305.

18. *Lovat* (*Lord*) v. *Leeds* (*Duchess*) (31 L. J., Ch., 503; 6 L. T. 307; 10 W. R. 397; 2 Dr. & Sm. 62) followed in *Bannerman's Estate, Re, Bannerman* v. *Young*, 21 L. R., Ch. D., 105; 51 L. J., Ch., 449. (*Quære* effect of *Pearetb* v. *Marriott*, 31 W. R. 68. Reversing 51 L. J., Ch., 821; 46 L. T. 800; 30 W. R. 884.)

19. *Lovell* v. *Knight* (3 Sim. 275) followed in *Evans* v. *Evans*, 23 Beav. 1; 3 Jur., N. S., 7; 26 L. J., Ch., 193.

20. *Lows* v. *Telford* (1 L. R., App. Cas., 414) considered in *Beddall* v. *Maitland*, 17 L. R., Ch. D., 174; 50 L. J., Ch., 401; 44 L. T. 248; 29 W. R. 484.

21. *Lucas* v. *Comerford* (1 Ves. J. 235; 3 Bro

C. C. 166; 8 Sim. 499) overruled, or its authority was displaced, by *Moores* v. *Choat* (8 Sim. 508; 8 L. J., Ch., 128; 3 Jur. 220). Per Turner, L. J., in *Cox* v. *Bishop*, 3 Jur., N. S., 499, 500; 26 L. J., Ch., 389, 394.

1. *Lucas* v. *Comerford* (1 Ves. J. 235; 3 Bro. C. C. 166; 8 Sim. 499) explained in *Moores* v. *Choat* (8 Sim. 508; 8 L. J., N. S., Ch., 128; 3 Jur. 220); and overruled. *Moore* v. *Greg*, 2 Ph. 717; 18 L. J., N. S., Ch., 15; 12 Jur. 952.

2. *Luckin* v. *Simpson* (6 Bing. N. C. 353; 8 Scott 676) overruled by *Varnish, Exp., Burghart, Re*, 1 M. D. & De G. 514; 5 Jur. 499; 10 L. J., N. S., Bky., 50.

3. *Lugar* v. *Harman* (1 Cox 250) disregarded as an authority. Per Romilly, M. R., *Davies, Re*, 7 Jur., N. S., 118; 9 W. R. 131.

4. *Lugar* v. *Harman* (1 Cox 250) followed in *Stummvoll* v. *Hales, Johnstone, Re*, 34 Beav. 124; 10 Jur., N. S., 716; 12 W. R. 1137; 10 L. T., N. S., 807; 4 N. R. 473.

5. *Lumley* v. *Wagner* (1 De G. M. & G. 604) distinguished in *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880; 24 L. J., Ch., 87; 3 Eq. Rep. 153; 3 W. R. 133. And see S. C. 1 Kay & J. 186; 24 L. J., Ch., 1; 3 Eq. Rep. 70.

6. *Lushington* v. *Sewell* (1 Sim. 435) observed upon in *Turner* v. *Barclay*, 9 Moo. P. C. C. 264.

7. *Lynch* (*Lessee of*) v. *Lynch* (6 Ir. L. R. 131) doubted in *Creagh* v. *Blood*, 3 J. & L. 133; 8 Ir. Eq. R. 688.

8. *Lynch, Exp. & Re* (2 L. R., Ch. D., 227; 45 L. J., Bky., 48; 34 L. T. 34; 24 W. R. 375), overruled in *Jones, Exp. & Re*, 18 L. R., Ch. D., 109; 50 L. J., Ch., 673; 45 L. T. 193; 29 W. R. 747. Reversing 44 L. T. 588.

9. *Lynes, Re* (8 L. R., Eq., 65), not followed in *Firth* v. *Fielden*, 22 W. R. 622.

10. *Lyon* v. *Coward* (15 Sim. 287; 15 L. J., Ch., 460) followed in *Harcourt* v. *Harcourt*, 26 L. J., Ch., 536.

11. *Lyon* v. *Fishmongers' Co.* (1 L. R., App. Cas., 662; 46 L. J., P. C., 68; 35 L. T. 569; 25 W. R. 165) approved in *Fritz* v. *Hobson*, 14 L. R., Ch. D., 542; 49 L. J., Ch., 321; 42 L. T. 225; 28 W. R. 459.

12. *Lyon* v. *Fishmongers' Co.* (1 L. R., App. Cas., 662; 46 L. J., P. C., 68; 35 L. T. 569; 25 W. R. 165) observed upon in *Bell* v. *Quebec Corporation*, 5 L. R., App. Cas., 84; 49 L. J., P. C., 1; 41 L. T. 151.

13. *Lyon* v. *Reed* (13 M. & W. 285) approved in *Creagh* v. *Blood*, 3 J. & L. 133; 8 Ir. Eq. R. 688.

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14. *McAndrew* v. *Barker* (7 L. R., Ch. D., 705; 47 L. J., Ch., 340; 37 L. T. 810; 26 W. R. 317). "Rather too strong," per James, L. J., in *Blyth and Young, Re*, 13 L. R., Ch. D., 416; 420; 41 L. T. 746; 28 W. R. 266. This observation approved in *New Callao Co., Re*, 22 L. R., Ch. D., 484; 52 L. J., Ch., 283; 48 L. T. 251; 31 W. R. 185.

15. *Macarthur, Exp.* (40 L. J., Bky., 86), overruled. *Shiel, Exp., Lonergan, Re*, 4 L. R., Ch. D., 782; 46 L. J., Bky., 62; 36 L. T. 270; 25 W. R. 420.

16. *Maccabe* v. *Hussey* (2 Dow & Cl. 440, and *Atwood* v. *Small*, 6 Cl. & F. 232) observed upon as to evidence in H. L. in *Banco de Portugal* v. *Waddell*, 5 L. R., App. Cas., 161; 49 L. J., Bky., 33; 42 L. T. 210; 28 W. R. 477.

17. *M'Carthy* v. *De Caix* (2 Russ. & M. 614; 2 Cl. & F. 568) overruled in *Harvey* v. *Farnie*, 8 L. R., App. Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433.

18. *McDonald* v. *Bryce* (16 Beav. 581). I very much doubt the correctness of my decision in *McDonald* v. *Bryce*, and I think that case ought not to be cited as an authority before me. Per Lord Romilly, M. R., in *Corneck* v. *Wadman*, 8 L. R., Eq., 80, 181.

19. *McDonald* v. *Bryce* (16 Beav. 581; 22 L. J., Ch., 779). I have no recollection of that case, and the exact words of the will are not stated in the report of that case. On reading it, I cannot, I confess, reconcile it either with principle or with the authorities. I regret it was not carried further, because it is of the greatest importance that nothing should shake settled rules of construction. It is to be observed that it does not appear that the point was raised, though certainly, speaking from my own experience, it rarely occurs that counsel omit to suggest to the Court any point that can properly be urged in support of their case. There may have been some circumstances that affected the particular matter. Per Romilly, M. R., in *Page* v. *May*, 24 Beav. 323, 326; 27 L. J., Ch., 242; 3 Jur., N. S., 1047; 5 W. R. 840.

20. *Macdonald* v. *Bryce* (2 Keen 276; 7 L. J., N. S., Ch., 173; 12 Jur. 295) disapproved of in *Elborne* v. *Goode*, 14 Sim. 165; 13 L. J., N. S., Ch., 394; 8 Jur. 1001.

21. *Macdonald* v. *Bryce* (2 Keen 276) observed upon in *Tench* v. *Cheese*, 18 Jur. 1087; 3 W. R. 42; 19 Beav. 3; 24 L. J., Ch., 49; 24 L. T. 151; 3 Eq. Rep. 47; and on appeal 3 W. R. 500; 1 Jur., N. S., 689.

22. *Macdonald* v. *Union Bank of Scotland* (Court Sess. Ca., 3rd Series, vol. ii., p. 963) approved in *Steele* v. *McKinlay*, 5 L. R., App. Cas. (Sc.), 754; 43 L. T. 358; 29 W. R. 17.

23. *Macfarlane's Claim, Northern Counties of England Fire Insurance Co., Re* (Principle of) (17 L. R., Ch. D., 337; 50 L. J., Ch., 273; 44 L. T. 299), followed in *Bridges, Re, Hill* v. *Bridges*, 17 L. R., Ch. D., 342; 50 L. J., Ch., 470; 44 L. T. 730.

24. *Mackay* v. *Douglas* (14 L. R., Eq., 106; 41 L. J., Ch., 539; 26 L. T. 721; 20 W. R. 652) followed in *Russell, Exp., Butterworth, Re*, 19 L. R., Ch. D., 588; 51 L. J., Ch., 521; 46 L. T. 113; 30 W. R. 584.

25. *Mackay* v. *Dick* (6 L. R., App. Cas. (Sc.) 251) followed in *Shepherd* v. *Henderson*, 7 L. R., App. Cas. (Sc.), 49.

26. *McKay's case, Morvah Consols Tin Minin Co., Re* (2 L. R., Ch. D., 1; 45 L. J., Ch., 148; 33 L. T., N. S., 517; 24 W. R. 490), and *Pearson's case, Caerphilly Colliery Co., Re* (5 L. R., Ch. D., 336; 46 L. J., Ch., 339; 25 W. R. 618. Affirming 4 L. R., Ch. D., 222). The principles laid down in these cases—viz., that a director being in a fiduciary position to his company cannot retain a consideration received by him from the promoters as an inducement to become a director; and, if the consideration has been a gift of fully paid-up shares, that he may be compelled not only to restore the shares, but to account to the company for the highest value to be attributed to them since they have been in his possession—

are equally applicable to proceedings in an action by the company to recover the value of the shares, as to proceedings under the Companies Act 1862, s. 165, for the same purpose. The director is further chargeable with interest on the highest value of the shares. *Nant-y-glo and Blaina Ironworks Co.* v. *Grave*, 12 L. R., Ch. D., 738; 26 W. R. 504; 8 L. T., N. S., 345.

1. *Mackenzie* v. *Coulson* (8 L. R., Eq., 368). The non-disclosure of a fact, after the policy was made in equity, could have no more effect than a similar non-disclosure after it was made in law. The present is an intermediate case, and the question which must now be determined seems to us to be whether, after the negotiation is complete and the contract made, in fact and in good faith, and the underwriter is under a moral obligation to execute a formal policy, the assured is bound by good faith to give information to the assurer of a matter which would make him aware that his bargain was a bad one, information which ought to have no effect on him, but would expose him to a temptation to break his contract, which, as far as the law is concerned, he may do with impunity, because for fiscal purposes the Legislature has forbidden the Court, either of law or equity, to enforce the contract. To the question thus stated the answer seems obvious, that he is not bound to lead his neighbour into temptation. Until lately, no question of this sort could be raised in any Court, for the rules of evidence required that the contract, being written, should be proved by the production of the writing, the slip; and Lord Ellenborough, in *Warwick* v. *Slade* (3 Camp. 127), accurately expressed the effect of the statutes then in force, when he said, "The revenue laws forbid me to look to what is called the slip;" and such continued to be the law down to and after the time when *Xenos* v. *Wickham* (2 L. R., H. L., 276; 36 L. J., C. P., 313; 16 L. T., N. S., 800) was argued in the House of Lords; and the judges who (on the 8th May 1867) gave their opinions, in the House of Lords, used language showing that they thought that the law was as stated by Lord Ellenborough; and so it was. These passages were quoted and relied on in the argument before us. But in that very year, on the 31st of May 1867, the 30 Vict., c. 23, received the royal assent. This statute was not brought to the notice of James, V.-Ch., in *Mackenzie* v. *Coulson* (8 L. R., Eq., 368). According to the construction put upon it by this Court in *Ionides* v. *Pacific Insurance Co.* (6 L. R., Q. B., 674; 41 L. J., Q. B., 33; 26 L. T., N. S., 161, 162, 163), that Act completely changed the law, and repealed all those Acts which had ordered that the slip was not so much as to be looked at in a court of justice, putting it on a footing very similar to that of an unsigned memorandum of a contract within the Statute of Frauds, or a lease for more than for three years not under seal, viz., that it was void and not enforceable at law or in equity, but might be given in evidence wherever, though not valid, it was material. It is open to the defendant in a court of error to question the accuracy of the reasoning on which the judgment in *Ionides* v. *Pacific Insurance Co.* (6 L. R., Q. B., 674; 41 L. J., Q. B., 33) proceeded, but we think that whilst it stands unreversed, it leads irresistibly to the conclusion that the judgment in the present case should be for the plaintiffs. Per Blackburn, J., delivering the considered judgment of the Court in *Cory* v. *Patton*, 7 L. R., Q. B., 304, 308, 309, 310; 41 L. J., Q. B., 195. n., 196. n.; 26 L. T. 161; 20 W. R. 364.

2. *McKenzie's Settlement, Re* (2 L. R., Ch., 345; 36 L. J., Ch., 320; 15 W. R. 662), approved in *Jackson's Will, Re*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 28 W. R. 209.

3. *Mackintosh* v. *Great Western Railway Co.* (4 Giff. 683) not followed by Hall, V.-Ch., in *Hull* v. *South Staffordshire Railway Co.*, 43 L. J., Ch., 556, 560, 18 L. R., Eq., 154.

4. *McLean* v. *Fleming* (2 L. R., H. L. (Sc.), 128). After the argument of this case, and I had written what I have read as my judgment on the point of dead freight, our attention was called to the case of *McLean* v. *Fleming*, decided by the House of Lords on the 3rd of April last. The delivery of the judgment of this Court was postponed till we had an opportunity of inquiring into the case of *McLean* v. *Fleming*. My brother Bramwell considers the decision in the House of Lords governs this case, and must govern him, whatever his opinion otherwise would have been. My brother Brett, for reasons he has given, considers that *McLean* v. *Fleming* does not apply. Other of the judges, including myself, take the same view of the effect of the decision in *McLean* v. *Fleming*. If I considered the decision of the House of Lords as one which governs the present case, of course I should be bound by it, and should withdraw so much of the judgment respecting the point of dead freight as I had prepared and have read; but, thinking that the decision of the House of Lords does not govern the present case, I abide by the opinion that the plaintiff cannot recover his claim for dead freight; and I therefore think the judgment of the Court of Queen's Bench should be affirmed on all points. Per Channell, B., in *Gray* v. *Carr*, 25 L. T., N. S., 216, 223; 6 L. R., Q. B., 522; 40 L. J., Q. B., 257; 19 W. R. 1173.

Since this case was argued, and since this judgment was written, our attention has been called to the case of *McLean* v. *Fleming*, in the House of Lords, and if I had thought that that case overruled anything I have said in this, I should have willingly bowed to it. But in that case, as I understand the judgment, the charter-party was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charter-party ascertained the amount of the cargo that was to be loaded. It then put upon the charterers the liability of loading a full cargo, and gave a lien to the shipowner for dead freight. Now, under those circumstances, it was pointed out by some, if not all, of the learned lords who took part in the judgment, that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule; and as I understand their

lordships, they declined to overrule the case of *Kirchner* v. *Venus* (12 Moo. P. C. C. 361), and expressly declined to overrule the case of *Pearson* v. *Goschen* (17 C. B., N. S., 352), which I think is decided on valuable principles, that ought to be generally applied. I therefore do not consider that that case overrules what I have said of this charter-party. With regard to the question of the bill of lading, even although the charter in this case did give a lien for dead freight, it seems to me that the authority in the House of Lords leaves the case untouched, because the House of Lords in the case before it came to the conclusion that the action was between those who were virtually the charterers and shipowner, and, therefore, they decided the case on the charter party alone, and held only that the facts of bills of lading being given to a charterer cannot alter or effect his liability under the charter-party. It therefore seems to me that that case does not affect this case, and I adhere to the judgment which I had already written. The case seems to me to be one of great importance, because bills of lading are the documents on which bills are bought and sold before ships arrive, and if the value of the bill of lading is to be dependant on an unascertained amount to be paid in respect of antecedent transactions, which cannot be known or estimated, any legitimate, in the sense of wholesome, traffic in such a document cannot be undertaken. This consideration tends to the same conclusion as the legal reasoning which has been before applied. Per Brett, J., S. C., 25 L. T., N. S., 216, 221, 222.

1. *Macleay, Re* (20 L. R., Eq., 186; 44 L. J., Ch., 441; 23 W. R. 718), commented on in *Rosher, Re, Rosher* v. *Rosher*, 26 L. R., Ch. D., 801; 53 L. J., Ch., 723; 32 W. R. 821.

2. *McLeod* v. *Drummond* (14 Ves. 353; 17 Ves. 152) distinguished in *Cooper, Re, Cooper* v. *Vesey*, 20 L. R., Ch. D., 611; 51 L. J., Ch., 862; 47 L. T. 89; 30 W. R. 648. Affirming 51 L. J., Ch., 149; 45 L. T. 532; 30 W. R. 148.

3. *Macnair* v. *Cathcart* (Morr. Dic. 12,832) approved of in *Grahame* v. *Swan*, 7 L. R., App. Cas. (Sc.), 547.

4. *M'Neill* v. *Cahill* (2 Bligh 229) (Bills of Review). We may observe with respect to the rules regulating bills of review, to which we were referred in the argument as laid down by Lord Redesdale in the above case, that we do not find any observations to the effect of those rules attributed to Lord Redesdale in the report. They appear to be the reporter's own note of what he considers to have been established by the decision. Per Lord Kingsdown, P. C., in *Hosking* v. *Terry*, 15 Moo. P. C. 493, 504; 8 Jur., N. S., 975; 10 W. R. 884.

5. *M'Neillie* v. *Acton* (4 De G. M. & G. 744) distinguished in *Devitt* v. *Kearney*, 11 L. R., Ir., 225.

6. *Macredie, Exp., Charles, Re* (8 L. R., Ch., 535, 539; 42 L. J., Bky., 90; 28 L. T. 827; 21 W. R. 535). I doubt whether I was right in what I said in this case, that possibly the doctrine in *Walker, Exp.* (4 Ves. 373), might apply not only to a case where there was an exchange of accommodation acceptances, but might apply to a case where one bill was, in some respects, the consideration for another bill. I have great doubt, on further consideration, whether that was right, and whether the rule was not that which was stated by Lord Selborne in that case, namely, that proof could only be admitted when an action at law would lie, and not in a case of pure accommodation acceptances, in respect of which if there was no bankruptcy, no action at law would lie. Per Mellish, L. J., *London, Bombay, & Mediterranean Bank, Re, Cama, Exp.*, 9 L. R., Ch., 686, 689; 43 L. J., Bky., 683; 31 L. T. 234; 22 W. R. 809.

7. *Macree* v. *Gorst* (4 L. R., Eq., 315; 15 W. R. 1197) distinguished in *Kaltenbach* v. *Lewis*, 24 L. R., Ch. D., 54; 52 L. J., Ch., 881; 48 L. T. 844; 31 W. R. 731.

8. *Maddeford* v. *Austwick* (1 Sim. 89) followed in *Rawlings* v. *Wickham*, 4 Jur., N. S., 990.

9. *Maddison* v. *Pye* (32 Beav. 658). Now, with regard to that case, I must say that I think it is a pity that cases which are to be reported at all should be reported as that was. The particular form of the will is not given, and there are no arguments, or even the name of the counsel engaged, and not a single authority is stated to have been cited. There is nothing to show whether the estate was charged with debts or legacies. Somebody must have told Mr. Beavan that such a case had occurred when he himself was not in court. The rule is thus laid down, and evidently incorrectly, "*Eyre* v. *Marsden* (1 Myl. & Cr. 231) settles this. Where a real estate is disposed of in favour of several persons and the suit is solely for the administration of the real estate, and some of the shares lapse, these shares are not to be made to bear the costs of the suit, but the costs are to be borne by the real estate"—which was not done in *Eyre* v. *Marsden*—"generally, and the heir-at-law's estate is not to bear all the costs." Further on the Master of the Rolls says, "I have always understood the rule to be this in suits for the administration of the personal estate the part of it undisposed of is first applicable to the payment of the costs; but the rule is different as to real estate. There the heir-at-law is only charged with his proportion of the costs of the suit." The rule as thus laid down is entirely erroneous, and I cannot believe that the Master of the Rolls ever stated it in those broad terms; and if he did, I can only say it is impossible that I can follow it. Per Malins, V.-Ch., in *Scott* v. *Cumberland*, 18 L. R., Eq., 578, 584, 585; 22 W. R. 840; 31 L. T., N. S., 26; 44 L. J., Ch., 226, 228.

10. *Madeley* v. *Booth* (2 De G. & Sm. 718) not followed in *Camberwell and South London Building Society* v. *Holloway*, 13 L. R., Ch. D., 754; 49 L. J., Ch., 361; 41 L. T. 752; 28 W. R. 222.

11. *Maden* v. *Taylor* (45 L. J., Ch., 569) followed in *Davidson* v. *Kimpton*, 18 L. R., Ch. D., 213; 45 L. T. 132; 29 W. R. 912.

12. *Magee* v. *Lavell* (9 L. R., C. P., 107) commented on in *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 389; 31 W. R. 214.

13. *Maghee* v. *M'Allister* (3 Ir. Ch. Rep. 604) followed in *Harvey* v. *Farnie*, 8 L. R., App. Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433.

14. *Mainwaring's Settlement, Re* (2 L. R.,

Eq. 487; 14 W. R. 887), considered in *Allnutt, Re, Pott* v. *Brassey*, 22 L. R., Ch. D., 275; 52 L. J., Ch., 299; 48 L. T. 155; 31 W. R. 469.

1. *Malcolm* v. *Charlesworth* (1 Keen 63) observed on in *Gardiner* v. *Blesinton*, 1 Ir. Ch. R. 64.

2. *Malcolm* v. *Hodgkinson* (8 L. R., Q. B., 209; 21 W. R. 360) followed in *Corta Para Gold Mining Co., Re*, 19 L. R., Ch. D., 457; 51 L. J., Ch., 191; 46 L. T. 406; 30 W. R. 117.

3. *Malins* v. *Price* (2 Colly. 190) overruled. *Duncan* v. *Varty*, 2 Ph. 696.

4. *Mallabar* v. *Mallabar* (Cas. t. Talb. 78) explained in *Barrs* v. *Fewkes*, 34 L. J., Ch., 522; 11 Jur., N. S., 669; 13 W. R. 987; 12 L. T., N. S., 727; 6 N. R. 355.

5. *Mammoth Copperopolis of Utah Co., Re* (50 L. J., Ch., 11; 43 L. T. 754), distinguished in *Alexandra Palace Co., Re*, 21 L. R., Ch. D, 149; 51 L. J., Ch, 655; 46 L. T. 730; 30 W. R. 771.

6. *Manderville's case* (Coke Litt. 26. b) recognised as a leading authority in *Vernon* v. *Wright*, 7 H. L. Ca. 35; 28 L. J., Ch., 198; 4 Jur., N. S., 1113.

7. *Mann* v. *Nunn* (30 L. T., N. S., 526; 43 L. J. 241). It is a most important rule that where there is a contract in writing, it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties; where there is a collateral contract the written contract does not contain the whole of the terms. As to the cases which have been cited, I should decide *Morgan* v. *Griffith* the same way; the decision in *Mann* v. *Nunn* I am inclined to think wrong, but it is unnecessary to say how that may be. Per Blackburn, J., in *Angell* v. *Duke*, 32 L. T., N. S., 321.

8. *Manson* v. *Thacker* (7 L. R., Ch. D., 620; 47 L. J, Ch., 312; 38 L. T. 209; 26 W. R. 604) not followed in *Turner and Skelton, Re*, 13 L. R., Ch. D, 130; 49 L. J, Ch., 114; 41 L. T. 668; 28 W. R. 312; and considered in *Phelps* v. *White*, 7 L. R., Ir., 160.

9. *Mapp* v. *Elcock* (2 Phil. 796; 3 H. L. Ca. 509) observed upon in *Williams* v. *Roberts*, 4 Jur., N. S., 18

10. *Mare* v. *Malachy* (1 Myl. & C. 577; 5 L. J., N. S., Ch., 345) followed in *Turner* v. *Borlase*, 11 Sim. 1; 10 L. J., N. S., Ch., 26.

11. *Markham, Re, Markham* v. *Markham* (16 L. R., Ch. D., 1; 29 W. R. 228), distinguished in *Watson* v. *Cave*, 17 L. R., Ch. D., 19; 44 L. T. 40; 29 W. R. 433.

12. *Marks, Exp.* (1 G. & J. 70), overruled. 1 Dea. & Ch. 434.

13. *Markwell, Re* (17 Beav. 618; 23 L. J., Ch., 502), is overruled, *Lister's Hospital, Re*, 6 De G. M. & G. 184. I cannot reconcile the two cases. I am satisfied that the principle of Lister's Hospital case overrules my decision in the case of Markwell's legacy; and I am bound to follow the former. Per Romilly, M. R., *St. Giles and St. George, Bloomsbury, Volunteer Corps, Re*, 25 Beav. 313, 315; 4 Jur., N. S., 297; 27 L. J., Ch., 560.

14. *Marne, Re* (15 W. R. 99; 3 L. R., Eq., 432; 15 L. T., N. S., 237), explained and followed in *Evans, Re*, 20 W. R. 695; 7 L. R., Ch., 609; 41 L. J., Ch., 512; 26 L. T., N. S., 815.

15. *Marris* v. *Ingram* (13 L. R., Ch. D., 338; 49 L. J., Ch., 123; 41 L. T. 613; 28 W. R. 434) distinguished in *Holroyde* v. *Garnett*, 20 L. R., Ch. D., 532; 51 L. J., Ch., 663; 46 L. T. 801; 30 W. R. 604.

16. *Marsh* v. *Att.-Gen.* (3 L. T., N. S., 715; 9 W. R. 179; 2 John. & H. 61; 7 Jur., N. S., 184) not followed in *Ashworth* v. *Munn*, per Brett, L. J., 15 L. R., Ch. D., 363; 50 L. J., Ch., 107; 43 L. T. 553; 28 W. R. 965; and in *Hill's Trusts, Re*, 16 L. R., Ch. D., 173; 43 L. T. 623; 29 W. R. 211; 50 L. J., Ch., 134.

17. *Marston, Exp.* (Mont. & Ch. 576), commented on in *Law, Exp*, *Hague, Re*, Mont. & Ch. 590.

18. *Marston* v. *Roe* (8 Adol. & Ell. 14) commented on in *Israell* v. *Rodon*, 2 Moo. P. C. 51.

19. *Martin* v. *M'Causland* (3 Ir. L. R.) is not law. *Kirkwood* v. *Lloyd*, 12 Ir. Eq. R. 585; 11 Ir. Eq. R. 561.

20. *Martin* v. *Mackonochie* (3 L. R., P. C., 409; 40 L. J, Ecc., 1; 24 L. T. 204; 18 W. R. 217) followed in *Mackonochie* v. *Penzance (Lord)*, 6 L. R., App. Cas., 424; 50 L. J., Q. B., 611; 44 L. T. 479; 29 W. R. 633.

21. *Martin* v. *Martin* (2 L. R., Eq., 404; 35 L. J., Ch., 679; 14 L. T. 129; 14 W. R. 986) distinguished in *Chaston, Re, Chaston* v. *Seago*, 18 L. R., Ch. D., 218; 50 L. J., Ch., 716; 45 L. T. 20; 29 W. R. 778.

22. *Martin* v. *Wilson* (3 Bro. C. C. 324). I made a note to this case many years ago in my copy of that volume, that the case of *Martin* v. *Wilson* is opposed to *Viner* v. *Francis* (2 Cox 190); and I think it is obviously an erroneous decision, and contrary to every other case. Per Malins, V.-Ch., in *Smith, Re*, 9 L. R., Ch. D., 117, 124; 47 L. J., Ch., 265; 38 L. T. 905; 27 W. R. 132.

23. *Maryport Railway, Re* (32 Beav. 397; 9 Jur, N. S., 1217; 32 L. J., Ch., 811; 11 W. R. 410, 507), not correctly decided, and not therefore followed by Lord Romilly, in *Corpus Christi College, Oxford, Exp.*, 12 L. R., Eq., 334; 41 L. J., Ch., 170.

24. *Mason* v. *Broadbent* (33 Beav. 296) (as to the operation of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42) questioned in *Edmunds* v. *Waugh*, 12 Jur, N. S., 326; 35 L. J., Ch., 234; 14 W. R. 257; 13 L. T., N. S., 739; 33 L. J., Ch., 234; by Kindersley, V.-Ch.

25 *Mason, Re, Smithett, Exp.* (19 W. R. 1025; 12 L. R., Eq., 111; 24 L. T., N. S., 869), not followed by Malins, V.-Ch., in *Evans, Re*, 20 W. R. 695; 41 L. J., Ch., 512; 7 L. R., Ch., 609; 26 L. T., N. S., 815.

26. *Mather* v. *Fraser* (25 L. J., Ch., 361; 4 W. R. 387; 2 Kay. & J. 536; 2 Jur., N. S., 902) approved in *Moore and Robinson's Banking Co., Exp., Armitage, Re*, 14 L. R., Ch. D., 379; 49 L. J., Bky., 60; 42 L. T. 443; 28 W. R. 924.

27. *Mather* v. *Fraser* (2 Kay & J. 536) approved of by Campbell, C., in *Haley* v. *Hammersley*, 7 Jur., N. S., 765, 767; 3 De G. F. & J. 587; 30 L. J., Ch., 771; 9 W. R. 562; 4 L. T., N. S., 269.

28. *Mather* v. *Fraser* (2 Jur., N. S., 902, 903). *Dalton* v. *Whittem* (3 Q. B. 961; 6 Jur., 1063) is a case at common law, to show that fixtures cannot be distrained. Although Wood, V.-Ch., in *Mather* v. *Fraser* (2 Jur., N. S., 902, 903), thought that fixtures could not be distrained, there is a long series of authorities to the contrary. Per Willes, J., in *Beck* v. *Denbigh*, 6 Jur., N. S., 998.

1. *Matthew* v. *Hanbury* (2 Vern. 187). The dictum to this case that the Court may aid the executor of a party culpable, where it would not have aided the party culpable himself, is not law. Per Lord Selborne, C., in *Ayerst* v. *Jenkins*, 21 W. R. 878; 29 L. T., N. S., 126; 42 L. J., Ch., 690.

2. *Matthews* v. *Blowsome* (33 L. J., Q. B., 209; 12 W. R. 795) doubted in *Steele* v. *McKinlay*, 5 L. R., App. Cas., 754; 43 L. T. 358; 29 W. R. 17.

3. *Maud, Exp., Hodges' Distillery Co*, *Re* (19 W. R. 113; 6 L. R., Ch., 51; 40 L. J., Ch, 21; 23 L. T., N. S., 749), followed in *James, Exp., Gibson & Co., Re*, 5 L. R., Ir., 139.

4. *Maxwell* v. *Mitchell* (1 Ir. Eq. R. 359) doubted in *French* v. *Macale*, 2 Dr. & War. 269; 1 Con. & L. 459; 4 Ir. Eq. R. 573.

5. *May* v. *Bennet* (1 Russ. 370) adopted in *Carmichael* v. *Gee*, 5 L. R., App. Cas., 588; 49 L. J., Ch., 829; 43 L. T. 227; 29 W. R. 293; 11 L. R., Ch. D., 891; 48 L. J., Ch., 657; 27 W. R. 843; 40 L. T. 663.

6. *May* v. *Bennett* (1 Russ. 370). With respect to the case of *May* v. *Bennett*, I cannot go quite so far. I say nothing in disparagement of that authority whatever; it is distinguishable from the present case; at the same time I will take leave to say, with the greatest possible respect for the learned judge who decided it (the late Lord Gifford), that if I had had to decide it, I think I should have come to a different conclusion from that at which he arrived. Per Lord Brougham, in *Baker* v. *Baker*, 4 Jur., N. S., 491, 493.

7. *Maycock, Re* (11 W. R. 1094), erroneous. See *Lovell, Exp. & Re*, 13 L. T., N. S., 451; 1 L. R., Ch., 134; 35 L. J., Bky., 14; 14 W. R. 186; 13 L. T., N. S., 118.

8. *May* v. *Skey* (16 Sim. 588). One adverse case was cited which I must notice, *May* v. *Skey*, the marginal note being, "A. having gone abroad, and left his wife unprovided for, the plaintiff lent her money to purchase necessaries, and she applied it accordingly —Held, that the plaintiff could not sue for the money in a court of equity." But it appears that the Vice-Chancellor who decided that case, not holding that there was not a debt due from A. to the plaintiff which might be recovered, proceeded upon the notion that this was a legal debt, the payment of which could not be directed by a court of equity. His Honour more fully explains this as his *ratio decidendi* in the subsequent case of *Hirst* v. *Tolson* (16 Sim. 620). But this is clearly erroneous, that no action at law could be maintained, for such a demand was considered too clear for argument in the recent case of *Knox* v. *Bushell*, 3 C. B., N. S., 334. Per Campbell, C., in *Jenner* v. *Morris*, 7 Jur., N. S., 375, 376.

9. *May* v. *Skey* (16 Sim. 588) is no longer law, and was overruled by *Jenner* v. *Morris*, 3 De G. F. & J. 45; 9 W. R. 391. Per Lord Romilly, M. R., in *Deare* v. *Soutten*, 18 W. R. 203, 204.

10. *Mayer* v. *Murray* (8 L. R., Ch. D., 424; 47 L. J., Ch., 605; 26 W. R. 690) commented on in *Symons, Re*, 21 L. R., Ch. D., 757; 46 L. T. 684; 30 W. R., 874.

11. *Mayott* v. *Mayott* (2 Bro. C. C. 125). "Head-note incorrect" in *Parker, Re, Barker* v. *Barker*, 17 L. R., Ch. D., 262; 50 L. J., Ch., 539; 44 L. T. 885; 29 W. R. 855.

12. *Mealis* v. *Mealis* (5 Ves. 517. n.; Dick. 373). *Quære* if not same case as *Ellis* v. *Ellis*, quoted in 5 Madd. 154.

13. *Mellish* v. *Vallins* (2 John. & H. 194; 8 Jur., N. S, 864; 10 W. R. 241; 6 L. T., N. S., 215). The Amendment Act, 30 & 31 Vict., c. 69, has done away with this decision. Per Malins, V.-Ch., in *Lewis* v. *Lewis*, 12 L. R., Eq., 218, 224; 41 L. J., Ch., 195; 25 L. T. 555; 20 W. R. 141.

14. *Mellor's Policy Trusts, Re* (6 L. R., Ch. D., 127; 7 Ch. D. 200; 47 L. J., Ch., 246; 26 W. R. 309), not followed in *Adams' Policy Trusts, Re*, 23 L. R., Ch. D., 525; 52 L. J., Ch., 642; 48 L. T. 727; 31 W. R. 810.

15. *Mercers' Co., Exp.* (10 L. R., Ch. D., 481; 48 L. J., Ch, 384; 27 W. R. 424), followed in *Lee and Hemingway, Re*, 24 L. R., Ch. D., 669; 49 L. T. 155; 32 W. R. 226.

16. *Merritt, In the Goods of* (1 Sw. & Tr. 112), considered in *Sotheran* v. *Dening*, 20 L. R., Ch. D., 99.

17. *Semble*, the Court construes a word in one statute by reference to its use in another, in which the context may be different. *Semble*, the Lord Chancellor in *Metropolitan District Railway Co.* v. *Sharpe* (5 L. R., App. Cas., 425) did not intend to lay down any general rule to the contrary. *Spencer* v. *Metropolitan Board of Works*, 22 L. R., Ch. D., 262; 53 L. J., Ch., 252; 47 L. T. 465; 31 W. R. 351.

18. *Metropolitan Board of Works* v. *London and North Western Railway Co.* (17 L. R., Ch. D., 246). The *ratio decidendi* of this case applies to a local board just as it does to an ordinary landowner. As to existing drains, as to those which were made before the defendant board came into existence, they could not be interfered with; and as to those made since, under the circumstances of the case, they would not be interfered with. *Att.-Gen.* v. *Acton Local Board*, 22 L. R., Ch. D., 221; 52 L. J., Ch., 108; 47 L. T. 510; 31 W. R. 153.

19. *Metropolitan Board of Works* v. *McCarthy* (7 L. R., H. L., 243) followed in *Caledonian Railway* v. *Walker's Trustees*, 7 L. R., App. Cas. (Sc.), 259; 46 L. T. 826; 30 W. R. 569.

20. *Meux* v. *Bell* (1 Hare 73) followed in *Hall, Re, Nolan* v. *O'Brien*, 7 L. R., Ir., 180.

21. *Meux's Executors' case* (2 De G. M. & G. 522) distinguished in *Devala Provident Gold Mining Co., Re, Abbott, Exp.*, 22 L. R., Ch. D., 593; 52 L. J., Ch., 434; 48 L. T. 259; 31 W. R. 425.

22. *Meyrick's Charity, Re* (24 L. J., Ch., 669; 1 Jur., N. S., 438), followed in *Att.-Gen.* v. *Manchester* (*Dean and Canons*), 18 Ch. D. 596; 50 L. J., Ch., 562; 44 L. T. 468. Affirmed 18 L. R., Ch. D., 612. n.; 45 L. T. 184.

23. *Michael, Re* (46 L. J., Ch., 651), explained and commented on in *Herbert* v. *Webster*, 15 L. R., Ch. D., 610; 49 L. J., Ch., 620.

24. *Middleton* v. *Reay* (18 L. J., Ch., 153; 7 Hare 106) explained and commented on in *Gadd, Re, Eastwood* v. *Clarke*, 23 L. R., Ch. D., 134; 52 L. J., Ch., 396; 48 L. T. 395; 31 W. R. 417.

25. *Middleton* v. *Spicer* (1 Bro. C. C. 201). The 11 Geo. 4 and 1 Will. 4, c. 40, s. 2, does not affect the rule laid down in this case. *Johnston* v. *Hamilton*, 11 Jur., N. S., 777; 13 W. R. 961; 12 L. T., N. S., 822.

26. *Midland Railway Co., Re* (34 Beav. 525;

34 L. J., Ch., 596). There Sir John Romilly, M. R., said, "If a testator had by his will said, 'I leave all the money I now possess in the 3*l.* per cent. consols to A. B.,' it would, I apprehend, be properly confined to the stock he held at the date of the will." Upon this dictum being cited, Lord Romilly, M. R., said, "That dictum was not necessary to the decision in that case, and now that I hear it read I am not sure that I approve of it." *Wagstaffe* v. *Wagstaffe*, 38 L. J., Ch., 528.

1. *Milbank* v. *Revett* (2 Meriv. 405) is very shortly and very loosely argued. *Tyson* v. *Fairclough*, 2 Sim. & S. 145.

2. *Mildmay* v. *Methuen* (3 Drew. 91). This case was referred to, in which there was a demand for a sum of 10,000*l.* and odd, but from which a deduction of 1,500*l.* and odd was made on investigation of the accounts, and interest was allowed on the balance. The statute (3 & 4 Will. 4, c. 42, s. 28) was referred to and was relied on as entitling the claimant to interest, but the argument seems to have been very curt and brief, and the statement of the case and the circumstances under which the reference was made to an architect to ascertain the amount, are not set forth with that amount of detail which would make the decision in the case satisfactory under any circumstances. No authority was referred to, and the judgment of the Vice-Chancellor (Kindersley) is not a very full one. The impression on the Vice-Chancellor's mind seems to have been that it was a case of debt or sum certain; and he declared that the claimant was entitled to interest at 4 per cent. from the date of his demand. It does not appear from the report whether it was a debt certain or a sum certain payable at a certain day;—there is not a word about that in the argument. But the Vice-Chancellor appears to have been influenced by the consideration of the 29th section of the statute; which enables the jury on the trial of any issue, or on any inquisition of damages, to give damages in the nature of interest, over and above the value of the goods at the time of conversion or seizure, and over and above the money recoverable. But that is a special clause applicable to trespass and trover, and to policies of assurance; with reference to which last, interest had, in the older cases, been allowed. The Vice-Chancellor seems to have considered that the 29th section assisted him in coming to a conclusion upon the construction of the 28th section. But I am quite at a loss to understand the bearing of that in any way; for the 29th section does not deal with sums certain at all; except that sums assured may or may not be a sum certain. I do not consider that the decision in that case is satisfactory, or one which ought to guide me in coming to a conclusion in this case; if, independently of it, I should come to a different conclusion, which, under all the circumstances of this case, I certainly should come to. The circumstances of that case are not set forth, and there is nothing to explain what the nature of the deduction was; but even supposing that I could treat the present as a case within the 28th section, I do not find that that section is imperative. It merely empowers a jury, if they shall think fit," to allow interest at a rate not exceeding a certain amount. Those words give a discretion to the jury to say whether the case is, under all the circumstances of it, one in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section. Per Hall, V.-Ch., in *Hill* v. *South Staffordshire Railway Co.*, 43 L. J., Ch., 556, 561; 18 L. R., Eq., 154.

3. *Mildred* v. *Austin* (8 L. R., Eq., 220) disapproved of by Malins, V.-Ch., in *Cork (Earl)* v. *Russell*, 13 L. R., Eq., 210, 214; 41 L. J., Ch, 226; 26 L. T. 230; 20 W. R. 164.

4. *Miller* v. *Miller* (8 L. R., Eq., 499) dissented from in *Noyes* v. *Crawley*, 10 L. R., Ch. D., 31; 48 L. J., Ch., 112; 27 W. R. 109; 39 L. T. 267.

5. *Millican* v. *Vanderplank* (11 Hare 136) distinguished in *Osborne* v. *Forcman*, 8 De G. M. & G. 122; 2 Jur., N. S., 361; 25 L. J., Ch., 340; 4 W. R. 396. Affirmed *sub. nom. Barlow* v. *Osbourne*, 6 H. L. Ca. 556; 4 Jur., N. S., 367; 27 L. J., Ch., 308; 6 W. R. 315.

6. *Mills, Exp., Tew, Re* (8 L. R., Ch., 569; 28 L. T. 606; 21 W. R. 557), approved in *Taylor, Exp., Grason, Re*, 12 L. R., Ch. D., 366; 41 L. T. 6; 28 W. R. 205.

7. *Mills* v. *Farmer* (19 Ves. 491) observed upon in *Aria* v *Emanuel*, 9 W. R. 366.

8. *Mills* v. *Jennings* (13 L. R., Ch. D., 639; 49 L. J., Ch., 209; 42 L. T. 169; 28 W. R. 349) distinguished in *Andrews* v. *City Permanent Benefit Building Society*, 44 L. T. 641.

9. *Mills* v. *Trumper* (1 L. R., Eq., 671; 12 Jur., N. S., 329; 14 W. R. 630; 14 L. T., N. S., 220), Stuart, V.-Ch., apportionment of rents, reversed. If *Brown* v. *Candler* (9 L. J., Ch., 212) had been called to the attention of the learned Vice-Chancellor, he would, no doubt, have followed it. That authority is conclusive. The 4 & 5 Will. 4, c. 22, does not apply, as none of the demises were in writing, and the 11 Geo. 2, c. 19, does not apply, because they did not determine on the death of the tenant for life. Per Giffard, L. J., in *Mills* v. *Trumper*, 4 L. R., Ch., 320, 322; 17 W. R. 428; 20 L. T., N. S., 384.

But, independently of principle, the case was concluded by the authority of *Brown* v. *Candler*, which was a decision of the Lord Chancellor. No attempt had been made to distinguish that case from the present, but it did not appear to have been cited before the Vice-Chancellor. Per Selwyn, L. J. *Ib.*

10. *Milltown (Lord)* v. *Stuart* (8 Sim. 34) commented on and not followed in *Secar* v. *Webb*, 52 L. J., Ch., 832; 49 L. T. 94; 31 W. R. 837. Affirmed 49 L. T. 481; 25 L. R., Ch. D., 84; 53 L. J., Ch., 464; 32 W. R. 351.

11. *Milnes* v. *Gery* (14 Ves. 400) followed in *Vickers* v. *Vickers*, 4 L. R., Eq., 529; 36 L. J., Ch., 946.

12. *Milroy* v. *Lord* (7 L. T., N. S., 178; 4 De G. F. & J. 264) followed in *Bottle* v. *Knocker*, 25 W. R. 209; 35 L. T., N. S., 545; 46 L. J., Ch., 159.

13. *Milroy* v. *Lord* (4 De G. F. & J. 264) followed in *Breton's Estate, Re, Breton* v. *Woollven*, 17 L. R., Ch., 416; 50 L. J., Ch., 369; 44 L. T. 337; 29 W. R. 777.

14. *Milsom* v. *Awdry* (5 Ves. 465) opposed to *Wilmot* v. *Wilmot*, 8 Ves. 10, and contrary to a long line of subsequent authorities, and is no longer a binding authority. Per Malins,

V.-Ch., in *Arnold, Re*, 10 L. R., Eq., 252, 256; 39 L. J., Ch., 875, 876; 23 L. T. 337; 18 W. R. 912.

1. *Milward, Exp., Stanley, Re* (16 L. R., Ch D., 256; 50 L J., Ch., 166; 44 L. T. 73; 29 W. R. 107), explained and followed in *Bennett, Exp., Ward, Re*, 16 L. R., Ch. D., 541; 44 L. T. 38; 29 W. R. 343.

2. *Minter* v. *Wraith* (10 Sim. 59) is somewhat shaken by the case of *Urquhart* v. *Urquhart*, 10 Sim. 297. Per Wood, V.-Ch., in *Wharton* v. *Barker*, 4 Jur., N. S., 553, 555.

3. *Mirehouse* v. *Scaife* (2 Myl. & Cr. 695) commented on in *Conron* v. *Conron*, 7 H. L. Ca. 168.

4. *Mirrour of Justices.* I may add, that some doubts have been thrown upon the authority of the Mirrour, but it has existed from the time of King Alfred; and in the reports it is spoken of in the highest possible terms, and by Lord Coke as an authority not to be treated lightly. Per Martin, B., in *Tatton* v. *Darke*, 6 Jur, N. S., 983, 984.

5. *Mitchel* v. *Reynolds* (1 P. W. 181). Lord Macclesfield, when chief justice of the Queen's Bench, in the celebrated case of *Mitchel* v. *Reynolds*, described very clearly what are conditions which shall be considered to be invalid; and he said: "All the instances of conditions against law, in a proper sense, are reducible under one of these heads.—1st. Either to do something that is *malum in se*, or *malum prohibitum;* 2ndly. To omit the doing of something that is a duty; 3rdly. To encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." Per Stuart, V.-Ch, in *Wilkinson* v. *Wilkinson*, 12 L R., Eq., 604, 608; 40 L. J., Ch., 242; 24 L. T. 314; 19 W. R. 538.

6. *Mocatta* v *Murgatroyd* (1 P. Wms. 393) followed in *Stevens* v. *Mid-Hants Railway Co., London Financial Association* v. *Stevens*, 29 L. T., N. S., 318.

7. *Mogg* v. *Mogg* (1 Meriv 654) distinguished in *Dias* v. *De Livera*, 5 L. R., App. Cas., 123; 49 L. J., P. C., 26; 42 L. T. 267.

8. *Molyneux's Estate, Re* (6 L. R., Eq., 411), discussed in *King* v. *Lucas*, 23 L. R., Ch. D., 712; 49 L. T. 216; 31 W. R. 904; 53 L. J., Ch., 64.

9. *Montagu* v *Inchiquin* (*Lord*) (32 L. T. 527; 23 W. R. 591) distinguished in *Johnson, Re*, 26 L. R., Ch. D., 538; 53 L. J., Ch., 645; 32 W. R. 634.

10. *Montague* v. *Kater* (8 Exch. 507; 22 L. J., Exch., 154). A case of great authority. Per Lord St. Leonards, in *Saunders* v. *Evans*, 7 Jur., N. S., 1293, 1296.

11. *Montague* v. *Kater* (8 Exch. 507) approved of. I am convinced that the conclusion of the Court of Exchequer in that case was as right in law as it was plainly agreeable to good sense and justice. Per Knight Bruce, L. J., in *Evans* v. *Saunders*, 6 De G. M. & G. 654, 666.

12. *Montgomery* v. *Montgomery* (3 J. & L. 47; 8 Ir. Eq. Rep. 740) explained in *Woodhouse* v. *Herrick*, 1 Kay & J. 352; 24 L. J., Ch., 649; 3 W. R. 303; 3 Eq. Rep. 817.

Lord St. Leonards did not disapprove of the rejection in a devise like the present, of creating a tenancy in common, but of the cases where, although words of limitation were superadded to the word "issue," as in a devise to one for life, with remainder to his issue, and their heirs, it has still been held that the issue took not as purchasers, but by descent through the first taker. *Ib.*

13. *Moneypenny* v. *Moneypenny* (4 Kay & J. 174; 4 Jur., N. S., 873; 27 L. J., Ch., 369) reversed on appeal to the Lord Chancellor, 5 Jur., N. S., 253; 28 L. J., Ch., 303; 3 De G. & J 572. The principles upon which covenants are to be construed, are elaborately and lucidly laid down and illustrated in the judgment of Lord Chancellor Chelmsford, in the late case of *Moneypenny* v. *Moneypenny*, in which he overruled (I think very properly) the judgment of two common law judges, who had departed from these principles. Per Lord Campbell, C., in *Pigott* v. *Stratton*, 29 L. J., Ch., 1, 8

14. *Molton* v. *Camroux* (2 Exch. 487. S. C. in error, 4 Exch. 17) observed upon in *Price* v. *Berrington*, 3 Macn. & G. 486; 15 Jur. 999.

15. *Moor* v. *Raisbeck* (12 Sim. 123) observed upon in *Fenn* v. *Death*, 2 Jur., N. S., 700; 23 Beav. 73; 4 W. R. 828.

16. *Moore* v. *Faulkner* (1 Anstr. 11). No good reason can be given why the contract should be considered binding upon the ancestor, and not upon the heir. *Jones* v. *Kearney*, 1 Dr. & War. 159; 1 Con. 34; 4 Ir. Eq. R. 74.

17. *Moore* v. *Moore* (1 Phillimore 375, 406) observed upon in *Cutto* v. *Gilbert*, 9 Moo. P. C. 131.

18. *Moores* v. *Choat* (8 Sim. 508; 8 L. J., N. S., Ch., 128; 3 Jur. 220) approved in *Robinson* v. *Rosher*, 1 Y. & Coll. C. C. 7; 5 Jur. 1006.

19. *Moores* v. *Choat* (8 Sim. 508; 8 L. J., Ch., 128), which overruled, or, at all events, displaced the authority of the cases of *Lucas* v. *Comerford*, 1 Ves. J. 235; 3 Bro. C. C. 166; and *Flight* v. *Bentley*, 7 Sim. 149; 4 L. J., Ch, 262, has been followed in all the subsequent cases, excepting only *Saunders* v. *Benson*, 4 Drew. 350, where the bill had been dismissed upon other grounds. Per Turner, L. J., in *Cox* v. *Bishop*, 3 Jur., N. S., 499, 500; 26 L. J., Ch., 389, 394.

20. *Moorhouse* v. *Lord* (9 Jur., N. S., 677; 32 L. J., Ch., 295; 11 W. R. 637; 8 L. T., N. S., 212). The opinion of Lord Kingsdown, given in his judgment in this case, as to the necessity of a settlement of many doubtful points in the law of domicil, referred to. See *Mitchell, Re*, 9 L. T., N. S., 282.

21. *Mores* v. *Mores* (6 Hare 127) not followed in *Russell* v. *Lucy*, 18 L. J., N. S., Ch., 464.

22. *Morgan* v. *Knight* (9 L. T. 803; 12 W. R. 428; 15 C. B., N. S., 669) followed in *Watson, Exp., Roberts, Re*, 12 L. R., Ch. D., 380; 41 L. T. 516; 28 W. R. 205.

23. *Morgan* v. *Malleson* (39 L. J., Ch., 680; 10 L. R., Eq., 475; 23 L. T. 336; 18 W. R. 1125) doubted by Bacon, V.-Ch., in *Warriner* v. *Rogers*, 42 L. J., Ch., 581; 16 L. R., Eq., 340; 28 L. T. 863; 21 W. R. 766.

24. *Morgan* v. *Malleson* (39 L. J., Ch., 680; 10 L. R., Eq., 475; 23 L. T. 336; 18 W. R. 1125) opposed to *Milroy* v. *Lord*, 4 De G. F. & J. 264; 31 L. J., Ch., 728; and to *Warriner* v. *Rogers*, 42 L. J., Ch., 581; 16 L. R., Eq., 340; 28 L. T. 863; 21 W. R. 766. Per Jessel,

M. R., in *Richards* v. *Delbridge*, 43 L. J., Ch., 459, 461; 18 L. R., Eq., 11; 22 W. R. 584.

1. *Morgan* v. *Scudamore* (2 Ves. J. 313; 3 Ves. 195) and *Barry* v. *Stawell* (Fl. & K. 1; 3 Ir. Eq. R. 18) observed upon in *Bowyer* v. *Beamish*, 2 J. & L. 228; 7 Ir. Eq. R. 7.

2. *Morison* v. *Turnour* (18 Ves. 175) incorrectly reported. *Sansom* v. *Prole*, 12 L. J., N. S., Ch., 25.

3. *Morley, Exp.* (8 L. R., Ch., 1026; 43 L. J., Bky., 28; 29 L. T. 442; 21 W. R. 940), approved in *Butcher, Exp., Mellor, Re*, 13 L. R., Ch D., 467; 28 W R. 484.

4. *Morrice* v. *England* (*Bank of*) (3 Swan 573) followed in *Dollond* v. *Johnson*, 18 Jur. 767; 23 L. J., Ch, 637.

5. *Morris's case, Oriental Commercial Bank, Re* (41 L. J., Ch., 11; 7 L. R, Ch., 200, 25 L. T., N. S., 443; 20 W. R. 25. Reversing 40 L. J., Ch., 520; 24 L. T, N S., 699; 19 W R. 944). With regard to *Morris's case*, I own I think the determination of that case cannot subsist with the determination at which your lordships seem now likely to arrive on the present appeal, and I myself think that the decision in *Morris's case* proceeded upon a construction of this Act of Parliament which I am unable to accept. Per Lord Cairns, in *Webb* v. *Whiffin*, 42 L. J., Ch., 161, 173; 5 L. R., H. L., 711.

6. *Morse* v. *Slue* (1 Vent. 190, 238; Sir T. Raym. 220; 1 Keble 806; 1 Mod. 85: 3 Keble 72, 112, 135; 2 Lev. 69) is a very obscure case. The great question there was, whether the common law liability of a carrier extended to a carrying beyond seas. Per Williams, J, in *Blaikie* v. *Stembridge*, 6 C. B, N. S., 894, 899

With respect to *Morse* v. *Slue*, 1 Vent. 238, it was founded upon a contract to carry goods actually delivered to and in the custody of the master on board the ship, and he was bound, as he would have been here if a bill of lading had been given for the injured pans, to deliver the goods in the state in which he received them, except prevented by the act of God or the Queen's enemies, or other expressly excepted peril Accordingly, in Abbott on Shipping, Part 2, ch. 2 (10th edit), p. 91, referring to *Morse* v. *Slue*, the law is laid down as follows: "It is true that the master also is answerable for his own contract; for, in favour of commerce, the law will not compel the merchant to seek after the owners and sue them, although it gives him the power to do so, but leaves him a twofold remedy against the one or the other." Per Willes, J. *Ib.* 909, 910.

7. *Morton* v. *Woods* (4 L. R., Q. B., 293; 38 L. J., Q. B., 81; 18 L. T. 791; 17 W. R. 414; 9 B. & S. 650) explained and followed in *Punnett, Exp., Kitchen, Re*, 16 L. R., Ch. D., 226; 50 L. J., Ch., 212; 44 L. T. 226; 29 W. R. 129.

8. *Morton* v *Woods* (4 L. R., Q. B., 293) explained in *Queen's Benefit Building Society, Exp., Threlfall, Re*, or *Blake, Exp., Threlfall, Re*, 16 L. R., Ch. D., 274; 50 L. J., Ch., 318; 44 L. T. 74; 29 W. R. 128. Reversing 42 L. T. 596; 28 W. R. 708.

9. *Morton* v. *Woods* (4 L. R., Q. B., 293) explained in *Jackson, Exp., Bowes, Re*, 14 L. R., Ch. D., 725; 43 L. T. 272. Reversing S. C. *nom. Whitehaven* (*Bank of*), *Exp., Bowes, Re*, 42 L. T. 409; 28 W. R. 523.

10. *Morman* v. *Thompson* (3 Hagg. 239). Judgment observed upon by Lord Cairns, C., in *Willock* v. *Noble*, 44 L. J., Ch., 345, 349; 7 L. R., H. L., 580; 32 L. T. 419; 23 W. R. 809.

11. *Moss* v. *Gallimore* (Doug. 279), not to be extended. *Wilson, Exp.*, 2 Ves. & B. 252; 1 Rose 444.

12. *Moseley's Reports*. As to these reports see 3 Anstr. 861; 19 Ves. 488. n.; 1 Meriv. 92.

13. *Moseley's Trusts, Re* (11 L. R., Eq., 499; 40 L. J., Ch., 275; 24 L. T. 260; 19 W. R. 431), disapproved of by Jessel, M. R, in *Hale* v. *Hale*, 3 L. R., Ch. D., 643, 648; 35 L. T. 933; 24 W. R. 1065.

14. *Moseley's Trusts, Re* (11 L. R., Eq., 499; 40 L. J., Ch., 275; 24 L. T. 260; 19 W. R. 431), not followed in *Pearks* v. *Moseley*, 5 L. R., App. Cas., 714; 50 L. J., Ch., 57; 43 L. T 449; 29 W. R. 1.

15. *Moss* v. *Harter* (2 W. R. 540; 2 Sm. & Giff. 458), and Lord St. Leonard's comments upon it ("Sugden on Powers," 8th ed., p. 8306), observed upon in *Clarke's Estate, Re, Maddick* v. *Marks*, 14 L. R., Ch. D., 422; 49 L. J., Ch., 586; 40 L. T. 49; 28 W. R. 753. Affirming 49 L. J., Ch., 205; 28 W. R 342.

16. *Mostyn* v. *Brooke* (33 Beav. 457) (compromises sanctioned by the Court of Chancery) reversed on appeal 2 De G. J. & S. 373, and afterwards it was brought by appeal to the House of Lords, where no counsel appeared for the respondents, and the decision of the Lords Justices was reversed. This reversal did not effect the law as laid down in the courts below, but proceeded on the opinion of the House that, in fact, there had not been any concealment of documents, or any misrepresentation, when the arrangements, which the suit sought to set aside, had been agreed upon. *Mostyn* v *Brooke*, 4 L. R., H. L., 304.

17. *Motley* v *Downman* (3 Myl. & Cr. 1). The judgment in this case acted upon in *Collins Co.* v. *Reeves*, 4 Jur., N. S., 865.

18. *Moult, Exp* (1 Mont. 321; 1 Dea. & Ch. 44). I own that at first I was very much perplexed, but upon the whole I have come to this conclusion, that *Moult, Exp.*, ought not to be overturned. That really is the question for us —ought *Moult, Exp*, to be supported or overturned? Now *Moult, Exp.*, was very fully considered by the learned judge who determined that case, and there it was held that the double proof ought not to be allowed. I called upon Mr. De Gex to distinguish upon principle *Moult, Exp.*, from *Hinton, Exp.*, De Gex, 550, and with all his learning and ability I think that he has failed in doing so. He only says that *Moult, Exp.*, rests upon an arbitrary rule, which ought not to be extended. Now, I must suppose that it rests upon some principle; and upon whatever principle it rests, that principle must apply as well to *Hinton, Exp.*, as to *Moult, Exp.* I cannot distinguish between the case of one member of a firm, who is a sole trader in a separate business, and two members of a firm carrying on a separate business, all the members of the separate firm being members of the joint firm; it is impossible, I think, to draw a distinction between the cases. That being so, I think that Sir J. L. Knight Bruce, when Vice-Chancellor, properly decided *Hinton, Exp.*, and although he has changed his opinion, and has been disposed since to express an opinion dissenting from it, I should say, in this instance, first thoughts were best, and that he did

well in considering *Moult, Exp.*, as a sound authority, and in deciding *Hinton, Exp.*, as it was decided. That case of *Moult, Exp.*, was decided a good many years ago; it has been considered and acted upon as law ever since, and I think that we should not be justified in overturning it. Per Chelmsford, C., in *Goldsmid* v. *Cazenove*, 5 Jur., N. S., 1230, 1232; 29 L. J., Bky., 17; 7 H. L. Ca. 785. Affirming S. C. *nom. Goldsmid, Exp*, 2 De G. & J. 67; 2 Jur., N. S., 1106; 25 L. J., Bky., 25.

1. *Mounsey* v. *Blamire* (4 Russ. 384) disapproved of in *Smith* v. *Butcher*, 10 L. R., Ch. D., 113; 48 L. J., Ch., 136; 27 W. R. 281.

2. *Mounsey* v. *Burnham* (1 Hare 15, 22) not followed by Lord Romilly, M.R., in *Finch* v. *Westrope*, 24 L. T., N. S., 412; 12 L. R., Eq., 24, 25; 40 L. J., Ch., 441; 19 W. R. 672.

3. *Mountford* v. *Keene* (19 W. R. 708; 24 L. T. 925). But there is one case, and one only —*Mountford* v. *Keene*—before the Master of the Rolls, in which, as reported, the broad proposition relied on in this case appears to have been laid down. That case is only reported in the Weekly Reporter, and the material part of it is as follows. [His lordship referred to the report.] It is not probable that the Master of the Rolls intended to lay down that which he is here reported to have said wholly irrespective of the consideration that "there was a set of relatives quarrelling over the poor enfeebled semi-paralytic old man," and of the other circumstances in that case, which might have well warranted the conclusion that it was not the deliberate act of a person understanding sufficiently the nature of what he was doing. It could not, at all events, have been intended by the Master of the Rolls to have overruled his own very elaborate judgment in *Toker* v. *Toker*, 31 Beav. 629, affirmed as that decision was by the Court of Appeal, 3 De G. J. & S. 487. Per James, L. J., in *Hall* v. *Hall*, 21 W. R. 373, 374; 8 L. R., Ch., 430.

4. *Mountstephen* v. *Lakeman* (in Q. B., 39 L. J., Q. B., 375; 5 L. R., Q. B., 613; 18 W. R. 1001; in Exch. Ch., 41 L. J., Q. B., 67; 7 L. R., Q. B., 196; 20 W. R. 117; in Dom. Proc., 43 L. J., Q. B., 188; 7 L. R., H. L., 17; 30 L. T. 437; 22 W. R. 617). The Statute of Frauds has said that if one man promises to pay the debt of another, the promise is void unless it is in writing; and no one doubts that that is the law. It appeared to me upon principle so plain that a promise like this is not within the Statute of Frauds, that I expressed perhaps rather too decided an opinion in the early part of the opening of the case; but I am very glad to find that that which then occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has, however, been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent judges known on the bench, sitting in banc., Mr. Justice Bayley and Mr. Justice Parke (afterwards Lord Wensleydale), in the case of *Thomas* v. *Cooke*, 8 B. & C. 728, and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that, in a later case of *Green* v. *Creswell*, 10 A. & E. 453; 2 P. & D. 430; 9 L. J., Q. B., 150, the same Court, constituted at that time of other judges, had taken a different view—and a view which if it had been maintained, I should have followed very reluctantly, if I had been obliged to follow it at all. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader* v. *Kingham*, 13 C. B., N. S., 344; 32 L. J., C. P., 108, when the full number of judges was present, the case of *Green* v. *Creswell* was considered and was overruled, and the law, as laid down by *Thomas* v. *Cooke*, restored. The learned judges commented upon those cases, and said that the law was accurately laid down in *Thomas* v. *Cooke*. I entirely approve of that expression of opinion. I accordingly decide that, where a man induces another man to enter into an engagement by a promise to indemnify him against liability, an agreement of that nature is not within the Statute of Frauds, and does not require to be in writing. This is a case in which the father induced his son to guarantee the debt of his son-in-law, upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him, and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come to his hands. The force of the decision in *Reader* v. *Kingham*, 13 C. B., N. S., 344; 32 L. J., C. P., 108, was somewhat shaken by the opinion expressed by Blackburn, J., in *Mountstephen* v. *Lakeman*. However, I am glad to find that *Mountstephen* v. *Lakeman* was overruled, not only by the Court of Exchequer Chamber but in the House of Lords. Therefore, the law is restored to the plain and reasonable ground upon which it was put in *Reader* v. *Kingham*. Per Malins, V.-Ch., in *Wildes* v. *Dudlow*, 44 L. J., Ch., 341, 343; 19 L. R., Eq., 198; 23 W. R. 435.

5. *Moylan Re* (16 Beav. 220):—Held, not to be inconsistent with the former authorities, and approved of in *Dunlevie* v. *Hort*, 6 Ir. Ch. R. 99.

6. *Mozley* v. *Alston* (16 L. J., N. S., Ch., 217; 11 Jur. 315; Ph. 790). The rule laid down in this case as to the interference of the Court in the internal management of the company, followed in *Macdougall* v. *Gardiner*, 45 L. J., Ch., 27; 1 L. R., Ch. D., 13, and in *Edwards* v. *Shrewsbury & Birmingham Railway Co.*, 2 De G. & Sm. 537, and in *Yetts* v. *Norfolk Railway Co.* 3 De G. & Sm. 293; 13 Jur. 249; 5 Rail. Ca. 487; and in *Lord* v. *Governor & Co. of Copper Miners*, 2 Ph. 740; 1 H. & Tw. 85; 18 L. J., N. S., Ch., 65; 12 Jur. 1059. Reversing 2 De G. & Sm. 308.

7. *Mumford's claim, Government Security Fire Insurance Co., Re* (14 L. R., Ch. D., 634; 49 L. J., Ch., 452; 42 L. T. 825; 28 W. R. 670), followed in *Appleyard's case, Re Great Australian Gold-mining Co.*, 18 L. R., Ch. D., 587; 50 L. J., Ch., 544; 45 L. T. 552; 30 W. R. 147.

8. *Mudford's claim* (14 L. R., Ch. D., 643; 49 L. J., Ch., 452; 42 L. T. 825; 28 W. R. 670) followed in *Government Security Investment Co.* v. *Dempsey*, 50 L. J., Q. B., 199.

9. *Mulholland* v. *Hendrick* (1 Moll. 359; Beat. 277) reviewed in *Garrett* v. *Besborough (Earl)*, 2 Dr. & Wal. 441; 2 Ir. Eq. R. 183.

10. *Mulkern* v. *Lord* (4 L. R., App. Cas. 182; 48 L. J., Ch., 745; 40 L. T. 594; 27 W. R. 510) distinguished in *Hack* v. *London Provident Building Society*, 23 L. R., Ch. D.,

103; 52 L. J., Ch., 541; 43 L. T. 247; 31 W. R. 392.

1. *Mundy* v. *Howe* (*Earl*) (4 Bro. C. C. 224) explained and commented on in *Wilson* v. *Turner*, 22 L. R., Ch. D., 521; 52 L. J., Ch., 270; 48 L. T. 370; 31 W. R. 438.

2. *Murray* v. *Walter* (Cr. & Ph. 114) followed in *Kearsley* v. *Philips*, 10 L. R., Q. B. D., 465; 52 L. J., Q. B., 269; 48 L. T. 468; 31 W. R. 467.

3. *Murry* v. *Wise* (2 Vern. 564) distinguished and commented on in *Marhant* v. *Twisden*, Gilb. Eq. Rep. 30.

4. *Musgrove, Exp.* (3 M. D. & De G. 386), considered in *Greener*, or *Kirk, Exp. & Re*, 15 L. R., Ch. D., 457; 43 L. T. 184; 29 W. R. 268; 28 W. R. 899.

5. *Mutton, Exp., Cole, Re* (41 L. J., Bky., 57; 14 L. R., Eq., 178; 20 W. R. 882; 26 L. T., N. S., 916), not followed in *Saffery, Exp., Brenner, Re*, 16 L. R., Ch. D., 668; 44 L. T. 324; 29 W. R. 749.

6. *Myers* v. *Perigall* (2 De G. M. & G. 599; 20 L. T., N. S., 229) distinguished in *Ashworth* v. *Munn*, 15 L. R., Ch. D., 363; 28 W. R. 965; 50 L. J., Ch., 107; 43 L. N. T. 553.

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7. *Nash, Exp.* (12 Jur. 494), approved of in *Nash, Exp.*, 13 Jur. 292.

8. *Nash, Re* (16 L. R., Ch. D., 503; 44 L. T. 40; 29 W. R. 294), not followed in *Watson, Re*, 19 L. R., Ch. D., 384; 45 L. T. 513; 30 W. R. 554, and considered in *Ruy, Re*, 47 L. T. 500.

9. *Natal (Bishop), Re* (11 Jur., N. S., 353; 2 Moo. P. C., N. S., 115; 13 W. R. 549; 12 L. T., N. S., 188), explained in *Colenso* v. *Gladstone*, 3 L. R., Eq., 1; 12 Jur., N. S., 971; 36 L. J., Ch., 2; 15 W. R. 29; 15 L. T., N. S., 465.

10. *Natal Investment Co., Re* (1 Hem. & M. 639). If that was a decision that the Court will never wind up a company which has only seven members, I entirely dissent from that view; but I think the learned Vice-Chancellor did not intend so to decide. Per Malins, V.-Ch., in *Sanderson's Patents' Association, Re*, 12 L. R., Eq., 188; 40 L. J., Ch., 519; 19 W. R. 966.

11. *National Exchange Co. of Glasgow* v. *Drew* (2 Macq. H. L. Ca. 103). The dicta of Lord Cranworth and Lord St. Leonards, as stated in this case, with regard to the relation in which a company stands to its directors, in respect to fraudulent representations made by the latter, dissented from in *Royal British Bank, Re, Nicol, Exp.*, 5 Jur., N. S., 205.

12. *National Funds Assurance Co., Re* (10 L. R., Ch. D., 118; 48 L. J., Ch., 163; 27 W. R. 302; 39 L. T. 420), is in no way affected by *Conventry and Dixon's case, Canadian Land Reclaiming and Colonizing Co., Re* (14 L. R., Ch. D., 660; 42 L. T. 559; 28 W. R. 775). The order of Bacon, V.-Ch., declared them to be jointly liable, but this was varied on appeal by declaring them jointly and severally liable. *Flitcroft's case, Exchange Banking Co., Re*, 21 L. R., Ch. D., 519; 31 W. R. 174; 48 L. T. 86; 52 L. J., Ch., 217. Varying 51 L. J., Ch., 525; 46 L. T. 474; 30 W. R. 695.

13. *National Mercantile Bank, Exp.* (15 L. R., Ch. D., 42; 49 L. J., Bky., 62; 43 L. T. 36; 28 W. R. 848), not followed in *Hamilton* v. *Chaine*, 7 Q. B. D. 320; 50 L. J., Q. B., 456; 44 L. T. 764; 29 W. R. 676.

14. *National Mercantile Bank, Exp.* (15 L. R., Ch. D., 42; 49 L. J., Bky., 62; 42 L. T. 64; 28 W. R. 248) distinguished in *Charing Cross Advance and Deposit Bank, Exp., Parker, Re*, 16 L. R., Ch. D., 35; 50 L. J., Ch., 157; 44 L. T. 113; 29 W. R. 204.

15. *National Mercantile Bank, Exp.* (15 L. R., Ch. D., 42; 49 L. J., Bky., 62; 42 L. T. 64, 28 W. R. 848), not followed in *Rolph, Exp., Spindler, Re*, 19 L. R., Ch. D., 98; 51 L. J., Ch., 88, 45 L. T. 482; 30 W. R. 52.

16. *National Mercantile Bank, Exp.* (15 L. R., Ch. D., 42), must be treated as binding authorities only in so far as they decide, that if part of a sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him. *Firth, Exp., Cowburn, Re*, 19 L. R., Ch. D., 419; 51 L. J., Ch., 473; 45 L. T. 120; 30 W. R. 529.

17. *National Provincial Bank* v. *Evans* (51 L. J., Ch., 97) commented on in *Fitzwater, Re, Fitzwater* v. *Waterhouse*, 52 L. J., Ch., 83.

18. *Naylor* v. *Arnitt* (1 Russ. & M. 501) followed in *Fitzpatrick* v. *Waring*, 11 L. R., Ir., 35.

19. *Naylor* v *Arnitt* (1 Russ. & M. 501), where the Court allowed a lease to be granted for ten years by trustees. I do not think that the decision in this case is considered to be good law. There is no case which distinctly overrules it; but in the case of *Wood* v. *Patteson* (10 Beav. 541, 541) Lord Langdale said: "As to *Naylor* v. *Arnitt*, I should be afraid to act on it; for if the trustees, unauthorised by the will, have the power of leasing for ten years, I see no reason why they should not have power to lease for sixty." After that expression of opinion, I think that *Naylor* v. *Arnitt* is not a case to be followed. Per Wickens, V.-Ch., in *Shaw's Trusts, Re*, 12 L. R., Eq., 124, 126; 19 W. R. 1025; 25 L. T., N. S., 22, 23.

20. *Neale* v. *Davies* (5 De G. M. & G. 258). This case has been relied on by the defendant Roche as an authority to the contrary, and the language of Turner, L. J., affirming the decision of Wood, V.-Ch., if taken to apply generally, and not merely to the facts of that particular case, would seem to conflict with what I have mentioned as the general principle. Knight Bruce, L. J., differed from Turner, L. J., and expressed his dissent in very unequivocal language. He was of opinion that persons accepting a fund upon trust are bound to perform the trusts which they undertook, even if by so doing they should become personally liable to an adverse claimant, and he was of opinion that they would not be thus liable by reason of paying over the fund to their *cestuis que trustent*. In this difference of opinion I would venture to say that the view of Knight Bruce, L. J., seems more in accordance with the principle which the authorities appear to have established. I should, notwithstanding, of course be bound to follow the actual decision in the case, if it were not distinguishable from the present. Per Chatterton, V.-Ch., in *Neligan* v. *Roche* Ir. R., Eq., 332

1. *Neeson* v. *Clarkson* (2 Hare 163) commented upon in *Parkinson* v. *Hanbury*, 2 L. R., H. L., 1, 17, 18, by Lord Westbury.

2. *Neilson* v. *Betts* (5 L. R., H. L., 1) most undoubtedly decided the general principle that, upon a decree against a party for the infringement of a patent, the patentee is not entitled both to an account of profits and an inquiry into damages. That principle applies generally and without any distinction at all. It applies to every case of infringement; and, therefore, it must be taken to have settled conclusively that point, that the patentee must, in all these cases where he has a decree, elect whether he will have an account of profits, or an inquiry into damages; he cannot have both. Per Lord Chelmsford, in *De Vitre* v. *Betts*, 6 L. R., H. L., 319, 321; 42 L. J., Ch., 841; 21 W. R. 705.

3. *Neilson* v. *Monro* (41 L. T. 209; 27 W. R 936) followed in *Stannard, Re, Stannard* v. *Burt*, 52 L. J., Ch., 355; 48 L. T. 660

4. *Nevis* v. *Levene* (Ambl. 237). In this case it is said that partition was to be at the expense of both parties; but Mr. Beames (Costs, 48 n) suggests that this may be the same case with *Norris* v. *Le Neve*, 3 Atk. 82, and that, though stated by Ambl. as a case of partition, it was a case respecting settling boundaries.

5. *New Callao Co., Re* (22 L. R., Ch. D., 484), approved in *Manchester Economic Building Society, Re*, 24 L. R., Ch. D., 488; 53 L. J., Ch., 115; 49 L. T. 793; 32 W. R. 335.

6. *Newland* v. *Champion* (1 Ves. 105) considered in *Law* v. *Law*, 2 Colly. 41; 14 L. J., N. S., Ch., 313; 9 Jur. 745. Affirmed 16 L. J., N. S., Ch., 375; 11 Jur. 463; and see extracts from the Record of *Newland* v. *Champion* in 2 Colly. 46. n.

7. *Newland* v. *Shephard* (2 P. W. 194) has been questioned. See *Davis* v. *Davis*, 1 Russ. & M. 648; 1 L. J., N. S., Ch., 155.

8. *Newman* v. *Auling* (3 Atk. 579) overruled. *Torre* v. *Brown*, 24 L. J., Ch., 757; 3 H. L. Ca. 555.

9. *Newton* v. *Chorlton* (1 W. R. 266; 10 Hare 646) followed in *Forbes* v. *Jackson*, 19 L. R., Ch. D., 615; 51 L. J., Ch., 690; 30 W. R. 652; 48 L. T. 722, and commented on in *Lake* v. *Brutton*, 2 Jur., N. S., 839; 25 L. J., Ch., 842. Affirming 18 Beav. 31; 18 Jur. 412; 23 L. J., Ch., 294.

10. *Newton* v. *Chorlton* (10 Hare 646). There was a case of *Newton* v. *Chorlton*, before myself, to which I think it right to refer, because, although the case itself has not been overruled, the Lords Justices have in another case intimated that they do not concur with the view which I there took, an intimation which, of course, binds me as much as if my decision had been reversed before them. It was a case in which a creditor, after the contract of suretyship, had obtained a security for the debt, which he afterwards parted with. I considered that I ought not to hold that the same principle applied to after-taken securities which applies to those which exist at the date of the contract of suretyship. The Lords Justices have, however, held that the rights of a surety extend to this, and that he is entitled to have the benefit of every after-taken security. The present, however, is a much stronger case, as the security was already taken when the debt was contracted. Were it otherwise, I should not think myself at liberty to follow *Newton* v. *Chorlton*. The surety here cannot have the same title to, or the same effect as, the security of 1850; and the effect of the alteration in the security is to discharge him. Per Wood, V.-Ch., in *Pledge* v. *Buss*, Johns. 663, 668; 6 Jur., N. S., 695, 696.

11. *Newton* v. *Harland* (1 Scott, N. R., 474) considered in *Beddall* v. *Maitland*, 17 L. R., Ch. D., 174; 50 L. J., Ch., 401; 44 L. T. 248; 29 W. R. 484.

12. *Nicholas* v. *Chamberlain* (Cro. Jac. 121). There it was held by all the Court, upon demurrer, that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereto. This case has always been cited with approval. It was expressly approved of by Lord Westbury in *Suffield* v. *Brown* (33 L. J., Chanc., 259), where, though his lordship objects to the decision in *Pyer* v. *Carter* (1 H. & N. 916; 26 L. J., Exch., 258), in which it was held that a right to an existent continuous apparent easement was implicitly reserved in a conveyance by the owner of two houses of the alleged servient house, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first. Per Mellish, L. J., in *Watts* v. *Kelson*, 40 L. J., Ch., 126, 129; 6 L. R., Ch., 166; 24 L. T. 209; 19 W. R. 338.

13. *Nicholl* v. *Nicholl* (2 W. Bl. 1159) observed upon in *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 457; 22 L. J., Ch., 313.

14. *Nicholls* v. *Skinner* (Pre. Ch. 528) misstated See 2 Meriv. 135; 2 Rop. Leg. 470.

15. *Nicholson* v. *Tutin* (2 Kay & J. 18) approved of by Campbell, C., in *Whitmore* v. *Turquand*, 7 Jur., N. S., 377.

16. *Nicholson* v. *Wright* (5 W. R. 431). I cannot say that I should be prepared to follow decision in that case, but I do not mean to give any definitive opinion upon it, as the point is not before me. Per Cranworth, C., in *Pell* v. *De Winton*, 2 De G. & J. 17.

17. *Noel* v. *Bewley* (3 Sim. 103). I think the Lord Chancellor of Ireland has taken an erroneous view, probably because he thought himself bound to follow the last authority on this subject (*Noel* v. *Bewley*), which, sitting in the highest tribunal of appeal, I am at liberty to say was, in my judgment, wrongly decided. *Smith* v. *Osborne*, 6 H. L. Ca. 375, 394; 3 Jur., N. S., 1181, 1183. Per Lord Wensleydale.

18. *Norbury* (*Lord*) v. *Kitchen* (15 L. T. 501; 9 Jur., N. S., 132) explained in *Kensit* v. *Great Eastern Railway Co.*, 27 L. R., Ch. D., 122; 32 W. R. 885; 54 L. J., Ch., 19.

19. *Norman* v. *Baldry* (6 Sim. 621). Observations on this case in *Atkinson* v. *Grey*, 1 Sm. & G. 577; 18 Jur. 282.

20. *Northam* v. *Hurley* (1 E. & B.) distinguished in *Kensit* v. *Great Eastern Railway Co.*, 23 L. R., Ch. D., 566; 52 L. J., Q. B., 608; 48 L. T. 784; 31 W. R. 603. Affirmed 27 L. R., Ch. D., 122; 54 L. J., Ch., 19; 32 W. R. 885.

21. *North British and Mercantile Insurance*

Co. v. *London, Liverpool, and Globe Insurance Co.* (5 L. R., Ch. D., 569; 46 L. J., Ch., 537; 36 L. T. 629) approved and followed in *Darrell* v. *Tibbits*, 5 L. R., Q. B. D., 560; 29 W. R. 66; 50 L. J., Q. B., 33; 42 L. T. 797.

1. *North British Railway Co.* v. *Tod* (12 Cl. & F. 722) followed in *Beardmer* v. *London & North Western Railway Co.*, 1 Macn. & G. 112; 1 H. & Tw. 161; 5 Rail. Ca. 728; 18 L. J., N. S., Ch., 432; 13 Jur. 327.

2. *North Central Waggon Co.* v. *Wales Waggon Co.* (39 L. T. 628) not followed in *Girvin* v. *Grepe*, 13 L. R., Ch. D., 174; 49 L. J., Ch., 63; 41 L. T. 522; 28 W. R. 123.

3. *Northfield Iron and Steel Co., Re* (14 L. T. 695), distinguished in *Great Western Railway Co., Exp., Bushell, Re*, 22 L. R., Ch. D, 470; 52 L. J., Ch., 734; 48 L. T. 196; 31 W. R. 419.

4. *North Yorkshire Iron Co., Re, Richardson, Exp.* (7 L. R., Ch. D., 661; 47 L. J., Ch., 333; 38 L. T. 143; 26 W. R. 367), followed in *South Kensington Co-operative Stores, Re, Seymour, Exp.*, 17 L. R., Ch. D., 161; 50 L. J., Ch., 446; 44 L. T. 471; 29 W. R. 662.

5. *Norton Iron Works, Re* (26 W. R. 53), followed in *Association of Land Financiers, Re*, 16 L. R., Ch. D., 373; 50 L. J., Ch., 201; 43 L. T. 753; 29 W. R. 277.

6. *Norton, Exp., Golden, Re* (21 W. R. 402; 16 L. R., Eq., 397), is in conflict with *Fernie* v. *Young* (14 W. R. 714; 1 L. R., H. L, 63), *Simpson* v. *Holliday* (1 L. R., H. L., 315) and *Fulton* v. *Andrew* (23 W. R. 566; 7 L. R., H. L., 448; 44 L. J., P., 17; 32 L. T. 209), and cannot be supported. Per Baggallay, J. A., in *Morgan, Exp., Simpson, Re*, 2 L. R., Ch. D, 72, 197; 45 L. J., Ch., 36; 34 L. T. 329; 24 W. R. 414.

7. *Norton* v. *Florence Land and Public Works Co.* (7 L. R., Ch. D., 334; 38 L. T., N. S., 377; 26 W. R. 123) overruled by *Florence Land and Public Works Co., Re, Moor, Exp.*, 10 L. R., Ch. D.. 530; 48 L. J., Ch., 157; 27 W. R. 236; 39 L. T. 589.

8. *Norton* v. *London & North-Western Railway Co.* (13 L. R., Ch. D., 268; 41 L. T. 429; 28 W. R. 173) distinguished in *Bonner* v. *Great Western Railway Co.*, 24 L. R., Ch. D., 1; 48 L. T. 619; 32 W. R. 190.

9. *Notley, Exp.* (3 Dea. & Ch. 367; 1 Mont. & A. 46; 3 L. J., N. S., Bky.), confirmed. *Gray, Exp. & Re*, 4 Dea. & Ch. 778; 2 Mont. & A. 283; 4 L. J., N. S., Bky., 70.

10. *Noyes* v. *Crawley* (10 L. R., Ch. D., 31; 48 L. J., Ch., 112; 39 L. T. 266; 27 W. R. 109), as to raising the Statute of Frauds by demurrer impugned. Per Cairn, L. C. *Dawkins* v. *Penrhyn* (*Lord*), 4 L. R., App. Cas., 51; 48 L. J., Ch., 304; 39 L. T. 583; 27 W. R. 173.

11. *Noys* v. *Mordaunt* (2 Vern 581) commented on in *Incledon* v. *Northcote*, 3 Atk. 436.

12. *Nunn* v. *Fabian* (1 L. R., Ch., 35) followed in *Conner* v. *Fitzgerald*, 11 L. R., Ir., 106.

13. *Nutter* v. *Accrington Local Board* (4 L. R., Q. B. D., 375; 48 L. J., Q. B., 487; 40 L. T. 802) distinguished in *Swansea Improvement Co.* v. *Glamorgan County Roads Board*, 41 L. T. 583.

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14. *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. N. S. 548). It was, however, argued, that however much this might be contrary to principle, it was established by the House of Lords in *Oakeley* v. *Pasheller*. We do not think that any such point either arose or was decided in that case. The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in Lindley on Partnership, 3rd ed., p. 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor, Sir Charles Oakeley, was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house which was indebted to Sir Charles, and then by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the Lords we think sufficiently appears from both reports, ill as they are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondents could not be liable for his default except in consequence of some arrangement by which they became his sureties. In the very meagre report of the judgment of the Master of the Rolls in Bligh (10 Bli. N. S., p. 578), he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir Charles, which Kynaston could not be without Sir Charles's consent, "and Sherard's estate surety only." And during the argument in the House of Lords, Lord Lyndhurst points out the difficulty in converting a joint debtor into a surety without the creditor's assent (10 Bli. N. S., p. 586; and 4 Cl. & F., p. 232). He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice (10 Bli N. S, p. 587). And, finally, in the judgment he says, "an arrangement was made between Sir Charles Oakeley and Kynaston' (10 Bli. N. S., p. 589). This would have been quite irrelevant unless Kynaston had become a new debtor, and the other parties, by agreement with Sir Charles, sureties for him. It is impossible to suppose that if Lord Lyndhurst had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (as appears from 10 Bli. N. S., p. 586; 4 Cl. & F., p. 232) there was no previous decision, he would have done it in so perfunctory a manner as he appears to have done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little. It is, however, true, that in *Wilson* v. *Lloyd* (16 L. R., Eq., 60, 70), Bacon, V.-Ch., in citing *Oakeley* v. *Pasheller*, takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three. No English case has actually decided this point if *Oakeley* v. *Pasheller* does not. But

there is an Irish case cited by Mr. Wills, which should be noticed. It is that of *Maingay* v. *Lewis* (3 Ir R., C. L., 495; in error 5. Ir. R., C. L., 229). There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench on demurrer unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which Lawson, J., based his judgment, which turned the scale. After stating the point, he says: "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies of a creditor by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law" (5 Ir. R., C. L., p. 231). So far we quite agree with him; but he adds, "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of Lords in *Oakeley* v. *Pasheller*, and that I ought to follow it implicitly." Had Mr. Justice Lawson thought, as we do, that the decision in *Oakeley* v. *Pasheller* proceeded on the ground that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal. Per Cockburn, C. J., in *Swire* v. *Redman*, 35 L. T., N. S., 470, 471, 472; 1 L. R., Q. B. D., 536, 543; 24 W. R. 1069.

1. *Oates* d. *Markham* v. *Cooke* (3 Burr. 1684) considered and followed in *Davies* v. *Jones*, 24 L. R., Ch. D., 190; 52 L. J., Ch., 720; 49 L. T. 624.

2. *Oakes* v. *Oakes* (9 Hare 666) distinctly overruled in *Morrice* v. *Aylmer*, 44 L. J., Ch., 212; 31 L. T., N. S., 660; 10 L. R., Ch., 148; 23 W. R. 221; and in Dom. Proc., 7 L. R., H. L., 717; 45 L. J., Ch., 614; 34 L. T. 218; 24 W. R. 587.

3. *Oakes* v. *Turquand* (2 L. R., H. L., 325; 36 L. J., Ch., 949; 16 L T., N. S., 808; 16 W. R. 1201) followed in *Houldsworth* v. *City of Glasgow Bank*, 5 L. R., App. Cas. (Sc)., 317; 42 L. T. 194; 28 W. R. 677.

4. *Oates*, *Exp.* (2 M. D. & De G. 234), followed in *Brien*, *Re*, 11 L. R., Ir., 213.

5. *Occleston* v. *Fullalove* (9 L. R., Ch., 147; 43 L. J., Ch., 297; 29 L. T. 780; 22 W. R. 786). The principle of the decision in this case, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix. Per Sir G. Jessel, M. R., in *Goodwin*, *Re*, 17 L. R., Eq., 345, 346; 43 L. J., Ch., 258; 22 W. R. 619.

6. *Ockford* v. *Barelli* (25 L. T. 504; 20 W. R. 116) not followed in *Banner*, *Exp.*, *Blyth*, *Re*, 17 L. R., Ch. D., 490; 44 L. T. 913; 30 W. R. 26; 51 L. J., Ch., 360.

7. *Oddie* v. *Woodford* (3 Myl. & Cr. 584) followed in *Rendlesham* (*Lord*) v. *Robarts*, 23 Beav. 321.

8. *O'Flaherty* v. *M'Dowell* (6 H. L. Ca. 182; 4 Jur., N. S., 33). The opinion in this case of Lord St. Leonards, that the 33 Geo. 2, c. 14 (Ir.), is repealed, so far as banking companies in Ireland are concerned, by 6 Geo. 4, c. 42, dissented from and held by Walsh, M. R, and by Lord Chancellor O'Hagan, that the Act still regulates all banking transactions in Ireland. *Davies* v. *Kennedy*, 17 W. R. 305; 3 Ir. R., Eq, 31, 668.

9. *Ogilvie*, *Exp.* (3 Ves. & B. 133), said to be overruled, arguendo, in *Ellis*, *Exp.*, 2 G. & J. 312; 6 L J, Ch., 44.

10. *Ogilvie* v. *Currie* (18 L. T., N. S., 593; 37 L. J., Ch, 541). In support of the demurrer to this bill, it was argued that the proper remedy for the plaintiff, if he had any remedy, was to proceed by action at law. It has been so often decided that this Court will grant relief in such cases that I should have overruled the demurrer without hesitation were it not for the case of *Ogilvie* v. *Currie*, said to have been decided by Lord Cairns when Lord Chancellor. Having examined the case, it is impossible to say that it does not countenance the argument that this Court ought not to give relief on bills brought against persons to recover back money paid on the faith of false representations. But this is only said in the latter part of the judgment, which deals with that which seems to have been a subordinate point. It is so well settled that this Court will entertain jurisdiction in such cases, that it would be a misfortune indeed to the public if there were any sufficient ground for considering that the jurisdiction is doubtful. Lord Eldon, in *Evans* v. *Bicknell* (6 Ves. 173), has stated it in clear and strong terms. Other great judges have quoted Lord Eldon's language with approbation when enforcing the doctrine. Sir William Grant carried it to a great extent in the remarkable case of *Burrowes* v. *Lock* (10 Ves. 540). In *Green* v. *Barrett* (1 Sim. 45) Sir John Leach overruled a demurrer to a bill by a shareholder to recover back from directors of a joint stock company money paid on false representations. In the case of *Slim* v. *Croucher* (2 Giff. 37. S. C. on appeal 1 De G. J. & S. 415; 2 L. T., N. S., 103) the Lord Chancellor, in affirming my decision, expressed his approbation of the doctrine, and said he should not be sorry to see it extended. Although courts of common law may have jurisdiction in some such cases, there is clearly concurrent jurisdiction in this court. Both the Lords Justices fully concurred in the views stated by the Lord Chancellor in *Slim* v. *Croucher*. So long ago as the case of *Colt* v. *Woollaston* (2 P. W. 154) the Master of the Rolls said, "It is no objection that the parties have their remedy at law, and may bring an action at law for money had and received for the plaintiff's own use, for in cases of fraud the Court of Equity has concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here." In the most recent case, *Ramshire* v. *Bolton* (8 L. R., Eq., 294; 2 L. T., N. S., 50), before Malins, V.-Ch., the jurisdiction was upheld to its full extent. Per Stuart, V.-Ch., in *Hill* v. *Lane*, 23 L. T., N. S., 547, 548; 11 L. R., Eq., 215; 40 L. J., Ch., 41; 19 W. R. 194.

11. *Ogle* v *Morgan* (1 De G. M. & G. 359; 17 Jur. 277. Reversing 19 L. J., N. S., Ch., 531; 14 Jur. 801) followed in *Vaughan* v. *Booth*, 16 Jur. 808.

12. *Oliver* v. *Oliver* (in part) (10 L. R., Ch. D., 765; 48 L. J., Ch. 630; 27 W. R. 657) not

followed in *Gowan, Re, Gowan* v. *Gowan*, 17 L. R., Ch. D., 778; 50 L. J., Ch., 248.

1. *Onions* v. *Cohen* (2 Hem. & M. 361). Dictum of Wood, V.-Ch., in this case, that, "except in the case of *Gwillim* v. *Stone* (14 Ves. 129), there is no instance of a contract being delivered up to be cancelled, unless there was fraud in obtaining the contract itself," disapproved of in *Panama & South Pacific Telegraph Co.*, v. *India-rubber, Gutta Percha, & Telegraph Works Co.*, 32 L. T., N. S., 238; 10 L. R., Ch., 515; 45 L. J., Ch., 121; 23 W. R. 583.

2. *Onions* v. *Tyrer* (1 P. W. 343) distinguished in *Tupper* v. *Tupper*, 1 Kay & J. 665; 1 Jur., N. S., 917.

3. *Orde, Exp., Horsley, Re* (6 L. R., Ch., 881; 40 L. J., Bky., 60; 25 L T. 400; 19 W. R. 1103), distinguished in *Evans, Exp., Baum, Re*, 13 L. R., Ch. D., 424; 49 L. J., Bky., 25; 28 W. R. 500.

4. *Original Hartlepool Collieries Co.* v. *Gibb* (5 L. R., Ch. D., 713; 36 L. T. 433), not followed in *Beddall* v. *Maitland*, 17 L. R., Ch. D., 174; 50 L. J., Ch., 401; 44 L. T. 249; 29 W. R. 484.

5. *Ormond* (*Marquis*) v. *Kynnersley* (5 Madd. 369) disapproved in *Kingham* v. *Lee*, 15 Sim. 396; 16 L. J., N. S., Ch., 49; 11 Jur. 4.

6. *Orr* v. *Union Bank of Scotland* (1 Macq. H. L. Ca. 513). I should be very sorry that what fell from me in this case should be misunderstood. When I said that there might be circumstances of fraud or negligence that would vary the case, what I meant was, that there might be negligence in the circumstances that were the immediate cause of the payment by the bank, as in the case decided in the Common Pleas (*Young* v. *Grote*, 4 Bing. 253, 12 Moore 484) where, when a cheque had been drawn payable to bearer, "fifty pounds," and it had been so badly written, or there had been so large a blank left on the left hand side of the "fifty," that the person who got hold of it was enabled to put in "three hundred and," the Court held, that as that negligence on the part of the drawer had afforded the opportunity for that fraud, which the bank could not have discovered by ordinary diligence, they were absolved from the ordinary liability attaching to the payment of a forged cheque. Per Lord Cranworth, in *British Linen Co.* v. *Caledonian Insurance Co.*, 7 Jur., N. S., 587, 588.

7. *Orrell* v. *Busch* (18 W. R. 588; 5 L. R., Ch., 467; 22 L. T. 61). The rule laid down in this case that, when there are two concurrent suits in different branches of the court relating to the same subject matter, the secondly instituted suit ought to be transferred to the court in which the first suit was instituted, applies even where a decree has been made in the second suit and not in the first. *Lucas* v. *Siggers*, 20 W. R. 458; 7 L. R., Ch., 517; 41 L. J., Ch., 364; 26 L. T., N. S., 651.

8. *Orr-Ewing's Trade Mark, Re* (8 L. R., Ch. D., 794), followed in *Brook, Re*, 26 W. R. 791.

9. *Orwell* v. *Hinchinbrook* (*Lord*) (Reg. Lib. 1772, fol. 252 and 10 Ves. 356.n.) not followed in *Abell* v. *Screech*, 10 Ves. 355.

10. *Osborne* to *Rowlett* (13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365). I should like to consider whether I should adopt the same view." Per Baggallay, L. J., in *Morton and Hallett, Re*, 15 L. R., Ch. D., 143; 49 L. J., Ch., 559; 42 L. T. 602; 28 W. R. 895.

11. *Overhill's Trusts, Re* (1 Sm. & G. 362), followed in *Bentley* v. *Blizard*, 4 Jur., N. S., 652.

12. *Owen* v. *Homan* (3 Macn. & G. 378; 15 Jur. 339). I do not feel myself at liberty to comment upon the propriety or impropriety of a principle which, more than half a century ago, was stated by Lord Eldon in *Samuell* v. *Howarth* (3 Meriv. 272), to have been long established, and which has been continually acted upon since that time, and is well settled and established as any other principle in courts of equity. I think that sometimes the cases are a little open to this observation; that they do not, all of them, especially the later cases, clearly and distinctly show in what way the principle was established and brought to bear. But, undoubtedly, if we look to the earlier cases, amongst which I might cite especially *Oakeley* v. *Pasheller* (10 Bligh 548), the principle is laid down very clearly, that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because, if you sue the surety, you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period. To show that this is the principle, we have only to refer to another class of cases which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal. I say that this doctrine has been always recognised down to a late period, because Lord Truro threw some doubts upon it in the case of *Owen* v. *Homan* (*supra*). But Lord Cranworth, in giving judgment in that case, on appeal to the House of Lords (4 H. L. Ca. 997; 17 Jur. 861), said there could be no doubt about the case before the House, and that he did not think he should have entered into any discussion of the case had it not been for the doubt thrown by Lord Truro upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord Cranworth said that he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established. Per Lord Hatherley, C., in *Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, 7 L. R., Ch., 142, 150, 151; 41 L. J., Ch., 332; 25 L. T. 813; 20 W. R. 253.

13. *Owen's Patent Wheel, Tree, and Axle Co., Re* (22 W. R. 151; 21 L. T., N. S., 672).

followed in *Simon's Reef Consolidated Gold Mining Co., Re*, 31 W. R. 238.

P.

1. *Page* v. *Adam* (4 Beav. 269; 10 L. J., N. S., Ch., 407; 5 Jur. 793) disapproved of in *Forbes* v. *Peacock*, 12 Sim. 528; 13 L. J., N. S., Ch., 46; 7 Jur. 688.

2. *Page* v. *Leapingwell* (18 Ves. 463) followed in *Laurie* v. *Clutton*, 15 Beav. 65; 21 L. J., N. S., Ch., 226; 16 Jur. 825.

3. *Palin* v. *Hills* (1 Myl. & K. 470) cannot be reconciled with the subsequent authorities. *Long* v. *Watkinson*, 17 Beav. 471.

4. *Palmer* v. *Jones* (43 L. J., Ch., 349) approved in *Kitto, Re, Kitto* v. *Luke*, 28 W. R. 411.

5. *Paramour* v. *Yardley* (Plowd. 539) discussed in *Ulrich* v. *Litchfield*, 2 Atk. 372.

6. *Parker* v. *Marchant* (1 Ph. 356) followed in *Cooke* v. *Wagster*, 2 W. R. 434; 18 Jur. 849; 23 L. J., Ch., 496; 2 Sm. & G. 296; 2 Eq. Rep. 789.

7. *Parker* v. *Smith* (1 Col. 608) not followed in *Maddison* v. *Alderson*, 8 L. R., App. Cas., 481; 52 L. J., Q. B., 737; 49 L. T. 303; 31 W. R. 820.

8. *Parker* v. *Whyte* (1 Hem. & M. 167) observed upon in *Fox, Re*, 11 Jur., N. S., 735.

9. *Parkin* v. *Thorold* (16 Beav. 76; 16 Jur. 959). The opinion of Lord Romilly, that after an extension of time, time cannot be taken to be of the essence of the contract, disapproved of in *Barclay* v. *Messenger*, 43 L. J., Ch., 449; 30 L. T. 350; 22 W. R. 522.

10. *Parsons* v. *Tinling* (2 L. R., C. P. D., 119; 46 L J., C. P., 230; 35 L. T. 851; 25 W. R. 255, which was overruled by the Court of Appeal, 2 L. R., Exch. D., 349) recognised and re-established by the House of Lords in *Garnett* v. *Bradley*, 3 L. R., App. Cas., 944; 48 L. J., Exch., 186; 39 L. T. 261; 26 W. R. 698.

11. *Part's Case, Bank of London and National Provincial Insurance Association, Re* (as to costs) (10 L. R., Eq., 622; 23 L. T. 305; 18 W. R. 977), not followed in *Mutual Society, Re, Grimwade* v. *Mutual Society*, 18 L. R., Ch. D., 530; 50 L. J., Ch., 400; 30 W. R. 242.

12. *Partericke* v. *Powlett* (2 Atk. 384) said to be inaccurately reported. Per Lord Redesdale in *Clinan* v. *Cooke*, 1 Sch. & Lef. 35.

13. *Paske* v. *Ollat* (2 Phillim. 323) approved of in *Browning* v. *Budd*, 6 Moo. P. C. 430.

The principles expounded in *Paske* v. *Ollatt* (2 Ph. 323) that the burthen of proof lies upon the party propounding a will, and that the Court is not bound to pronounce in favour of a will, unless it is judiciously satisfied that it is the last will of a free and capable testator, considered and affirmed. *Ib.*

14. *Paterson, Exp.* (1 Rose 402), approved in *Salaman, Exp., Taylor, Re*, 21 L. R., Ch. D., 394.

15. *Paterson, Exp., Throckmorton, Re* (11 L. R., Ch. D., 908), followed and approved in *Dyke, Exp., Morrish, Re*, 22 L. R., Ch. D., 410; 52 L. J., Ch., 570; 48 L. T. 303; 31 W. R. 278. Affirming 47 L. T. 26; 30 W. R. 952.

16. *Paterson* v. *Wallace* (1 Macq. H. L. Ca. 748). Lord Cranworth, C., there says, "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when, in fact the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arises, the master is responsible." Upon which Pollock, C. B., said, "That is merely a declaration of the Lord Chancellor in a Scotch case, not a decision of the House of Lords." *Vose* v. *Lancashire & Yorkshire Railway Co.*, 2 H. & N. 728, 732. See also *Roberts* v. *Smith*, 2 H. & N. 213.

17. *Paul* v. *Paul* (No. 1) (15 L. R., Ch. D., 580; 50 L. J., Ch., 14: 43 L. T. 239; 29 W. R. 281) not followed in *Paul* v. *Paul* (No. 2), 19 L. R., Ch. D., 47; 51 L. J., Ch., 5; 45 L. T. 437; 30 W. R. 801. Affirmed 20 L. R., Ch. D., 742; 51 L. J., Ch., 839; 47 L. T. 210; 30 W. R. 801.

18. *Pawsey* v. *Armstrong* (18 L. R., Ch. D., 690) observed upon in *Walker* v. *Hirsch*, 27 L. R., Ch. D., 460; 51 L. T. 581; 32 W. R. 992.

19. *Peacock, Re* (14 L. R., Ch. D., 212; 49 L. J., Ch., 228; 43 L. T. 99; 28 W. R. 801), explained in 50 L. J., Ch., 380.

20. *Peacock* v. *Monk* (1 Ves. 127). *Semble*, the dictum of Lord Hardwicke in this case, that where a consideration is stated in a deed, without mention of other considerations, proof of any other consideration cannot be given, applies only to cases where the real consideration may be said to be inconsistent with the consideration expressed in the deed, and not to the case of a nominal consideration. See 11 Jur., N. S., 941; 14 W. R. 22; 13 L. T., N. S., 267.

21. *Peacocke* v. *Pares* (2 Keen 689) observed upon. It is in conflict with *Spencer* v. *Spencer* (8 Sim. 87), and not to be followed as an authority. *Macoubrey* v. *Jones*, 2 Kay & J. 684.

22. *Peake* v. *Penlington* (2 Ves. & B. 311) approved in *Wise* v. *Piper*, 13 L. R., Ch. D., 848; 49 L. J., Ch., 611; 41 L. T. 794; 28 W. R. 442.

23. *Pearl* v. *Deacon* (1 De G. & J. 461; 3 Jur., N. S., 1187; 26 L. J., Ch., 761; 5 W. R. 793. Affirming 24 Beav. 186; 3 Jur., N. S., 879; 5 W. R. 702) followed in *Coates* v. *Coates*, 3 N. R. 355; 33 L. J., Ch., 448; 9 L. T., N. S., 795; 10 Jur, N. S., 532; 12 W. R. 634.

24. *Pearse* v. *Pearse* (1 De G. & Sm. 12) followed in *Manser* v. *Dix*, 3 W. R. 313; 1 Kay & J. 451; 1 Jur., N. S., 466; 3 Eq. Rep. 650.

25. *Pearson, Re* (5 L. R., Ch. D., 982; 37 L. T. 299; 25 W. R. 853), followed in *Chell, Re*, 49 L. T. 196; 31 W. R. 898.

26. *Pease* v. *Jackson* (3 L. R., Ch., 576; 37 L. J., Ch., 725) observed upon in *Marson* v. *Cox*, 14 L. R., Ch. D., 140; 49 L. J., Ch., 245; 42 L. T. 615; 28 W. R. 572.

27. *Pease* v. *Jackson* (37 L. J., Ch., 725; 3 L. R., Ch., 576; 17 W. R. 1. Affirmed 16 W. R. 58) considered in *Fourth City Mutual Benefit Building Society* v. *Williams, Marson* v. *Cox*, 14 L. R., Ch. D., 140; 49 L. J., Ch., 245; 42 L. T. 615; 28 W. R. 572, and distinguished in *Carlisle City and District Banking Co* v. *Thompson*, 33 W. R. 119.

28. *Peck* v. *Larsen* (12 L. R., Eq., 378; 40 L. J., Ch., 763; 25 L. T. 580; 19 W. R. 1045)

followed in *The Stornoway*, 51 L. J., P., 27; 46 L. T. 773.

1. *Peek* v. *North Staffordshire Railway Co.* (4 B. & S. 627) is a remarkable case, and I think it may practically be said to have been right, because the Exchequer Chamber ought, in the judgment of the Lords, to have affirmed the decision of the Queen's Bench, in which case it would have given costs, and so when by the effect of the judgment of the Lords the decision of the Court below was practically affirmed in the Exchequer Chamber, the plaintiff was entitled to costs. I cannot help thinking, however, that the course adopted in *Walsh* v. *Trimmer* (1 L. R., H. L. Cas., 208) was the more regular one. I think that the application in *Peek* v. *North Staffordshire Railway Co.* should more properly have been made to the House of Lords, because the 42nd section of the Common Law Procedure Act 1854 gives a discretion to the Court of Appeal, so that it seems to me a question whether the Court of Queen's Bench did not in *Peek's* case assume a jurisdiction which more properly belonged to the Lords. At any rate, to make that case apply here would be straining the law; if I had thought it did apply, I should have been inclined to grant a rule that the question might be considered. Per Willes, J., in *Gann* v. *Johnson*, 21 L. T., N. S., 753, 754; 40 L. J., C. P., 227, 228; 6 L. R., C. P., 461.

As regards the case of *Peek* v. *North Staffordshire Railway Co.*, I have some difficulty in seeing on what legal foundation the Court of Queen's Bench awarded costs. It is, however, sufficient to say that this case is distinguishable from it. Per Montague Smith. *Ib.*

2. *Peek* v. *North Staffordshire Railway Co.* (32 L. J., Q. B., 241; 8 L. T. 768; 11 W. R. 1023; 10 H. L. Cas. 473) considered in *Manchester, Sheffield, & Lincolnshire Railway* v. *Brown*, 8 L. R., App. Cas., 703; 53 L. J., Q. B., 124; 50 L. T. 281; 32 W. R. 207.

3. *Peile* v. *Stoddart* (1 Macn. & G. 192) distinguished in *Manby* v. *Bewicke*, 2 Jur., N. S., 671; 8 De G. M. & G. 476; 4 W. R. 757.

4. *Pelham, Exp.* (Mont. 211), not followed in *Etherington, Exp., Glossop, Re*, 4 Dea. & Ch., 218; 1 Mont. & A. 607. S. C. *nom. Glossop, Exp. & Re*, 3 L. J., N. S., Bky.. 41.

5. *Pell, Exp., Heyford Co., Re* (5 L. R., Ch., 11; 39 L. J., Ch., 120; 21 L. T., N. S., 412; 18 W. R. 31). I have more than once expressed a strong—I may say something more than a strong—inclination of my opinion, that *Pell's case* was originally rightly decided; but I am, of course, bound by the decision of the Court of Appeal, sitting here, as I do as Vice-Chancellor, and should follow it if it governed this case; but it appears to me that the *ratio decidendi* does not extend to this case, and therefore I must act upon what I conceive to be the law applicable to it, which I think is a very simple one. Per Lord Justice James, in *Dent's case, Anglo-Moravian Hungarian Junction Railway Co., Re*, 15 L. R., Eq., 407, 411; 42 L. J., Ch., 474; 28 L. T. 264; 22 W. R. 45. Affirmed 42 L. J., Ch., 857; 8 L. R., Ch., 768; 28 L. T., N. S., 888.

6. *Pemberton* v. *Barnes* (6 L. R., Ch., 685; 40 L. J., Ch., 675; 25 L. T. 577; 19 W. R. 988) dicta in not followed in *Pitt* v. *Jones*, 5 L. R., App. Cas., 651; 49 L. J., Ch., 795; 43 L. T. 385; 29 W. R. 33.

7. *Penfold* v. *Bouch* (2 Hare 157) distinguished in *Broughton* v. *Broughton*, 8 Jur. 441; 3 Hare 335.

8. *Pennell* v. *Deffell* (4 De G. M. & G. 372; 20 L. J., Ch., 115; 22 L. T., N. S., 126; 1 W. R. 499) not followed as to part of decision, though not the principle, in *Hallett's Estate, Re, Knatchbull* v. *Hallett*, 13 L. R., Ch. D., 696; 49 L. J., Ch., 415; 42 L. T. 421; 28 W. R. 732.

9. *Pennington* v. *Alvin* (1 Sim. & S. 264; 1 L. J., Ch., 202) questioned in *Dowden* v. *Hook*, 3 Beav. 399; 14 L. J., N. S., Ch., 383; 9 Jur. 544.

10. *Penysyflog Mining Co., Re* (30 L. T. 861), considered in *Whitworth's case, Silkstone & Dodsworth Coal & Iron Co., Re*, 19 L. R., Ch. D., 118; 51 L. J., Ch., 71; 45 L. T. 449; 30 W. R. 33.

11. *Penrhyn* (*Lord*) v. *Hughes* (5 Ves. 106). Dicta in this case observed upon in *Sharshaw* v. *Gibbs*, 1 Kay 333; 18 Jur. 330; 23 L. J., Ch., 451.

12. *Percival, Exp.* (6 L. R., Eq., 519), considered in *Dronfield Silkstone Coal Co.* (No. 2), *Re*, 23 L. R., Ch. D., 511; 52 L. J., Ch., 963; 31 W. R. 671.

13. *Perkins Beach Lead Mining Co., Re* (7 L. R., Ch. D., 371; 37 L. T. 604; 26 W. R. 164), disapproved of in *Artistic Colour Printing Co., Re*, 14 L. R., Ch. D., 502; 49 L. J., Ch., 526; 42 L. T. 803; 28 W. R. 943.

14. *Perrin, Re* (2 Dr. & War. 147), distinguished in *Simpson* v. *Morley*, 2 Kay & J. 71.

15. *Perrin, Re* (2 Dr. & War. 147), observed upon in *Boyle, Exp.*, 3 De G. M. & G. 515; 17 Jur. 979; 22 L. J., Ch., 78.

16. *Perry* v. *Knott* (5 Beav. 293) disapproved of in *Lenaghan* v. *Smith*, 2 Ph. 301; 16 L. J., N. S., Ch., 376; 11 Jur. 503.

17. *Perry* v. *Phelips* (17 Ves. 173), in reference to bills of review, approved in *Trulock* v. *Robey*, 2 Ph. 395; 11 Jur. 999.

18. *Perry-Herrick* v. *Attwood* (27 L. J., Ch., 121; 2 De G. & J. 21; 25 Beav. 205) commented on in *Clarke* v. *Palmer, Palmer, Re*, 21 L. R., Ch. D., 124; 51 L. J., Ch., 634; 48 L. T. 857.

19. *Petre* (*Lord*) v. *Eastern Counties Railway Co.* (1 Rail. Ca. 462) impugned. *Preston* v. *Liverpool, Manchester, & Newcastle-upon-Tyne Railway Co.*, 5 H. L. Ca. 605; 2 Jur., N. S., 241; 25 L. J., Ch., 421; 4 W. R. 383; *Caledonian & Dumbartonshire Junction Railway Co.* v. *Helensburgh Harbour* (*Trustees*), 2 Jur., N. S., 95; 2 Macq., H. L. Ca., 391.

20. *Petre* v. *Duncombe* (20 L. J., Q. B., 242; 2 L. M. & P. 107) approved and followed in *Bishop, Exp., Fox, Re*, 15 L. R., Ch. D., 400; 50 L. J., Ch., 18; 43 L. T. 165; 29 W. R. 144.

21. *Philanthropic Society* v. *Kemp* (4 Beav. 581; 11 L. J., N. S., Ch., 360) observed on in *Robinson* v. *Geldard*, 3 Macn. & G. 735. Reversing 3 De G. & Sm. 499; 18 L. J., N. S., Ch., 454; 14 Jur. 143.

22. *Phillips* v. *Beal* (32 Beav. 25). The question is, what is the effect of a legacy to a widow for life of perishable articles which cannot be used without being consumed. . . . Now, there are conflicting cases on the effect of such a gift, and I am disposed to think, after

looking at all the cases and examining them all, and particularly the last case before the present Lord Chancellor (Hatherley), when Vice-Chancellor, *i.e.*, *Groves* v. *Wright* (2 Kay & J. 347), that the rule cannot be considered as quite settled; but I think that the distinction which I took in *Phillips* v. *Beal* (32 Beav. 25) is the correct view of the case, which is to hold, that where the subject of the legacy is really farming stock, such as is necessary in order to keep up the business, the legatee only takes a life interest. If she takes the stock in specie, she is bound to keep up the amount of it, and if it is sold, the proceeds must be invested, and the income paid to the legatee. Per Lord Romilly, M. R., in *Cockayne* v. *Harrison*, 41 L. J., Ch., 509, 510; 13 L. R., Eq., 432; 26 L. T. 385; 20 W. R. 504.

1. *Phillips, Re* (6 L. R., Eq., 250). "Case imperfectly stated in the report" in *Askew* v. *Woodhead*, 41 L. T. 670.

2. *Phillips* v. *Garth* (3 Bro. C. C. 64) overruled. *Brandon* v. *Brandon*, 3 Swan 324; 2 Wils. 14; *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J., N. S., Ch., 200. Reversing 2 Myl. & K. 82; 3 L. J., N. S., Ch., 17.

3. *Phillips* v. *Phillips* (31 L. J., Ch., 321; 5 L. T. 655; 10 W. R. 236; 5 De F. & J. 208) observed upon in *Cave* v. *Cave*, 15 L. R., Ch. D., 639; 49 L. J., Ch., 505; 42 L. T. 730; 28 W. R. 798.

4. *Phillips* v. *Phillips* (1 Myl. & K. 649) overruled in *Taylor* v. *Taylor*, 3 De G. M. & G. 190; 17 Jur. 583; 22 L. J., Ch., 742.

5. *Phillips* v. *Phillips* (9 Hare 471; 22 L. J., Ch., 141) explained in *Makepeace* v. *Rogers*, 34 L. J., Ch., 396, 398; 11 Jur., N. S., 215; 13 W. R. 450, 566; 12 L. T., N. S., 12, 221; 4 De G. J. & S. 649; 5 N. R. 199.

Knight Bruce, L. J., did not think that Turner, L. J., when, as Vice-Chancellor, he had disposed of this case, had intended to say that a bill in equity for an account would not lie unless there had been receipts and payments on both sides (*Makepeace* v. *Rogers*, 4 De G. J. & S. 649, 652). *Phillips* v. *Phillips* went upon the footing of the account there in question being a current account between the parties, and the bill made no case of general agency, alleging only an isolated agency transaction connected with the sale by the defendant of some railway shares belonging to the plaintiff. That case had no reference to a case of general account between principal and agent; and if his language in giving judgment in that case had been in fact such as to give rise to misapprehension, such misapprehension ought to have been dispelled by what he had said in the subsequent case of *Padwick* v. *Stanley*, 9 Hare 628, when adverting to the want of correlation between the rights of a principal and an agent to sue in chancery. Per Turner, L. J. *Ib.*

6. *Philpott* v. *St. George's Hospital* (21 Beav. 134) observed upon in *Warren* v. *Rudall*, 4 Kay & J. 603.

7. *Philpott* v. *St. George's Hospital* (21 Beav. 134) founded on the decision of *Att.-Gen.* v. *Hodgson*, 15 Sm. 146, and cannot be maintained consistently with the principles of former decisions. *Hill* v. *Warren*, 9 H. L. Ca. 420.

8. *Phillips* v. *Hornstedt* (1 L. R., Exch. D., 62) disapproved in *Cooper, Exp., Baum, Re*, 10 L. R., Ch. D., 313; 48 L. J., Bky., 54; 27 W. R. 299; 39 L. T. 523.

9. *Phipps* v. *Steward* (1 Atk. 286). Observations on this case in *Tom* v. *Deane*, 8 Ir. Eq. R. 39.

10. *Phipson* v. *Turner* (9 Sim. 227). I must follow this case, even if it were wrongly decided; I could not overrule it at this distance of time. Per Lord Romilly, M. R., in *Slark* v. *Dakyns*, 15 L. R., Eq., 307, 310; 42 L. J., Ch., 524.

11. *Phipson* v. *Turner* (9 Sim. 227). It would be a serious thing now to disturb the decision of *Phipson* v. *Turner*, which had been followed in more than one case, and had been acted upon by the long practice of conveyance, and also approved by Lord St. Leonards in his well-known treatise on Powers. Per Cairns, C., in *Slark* v. *Dakyns*, 44 L. J., Ch., 205; 10 L. R., Ch., 35; 31 L. T. 712; 23 W. R. 118.

12 *Pickard* v. *Sears* (6 Ad. & Ell. 469) commented on and followed in *Pigott* v. *Stratton*, 29 L. J., Ch., 8; 1 De G. F. & J. 33.

13. *Pickford* v. *Brown* (2 Kay & J. 426) followed as an authority in *Stringer* v. *Harper*, 5 Jur., N. S., 401.

14. *Pickford* v. *Brown* (25 L. J., Ch., 702; 27 L. T., N. S., 259; 4 W. R. 473; 2 Kay & J. 426) not followed in *Middleton, Re*, 19 L. R., Ch. D., 552; 51 L. J., Ch., 273; 46 L. T. 359; 30 W. R. 293.

15. *Piers* v. *Piers* (Sau. & Sc. 379; 1 Dr. & Wal. 264) commented on in *Ponsonby* v. *Ponsonby*, 2 Hog. 201.

16. *Piggin* v. *Cheetham* (2 Hare 80; 6 Jur. 819) disapproved of in *Reeves* v. *Glastonbury Canal Co.*, 14 Sim. 351.

17. *Pigot's case* (11 Rep. fol. 27, a). The statement in the second resolution of *Pigot's case*, "if the obligee himself alters the deed . . . although it is in words not material, yet the deed is void," dissented from. *Aldous* v. *Cornwell*, 3 L. R., Q. B., 573; 9 B. & S. 607.

18. *Pigot's case* (11 Rep. 27, a). The case of *Aldous* v. *Cornwell* (9 B. & S. 607; 3 L. R., Q. B., 573) has, I think, established that the proposition laid down in *Pigot's case*, that "if the obligee himself alters the deed . . . although it is in words not material, yet the deed is void," is no longer to be considered law. Per O'Sullivan, M. R., in *Caldwell* v. *Parker*, 3 Ir. R., Eq., 519, 526.

19. *Pigott, Re* (3 Macn. & G. 268) disapproved of. The order there was made *per incuriam*. Per Lord Justice James, in *Wilkinson, Re*, 23 W. R. 51; 44 L. J., Ch., 56; 10 L. R., Ch., 73.

20. *Pike* v. *Fitzgibbon* (14 L. R., Ch. D., 837; 49 L. J., Ch., 493; 42 L. T. 525; 28 W. R. 667) approved in *Flower* v. *Buller*, 15 L. R., Ch. D., 665; 49 L. J., Ch., 784; 43 L. T. 311; 28 W. R. 948.

21. *Pile* v. *Salter* (5 Sim. 411). Against these authorities, *Eaton* v. *Hewitt* (2 De G. F. & Sm. 184) and *Browne* v. *Hammond* (Johns. 210), there is the case of *Pile* v. *Salter*, which appears to me wrongly decided. It was cited in both the cases I have mentioned, and not followed. Per Jessel, M. R., in *Underhill* v. *Roden*, 2 L. R., Ch. D., 494, 497; 45 L. J., Ch., 266; 34 L. T. 227; 24 W. R. 574.

22. *Pile* v. *Salter* (5 Sim. 411) determined upon its own special circumstances. Per Wood, V.-Ch., in *Browne* v. *Hammond*, 1 Johns. 210, 213.

1. *Pile* v. *Salter* (5 Sim. 411). I am bound to say, with regard to that case, that I doubt whether I should go so far as the Vice-Chancellor of England went under those circumstances; but that case strongly illustrates this principle, at all events, that if it does produce an absurdity, that then the doctrine, that the testator meant the gift over to take effect either on the marriage or the death of the tenant for life, is not to be held. Per Kindersley, V.-Ch, in *Eaton* v. *Hewitt*, 8 Jur., N. S., 1120, 1121; 2 De G. & Sm. 184.

2. *Pillage* v. *Armitage* (12 Ves.) not applicable to the case of a tenancy created for the express purpose of expenditure by the tenant in building. *Thornton* v. *Ramsden*, 4 Giff. 519.

3. *Pim* v. *Curell* (6 M. & W. 234) discussed in *Neil* v. *Devonshire* (*Duke*), 8 L. R., App. Cas., 135; 31 W. R. 622.

4. *Pinchin* v. *London & Blackwall Railway Co.* (24 L. J., Ch., 417; 3 W. R. 125; 5 De G. M. & G. 831) commented on in *Great Western Railway Co.* v. *Swindon & Cheltenham Extension Railway Co.*, 9 L. R., App. Cas., 787; 53 L. J., Ch., 1075; 32 W. R. 957.

5. *Pinchin* v. *London & Blackwall Railway Co.* (*supra*) followed in *Schuinge* v. *London & Blackwall Railway Co.*, 1 Jur, N. S., 368; 24 L. J., Ch., 405.

6. *Pitt* v. *Jackson* (2 Bro. C. C. 56) observed upon in *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur, 457; 22 L. J., Ch., 313.

7. *Pitt* v. *Jones* (5 L. R., App. Cas., 651). Having regard to the decision of the House of Lords in this case, that the remedies granted by ss. 3 and 5 of the Partition Act 1868 are entirely distinct from each other, a plaintiff in a partition action, who desires a sale instead of a partition, must expressly state in his pleadings that a sale will be more beneficial, so as to give notice to the opposite party that this is the relief which he is claiming under s. 3. The mere statement of facts which tend *primâ facie* to show that a sale will be more convenient, but which do not exclude the operation of s. 5, will not debar the defendant from insisting, under the latter section, on a partition, on his offer to buy up the plaintiff's interest. *Evans* v. *Evans*, or *Evans* v. *Jones*, 52 L. J., Ch., 304; 48 L. T. 567; 31 W. R. 495.

8. *Pitt* v. *Pitt* (4 Macq. H. L. Ca. 627). *Quære*, whether this case would govern cases like *Niboyet* v. *Niboyet* (4 L. R., P. D., 1) if they arose in Scotland. *Harvey* v. *Farnie*, 8 L. R., App. Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433. Affirming 6 L. R., P. D., 35; 50 L. J., P., 17; 43 L. T. 737; 29 W. R. 409.

9. *Platt* v. *Platt* (28 W. R. 533) not followed in *Rimington* v. *Hartley*, 14 L. R., Ch. D., 630; 43 L. T. 15; 29 W. R. 42.

10. *Platt* v. *Routh* (6 M. & W. 756) observed upon in *Philbrick*, *Re*, 5 N. R. 502; 11 Jur., N. S., 558; 34 L. J., Ch., 368; 13 W. R. 570; 12 L. T., N. S., 261.

11. *Plowes* v. *Bossey* (8 Jur., N. S., 352; 31 L. J., Ch., 681; 10 W. R. 332; 7 L. T., N. S., 306) is not an exception to the rule that a parent's evidence cannot be admitted on the question of the legitimacy of his child. *Atchley* v. *Sprigg*, 10 Jur., N. S., 144; 33 L. J., Ch., 345; 12 W. R. 364; 10 L. T., N. S., 16.

12. *Plumbe* v. *Neild* (29 L. J., Ch., 618; 8 W. R. 335). I am at a loss to understand the distinction of V.-Ch. Kindersley in *Plumbe* v. *Neild*, between bonuses derived from profits which accrued during the half-year immediately preceding the declaration of the bonus, and those derived from an accumulation of profits; for as long as they are derived from profits accruing during the lives of the tenants for life, in my opinion it is for the remaindermen to show that they do not belong to such persons. Per Stuart, V.-Ch, in *Dale* v. *Hayes*, 19 W. R. 299, 300; 40 L. J. 244; 24 L. T. 12.

13. *Plunkett* v. *Mansfield* (2 J. & L. 344) not followed in *Armstrong*, *Re*, 3 Kay & J. 486; 3 Jur., N. S., 612; 26 L. J., Ch., 658.

14. *Plyer's Trust*, *Re* (9 Hare 220), in so far as it decides that an order made, under the Trustees Act 1850, s. 10, to vest the trust estate in continuing and new trustees, would sever the joint tenancy, overruled by *Bute* (*Marquis*), *Re*, Johns. 15; 5 Jur., N. S., 487; 33 L. T. 178.

15. *Pockley* v. *Pockley* (1 Vern. 36; 2 Salk. 449) commented on in *Galton* v. *Hancock*, 2 Atk. 244; Ridgw. 301.

16. *Pocock* v. *Titmarsh* (Bunb. 102). "It is difficult to determine on what principle that case was decided; and, at all events, it cannot be recognised as establishing a rule (contrary to all principle and authority) that a bill, simply asserting the plaintiff's right to receive certain annual payments from the defendants for the tithes of their houses, without alleging the foundation of the alleged right, can be maintained." Per Kindersley, V.-Ch., in *Champneys* v. *Buchan*, 4 Drew. 104, 124, 125.

17. *Pollen* v. *Brewer* (7 C. B., N. S., 371) considered in *Beddall* v. *Maitland*, 17 L. R., Ch. D., 174; 50 L. J., Ch., 401; 44 L. T. 248; 29 W. R. 484.

18. *Pollexfen* v. *Moore* (3 Atk. 272), a dictum therein overruled. *Sproule* v. *Prior*, 8 Sim. 189; 6 L. J., N. S., Ch., 1.

19. *Pool* v. *Sacheverel* (1 P. W. 675) not followed in *Plating Co.* v. *Farquharson*, 17 L. R., Ch. D., 49; 50 L. J., Ch., 406; 44 L. T. 389; 29 W R. 510.

20. *Poole* v. *Adams* (12 W. R. 683) approved in *Rayner* v. *Preston*, 14 L. R., Ch. D., 297; 43 L. T. 18; 28 W. R. 808.

21. *Pope* v. *Simpson* (5 Ves 145), that a purchaser under bankruptcy must take such title as bankrupt had, overruled. 11 Ves. 343, and see 5 Ves. 147. n. (1).

22. *Pope* v. *Whitcombe* (3 Russ. 124) observed upon in *Ivison* v. *Gassiot*, 3 De G. M. & G. 958.

23. *Pope* v. *Whitcombe* (3 Meriv. 689); the report of this case is inaccurate in Merivale but correct in Sugden on Powers, App. No. 29. *Finch* v. *Hollingsworth*, or *Hollingworth*, 21 Beav. 112; 1 Jur., N. S., 718; 25 L. J., Ch., 55; 3 Eq. Rep. 993; 3 W. R. 589.

24. *Popham* v. *Aylesbury* (Ambl. 68). Report of this case corrected in 11 Ves. 662.

25. *Popple* v. *Sylvester* (22 L. R., Ch. D., 98; 52 L. J., Ch., 54; 47 L. T. 329; 31 W. R. 116) distinguished in *Fewings*, *Exp.*, *Sneyd*, *Re*, 25 L. R., Ch. D., 338; 53 L. J., Ch., 545; 50 L. T. 100; 32 W. R. 352.

26. *Porter* v. *Fox* (6 Sim. 485) observed upon as to how far it is consistent with *Leake* v. *Robinson* (2 Meriv. 203). *James* v. *Wynford*

(*Lord*), 1 Sm. & G. 40; 17 Jur. 17; 22 L. J., Ch., 450; 1 W. R. 61.

1. *Portpatrick Railway Co.* v. *Caledonian Railway Co.* (3 Nev. & Mac. 189) disapproved in *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.*, 17 L. R., Ch. D., 493; 50 L. J., Ch., 513; 44 L. T. 723; 29 W. R. 826.

2. *Potter, Exp.* (34 L. J., Bky., 46; 3 De G. J. & S. 240; 13 W. R. 189; 11 L. T., N. S., 435) (inadmissibility of an unstamped deed of assignment to establish an act of bankruptcy), dissented from, and finally and effectually overruled in *Ponsford* v. *Walton* (3 L. R., C. P., 167; 37 L. J., C. P., 113; 16 W. R. 363; 17 L. T., N. S., 511), and in *Squire, Exp.* (19 L. T., N. S, 272; 4 L. R., Ch., 47; 17 W. R. 40), by the Lords Justices; and the ruling in *Wensley, Exp.* (1 De G. J. & S. 273; 23 L. J., Bky, 23), followed and approved of, notwithstanding the observation of Lord Chancellor Westbury, in *Potter, Exp.* (3 De G. J. & S. 246), that he "should require considerable argument before he should be prepared to support it." The decision having been inadvertently cited in argument, as a decision of Lord Chancellor Campbell, whereas it was the decision of the Lord Chancellor Westbury himself. Therefore, an unstamped and an unregistered deed of assignment of the whole of a debtor's property for the benefit of his creditors can be made use of against the debtor as establishing an act of bankruptcy, though not receivable in evidence for the purpose of being acted upon and enforced as an available deed in other respects.

3. *Potter, Re* (8 L. R., Eq., 52; 39 L. J., Ch., 402). I am sorry to find there is so much difference of opinion about this question. It is evident that in the case of *Atkinson* v. *Atkinson* (6 Ir. R., Eq., 184) the Master of the Rolls in Ireland expressed dissent from the principle I laid down, and so also did Lord Justice James, when Vice-Chancellor, in *Hotchkiss, Re* (8 L. R., Eq., 643), and they seemed to think that the case of *Christopherson* v. *Naylor* (1 Meriv. 320) had never before been questioned, notwithstanding that it had been treated as a case of no authority at the present day by V.-Ch. Stuart in *Parsons* v. *Gulliford* (10 Jur., N. S, 231), and by the present Lord Chancellor (Hatherley) when Vice-Chancellor, in the case of *Gowling* v. *Thompson* (11 L. R., Eq., 366. n.). I am satisfied that the rule laid down in *Christopherson* v. *Naylor* has worked great injustice in a number of cases. I have repeatedly had the question raised and argued before me since I decided *Potter, Re* (8 L. R., Eq., 52), but I have invariably adhered to the principle I there laid down. I decided that case after very much consideration, and being convinced that it is one which is calculated to give effect to the intention of testators, and to carry out substantial justice, I shall continue to act upon it until my decision is reversed by a higher tribunal. I should certainly be glad if the parties would take this case before the Court of Appeal, in order that the question may be set at rest one way or the other, and, considering the opinion entertained by Lord Justice James, it is not unlikely that my decision may be reversed, together with the decisions of the two Vice-Chancellors who preceded me in entertaining the same opinion; but as long as it stands unreversed I shall continue to act upon it. Per Malins, V.-Ch., in *Adams* v. *Adams*, 14 L. R., Eq., 246, 249, 250; 27 L. T. 505; 20 W. R. 881.

4. *Potter, Re* (8 L. R, Eq., 52; 39 L. J., Ch., 102), doubted, but distinguished in *Hotchkiss, Re*, 38 L. J., Ch., 631; 8 L. R., Eq., 52, by James, V.-Ch. In this case, if the words of the will had been the same as the words in *Potter, Re* (8 L. R., Eq., 52), I should, without expressing any opinion of my own, simply have followed the decision of Malins, V.-Ch., in that case; because I do not think it seemly that two branches of a court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments, and encouraging, as it were, a race, by inducing persons who wish for one construction to go to one court, and those who wish for another construction to go to another. I should simply have affirmed the Vice-Chancellor's decision, with the intimation of my wish that the whole matter should be brought before a court of appeal. But it appears to me that there is a substantial, and not merely a verbal, distinction between the two cases. Per James, V.-Ch., in *Hotchkiss, Re* 8 L. R., Eq., 643, 647.

5. *Potter* v. *Duffield* (18 L. R., Eq., 4; 43 L. J., Ch., 472; 22 W. R. 585). Several cases have been decided on the point now raised, particularly two cases which came before the Master of the Rolls, *Sale* v. *Lambert* (18 L. R., Eq, 1) and *Potter* v. *Duffield* (*supra*). In the first of these cases a memorandum of agreement was held to be insufficient within the Statute of Frauds, though the vendor was not described otherwise than as "the proprietor" of the premises, the Master of the Rolls saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one (*Potter* v. *Duffield*), where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient; though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that in neither of the cases was this requirement complied with. To allow so general a description to satisfy the statute seems to me to lead to all the mischief which it was intended to prevent, and I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parol evidence. Per Mellor, J., in *Thomas* v. *Brown*, 1 L. R., Q. B. D., 714, 720; 45 L. J., Q. B., 811; 24 W. R. 821.

6. *Potts* v. *Warwick and Birmingham Canal Navigation Co.* (1 Kay 142) adopted in *Ames* v. *Birkenhead Dock Co.*, 3 W. R. 381; 1 Jur., N. S., 529.

7. *Pontell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.* (9 L. R., Ch., 331) considered and distinguished in *Todd* v. *Midland Great Western Railway Co.*, 9 L. R., Ir., 85.

8. *Powell* v. *Riley* (12 L. R., Eq., 175; 40

L. J., Ch., 533; 19 W. R. 869) not followed. in *Ovey, Re, Broadbent* v. *Barrow*, 51 L. J., Ch., 665; 30 W. R. 645.

1. *Powell, Exp., Matthews, Re* (in part) (1 L. R., Ch. D., 501; 45 L. J., Bky., 100; 34 L. T. 224; 24 W. R. 378), not followed in *Crawcour* v. *Salter*, 18 L. R., Ch. D., 30; 51 L. J., Ch., 495; 45 L. T. 62; 30 W. R. 21.

2. *Power* v. *Sheil* (1 Moll. 311), dictum of Sir A. Hart in, overruled. *Dyke* v. *Rendall*, 16 Jur. 939; 21 L. J., Ch., 905. See also 2 De G. M. & G. 209.

3. *Powis* v. *Andrews* (2 Bro. P. C. 476) approved in *Bennet* v. *Vade*, 2 Atk. 324; 9 Mod. 312.

4 *Powles* v. *Hargreaves* (3 De G M. & G. 453) commented on in *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 L. R, App. Cas., 366; 47 L. T. 360; 31 W. R. 49.

5. *Powys* v. *Mansfield* (6 Sim. 637; 5 L. J., N. S., Ch., 297) overruled by *Price* v. *Carver*, 3 Myl. & C. 157.

6. The *Practical Register* is a useful book, but deficient in not discriminating what is subsisting from what is obsolete or overruled. *Cramer* v. *Morton*, 2 Moll. 108.

7. *Pratt* v. *Archer* (1 Sim. & S. 433) misreported. See 2 Sim. 488. n.

Prebble v. *Boghurst* (1 Swan 319). The third marginal abstract of case corrected. See *Id.* 580.

8. *Prendergast* v. *Turton* (1 Y. & Coll. C. C. 98; 13 L. J., Ch., 268). The doctrine of this case does not apply where a surviving partner has refused to give the representatives of a deceased partner all the information as to the state of the concern which is necessary to enable them to exercise a sound discretion as to whether they should claim an interest in, and take a share of the risks of the concern. *Clements* v. *Hall*, 2 De G. & J. 173. And see *Clarke* v. *Hart*, 6 H. L. Ca. 633. Affirming S. C. *sub. nom. Hart* v. *Clarke*, 6 De G. M. & G. 232.

9. *Prendergast* v. *Turton* (1 Y. & C. C. 98) followed in *Rule* v. *Jewell*, 18 L. R, Ch. D., 660; 29 W. R 755.

10. *Prettyman's case* (2 Vern. 279, cited in *Walton* v. *Stamford*, 2 Vern. 279). As to this case, I need only remark that it does not appear what the circumstances of the case were, and it may well be that the intended grantee of the estate for life had an equity sufficient to entitle him to a decree that he should enjoy the land. Per Bramwell, L. J., in *Smith* v. *Widlake*, 3 L. R., C. P. D., 10, 15, 16; 47 L. J., C. P., 282; 26 W. R. 52.

The facts of *Prettyman's case* are very shortly stated. It is not reported, but merely referred to in the case of *Walton* v. *Stamford*. Probably the decision was on the ground that the intended grantee for life had a claim against the vendor, and therefore against the purchaser as taking with notice. But whatever may be the true explanation of that case, I cannot recognise it as an authority in favour of the conveyance to the plaintiff. Per Cotton, L. J. *Id.* 17.

11. *Price* v. *Jenkins* (5 L. R., Ch. D., 619; 46 L. J., Ch., 805; 37 L. T. 5). Reversing 4 L. R., Ch. D., 483; 46 L. J., Ch., 214; 25 W. R. 427; 36 L. T. 237; explained and commented on in *Ridler, Re, Ridler* v. *Ridler*, 22 L. R., Ch. D., 74; 52 L. J., Ch., 343; 48 L. T. 396; 31 W. R. 93; and in *Marsh and Granville* (*Earl*), *Re*, 24 L. R., Ch. D., 25; 48 L. T. 947; 31 W. R. 845, Per Bowen, L. J.; and dissented from in *Lee* v. *Mathews*, 6 L. R., Ir., 530.

12. *Price* v. *Salusbury* (11 W. R. 1014) overruled in *Galloway* v. *London* (*Mayor*), 13 W. R. 933.

13. *Prichard* v. *Ames* (T. & R. 222) followed in *Bland* v. *Dawes*, 17 L. R., Ch. D., 794; 50 L. J, Ch., 252; 43 L. T. 751; 29 W. R. 416.

14. *Prideaux, Exp.* (3 Myl. & Cr. 327), doubted in *St. Pancras* v. *Clapham*, 6 Jur., N S., 700, 702.

15. *Prince* v. *Lewis* (5 B. & C. 363) considered in *Goldsmid* v. *Great Eastern Railway Co.*, 25 L. R, Ch. D., 510; 53 L. J., Ch., 371; 49 L. T. 717; 32 W. R. 341. Affirmed 9 L. R., App. Cas., 927; 32 W. R. 81. Varying 47 L. T. 727.

16. *Princess of Wales* v. *Liverpool* (*Earl*) (1 Swan. 114) approved of in *Taylor* v. *Heming*, 4 Beav. 235; 10 L. J., N S., Ch., 369; 5 Jur. 766.

17. *Printing and Numerical Registering Co., Re* (8 L. R., Ch. D., 535; 47 L. J., Ch., 580; 38 L. T. 676; 26 W. R. 627), overruled in *Withernsea Brick Works Co., Re*, 16 L. R., Ch. D., 337; 50 L. J, Ch., 185; 43 L T. 713; 29 W. R. 178.

18. *Printing and Numerical Registration Co., Re* (8 L. R, Ch. D., 535; 47 L. J., Ch., 580; 38 L. T. 676; 26 W. R. 647), not followed in *Richards & Co., Re*, 11 L. R., Ch. D., 676; 48 L. J., Ch., 555; 27 W. R. 530; 40 L. T. 315.

19. *Prodgers* v. *Langham* (1 Sid. 133). A conveyance, though voluntary upon the face of it, and at first void as against a purchaser for consideration, may yet become valid by force of subsequent events. This was held in *Prodgers* v. *Langham*, a case which Lord Eldon said, in *George* v. *Milbanke* (9 Ves. 193), had long been considered good law; and Lord Kenyon spoke of it in *Parr* v. *Eliason* (1 East 95) as a leading authority. See also per Lord Eldon, in *Johnson* v. *Legard* (T. & R. 294). Per Cleasby, B., in *Clarke* v. *Willott*, 7 L. R., Exch., 313, 317; 41 L. J., Exch., 197; 21 W. R. 73.

20. Upon motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the plaintiff's trade, the Court was of opinion that notwithstanding the decision in *Prudential Assurance Co.* v. *Knott* (10 L. R., Ch., 142; 44 L. J, Ch., 192), it now has power by the Judicature Act, s. 25, sub-s. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application. *Thorley's Cattle Food Co.* v. *Massam*, 6 L. R., Ch. D., 582; 46 L. J., Ch., 713.

21. *Purser* v. *Darby* (4 Kay & J. 41). In that case, Wood, V.-Ch., lays down the rule without any qualification that where a person contracts to sell and then devises his property, so that upon his death it becomes vested in an infant, then the necessity of the suit cannot be said to have arisen from the mere act of God: the testator, by his own voluntary act, has made the suit necessary, and his estate should bear the costs. *Williams* v. *Glenton* (14 W. R. 294), before the Lords Justices, is to the same effect. *Heard* v. *Cuthbert* (1 Ir. Ch. R. 369), where Brady, C., decided that the costs of the suit ought to come out of the purchase money. On the contrary it was

insisted that the rule was not as stated on the part of the plaintiff, but quite otherwise, and that it was now well settled that each party should abide his own costs: *Hanson* v. *Lake* (2 Y. & C. C. C. 328), decided by Knight Bruce, V.-Ch., in 1843; *Hinder* v. *Streeten* (10 Hare 18), by Sir George Turner, V.-Ch., in 1852; and *Bannerman* v. *Clarke* (5 W. R. 37; 3 Drew. 632), by Kindersley, V.-Ch., in 1856. This last case was the subject of great deliberation. It was not cited to Wood, V.-Ch., when he decided *Purser* v. *Darby*, which greatly detracts from the authority of that case. All these cases came under the notice of Lord Romilly in *Hale* v. *Bushill* (35 Beav. 343), who states his opinion to coincide with that of Kindersley, V.-Ch. The Lords Justices, in *Williams* v. *Glenton*, seem not altogether to have agreed as to the rule. The decision of Brady, C., in *Heard* v. *Cuthbert*, is clearly unsustainable. Sullivan, M. R., after reviewing the authorities, said that in his view of the case the proper rule, and that which he was prepared to adopt in all such cases, was that each party should abide his own costs. The suit had become necessary in consequence of the infancy of the parties who represented the testator, Archibald Beck, and was not occasioned by any embarrassment created by the testator's will. The difficulty was accidental. There was no neglect or default on either side. Where a party having contracted to sell an estate dies intestate and a suit becomes necessary, it is clear upon all the authorities that each party should pay his own costs, because, as it has been said, it is the act of God. But how can it be said to be less the act of God for a man to die testate? I shall follow the decisions in *Bannerman* v. *Clarke* and *Hale* v. *Bushill* in preference to *Purser* v. *Darby*, and not visit the estate with the costs of the suit. Each party must abide his own costs. *White* v. *Beck*, 20 W. R. 275, 276; 6 Ir. R., Eq., 63. See *Longinotto* v. *Morss*, 26 L. T., N. S., 828, where Bacon, V.-Ch., decided in a similar way.

1. *Pyle* v. *Price* (6 Ves. 779) observed upon in *Pratt* v. *Keith*, 3 N. R. 406; 10 Jur., N. S., 305; 33 L. J., Ch., 528.

2. *Pyrke* v. *Waddingham* (10 Hare 1). The principles laid down in this decision approved of, but the decision disapproved of and not followed, by Lord Romilly, under precisely similar circumstances in *Mullings* v. *Trinder*, 23 L. T., N. S., 580; 18 W. R. 1186; 39 L. J., Ch., 833; 10 L. R., Eq., 449.

3. *Pyrke* v. *Waddingham* (10 Hare 1) had been carried too far. Per Romilly, M. R., in *Bull* v. *Hutchons*, 8 L. T., N. S., 716, 717.

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4. *Quested* v. *Mitchell* (24 L. J., Ch., 722) commented upon in *Brookman* v. *Smith*, 6 L. R., Exch., 291, 305; 40 L. J., Exch., 161; 24 L. T. 625; 19 W. R. 1029.

R.

5. *Rabbeth* v. *Squire* (in part) (28 L. J., Ch., 565; 24 L. T., N. S., 295; 4 De G. & J. 406; 19 Beav. 77) not followed in *Hudson* v. *Hudson*, 20 L. R., Ch. D., 406; 51 L. J., Ch., 455; 46 L. T. 93; 30 W. R. 487.

6. *Radcliffe* v. *Fursman* (3 Bro. P. C. 514) and *Richards* v. *Jackson* (18 Ves. 472) observed on in *Pearce* v. *Pearce*, 1 De G. & Sm. 12; 16 L. J., N. S., Ch., 159; 11 Jur. 52.

7 *Railway Steel & Plant Co., Exp., Taylor, Re* (8 L. R., Ch. D., 183; 47 L. J., Ch., 321; 38 L. T. 475; 26 W. R. 418), not followed in *Vron Colliery Co., Re*, 20 L. R., Ch. D., 442; 51 L. J., Ch., 389; 30 W. R. 388.

8. *Rakestraw* v. *Brewer* (Sel. Ca. Ch. 56) not followed in *Kinsman* v. *Rouse*, 17 L. R., Ch. D., 104; 50 L. J., Ch., 436; 44 L. T. 597; 29 W. R. 627.

9. *Ramkissenseat* v. *Barker* (1 Atk. 20) considered in *Wigley* v. *Whitaker*, 1 Beav. 349; 8 L. J., N. S., Ch., 103.

10. *Ram Sabuk Bose* v. *Monomohini Dossee* (2 L. R., Ind. App., 81) approved in *Mussoorie Bank* v. *Raynor*, 7 L. R., App. Cas., 321; 51 L. J., P. C., 72; 46 L. T. 633; 31 W. R. 17.

11. *Ramsden* v. *Smith* (23 L. T., N. S., 166; 2 Drew 298) followed in *Dawes* v. *Tredwell*, 18 L. R., Ch. D., 354; 45 L. T. 118; 29 W. R. 793.

12. *Randall* v. *Morgan* (12 Ves. 67). The doubts of Sir William Grant, expressed in this case, that a written memorandum, or note made after the marriage, of a parol agreement, would not be sufficient within the Statute of Frauds, are outweighed by the opinion of Lord Langdale, in *De Biel* v. *Thomson*, 3 Beav. 469, and of Lord Cottenham in *Hammersley* v. *De Biel* (*Baron*), 12 Cl. & F. 45, 61. n. See *Barkworth* v. *Young*, 26 L. J., Ch., 157.

13. *Randall* v. *Russell* (3 Meriv. 190) distinguished in *Gabbett* v. *Lawder*, 11 L. R., Ir., 295.

14. *Randfield* v. *Randfield* (11 W. R. 847) not followed in *Middleton, Re, Thompson* v. *Harris*, 19 L. R., Ch. D., 552; 51 L. J., Ch., 273; 46 L. T. 359; 30 W. R. 293. Reversing 50 L. J., Ch., 525; 45 L. T. 40; 29 W. R. 73.

15. *Ranelaugh* (*Lord*) v. *Hayes* (1 Vern. 189). This case, I believe, has never been actually followed. It has been cited over and over again, but the industry and learning of the counsel for the plaintiff have not enabled them to produce a single case in which a decree has been made declaring the right to indemnity, and giving liberty to apply from time to time. Therefore, upon the ground of the great inconvenience of such a judgment, and looking at the fact that no decree can be produced from the time of *Ranelaugh* v. *Hayes* down to the present time, and looking at the not very clear report of that case, and the difficulty of ascertaining the exact circumstances, and especially what was the duration of the liability in respect of which that indemnity was declared. I feel myself bound to say that I cannot make such a declaration or give such a liberty to apply. Per Fry, J., in *Lloyd* v. *Dimmack*, 7 L. R., Ch. D., 398, 401; 47 L. J., Ch., 398; 38 L. T. 173; 26 W. R. 458.

16. *Ranelaugh* (*Lord*) v. *Hayes* (1 Vern. 189), not followed in *Hughes-Hallett* v. *Indian Mammoth Gold Mining Co.*, 22 L. R., Ch. D., 561; 52 L. J., Ch., 418; 48 L. T. 107; 31 W. R. 285.

17. *Ransome* v. *Burgess* (3 L. R., Eq., 773; 36 L. J., Ch., 84; 15 W. R. 189) not followed in *Wilson* v. *Turner*, 22 L. R., Ch. D., 521; 52 L. J., Ch., 270; 48 L. T. 370; 31 W. R. 438.

1. *Raphael* v. *Boehm* (11 Ves. 92), *quære* as to this case. See per V.-Ch., in *Att.-Gen.* v. *Solly*, 2 Sim. 519.

2. *Rawbone, Re* (3 Kay & J. 300; 26 L. J., Ch., 509), on re-argument, overruled. S. C. 26 L. J., Ch., 588.

3. *Rawlins* v. *Burgis* (2 Ves. & B. 382). See the observations on this case in the argument for plaintiff in *Ward* v. *Moore*, 4 Madd. 370.

4. *Ray* v. *Ray* (G. Coop. 264) distinguished in *Morgan, Re, Pillgrem* v. *Pillgrem*, 18 L. R., Ch. D., 93; 50 L. J., Ch., 834; 45 L. T. 183. Affirming 50 L. J., Ch., 654; 44 L. T. 796; 29 W. R. 733.

5. *Rayner* v. *Koehler* (14 L. R., Eq., 262; 41 L. J., Ch., 697; 27 L. T., N. S., 506; 20 W. R. 859). That was a case which very plainly brought out the point. It was argued by very able and experienced counsel, who appeared in support of a plea. My decision has not been appealed against, and my recollection of the case is, that, if the counsel who argued the case had entertained any reasonable hope of success, they would have appealed. . . . Now I read that as a recent decision, not because it was my own decision, but because it has not been followed, it is said, by a more recent decision of the Master of the Rolls. The Master of the Rolls having decided a case of *Cary* v. *Hills* (15 L. R., Eq., 79; 42 L. J., Ch., 100; 28 L. T., N. S., 6; 21 W. R. 166), that case having been cited to him, the reporters have inserted in head-note "*Rayner* v. *Koehler*, not followed." Finding that in a head-note I expected at least that the Master of the Rolls would have given some reason why he did not follow it. Possibly it escaped his notice altogether, and he did not even know of it, and from what I know of the Master of the Rolls, I think that if he had intended to dissent from me, he would at least have paid me the respect of stating the ground of his dissent when I had so explicitly decided this case in the month of July preceding. No notice appears to have been taken of it, however. Therefore I cannot regard the Master of the Rolls as deciding contrary to me, and even if he had, I am sure I should feel constrained, with the most perfect respect, to decide in accordance with my own decision in *Rayner* v. *Koehler*. Per Malins, V.-Ch., in *Coote* v. *Whittington*, 16 L. R., Eq., 534, 543, 544; 21 W. R. 839; 29 L. T., N. S., 206; 42 L. J., Ch., 846.

6. Whether the Court can administer an estate without having before it the legal personal representative of the testator or intestate, where an executor *de son tort* or the legal personal representative of such an executor is before the Court. But for two recent decisions of the V.-Ch. Malins, I should have thought that the question was unarguable. I have always supposed that this Court could not make a decree for general administration in the absence of the legal personal representative. In *Rayner* v. *Koehler* (*supra*), the first of his two decisions, the V.-Ch. Malins decided the contrary, but he did not go into the subject very fully, nor perhaps very carefully. Then followed a case of *Cary* v. *Hills* (*supra*), in which my predecessor, Lord Romilly, declined to follow *Rayner* v. *Koehler*. Then came *Coote* v. *Whittington* (*supra*), the second of the two cases, and in it unquestionably the Vice-Chancellor did examine the subject with the greatest minuteness and care. I have read his judgment most carefully, but am unable to follow his reasoning or to agree with his conclusion. I should not, however, have ventured to express so strongly my dissent from the Vice-Chancellor, had not my attention been called to two decisions which are in opposition to his, one by Lord Cottenham, *Penny* v *Watts* (2 Ph. 149), which is binding on me, and the other by Lord Hatherley, *Beardmore* v. *Gregory* (2 Hem. & M. 491), which is not absolutely binding, but is of equal authority with the decisions of V.-Ch. Malins, and I should prefer to follow it in a case where difference of opinion exists. Per Jessel, M. R., in *Rowsell* v. *Morris*, 17 L. R., Eq., 20, 22, 23; 22 W. R. 67; 43 L. J., Ch., 79; 29 L. T. 446.

7. *Read* v. *Blunt* (5 Sim. 567) observed upon in *Atkinson* v. *Grey*, 18 Jur. 282.

8. *Reay's Estate, Re* (3 W. R. 312; 1 Jur., N. S., 222) (proof of handwriting of the execution of a deed), not followed by Wickens, V.-Ch., in *Mair, Re*, 21 W. R. 749; 42 L. J. Ch., 882; 28 L. T. 760.

9. *Redfearn, Re, Bromley, Exp.* (11 Jur., N. S., 611; 13 W. R. 667; 12 L. T., N. S., 292; 34 L. J., Bky., 35). An appeal in bankruptcy, though by way of motion, must be entered within twenty-one days from the date of the pronouncing of the order appealed from, and the above case to the contrary is not law or correctly reported, or the order therein was made by consent. See *Lublin, Exp. & Re*, 18 W. R. 104, 21 L. T., N. S., 573. Giffard, L. J.

10. *Redgrave* v. *Hurd* (20 L. R., Ch. D., 1; 51 L. J., Ch., 113; 45 L. T. 485; 30 W. R. 251) followed in *Smith* v. *Land and House Property Corporation*, 49 L. T. 532.

11. *Redhead* v. *Walton* (30 L. J., Ch., 577; 9 W. R. 473; 29 Beav. 521) approved in *Levy* v. *Lovell*, 14 L. R., Ch. D., 234; 49 L. J., Ch., 305; 42 L. T. 242; 28 W. R. 602.

12. *Reese River Silver Mining Co., Re* (2 L. R., Ch., 604; 36 L. J., Ch., 618; 16 L. T. 549; 15 W. R. 882). The principle of this case followed in *Redgrave* v. *Hurd*, 20 L. R., Ch. D., 1; 51 L. J., Ch., 113; 45 L. T. 485; 30 W. R. 251.

13. *Rees* v. *Berrington* (2 Ves. J. 540; 2 White & Tudor's Leading Cases, 887). As early as *Rees* v. *Berrington*, a case decided in 1795 by Lord Loughborough, it was held, on what certainly seems somewhat artificial reasoning, that where any time is given by a creditor to a principal debtor without the consent of the surety, the surety is in equity discharged, however short the time may be, on the ground that the giving of time interferes with the right which the surety has to come to the principal debtor to say, "I pay you the money and require you, on my giving you a proper indemnity, to hand over all your right to me." If he did that, and it turns out that the creditor has, by giving time to the debtor, precluded himself from suing, and so deprived the surety of the right of suing in his (the creditor's) name, though for ever so short a time, it has been held to discharge the surety from his obligation. Lord Eldon, in *Samuell* v. *Howarth* (3 Mer. 272), cited in the notes to *Rees* v. *Berrington*, says:—"The rule is that if a creditor, without the consent

of the surety, gives time to the principal debtor, by so doing he discharges the surety —that is, time is given by virtue of positive contract, between the creditor and principal, not where the creditor is merely inactive. And in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. . . . It has been truly stated that the renewal of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." Such is the principle which Lord Eldon lays down; I think it is impossible to read it without saying, with due respect for so great a judge, that it is based on highly technical reasoning, however accurately and strictly logical the reasoning may be. That the creditor who gives time to the principal without expressly reserving his right against the surety does alter the rights of the surety, and so discharge him, is clear. But that time given by a lenient creditor which, ninety-nine times out of a hundred, does not injure the surety should yet discharge him, is to my mind not justice, although established by courts of equity; and if in the course of legislation which is contemplated it should be enacted, as is proposed, that where law and equity conflict, the rule of equity shall prevail, I, for one, shall be very reluctant to administer such a doctrine of equity as that I have mentioned. The law would have to adopt the doctrine, that giving of time discharges the surety unless the rights are saved. Now the whole ground of the doctrine there is that it is against good faith, that is, against the duty of the creditor, that he injured the surety with his eyes open, that he did it in such a way that it was a breach of duty and good faith. Per Blackburn, J., in *Petty* v. *Cooke*, 25 L. T., N. S., 90, 92, 93; 6 L. R., Q. B., 790, 794; 40 L. J., Q. B., 281; 19 W. R. 1112.

1. *Reeves* v. *Brymer* (6 Ves. 425) said by Registrar not to have been acted on. *Bond, Exp.*, 2 Myl. & K. 440.

2. *Reg.* v. *Boyes* (1 B. & S. 311) approved and followed in *Reynolds, Exp. & Re*, 20 L. R., Ch. D., 294; 51 L. J., Ch., 756; 46 L. T. 508; 30 W. R. 651; 15 Cox. C. C. 108. Affirming 46 L. T. 143.

3. *Reg.* v. *Millis* (10 Cl. & F. 534). Since this case it must be taken that there never could have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon. When a bridegroom was himself a priest, there being no other priest present, a valid marriage was not contracted by him. The law requires that equally in the case of the clergy, as of the laity, marriage in this country must, in the absence of express statute, take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there is opposed a just impediment, and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife. The ceremonies enjoined by the rubric, such as addressing the congregation, putting the ring on the finger, pronouncing the benediction, etc., are not absolutely essential to the validity of a marriage *in facie ecclesiæ*, the essential part being the reciprocal taking of each other for wedded wife and wedded husband, and being declared married persons. *Quære*, whether the decision in *Reg.* v. *Millis* (10 Cl. & F. 534) would apply to a marriage *bonâ fide* contracted in the colonies, or on board a ship, where it was impossible to procure the attendance of a minister of religion. *Beamish* v. *Beamish*, 9 H. L. Ca. 274: 8 Jur., N. S., 770; 11 Ir. Com. Law Rep. 511; 5 L. T., N. S., 97.

4. *Reg.* v. *Millis* (10 Cl. & F. 534; 8 Jur. 717), which was an appeal from a judgment holding that by the common law of England a valid marriage could not be contracted without the presence of a priest canonically ordained; the question having been put that the judgment be reversed, there was an equality of the votes of the peers who were present and took part in the decision. Thereupon the House affirmed the judgment, deciding that by the common law of England a valid marriage could not be contracted without the presence of a priest canonically ordained. I by no means concurred in that decision, thinking that the common law of England accorded with the canon law upon this subject which prevailed over the whole of the Western Church till the Council of Trent, and that a valid marriage might be contracted by the solemn assent of the contracting parties, as Lord Stowell had often laid down, and for fifty years had been considered clear law in Westminster Hall. But subsequently, when presiding as Chief Justice of the Court of Queen's Bench, I several times, with the approbation of my brother judges, ruled that the question as to the validity of such marriages was settled by the decision of the House of Lords in *Reg.* v. *Millis*. And if this question were again to be mooted in this House upon an appeal, I conceive that this House would be bound to decide that such a marriage was always null and void, although every peer present should be of opinion that *Reg.* v. *Millis* was improperly decided, and that in England, till Lord Hardwicke's Act, the presence of a priest was as little necessary for making a binding marriage contract, as a binding contract of hiring and service. Per Campbell, C., in *Att.-Gen.* v. *Windsor* (*Dean and Canons*), 6 Jur., N. S., 834, 835.

5. *Reg.* v. *Millis* (10 Cl. & F. 534; 8 Jur. 717). I shall never believe to be a binding authority. In the House of Lords there were three law peers against three. Per Willes, J., in *Reg.* v. *Mainwaring*, 26 L. J., M. C., 10-13.

6. *Reg.* v. *Tithe Commissioners* (14 Q. B. 459, 474; 19 L. J., Q. B., 177) and *Ditcher* v. *Denison*, 4 Q. B. D. at p. 273, Special Report,

1857) observed upon in *Julius* v. *Oxford* (*Bishop*), 5 L. R., App. Cas., 214; 49 L. J., Q. B., 577; 42 L. T. 546; 28 W. R. 726.

1. *Remington* v. *Deverall* (2 Anst. 550). The case in Anstruther is so shortly stated that little can be deduced from it. All it seems to decide is, that the Court will take care to secure the annuity, unless there is something to indicate a contrary intention. Per Chanworth, C., in *Dixon* v. *Gayfere*, 1 De G. & J. 662.

2. *Rennie* v. *Morris* (20 W. R. 227; 13 L. R., Eq., 203; 25 L. T., N. S., 862; 41 L. J., Ch., 321). As to liability of jobber on transfer of shares on sale to an infant: overruled in *Merry* v. *Nickalls*, 20 W. R. 929; 41 L. J., Ch., 767; 7 L. R., Ch., 733; 26 L. T., N. S., 12. S. C. *nom. Nickalls* v. *Merry*, 7 L. R., H. L., 530; 45 L. J., Ch., 575; 32 L. T. 623; 23 W. R. 663.

3. *Reuss* (*Princess*) v. *Bos* (5 L. R., H. L., 176; 40 L. J., Ch., 665) commented on and distinguished in *Capital Fire Insurance Association*, *Re*, 21 L. R., Ch. D., 201; 52 L. J., Ch., 20; 47 L. T. 123; 30 W. R. 941.

4. *Revell* v. *Blake* (7 L. R., C. P., 300) followed in *French*, *Exp.*, *Trim*, *Re*, 52 L. J., Ch., 48; 47 L. T. 339.

5. *Rex* v. *Twyning* (*Inhabitants of*) (2 B. & Ald. 386) explained in *Lapsley* v. *Grierson*, 1 H. L. Ca. 498.

6. *Reynolds* v. *Godlee* (Johns. 536; 29 L. J., Ch., 633) overruled by *Curteis* v. *Wormald*, 10 L. R., Ch. D., 172; 27 W. R. 419; 40 L. T. 108.

7. *Reynolds* v. *Howell* (8 L. R., Q. B., 398). The practice at common law as laid down in this case followed in *Nurse* v. *Durnford*, 13 L. R., Ch. D, 764; 49 L. J., Ch., 229; 41 L. T. 611; 28 W. R. 145.

8. *Reynolds* v. *Wheeler* (30 L. J., C. P., 350; 10 C. B., N. S., 561) followed in *Macdonald* v. *Whitfield*, 8 L. R., App. Cas., 733; 52 L. J., P. C., 70; 49 L. T. 446.

9. *Rhodes* v. *Bate* (1 L. R., Ch., 252; 35 L. J., Ch., 267; 13 L. T. 778; 14 W. R. 292) distinguished in *Mitchell* v. *Homfray*, 8 L. R., Q. B. D., 587; 50 L. J., Q. B., 460; 45 L. T. 694; 29 W. R. 558.

10. *Ricardo Schmidt*, *The* (1 L. R., P. C., 268; 4 Moo. P. C. 121), approved of in *Reg.* v. *Casaca*, 5 L. R., App. Cas., 548; 49 L. J., P. C., 41; 43 L. T. 290

11. *Richards*, *Re* (8 L. R., Eq., 119). There the interest on a legacy for the benefit of an infant was ordered to be paid as from the death of the testator. Mr. Dickinson: The law as laid down in the case cited is new to me. Wickens, V.-Ch.: I certainly thought it had been otherwise, but I must follow that authority. *Chidgey* v. *Whitby*, 41 L. J., Ch., 699, 700.

12. *Richards & Co.*, *Re* (11 L. R., Ch. D., 676; 48 L. J., Ch., 555; 40 L. T. 315; 27 W. R. 530), approved in *Withernsea Brick Works Co.*, *Re*, 16 L. R., Ch. D., 337; 50 L. J., Ch., 185; 43 L. T. 713; 29 W. R. 178.

13. *Richards & Co.*, *Re* (11 L. R., Ch. D., 676; 48 L. J., Ch., 555; 40 L. T. 315; 27 W. R. 530), not followed in *Vron Colliery Co.*, *Re*, 20 L. R., Ch. D., 442; 51 L. J., Ch., 389; 30 W. R. 388.

14. *Richards* v. *Delbridge* (18 L. R., Eq., 11; 43 L. J., Ch., 459; 22 W. R. 584) followed in *Breton's Estate*, *Re*, *Breton* v. *Woolven*, 17 L. R., Ch. D., 716; 50 L. J., Ch., 369; 44 L. T. 337; 29 W. R. 777.

15. *Richards* v. *James* (2 L. R., Q. B., 285; 39 L. J., Q. B, 116; 16 L. T. 174; 15 W. R. 580) distinguished in *Artistic Colour Printing Co.*, *Re*, *Fourdrinier*, *Exp.*, 21 L. R., Ch. D., 510; 48 L. T. 46; 31 W. R. 149; and *Toomer*, *Re*, *Blaiberg*, *Exp.*, 23 L. R., Ch. D., 254; 52 L. J., Ch., 461; 49 L. T. 16; 31 W. R. 906.

16. *Richards* v. *Platel* (Cr. & Ph. 79) commented on in *South Essex Equitable Investment and Advance Co.*, *Re*, 46 L. T. 280.

17. *Richardson Exp.* (*Buck* 480), questionable. *Rawbone*, *Re*, 26 L. J., Ch., 588, 589.

18. *Richardson* v. *Richardson* (36 L. J., Ch., 653; 3 L. R., Eq., 686) doubted to be law by Bacon, V.-Ch., in *Warriner* v. *Rogers*, 42 L. J., Ch., 581.

19. *Richardson* v. *Richardson* (36 L. J., Ch., 653; 3 L. R., Eq., 686) opposed to *Milroy* v. *Lord*, 4 De G. F. & J. 264; 31 L. J., Ch., 798; and to *Warriner* v. *Rogers*, 42 L. J., Ch., 581; 16 L. R., Eq., 340; 28 L. T. 863; 21 W. R. 766). Per Jessel, M. R, in *Richards* v. *Delbridge*, 43 L. J., Ch., 459, 461; 18 L. R., Eq., 11; 22 W. R. 584.

20. *Ricket* v. *Metropolitan Railway Co.* (2 L. R., H. L., 175; 36 L. J, Q. B., 205; 16 L. T. 542; 15 W. R. 937) distinguished in *Fritz* v. *Hobson*, 14 L. R., Ch. D., 542; 49 L. J., Ch., 321; 42 L. T. 225; 28 W. R. 459.

21. *Ricket* v. *Metropolitan Railway Co.* (2 L. R. H. L., 175). Lord Westbury's opinion on the uncertainty and complexity of the judicial decisions of modern days.—This case was heard by six judges in the Court of Exchequer Chamber on a writ of error from the Court of Queen's Bench. The six judges differed in opinion, four being for reversing, and two for affirming the judgment of the Court below. The four judges in the Queen's Bench were unanimous. Deducting, therefore, the two from the four judges in the Exchequer Chamber, the unanimous judgment of the four judges in the Queen's Bench has been annulled by two judges in the Exchequer Chamber. By the same majority the case of *Senior* v. *Metropolitan Railway Co.*, 2 H. & C. 258, decided by the Court of Exchequer in 1863, and the case of *Cameron* v. *Charing Cross Railway Co.*, 16 C. B., N. S., 430, decided by the Court of Common Pleas in 1864 (which are the authorities for the judgment in the Court of Exchequer Chamber in the present case), have also been overruled. They are, therefore, the judicial opinions of ten or twelve judges opposed to the present judgment, which is the judicial opinion of four. It is a matter of regret that our judicial institutions should admit of these anomalies. It is also painful to observe the number of conflicting decisions on the law of compensation by railway companies, which is the subject of the present appeal. It is impossible to reconcile these decisions by any sound distinctions, and the result is, that to a great extent they neutralize each other. Moreover, it is distressing to be told (as we are in the judgment before us) that the Court of Exchequer in *Senior* v. *Metropolitan Railway Co.*, and the Court of Common Pleas in *Cameron* v. *Charing Cross Railway Co.*, founded their judgments on the supposed effect of the judgment given by the Court of Exchequer Chamber so recently as in the year 1863 in the case of *Chamberlain* v. *London & Crystal Palace Railway Co.*, 2 B.

& S. 605, 617, but that both the Common Pleas and the Court of Exchequer did not understand the judgment on which they so relied. It is a striking example of the uncertainty of all law which rests on judicial decisions. Per Lord Westbury in *Ricket* v. *Metropolitan Railway Co.*, 16 L. T., N. S., 547; 2 L. R., H. L. 175, 201; 15 W. R. 937, 942.

1. *Ricket* v. *Metropolitan Railway Co.* (36 L. J., Q. B., 205; 2 L. R., H. L., 175), 16 L. T., N. S., 542; 15 W. R. 937. Affirming 5 B. & S. 156, which reversed 5 B. & S. 149). It is our duty to endeavour to extract from the case of *Ricket* v. *Metropolitan Railway Co.* in the House of Lords, the principle upon which the decision is based. That principle is, that no case comes within the purview of the Lands Clauses Consolidation Act 1845, s. 68, or the Railways Clauses Consolidation Act 1845, s. 6, unless there has been damage to the land itself or to some interest therein, and unless that damage would have been the subject of an action at law before those statutes. The two things must concur, mere personal interest or injury, though connected with the enjoyment of particular land, is not ground for compensation. In the present case it is plain that there is no injury to the land or to any interest therein, and therefore we must give judgment for the defendants, unless we adopt the very powerful reasoning of Lord Westbury. But the other noble and learned lords, whose judgment has now become the law of the land, were opposed to it. They have laid down a principle which disposes of the present case, and it would be unbecoming in us to express any disapprobation of it. Per Hannen, J., in *Reg.* v. *Metropolitan Board of Works*, 10 B. & S. 391, 398; 4 L. R., Q. B., 358; 38 L. J., Q. B., 201; 17 W. R. 1094.

2. *Ricket* v. *Metropolitan Railway Co.* (2 L. R., H. L., 175) examined in *Caledonian Railway* v. *Walker's Trustees*, 7 L. R., App. Cas. (Sc.), 259; 46 L. T. 826; 30 W. R. 569.

3. *Ridgway* v. *Wharton* (6 H. L. Ca. 238). In this case it was held that the act of sending a paper containing the terms of an agreement to a solicitor, to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till the matter is reduced into form. I was counsel in that case from the commencement, and I doubt if it can properly be cited as an authority for that position. It shows merely that all the circumstances must be considered in order to determine whether what has taken place is an agreement or a mere proposal for an agreement. Per Bramwell, B., in *Barker* v *Allan*, 5 H. & N. 61, 68.

The case of *Ridgway* v. *Wharton* only proves that parties may come to an incomplete agreement, which is to be worked out by a written agreement, and that in that particular case the intention of the parties was, that there should be no agreement until the written document was complete. Per Watson, B., delivering the considered judgment of the Court, in *Barker* v. *Allan*. *Ib.*

4. *Ridgway* v. *Wharton* (3 De G. M. & G. 677). Is there not a later case, in which we declined to follow that case? Per Turner, L. J., in *Heys* v. *Astley*, 4 De G. J. & S. 34, 37. I do not think it necessary, in the view which I take of this case, to say anything with respect to *Ridgway* v. *Wharton* before the Lord Chancellor. Per Turner, L. J., in *Heys* v. *Astley*, 4 De G. J. & S. 34, 37, 39. The case of *Ridgway* v. *Wharton* is referred to by Lord St. Leonards without remark. See Sugden, V. & P., 13th edit., p. 122, and 14th edit., p. 149, and see *Wood* v. *Midgley*, 5 De G. M. & G. 41.

5. *Ridley* v. *Plymouth Grinding Co.* (2 Exch. 711) observed upon in *Greenwood's case*, 3 De G. M. & G. 459; 18 Jur. 387; 23 L. J., Ch., 966.

6. *Rigby* v. *Connol* (14 L. R., Ch. D., 482; 49 L. J., Ch., 328; 42 L. T. 139; 28 W. R. 650) approved in *Duke* v. *Littleboy*, 49 L. J., Ch., 802; 43 L. T. 216; 28 W. R. 977.

7. *Riley* v. *Garnett* (3 De G. & Sm. 629) distinguished in *Abbiss* v. *Burney*, *Finch*, *Re*, 17 L. R., Ch. D., 211; 50 L. J., Ch., 348; 44 L. T. 267; 29 W. R. 449. Reversing 49 L. J., Ch., 710; 43 L. T. 20; 28 W. R. 903.

8. *Riley* v. *Garnett* (3 De G. & Sm. 629). If I were at liberty to follow the case of *Riley* v. *Garnett*, before Knight Bruce, V.-Ch., which was cited by Mr. Kay, the law would seem to be clearly in her favour. There are, however, those other cases which were mentioned. *Hodgson* v. *Bective* (*Earl*) (9 L. T., N. S., 18; 10 H. L. Ca. 656) and *Holmes* v. *Prescott* (11 L. T., N. S., 38), in which the very point was clearly decided, and decided then after deliberate consideration and examination of all the cases, which were numerous, which had preceded the decision in *Holmes* v. *Prescott*; and I do not feel myself at liberty to dissent from the rule which I find there established, that there being no gift of the intermediate rents, they must of necessity fall into the residue. Per Bacon, V.-Ch., in *Eddels*, *Re*, 24 L. T., N. S., 223, 224; 11 L. R., Eq., 559; 40 L. J., Ch., 316; 19 W. R. 815.

9. *Ring* v. *Jarman* (20 W. R. 744; 14 L. R., Eq., 357; 41 L. J., Ch., 535; 26 L. T. 690). (Succession duty.) An appeal was presented from the decision of Wickens, V.-Ch., in this case, and came on to be argued in July 1872, and soon after the opening of the case their lordships said that whatever view they might take of the Act they should feel a difficulty in differing from the decision of the Court of Exchequer in *Att.-Gen.* v. *Gell* (13 W. R. 900; 3 H. & C. 615, 630), upon the authority of which Wickens, V.-Ch., made the order appealed from. Their lordships therefore suggested that the best course would be to carry the appeal at once to the House of Lords. The matter stood over that the parties might consider what they should do. Ultimately they determined not to prosecute the appeal, and it was arranged between them and the Crown that an agreed sum should be paid for succession duty. *Ring* v. *Jarman*, 21 W. R. 213.

10. *Ripley* v. *Moysey* (1 Keen 578) not followed in *Middleton*, *Re*, *Thompson* v. *Harris*, 19 L. R., Ch. D., 552; 51 L. J., Ch., 273; 46 L. T. 359; 30 W. R. 293. Reversing 50 L. J., Ch., 525; 45 L. T. 40; 29 W. R. 731.

11. *Rishton* v. *Cobb* (5 Myl. & Cr. 145) doubted in *Boddington*, *Re*, *Boddington* v. *Clariat*, 25 L. R., Ch. D., 685; 53 L. J., Ch., 475; 50 L. T. 761; 32 W. R. 448.

12. *Rittson* v. *Stordy* (3 Sm. & G. 230; 1 Jur., N. S., 771) dissented from in *Barrow* v. *Wadkin*, 24 Beav. 1; 3 Jur., N. S., 679; 27 L. J., Ch., 129.

1. *Roberts* v. *Walker* (1 Russ. & M. 752) approved of in *Simmons* v. *Rose*, 6 De G. M. & G. 411; 2 Jur., N. S., 70; 25 L. J., Ch., 615.

2. *Roberts* v. *Walker* (1 Russ. & M. 752) observed upon and distinguished in *Bentley* v. *Oldfield*, 18 Beav. 225.

3. *Robertson, Re* (23 Beav. 433; 26 L. J., Ch., 349), not acted upon in *Mouseley, Re*, 4 Kay & J. 86. n.

4. *Robertson* v. *Norris* (1 Giff. 421) commented on in *Warner* v. *Jacob*, 20 L. R., Ch. D., 220; 51 L. J., Ch., 642; 46 L. T. 656; 30 W. R. 721.

5. *Robertson* v. *Norris* (1 Giff. 421) not followed in *Martinson* v. *Clowes*, 21 L. R., Ch. D., 857; 51 L. J., Ch., 594; 46 L. T. 882; 30 W. R. 795.

6. *Robins* v. *Mills* (1 Beav. 227). The decision in this is inapplicable where the merits of the cause must enter into the discussion. *Webb* v. *Grace, Vines & Hobbs, Re*, 12 Beav. 489.

7. *Robinson, Exp.* (Buck. 113). So an agent, employed to procure a bill or note to be discounted for his principal, may, if it be necessary or proper to accomplish the end, indorse the same in his own name, although not indorsed by his principal, and in such case he will be entitled to be indemnified by his employer. Story on Agency, s. 57, citing *Robinson, Exp.*, Buck. 113; Bayley on Bills, c. 2, s. 7, 5th edit. *Robinson. Exp.*, is no authority at all for the proposition it is cited for in Story's book. Per Willes, J., *Fitzgerald* v. *Dressler*, 5 Jur., N. S., 598, 600.

8. *Robinson, Re* (Fonb. Rep. 205), overruled by Bacon, Com., in *Chichester, Re*, 19 L. T., N. S., 188.

9. *Robinson* v. *Geldard* (3 Macn. & G. 735; 16 Jur. 955) adopted and approved of in *Tempest* v. *Tempest*, 2 Kay & J. 635; and on appeal, S. C. 3 Jur., N. S., 251; 26 L. J., Ch., 501.

10. *Robinson* v. *London Hospital* (*Governors*) (10 Hare 29) overruled in *Calvert* v. *Armitage*, 8 L. T., N. S., 269.

11. *Robinson* v. *Lowater* (5 De G. M. & G. 272; 18 Jur. 363; 23 L. J., Ch., 641). I cannot say on looking into the authorities on this subject, which I have taken the opportunity of doing, that the title can be held to be good. It may be so if the case of *Robinson* v. *Lowater* is to be followed to its full extent; but I observe that doubts have been expressed in the profession, whether that case should or should not be followed to its full extent, and I must respectfully say that I think the purchaser has done very wisely in escaping from his purchase. Per Turner, L. J., in *Cook* v. *Dawson*, 30 L. J., Ch., 359, 360; 3 De G. F. & J. 128. *Robinson* v. *Lowater* shows that a charge of debts enables the executor to sell. Lord St. Leonards has expressed a doubt as to the correctness of that decision; and a doubt from such a quarter deserves attention. Per Knight Bruce, L. J. *Ib.* See Hays' and Jarman's Concise Forms of Wills, by Badger, p. 429.

12. *Robinson* v. *Mollett* (7 L. R., H. L., 802; 44 L. J., C. P., 362; 33 L. T. 544) distinguished in *Rogers, Exp. & Re*, 15 L. R., Ch. D., 207; 43 L. T. 163; 20 W. R. 29.

13. *Robinson* v. *Nevdick* (3 Meriv. 13) observed upon in *Groom* v. *Stinton*, 2 Ph. 384; 17 L. J., N. S., Ch., 1; 11 Jur. 895.

14. *Robinson* v. *Shepherd* (4 De G. F. & J. 129) followed in *Parker* v. *Winder, Wilson, Re*, 24 L. R., Ch. D., 664; 53 L. J., Ch., 130.

15. *Robinson* v. *Tonge* (3 P. W. 399) overruled. See *Aldrich* v. *Cooper*, 8 Ves. 382.

16. *Robinson* v. *Trevor* (12 L. R., Q. B. D., 423) distinguished in *Carlisle City and District Banking Co.* v. *Thompson*, 33 W. R. 119.

17. *Rochdale Canal Co.* v. *King* (2 Sim., N. S., 78) distinguished in *Cooper* v. *Crabtree*, 20 L. R., Ch. D., 589; 51 L. J., Ch., 544; 47 L. T. 5; 30 W. R. 649. Affirming 19 L. R., Ch. D., 193; 51 L. J., Ch., 189; 45 L. T. 587; 30 W. R. 285.

18. *Rochfort* v. *Battersby* (2 H. L. Ca. 388; 14 Jur. 229). I may observe, however, with reference to that case, that though I should be very unwilling to express a doubt about any decision of the House of Lords, especially in a case which has been so much considered, yet that it seems a startling proposition, as stated in the marginal note, that a person being improperly made a defendant, and against whom a decree has been pronounced (other than that of dismissal of the bill with costs), could not be heard to appeal. That is a proposition which, I think, is too broadly stated. I have no doubt but that the object of that appeal was, that the bankrupt might get relief, as it were, in bankruptcy or insolvency, and not on the ground that he was improperly made a party. Per Cranworth, C. *Wearing* v. *Ellis*, 6 De G. M. & G. 596, 608; 2 Jur., N. S., 1147; 26 L. J., Ch., 15. Affirming 2 Jur., N. S., 204; 25 L. J., Ch., 248.

19. *Rochfort* v. *Battersby* (2 H. L. Ca. 338; 14 Jur. 229) recognised in *Dyson* v. *Hornby*, 7 De G. M. & G. 1.

20. *Roddam* v. *Morley* (1 De G. & J. 1; 3 Jur., N. S., 449; 26 L. J., Ch., 438. Reversing 2 Kay & J. 336; 2 Jur., N. S., 805; 25 L. J., Ch., 329). The case of *Roddam* v. *Morley*, which, notwithstanding all that has been said of it in *Coope* v. *Creswell* (2 L. R., Ch., 112; 36 L. J., Ch., 114), or elsewhere, I conceive to be of unquestionable authority, has decided that payment of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder. But the case is also of great value by reason of the close and careful examination into the Statutes of Limitation, as well by the common law judges, whose assistance was procured by the Lord Chancellor, as by Lord Cranworth himself. The judges pointed out that the action to be brought could only be one and the same action on the specialty, and not on any new promise, express or implied, from the terms of the acknowledgment, whatever it might have been. They held that a devisee who might plead the bar, if it existed, could only plead it on such single action; and, observing that he was capable of making the acknowledgment—and the Statute of Fraudulent Devises having declared that the devisee should be liable and chargeable in the same manner as the heir—they concluded, without hesitation, that the devisee might as properly be said to be "liable by virtue of the indenture," as either the real or personal representative, and, therefore, that by the acknowledgment the action—the only action that could be brought—was set free generally, the statutes having nowhere said that it could be brought only against the party making the

acknowledgment. Lord Cranworth, who concurred with the judges "not only in the result at which they had arrived, but in the reasoning which led them to their conclusion." Per Bacon, V.-Ch., in *Pears* v. *Laing*, 24 L. T., N. S., 19, 21, 22; 40 L. J., Ch., 225, 229; 12 L. R., Eq., 42, 55, 56; 19 W. R. 658.

1. *Roddy* v. *Fitzgerald* (6 H. L. Ca. 823). The decision in that case proceeded upon the expressed purpose of re-settling the law upon the basis on which, thirty-eight years earlier, *Jesson* v. *Wright* (2 Bligh 1) had been supposed to have placed it. A tendency had arisen, after *Jesson* v. *Wright*, to draw a distinction between "heirs of the body," which are the words in the will in that case, and "issue," and to lay hold of smaller circumstances to warrant the Court in giving to the issue estates in fee; in which case it was considered, with some lingering regard for the intentions of testators, that it ought to be held that issue did take as purchasers in fee, and not as inheritors *per forman doni*. That is the rule sanctioned, though not applied, by V.-Ch. Wood, in *Kavanagh* v. *Morland* (Kay 16), and adopted with some amplification by Mr. Jarman. But *Roddy* v. *Fitzgerald* disaffirmed the attempted distinction between "heirs of the body" and "issue" (so far at least as the *Jesson* v. *Wright* doctrine is concerned), and determined that the circumstance there relied on for giving a fee to the issue, namely, the power of appointment amongst them in such manner, etc., was as ineffectual for that purpose as had been, in *Jesson* v. *Wright*, a nearly similar power for so dealing with "heirs of the body." The principle, or rather the motive, for this decision is stated in the last paragraph of Lord Cranworth's judgment. "It is," he says, "in these cases, to the last degree important to have a settled rule of construction, which may make it possible to advise confidently on titles; and this object cannot be attained if, from any speculation as to what the testator had on his mind, we endeavour to raise distinctions between decided cases and those under consideration where no real distinction exists." Per O'Hagan, C., in *Colclough* v. *Colclough*, 4 Ir. R., Eq., 263, 290.

The decision in *Roddy* v. *Fitzgerald* is one to which, I must confess, my submission is not a willing one. I have always thought that, when Lord Cranworth rose to move the judgment of the House of Lords in that case, the weight of reasoning, as well as of individual authority amongst the judges of both countries, preponderated strongly against the conclusion which he recommended to the house. All, however, gave way to the policy of having a settled rule of construction, which might make it possible, as Lord Cranworth said, to advise confidently on titles. Per Christian, L. J., 4 Ir. R., Eq., 294.

2. *Rodger* v. *Comptoir d'Escompte de Paris* (2 L. R., P. C., 393) dissented from in *Leask* v. *Scott*, 2 L. R., Q. B. D., 376; 46 L. J., Q. B., 576; 36 L. T. 784; 25 W. R. 654.

3. *Rodgers, Exp.* (2 Madd. 449). The only case supporting the argument in favour of an implied gift, but I am satisfied that that case cannot in its integrity be now treated as an authority. It has been doubted by Lord Cranworth, and, as I stated on a former occasion (see *Webster* v. *Parr*, 26 Beav. 236), Lord Cottenham declined to follow it in a case in which I was counsel. Per Romilly, M. R., in *Neighbour* v. *Thurlow*, 28 Beav. 33, 37.

4. *Rodgers* v. *Nowill* (6 Hare 325) followed in *Collins Co.* v. *Reeves*, 4 Jur., N. S., 865.

5. *Rogers* v. *Horn* (26 W. R. 432). "Report incorrect." *Wilson* v. *Cave* (No. 2), 44 L. T. 118. n.

6. *Rolfe* v. *Maclaren* (3 L. R., Ch. D., 106; 24 W. R. 816) not followed as to part in *Benbow* v. *Low*, 13 L. R., Ch. D., 553; 49 L. J., Ch., 259; 42 L. T. 14; 28 W. R. 364.

7. *Rolland* v. *Hart* (6 L. R., Ch., 678; 40 L. J., Ch., 701; 25 L. T. 191; 19 W. R. 962) observed upon in *Care* v. *Care*, 15 L. R., Ch. D., 639; 49 L. J., Ch., 505; 42 L. T. 730; 28 W. R. 798.

8. *Rollins* v. *Hinks* (13 L. R., Eq., 355; 41 L. J., Ch., 358; 26 L. T. 56; 20 W. R. 287) dicta disapproved of in *Halsey* v. *Brotherhood*, 15 L. R., Ch. D., 514; 49 L. J., Ch., 786; 43 L. T. 366; 29 W. R. 9.

9. *Roose* v. *Chalk* (49 L. J., Ch, 625). Observations of the Vice-Chancellor in this case upon *Braddon* v. *Farrand* (1 Russ. 86) commented on in *Dillon* v. *Reilly*, 9 L. R., Ir., 57.

10. *Rose* v. *Bartlett* (Cro. Car. 293) commented on in *Wilson* v. *Eden*, 11 Beav. 237; 17 L. J., N. S., Ch., 459; 12 Jur. 488.

11. *Rose* v. *Groves* (5 Man. & Gr. 613) followed in *Fritz* v. *Hobson*, 14 L. R., Ch. D., 542; 49 L. J., Ch., 321; 42 L. T. 225; 28 W. R. 459.

12. *Rosenthal, Exp., Dickinson, Re* (20 L. R., Ch. D., 315; 51 L. J., Ch., 736; 47 L. T. 266; 30 W. R. 667. Affirming 51 L. J., Ch., 559; 46 L. T. 320; 30 W. R. 492). The practice laid down in *Rosenthal, Exp., suprà*, that before entering an appeal in bankruptcy the registrar ought now to give a direction to the Bank of England to receive the deposit payable on the entry, and not to enter the appeal until he receives from the bank a certificate that the money has been paid, applies to appeals from the Chief Judge to the Court of Appeal, as well as to appeals from a county court to the Chief Judge. *Lawon, Exp., Pidsley, Re*, 20 L. R., Ch. D., 701; 51 L. J., Ch., 928; 47 L. T. 211; 31 W. R. 71.

13. *Ross* v. *Laughton* (1 Ves. & B. 349). In order to dispose of the case satisfactorily, therefore, we must consider whether *Ross* v. *Laughton* was overruled by *Lord* v. *Wormleighton* (Jacob 580). I am of opinion that it was not. Lord Eldon certainly did not say that he was overruling the former case, which he probably would have said if he thought he was doing so; and, in fact, the cases were distinct, for an executor strictly represents and continues his testator's interest in every respect, whereas an assignee in bankruptcy comes in by a title adverse to the bankrupt; an assignee may elect whether or not he will carry on the suit; if he does so, he is not obliged to employ the same solicitor. Per Wood, L. J., in *Simmonds* v. *Great Eastern Railway Co.*, 38 L. J., Ch., 87, 88.

If *Ross* v. *Laughton* had not been cited in the argument of *Lord* v. *Wormleighton*, there might have been more strength before us that the former case was overruled by the latter. I cannot but think, considering the great care and accuracy of Lord Eldon, that if he

thought he was overruling the earlier case he would have said so expressly. Per Selwyn, L. J. *Ib.*

1. *Ross* v. *Ross* (1 Jac. & Walk. 154). *Quære*, whether reconcilable with *Doe* v. *Glover* (1 C. B. 448). *Palmer, Exp.*, 5 De G. & Sm. 649; 17 Jur. 108.

2. *Ross* v. *Ross* (20 Beav. 645) followed in *Robinson* v. *Sykes*, 2 Jur., N. S., 895; 23 Beav. 40; 26 L. J., Ch., 782.

3. *Ross's Trust, Re* (15 Jur. 241), disapproved of in *Bangley's Trust, Re*, 16 Jur. 682; 21 L. J., Ch., 875.

4. *Rotherham* v. *Rotherham* (26 Beav. 465) dissented from in *Clark* v. *Clark*, 34 L. J., Ch., 477.

5. *Roundell* v. *Breary* (2 Vern. 482) explained and corrected in *Mornington (Earl)* v. *Keane*, 2 De G. & J. 292; 4 Jur., N. S., 981; 27 L. J., Ch., 791.

6. *Rowbotham* v. *Wilson* (8 H. L. Ca. 348). The rule established in this case cited and approved of in *Dixon* v. *White*, 8 L. R., App. Cas. (Sc.), 833.

7. *Rowe* v. *Anderson* (3 Beav. 66; 9 L. J., N. S., Ch., 400, cited) questioned in *Lane* v. *Paul*, 3 Beav. 66; 9 L. J., N. S., Ch., 400.

8. *Rowley* v. *Adams* (4 Myl. & C. 534; 8 Sim. 205; 6 L. J., Ch., 24), which decides that executors are liable as for a breach of trust in not assigning leaseholds to an insolvent person, in order to get rid of their liability to the covenants. I entertain doubts whether, in such circumstances, the Court could make executors liable for a breach of trust. The case seems to me at variance with the fundamental principles of equity. It is a startling proposition. The law has always held that an assignee may get rid of a lease by assignment, but the lessee cannot get rid of his covenants; though an assignee can get rid of the consequential liability for the future, because he is liable only during the time he holds the lease. Per Romilly, M. R., *Mexican & South American Co. Re, Lund, Exp.*, 5 Jur., N. S., 400, 401; 28 L. J., Ch., 628, 629; 27 Beav. 465.

9. *Rowsell* v. *Morris* (17 L. R., Eq., 20; 43 L. J., Ch., 97; 29 L. T. 446; 22 W. R. 67). I am aware that the case of *Coote* v. *Whittington* (16 L. R., Eq., 534; 42 L. J., Ch., 846; 29 L. T. 206) was subjected to criticism by Sir George Jessel in *Rowsell* v. *Morris*, and I think, in answer to the observations made by him, I may say that he expressed himself somewhat incautiously, for he decides that you cannot administer an estate in this court without having before it the legal personal representative of the testator or intestate, although an executor *de son tort* or the legal personal representative of such an executor is before the Court. If, as he says, you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so. I know of no character in which such a man can be sued except it is that of an executor *de son tort*, as I pointed out in the case of *Coote* v. *Whittington*. It would be the height of injustice if a man could possess himself of the assets of a testator, and because he did not choose to clothe himself with the character of administrator, could not therefore be sued in respect of such assets. I have already decided the contrary, first in *Rayner* v. *Koehler* (14 L. R., Eq., 262; 41 L. J., Ch., 697; 27 L. T. 506; 20 W. R. 859), and then in *Coote* v. *Whittington*; and I believe that what I decided in those cases has been the rule ever since the statute of Elizabeth. Per Malins, V.-Ch., in *Ambler* v. *Lindsay*, 3 L. R., Ch. D., 198, 205; 45 L. J., Ch., 768; 35 L. T. 93; 24 W. R. 982.

10. *Royal Hotel Co. of Great Yarmouth, Re* (4 L. R., Eq., 244), disapproved of in *Mercantile Trading Co., Re, Stringer, Exp.*, 4 L. R., Ch., 475; 38 L. J., Ch., 698; 20 L. T., N. S., 553, 591; 17 W. R. 694.

11. *Rucker, Exp.* (3 Dea. & Ch. 704; 1 Mont. & A. 481), overruled by *Exp. Borowdaile*, 2 Mont. & A. 398.

12. *Ruding, Re* (14 L. R., Eq., 266; 41 L. J., Ch., 665; 20 W. R. 936), questioned and not followed in *Boyes* v. *Cook*, 14 L. R., Ch. D., 53; 49 L. J., Ch., 350; 42 L. T. 556; 28 W. R. 754.

13. *Rule* v. *Henry* (Fl. & K. 97) disapproved of in *Abbott* v. *Stratten*, 3 J. & L. 603; 9 Ir. Eq. R. 233.

14. *Russel* v. *Buchanan* (9 Sim. 167, 175) overruled in *Cooper* v. *Ewart*, 15 Sim. 564; 2 Ph. 362; 16 L. J., N. S., Ch., 417.

15. *Russell* v. *Ashby* (5 Ves. 96) (affidavit to obtain a writ of *ne exeat regno*) not followed by Lord Romilly, M. R., in *Perry* v. *Dorset*, 19 W. R. 1048.

16. *Russell* v. *Clowes* (2 Coll. 648) distinguished in *Powell* v. *Merrett*, 17 Jur. 449; 22 L. J., Ch., 408; 1 Sm. & G. 381.

17. *Russell* v. *Dight* (6 Sim. 430; 3 L. J., N. S., Ch., 152) explained in *Ingham* v. *Ingham*, 9 Sim. 363; 2 Jur. 886.

18. *Russell* v. *Plaice* (18 Beav. 21; 23 L. J., Ch., 441). That case having been cited before the Lord Chancellor and the Lords Justices in the case of *Vane* v. *Rigden* (5 L. R., Ch., 663; 39 L. J., Ch., 143, 797; 18 W. R. 1092), was commented upon by the Lord Chancellor, who expressed his approbation of it, and I therefore think it may be considered as a binding authority upon the point. Per Malins, V.-Ch., in *Cruickshank* v. *Duffin*, 13 L. R., Eq., 555, 560; 41 L. J., Ch., 317; 26 L. T. 121; 20 W. R. 354.

19. *Russell's Patent, Re* (2 De G. & J. 130), distinguished in *Mathers* v. *Green*, 5 N. R. 358; 11 Jur., N. S., 845; 35 L. J., Ch., 1; 14 W. R. 17; 13 L. T., N. S., 420.

20. *Ruston* v. *Tobin* (10 L. R., Ch. D., 558. 565; 27 W. R. 588; 40 L. T. 111) commented on in *Martin, Re, Hunt* v. *Chambers*, 20 L. R., Ch. D., 365; 51 L. J., Ch., 683; 46 L. T. 399; 30 W. R. 527.

21. *Rutter* v. *Daniel* (30 W. R. 724) followed in *Brien, Re*, 11 L. R., Ir., 213.

22. *Ryall* v. *Rowles* (1 Ves. sen. 375). This case has been referred to at very great length, and it has been said that that case has never been disputed; and no doubt there is a great deal to be found in that case that never was disputed when that case was decided. There the Court ultimately decided that the interests were choses in action, except all the fixtures, and that they passed under the order and disposition clause. But the law has been wholly altered since then. No choses in action now pass under the order and disposition

clause except debts due in the course of trade or business. The alteration of the law was made not unadvisedly, because very hard cases had occurred. However, I need not more particularly refer to that. . . . With the greatest respect and veneration for the case of *Ryall* v. *Rowles*, I do not think that that case has the remotest application to this question before me, now that the law is altered respecting choses in action. Per Bacon, C. J. B., *Bainbridge, Re, Fletcher, Exp.*, 8 L. R., Ch. D., 218, 224; 47 L. J., Bky., 70; 38 L. T. 229; 26 W. R. 439.

1. *Rylands* v. *Fletcher* (3 L. R., H. L., 330; 37 L. J., Exch., 161) distinguished in *Anderson* v. *Oppenheimer*, 5 L. R., Q. B. D. 602; 49 L. J., Q. B., 708.

S.

2. *Sabin* v. *Heap* (as to time) (29 L. J., Ch., 79; 1 L. T. 51; 8 W. R. 120; 27 Beav. 553) doubted in *Tanqueray-Willaume and Landau, Re*, 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

3. *St. Albans (Bishop)* v. *Battersby* (3 L. R., Q. B. D., 359) approved of in *London and Suburban Land and Building Co* v. *Field*, 16 L. R., Ch. D., 645; 50 L. J., Ch., 549; 44 L. T. 444.

4. *St. Albans (Duke)* v. *Beauclerk* (2 Atk. 636). The material errors in the report of this case are pointed out in *Hooley* v. *Hatton*, as stated in a note to *Ridges* v. *Morrison*, 1 Bro. C. C. 389, and S. C. 2 Dick. 491. *Hurst* v. *Beach*, 5 Madd. 358.

5. *St. Germains (Earl)* v. *Crystal Palace Railway Co.* (11 L. R., Eq., 568; 24 L. T. 288; 19 W. R. 584) not followed by Bacon, V.-Ch., in *Lycett* v. *Stafford & Uttoxeter Railway Co.*, 12 L. R., Eq., 261; 40 L. J., Ch., 471; 25 L. T. 870.

6. *St. Mary Magdalen, Oxford (President)* v. *Sibthorp* (1 Russ. 154) observed upon in *Watts* v. *Hyde*, 2 Ph. 406; 17 L. J., N. S., Ch., 39; 11 Jur. 979. Overruling 2 Colly. 368; 10 Jur. 127.

7. *Salisbury (Lord)* v. *Newton* (1 Eden 570) questioned in *Hutchings* v. *Smith*, 9 Sim. 137; 7 L. J., N. S., Ch., 128; 2 Jur. 231.

8. *Salway* v. *Salway* (1 Russ 60) overruled by *Salway* v. *Salway*, 2 Russ. & M. 215, and *White* v. *Baugh*, 9 Bli. N. S. 181; 3 Cl. & F. 44.

9. *Sampson* v. *Hoddinot* (1 C. B., N. S., 590) distinguished in *Kensit* v. *Great Eastern Railway Co.*, 23 L. R., Ch. D., 566; 52 L. J., Q. B., 608; 48 L. T. 784; 31 W. R. 603. Affirmed 27 L. R., Ch. D., 122; 54 L. J., Ch., 19; 32 W. R. 885.

10. *Samuel* v. *Rogers* (1 De G. J. & S. 396; 9 L. T., N. S., 396) overruled by *Drummond* v *Drummond*, 36 L. J., Ch., 153; 15 W. R. 267; 15 L. T., N. S., 337.

11. *Sanders* v. *Franks* (2 Madd. 147). I think I have heard this case unfavourably commented upon from the bench. Per Kindersley, V.-Ch., in *Johnson* v. *Routh*, 3 Jur., N. S., 1048, 1049.

12. *Sanders* v. *Miller* (25 Beav. 154) inconsistent with *Pickford* v. *Brown*, 2 Kay & J. 426, and not followed in *Stringer* v. *Harper*, 5 Jur., N. S., 401.

13. *Sanders* v. *Miller* (25 Beav. 154) not followed in *Middleton, Re, Thompson* v. *Harris*, 50 L. J., Ch., 525; 45 L. T. 40; 29 W. R. 731.

14. *Sanders* v. *Richards* (2 Coll. C. C. 568). It is very true that it was formerly held in this case, that where a power of sale was given by an executor upon a mortgage, the title under that power of sale could not be forced upon a purchaser. That case, I find, is cited by Lord St. Leonards (Sugden, V. & P., p. 390, n., ed. 14) as an authority. But I think (and indeed the learned counsel for the defendant has not disputed it) that the doctrine laid down in that case can be no longer maintained as the rule of the court, for in the case of *Russell* v. *Plaice* (18 Beav. 21; 23 L. J., Ch., 441), the Master of the Rolls decided directly the contrary, namely, that a good title could be made under a power of sale created by an executor. That case of *Russell* v. *Plaice* having been cited before the Lord Chancellor and the Lords Justices in the case of *Vane* v. *Rigden* (39 L. J., Ch., 143, 797; 5 L. R., Ch., 663; 18 W. R. 1092), was commented upon by the Lord Chancellor, who expressed his approbation of it, and I therefore think it may be considered as an authority upon the point. There is another case before myself of *Channer, Re* (38 L. J., Ch., 726; 8 L. R., Eq., 569), which is to the same effect. Per Malins, V.-Ch., in *Cruickshank* v. *Duffin*, 41 L. J., Ch., 317, 320; 13 L. R., Eq., 555; 26 L. T. 121; 20 W. R. 354.

15. *Sanderson* v. *Geddes* (1 Court Sess. Car., 4th Series, 1198) approved of in *Grahame* v. *Swan*, 7 L. R., App. Cas. (Sc.), 547.

16. *Sandon* v. *Hooper* (14 L. J., Ch., 120; 6 Beav. 246) explained and commented on in *Shepard* v *Jones*, 21 L. R., Ch. D., 469; 47 L. T. 604, 31 W. R. 308.

17. *Sandford* v. *Vaughan* (1 Phill. 39). It was further contended, that the repetition, in the same words, in the second will, of legacies given by the first will, which, it is probable, were not intended to be cumulative gifts, proves an intention to revoke; and *Sandford* v. *Vaughan* was cited. In that case, Sir John Nicholl does say, that the repetition of a specific legacy proved that both papers were not intended to operate, and he applies the circumstance to the principle which he had previously laid down, viz., that in order to establish all the papers, the Court should be satisfied that it was the intention of the testator that all of them should compose his will. But this principle is inconsistent with *Lemage* v. *Goodban* (1 L. R., Prob., 57) and *Birks* v. *Birks* (34 L. J., Prob., 90), where it could not have been affirmatively the intention of the testator that the two papers should be admitted to probate, but there was nothing to show an intention to revoke certain dispositions of the earlier will. Within this principle, the value of *Sandford* v. *Vaughan* as an authority seems to fall, and it appears to me that it would be dangerous for the Court to conclude, first, that certain repeated gifts would, according to the doctrines of a court of construction, be cumulative; second, that the testator could not have intended cumulative gifts; and third, that, therefore, it was the intention of the testator to revoke other gifts wholly unconnected with the repealed bequests. Per Warren, J., in *Leslie* v. *Leslie*, 6 Ir. R., Eq., 332, 336.

1. *Sandys* v. *Long* (2 Myl. & K. 487) observed upon in *Hurst* v. *Padwick*, 12 Jur. 21.

2. *Saner* v. *Bilton* (7 L. R., Ch. D., 815; 47 L. J., Ch., 267; 38 L. T. 281; 26 W. R. 394) approved in *Manchester Bonded Warehouse Co.* v. *Carr*, 5 L. R., C. P. D., 507; 49 L. J., C. P., 809; 43 L. T. 476; 29 W. R. 354.

3. *Saner* v. *Bilton* (11 L. R., Ch. D., 416; 48 L. J., Ch., 545; 40 L. T. 314; 27 W. R. 472) approved and followed in *Mason* v. *Brentini*, 15 L. R., Ch. D., 287; 43 L. T. 557; 29 W. R. 126.

4. *Sanford* v. *Irby* (3 Barn. & Ald. 654, cited in *Morse* v. *Ormonde* (*Lord*), 1 Russ. 382; 4 L. J., Ch., 158,) doubted per V.-Ch., in *Egerton* v. *Jones*, 3 Sim. 417. (See *Andree* v. *Ward*, 1 Russ. 260; 4 L. J., Ch., 98).

5. *Sargeant, Exp.* (1 Rose 153). The observations of Lord Eldon in this case explained in *Barkworth, Exp.*, 2 De G. & J. 194.

6. *Sargent, Exp., Tahiti Cotton Co., Re* (17 L. R., Eq., 273; 43 L. J., Ch., 425; 22 W. R. 815), commented on and distinguished in *France* v. *Clark*, 22 L. R., Ch. D., 830; 52 L. J., Ch., 362; 48 L. T. 185; 31 W. R. 374. S. C. on appeal 26 L. R., Ch. D., 257; 53 L. J., Ch., 585; 50 L. T. 1; 32 W. R. 466.

7. *Saunders* v. *Jones* (7 L. R., Ch. D., 435; 47 L. J., Ch., 440; 37 L. T. 769; 26 W. R. 226) explained and followed, Per M. R., in *Benbow* v. *Low*, 50 L. J., Ch., 37; 16 L. R., Ch. D, 93; 44 L. T. 119; 29 W. R. 265. Affirming 28 W. R. 435.

8. *Saunders* v. *Smith* (7 L. J., N. S., Ch., 227; 3 Myl. & C. 711) commented on in *Sweet* v. *Shaw*, 8 L. J., N. S., Ch.. 216; 3 Jur. 217.

9. *Say, Exp.* (1 Dea. & Ch. 32), overruled in *Williams, Exp., Hall, Re*, 1 Dea. & Ch. 489; Mont. 514.

10. *Scales* v. *Maude* (6 De G. M. & G. 51; 1 Jur., N. S., 1147; 25 L. J., Ch., 433). The dictum attributed to Lord Cranworth in this case, that a mere declaration of trust in favour of a volunteer is invalid, corrected. The dictum, said his Lordship, attributed to me in *Scales* v. *Maude*, probably had reference to the special circumstances of that case, and is clearly wrong as a general statement of the law. I have no reason to doubt that the case is correctly reported, and I think the decision itself is perfectly right; but I am glad to have this opportunity of repudiating the dictum in question, for there is no doubt that there may be a valid declaration of trust in favour of a volunteer. Per Cranworth, C., in *Jones* v. *Lock*, 11 Jur., N. S., 913; 14 W. R. 149; 1 L. R., Ch., 25; 35 L. J., Ch., 117; 13 L. T., N. S., 514.

11. *Scarborough* v. *Borman* (4 Myl. & C. 377; 9 L. J., N. S., Ch., 48; 4 Jur. 38. Affirming 1 Beav. 34; 8 L. J., N. S., Ch., 22) approved of in *Russell* v. *Dickson*, 2 Dr. & War. 133; 1 Con. & L. 284; 4 Ir. Eq. R. 339.

12. *Schomberg, Exp.* (10 L. R., Ch., 172; 31 L. T. 665; 23 W. R. 204), approved and followed in *M'George, Exp., Stevens, Re*, 20 L. R., Ch. D., 697; 51 L. J., Ch., 909; 47 L. T. 213; 30 W. R. 817.

13. *Scott* v. *Avery* (5 H. L. Ca. 811; 2 Jur., N. S., 815). There were dicta in this case, no doubt, which it was not possible to reconcile with each other; but the general principle laid down was, that it was illegal, by any agreement between the parties, to withdraw the decision of the question at issue from the determination of the ordinary tribunals of the country; but if A. agreed with B. that, in the event of his doing or omitting to do a particular act, A. would pay, not a particular sum of money for damage, but such an amount as an arbitrator to be appointed should agree upon, that was lawful, and was not a withdrawing; and he, the Vice-Chancellor, did not find that either Lord Cranworth or Lord Campbell, who agreed with him, or the common-law judges who assisted the House of Lords, put it on the footing of a negative clause; and it was therefore not necessary to consider whether a negative clause was on the same footing as an agreement for arbitration, or an agreement between the parties. *Horton* v. *Sayer* (4 H. & N. 643; 5 Jur., N. S., 989) was not inconsistent with *Scott* v. *Avery*; and the Court of Exchequer was of opinion that if there was an arbitration clause, and, superadded upon that, a negative clause that neither party should bring an action before the arbitrator had made his award, that was an illegal withdrawing of the decision of this question. Per Stuart, V.-Ch., in *Lee* v. *Page*, 7 Jur., N. S., 768, 769.

14. *Scott* v. *Beecher* (5 Madd. 96) followed in *Swainson* v. *Swainson*, 6 De G. M. & G. 648.

15. *Scott* v. *Nesbitt* (14 Ves. 438) as to the right of heir of a consignee of a West Indian estate on the corpus of the estate. The report of this case seems to be very imperfect, and it is not easy to collect from it with accuracy the principles which were laid down by the great judge (Eldon) who decided it. Per Lord Kingsdown, P. C., in *Fraser* v. *Burgess*, 13 Moo. P. C. 314, 347; 6 Jur., N. S., 327, 328.

16. *Scott* v. *Scholey* (8 East 467) observed upon in *Gore* v. *Bowser*, 1 Jur., N. S., 392; 24 L. J., Ch., 316; 3 Sm. & G. 1. Affirmed 24 L. J., Ch., 440.

17. *Scurfield* v. *Howes* (3 Bro. C. C. 90), an authority entitled to great respect, is decidedly in his (the appellant's) favour. There the testator bequeathed 500*l.* to A. for life, and after her decease to her two children, share and share alike; but if either of them should die before the decease of their mother, the whole to the survivor. Both died in the mother's lifetime, and it was held that the whole sum of 500*l.* belonged to the representatives of the survivor. This was the solemn decision of a very able judge, Lord Alvanley, when Master of the Rolls. For the assertion that this case has been overruled there seems to me to be no foundation; on the contrary, it appears to have been followed in several subsequent cases, cited by the appellant's counsel. Per Campbell, C., in *White* v. *Baker*, 6 Jur., N. S., 591, 592; 29 L. J., Ch., 577, 579; 2 De G. F. & J. 55.

For the reasons which I have given, I do not think the case of *Scurfield* v. *Howes*, as suggested by the late Mr. Jarman (see 1 Jarman, Wills, 705, 2nd edit.), at variance with the other authorities to which he has referred. Per Turner, L. J. *Ib.*

18. *Sea and River Marine Insurance Co., Re* (2 L. R., Eq., 545; 12 Jur., N. S., 779; 35 L. J., Ch., 820), not followed by Malins, V.-Ch.

in *Sanderson's Patents Association, Re*, 12 L. R., Eq., 188; 40 L. J., Ch., 519; 19 W. R. 966.

1. *Sea Fire Life Insurance Society, Re* (5 De G. M. & G. 465; 24 L. J., Ch., 705), judgment of Lords Justices reversed, but on grounds not raised before them. S. C. *nom. Ernest* v. *Nicholls*, 6 H. L. Ca. 401; 3 Jur., N. S., 919.

2. *Seale* v. *Barter* (2 B. & P. 485) followed in *Clifford* v. *Koe*, 5 L. R., App. Cas., 447; 43 L. T. 322; 28 W. R. 683.

3. *Seaman* v. *Wood* (22 Beav. 591), There the testator gave the property "unto, between, and among such child or children of my said son as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or be married, whichever shall first happen." I may say that this case is identical with the present case. I do not think it is possible to distinguish the two cases, and therefore, if I am bound by this case, I must hold this limitation to be void. In *Seaman* v. *Wood*, the words are also, "But so that the child or children collectively of any deceased son of my said son shall take only the share which such son would have taken if living." Now, the judgment of the Master of the Rolls is very short, and appears to have been given at the end of the argument. It is in these few words: "My opinion is that this gift is void for remoteness. I concur in the argument that this is a question of construction upon the meaning of the words of the gift. But the way I look at it is this: If a man gives an estate or a sum of money to all the children of A. and all the grandchildren of B., to be divided among them in equal shares and proportions, and both A. and B. survive the testator, I have very little doubt that such a gift would be void for remoteness." I have not a shadow of doubt that it would be void for remoteness, because there it is a class—children of A. and grandchildren of B.—all thrown together to take *per capita*. Then, the Master of the Rolls puts this question: "Would the case be varied if the children were to take one-half of what the grandchildren were to take?" That is not exactly so. I see in Jarman they interpret the question he puts in this way: "Would the case be different if the children of A. were to take one-half, and the grandchildren of B. the other half?" In my opinion it would totally vary it, because if you give one moiety of the property to the children of A. at twenty-one, that is a valid limitation; but if the gift is to the grandchildren of A. at twenty-one, it is invalid. Therefore such a gift would be as to one moiety good, and as to the other moiety bad. On looking at Mr. Jarman's book (vol. 2, p. 245, 3rd ed.), I see that the editors answer the question just as I had answered it in my own mind; namely, that undoubtedly, the limitation of one moiety would be good and the limitation of the other would be bad. The Master of the Rolls came to the conclusion that the limitation was void for remoteness. With great respect, I come to an entirely opposite conclusion, and I think every principle of justice required that he should have held that the class was necessarily reduced, that the maximum of the children to take was reduced. The result should have been that the limitations to the children who attained twenty-one were good and to the subsequent class void, because the gift to one class was good and the gift to the other bad. I may also state that there are observations upon the judgment of the Master of the Rolls in the case of *Webster* v. *Boddington*, at pp. 246 and 249 of the 1st vol. of Jarman, with which observations I generally concur. Per Malins, V.-Ch., in *Moseley's Trusts, Re*, 24 L. T., N. S., 260, 261; 11 L. R., Eq., 499; 40 L. J., Ch., 275; 19 W. R. 431.

4. *Searby* v. *Tottenham Railway* (5 L. R., Eq., 409). "Cannot agree with that decision." Per James, L. J., in *Norton* v. *London & North-Western Railway*, 13 L. R., Ch. D., 271. n. 3; 41 L. T. 429; 28 W. R. 173.

5. *Searle* v. *Law* (15 Sim. 95) irreconcilable with the cases of *Ward* v. *Audland*, 16 M. & W. 862, and *Oulton* v. *Athins*, 18 C. B. 249. See *Parnell* v. *Hingston*, 2 Jur., N. S., 854.

6. *Seers* v. *Hind* (1 Ves. J. 294) commented on and doubted in *Ashburnham* v. *Thompson*, 13 Ves. 404.

7. *Seccombe* v. *Edwards* (28 Beav. 440) followed in *Barker* v. *Young*, 10 Jur., N. S., 163; 33 L. J., Ch, 279; 12 W. R. 659; 33 Beav. 353; 3 N. R. 350.

8. *Segrave* v. *Kirwan* (Beat. 157) distinguished in *Lysaght* v. *M'Grash*, 11 L. R., Ir., 142.

9. *Seidler, Exp.* (12 Sim. 106). The case of *Seidler, Exp.*, was one of questionable authority, as it was not to be found in the Registrar's Book. This question had been considered by the Master of the Rolls in *Murrow* v. *Wilson* (12 Beav. 497), where it was decided that filing affidavits would not in general waive the right to security for costs, and under the circumstances that judgment must be taken to establish the balance of authority. It was important that such matters should be decided, and on the authority of that case he should hold that the respondents were entitled to security for costs, and on the authority of *Latta, Exp.*, *Royal Bank of Australia, Re* (3 De G & Sm. 186; 19 L. J., N. S., Ch., 387; 14 Jur. 908), the only case to be found upon the subject, he should hold that the amount of such security must be 100*l*. Per Wickens, V.-Ch., in *Home Assurance Association, Re* (19 W. R. 947; 12 L. R., Eq., 112; 25 L. T. 199).

10. *Selby* v. *Pomfret* (3 De G. F. & J. 595; 1 John. & H. 336; 4 L. T. 314; 9 W. R. 398, 583) observed upon in *Cummins* v. *Fletcher*, 14 L. R., Ch. D., 699; 49 L. J., Ch., 563; 42 L. T. 859; 28 W. R. 772.

11. *Select Cases in Chancery* not a work of much authority. 5 Ves. 598. n. (92).

12. *Selkrig* v. *Davies* (2 Dow 230; 2 Rose 97) followed in *Banco de Portugal* v. *Waddell*, 5 L. R., App. Cas., 161; 49 L. J., Bky., 33; 42 L. T. 698; 28 W. R. 477.

13. *Sellers, Exp.* (2 De G. & J. 218). The course laid down in this case is inapplicable to the altered state of the law. *Lemzberg, Exp. & Re*, 10 L. T., N. S., 721. Goulburn, Com.

14. *Sellers* v. *Dawson* (2 Dick. 739). Where an order to dismiss a bill for want of prosecution, obtained against a bankrupt plaintiff, was treated by Lord Thurlow, C., as a nullity; but in *Boddy* v. *Kent* (3 Meriv. 365), Lord Eldon, C., disapproved of this view. See *Boucicault* v. *Delafield*, 10 Jur., N. S., 937; 10 L. T., N. S., 202.

1. *Selwood* v. *Mildmay* (3 Ves. 306) explained, and the effect of the decree therein stated in *Lingren* v. *Lingren*, 9 Beav. 358; 15 L. J., N. S., Ch., 428; 10 Jur. 674.

Selwood v. *Mildmay* (3 Ves. 306) is not overruled by the cases of *Miller* v. *Travers*, 8 Bing. 244, and *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363. *Ib.*

2. *Sewell, Exp.* (13 L. R., Ch. D., 266; 49 L. J., Bky., 15; 28 W. R. 286), explained in *Jacobson, Exp., Pincoffs, Re*, 22 L. R., Ch. D., 312; 52 L. J., Ch., 561; 48 L. T. 197; 31 W. R. 554.

3. *Sewell* v. *Godden* (1 De G. & Sm. 126) overruled. *Zulueta* v. *Vinent*, 3 Macn. & G. 246; 20 L. J., N. S., Ch., 474; 15 Jur. 277.

4. *Shadbolt* v. *Thornton* (17 Sim. 49; 18 L. J., Ch., 392; more fully reported in 13 Jur. 597), disapproved of. This case raises a question as to the authority of *Shadbolt* v. *Thornton*. I must confess that I think that case went too far. All the other authorities, including *Myers* v. *Perigal* (2 De G. M. & G. 599; 22 L. J., Ch., 431, reversing 18 L. J., Ch., 185), fall short of that decision. *Shadbolt* v. *Thornton* goes a long way; it lays down that the property in such a case as the one before me must be converted. I cannot say that I distinguish that case from this; but I am compelled to go straight against that authority. The rule appears to be this, that if property is given to one individual with absolute control over it, then no case of conversion arises, and the property must be taken to be of the quality in which he took it, but where, on the other hand, property is given to one with a direction that it is to be sold, and the proceeds divided between himself and several other persons, there, inasmuch as the individual legatee had no control over the property, and he must sell it in order to divide the proceeds, the property must be deemed to be converted. The case is analogous to those in which the questions of conversion have arisen between the heir-at-law and next of kin of a testator, as *Wheldale* v. *Partridge* (8 Ves. 227, 255). Per Wood, V.-Ch., in *Lucas* v. *Jones*, 36 L. J., Ch., 602, 604; 4 L. R., Eq., 73; 15 W. R. 738.

5. *Shaftoe's Charity* (3 L. R., App. Cas., 872) approved in *Sutton Coldfield Grammar School, Re*, 7 L. R., App. Cas., 91; 51 L. J., P. C., 8; 45 L. T. 631; 30 W. R. 341.

6. *Shailer* v. *Groves* (6 Hare 162. See reports of same case 11 Jur. 485, and 16 L. J., Ch., 367) questioned. The present case appears most strongly to resemble *Atkinson* v. *Bartrum* (28 Beav. 219), the word "surviving" applying to the whole class. The period of distribution is the death of the surviving tenant for life, and in order to take, they must survive the period of distribution, and they take *per capita*, and not *per stirpes*. This decision is consistent with *Shailer* v. *Groves*, although not with the reasons for the decree given in the judgment in Mr. Hare's reports. Probably the words in that case were "or their issue," and not "and their issue," which would explain the inconsistency. Per Romilly, M. R., *Fox, Re*, 11 Jur., N. S., 735; 13 W. R. 1013.

7. *Sharples* v. *Adams* (32 Beav. 213). There is no doubt that you cannot gain priority by obtaining the legal estate from a trustee who commits a breach of trust in transferring it to you; but *Sharples* v. *Adams* seems to go beyond that, for Lord Romilly says, "If the owner in fee simple, having the legal estate, creates an equitable charge in favour of A., and afterwards a second equitable charge in favour of B., and then a third equitable charge in favour of C., I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C., the owner of the third equitable charge, would not affect the rights of the first or second." . . . I wish to state so distinctly, because I am not quite sure that, without further authority, I should go quite so far as my predecessor did in the case of the illustration he gave in *Sharples* v. *Adams*. Per Jessel, M. R., in *Maxfield* v. *Burton*, 17 L. R., Eq., 15, 17, 19; 43 L. J., Ch., 46; 29 L. T. 571; 22 W. R. 148.

8. *Shattock* v. *Shattock* (2 L. R., Eq., 182; 14 L. T., N. S., 452). It is true, that in *Shattock* v. *Shattock*, the Master of the Rolls (Lord Romilly) expressly overruled the judgment of the Lord Justice Turner in *Johnson* v. *Gallagher* (3 De G. F. & J. 513), and held, that even a promissory note given by a married woman living separate and apart from her husband, and having property settled to her separate use for life, with a power to appoint it by will, was not a debt payable out of the property so appointed. In that judgment he bases his dissent from the Lord Justice Turner on the ground that the authorities cited by the latter do not warrant his conclusion. Their lordships are not able to concur in that view of the authorities, and have arrived at the conclusion that Lord Justice Turner's judgment is expressed with his usual accuracy. Per James, L. J., in delivering the reserved judgment of the Judicial Committee of the Privy Council in *London Chartered Bank of Australia* v. *Lempriere*, 9 Moo. P. C., N. S., 426, 456; 4 L. R., P. C., 572; 29 L. T., N. S., 186.

9. *Shaw, Re, Topham* v. *Burgoyne* (49 L. J., Ch., 213; 41 L. T. 670), not followed in *Wallace* v. *Greenwood*, 16 L. R., Ch. D., 362; 50 L. J., Ch., 289; 43 L. T., 720.

10. *Shaw* v. *Borrer* (1 Keen 557) approved of in *Ball* v. *Harris*, 8 Sim. 485; 4 Myl & C. 264; 8 L. J., N. S., Ch., 114; 1 Jur. 706; 3 Jur. 140.

11. *Shaw* v. *Neale* (20 Beav 666; 1 Jur., N. S., 157; 24 L. J., Ch., 563); the decision in this case, as to the effect of omitting to re-register within five years, in substance overruled. *Beavan* v. *Oxford* (*Earl*), 6 De G. M. & G. 492; 1 Jur., N. S., 1121; *Shaw* v. *Neale* was itself reversed on appeal to the House of Lords, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444.

12. *Shaw* v. *Rhodes* (1 Myl. & Cr. 135) and S. C. on appeal *sub nom. Evans* v. *Hellier* (5 Cl. & F. 114), observed upon in *Barrington* v. *Liddell*, 2 De G. M. & G. 480; 17 Jur. 241; 22 L. J., Ch., 1.

13. *Shaw's Trusts, Re* (12 L. R., Eq., 124) explained and distinguished in *Fitzpatrick* v. *Waring*, 11 L. R., Ir., 35.

14. *Shee* v *Hale* (13 Ves. 404). Sir William Grant, in 1807, decided in *Shee* v. *Hale* that an annuity may be given with a proviso cutting it short. The case of *Day* v. *Day*, 1 Drew. 569, was pressed on me in 1869, in the case of *Power* v. *Hayne*, 17 W. R. 783; 8 L. R., Eq.,

262, when I fully and carefully considered it, and deliberately came to the conclusion that I could not follow it. The reasons for my decision are perfectly conclusive to my mind now, as they were then. Per Malins, V.-Ch., in *Halton* v. *May*, 24 W. R. 754, 755.

1. *Sheffield* v. *Kennett* (27 Beav. 207; 4 De G. & J. 593). To my mind that is about one of the most unsatisfactory cases I have ever met with, because, as reported, it is a case in which the decision stands without any reasons whatever being given, when strong reasons were manifestly required to support it. Per Malins, V.-Ch., in *Bryden* v. *Willett*, 7 L. R., Eq., 472, 477.

2. *Sheffield* v. *Orrery* (3 Atk. 282) determined on its own special circumstances. Per Wood, V.-Ch., in *Browne* v. *Hammond*, Johns. 210, 213.

3. *Sheil, Exp., Lonergan, Re* (4 L. R., Ch. D., 789; 36 L. T. 270), approved in *Bayly, Exp., Hart, Re*, 43 L. T. 181; 15 L. R., Ch. D., 223.

4. *Sheldon* v. *Wildman* (2 Ch. Ca. 26; Freem. 156) followed in *Heath* v. *Henley*, 1 Ch. Ca. 21; 3 Ch. Rep. 8.

5. *Shelley's case* (1 Co. Rep. 88). The rule in Shelley's case must always be regarded as a guiding principle of the law of real property. The cases to which this rule (which is a rule of law and not of construction) is applicable are well defined by a long course of authoritative decisions. Per Stuart, V.-Ch., in *Parker* v. *Clark*, 3 Sm. & G. 161, 165; 1 Jur, N. S., 605; 3 W. R. 471. Affirmed 2 Jur., N. S., 335; 6 De G. M. & G. 104.

6. *Shelley's case*. In the application of the rule in this case there is no distinction between a will and a deed. *White and Hindle, Re*, 47 L. J., Ch., 85; 37 L. T., N. S., 574; 26 W R. 124; 7 L. R., Ch. D., 201

7. *Shelley's case*. *Semble*, the rule in this case applies only where the remainder is created by the same instrument which creates the particular estate. *Coape* v. *Arnold*, 4 De G. M. & G. 574; 1 Jur., N. S., 313; 24 L. J., Ch., 673; 3 W. R. 187. Affirming 2 W. R. 482; 18 Jur. 506.

8. *Shepherd* v. *Beane* (2 L. R., Ch. D., 223; 24 W. R. 363) not followed. With regard to this case, I do not think the Vice-Chancellor (Hall) intended to lay down that a counter-claim is the right form of such a pleading as between co-defendants. He does not, in fact, use the word in his decision, and it seems to me, therefore, that the head-note of the case is incorrect in so laying it down. However, it stands as a reported decision in your favour, Mr. Heath, and, therefore, I shall not make you bear the costs of the application. Per Jessel, M. R., in *Furness* v. *Booth*, 4 L. R., Ch. D., 586, 587; 46 L. J., Ch., 112; 25 W. R. 267.

9. *Shepherd* v. *Harrison* (5 L. R., H. L. 116; 24 L. T., N. S., 857; 40 L. J., Q. B., 148; 20 W. R. 1). We think that there is very great ground for saying that the language and reasonings of all the learned Lords who advised their House in the case of *Shepherd* v. *Harrison* would apply to this case; that, from the course of dealing between the parties, there would be implied that which would not, according to mercantile courtesy and usage, be said in so many words, namely, "I send you the remittances on the faith that you will accept the draughts." That would no doubt, appear to be inconsistent with the decision of Giffard, V.-Ch., in *Trimmingham* v. *Maud*, 7 L. R., Eq., 291; 19 L. T., N. S., 554. But it is to be observed that that decision was pronounced some years before the case in the House of Lords, and further that, as a matter of fact, the Vice-Chancellor came to the conclusion that there was only one general account, and that the remittances were made on that general account. It is not necessary for any present purpose critically to examine that decision, but we are not sure that we can reconcile the premises and the conclusion in the judgment. Per James, L. J., in *Gomez, Exp., Yglesias, Re*, 32 L. T., N. S., 677, 680, 681; 10 L. R., Ch., 639; 23 W. R. 780; 45 L. J., Bky., 54.

10. *Sherley* v. *Fagg* (1 Ch. Ca. 68, cited 1 Vern. 52). "A decision of Lord Nottingham's is reported in 1 Ch. Ca. without the circumstances which are mentioned in the narrative of the case in Vernon, of the actual fraud which appears to have existed, and according to which the case is an authority to its full extent, that even a fraudulent act on the part of a purchaser without notice would be supported in order to maintain his title. Vernon, in narrating the case, states, that Sir John Fagg, on walking into a room and seeing some deeds which he thought of value, possessed himself of them, evidently without any authority; in fact, stole them; and was, nevertheless, supported in the possession of those deeds. That fact does not appear as the case is narrated in the more full report in 1 Ch. Ca., and I should apprehend it is sufficiently clear that a case to such an extent as that would never be upheld." Per Wood, V.-Ch., in *Carter* v. *Carter*, 4 Jur., N. S., 65 66; 27 L. J., Ch., 74, 81.

11. *Sherman* v. *Abell* (2 Vern. 64; 2 Eq. Cas. Ab. 307, pl. 2) not adopted by Romilly, M. R., in *Webb* v. *England*, 7 Jur., N. S., 153.

12. *Sherwin* v. *Shakspear* (5 De G. M. & G. 517). The principle of this case applies as well to an actual defect of title as to imperfections in the abstracts delivered. *Palmerston (Lord)* v. *Turner*, 4 N. R. 46; 33 Beav. 524; 10 Jur, N. S., 577; 33 L. J., Ch., 457; 12 W. R. 816; 10 L. T., N. S., 364.

13. *Sherwood* v. *Smith* (6 Ves. 354), said by Registrar not to have been acted on. *Bond, Exp.*, 2 Myl. & K. 440.

14. *Shipperdson* v. *Tower* (8 Jur. 485) (Apportionment) was decided as long ago as 1844, and no attempt has been made to shake or question it. We must, therefore, take it to be the *cursus curiæ*, and also the settled understanding of conveyancers, that the Apportionment Act did apply to cases of this kind. The new Act of the 33 & 34 Vict., c. 35, extended the principle of the Act of 4 & 5 Will. 4, c. 22, in the same direction, so as to make it applicable to every form of reservation of income, which was in all cases to be treated as if it were interest accruing *de die in diem*, so that there might be no more questions on this subject. Per James, L. J., in *Clive* v. *Clive*, 7 L. R., Ch., 433, 437, 438; 41 L. J., Ch., 386; 26 L. T. 489; 20 W. R. 477.

15. *Shylock's case* (Shakespeare, Merchant of Venice, Act iv., Scene 1). Cut as much as

you like, but shed no drop of blood. Per Bacon, V.-Ch., in *Parke, Exp., Potter & Ferrige, Re*, 43 L. J., Bky., 139, 140.

1. *Skeene* v. *Pepper* (at the Rolls 3rd July, 1804, and see 10 Ves. 356. n.), not followed in *Abell* v. *Screech*, 10 Ves. 355.

2. *Sibley, Re* (5 L. R., Ch. D, 494; 46 L. J., Ch., 387; 37 L. T. 180), distinguished in *Webster's estate, Re, Widgen* v. *Mello*, 23 L. R, Ch. D., 737; 52 L. J., Ch, 767; 49 L. T. 585.

3. *Sidebotham, Exp.* (1 Mont. & A. 655, and 2 *id.* 146) overruled in *Cutts, Exp., Goren, Re*, 3 *id.* 549; 3 Dea. 242.

4. *Sidney* v. *Wilmer* (4 De G. J. & S. 84; 9 L. T., N. S., 18; 25 Beav. 260; reversed on appeal, 10 Jur., N. S, 217; 9 L. T., N. S., 737). In another case referred to, a case decided by one of the same judges who decided *Hodgson* v. *Bective* (*Earl*) (1 Hem. & M. 376, 391; 9 L. T., N. S., 18; 34 L. J., Ch, 489), in the House of Lords, I mean *Sidney* v. *Wilmer*, a direct and contrary decision was arrived at, the Court in that case being influenced to some extent, no doubt, by the construction that was put upon the will, and a great deal more by the general principle found in the judgment. And if there was no such case as *Hodgson* v. *Bective* (*Earl*), I do not hesitate to say that I would rather adopt the decision in *Sidney* v. *Wilmer*, than the principle of the decision in *Hodgson* v. *Bective* (*Earl*). But I am bound by *Hodgson* v. *Bective* (*Earl*), and have no alternative. The law is plainly decided, and I must obey the law, and should be outraging and acting contrary to the decision in *Hodgson* v. *Bective* (*Earl*), if I yielded to the strong temptation which I feel, and to the strong solicitations which have been presented to me, not to leave the income of this property any longer in suspense, to wait for an event which may never happen, and in all probability never will happen, and not to hand over the income of the property in the meantime to the person whom the law has designated as being entitled to that intermediate enjoyment, if the testator has not taken it away from him. If he has given it to nobody else, he has not taken it away from him. In my opinion the heir at law and the next of kin are, therefore, entitled to the intermediate proceeds of this estate, real and personal until it shall be ascertained whether the contingency, which in any event will put the plaintiff in possession, has happened. Per Bacon, V.-Ch., in *Wade-Gery* v. *Handley*, 34 L. T. 233, 235; 1 L. R., Ch. D., 653, 663; 45 L. J., Ch., 457.

It is utterly impossible to say that the case before Lord Westbury (*Sidney* v. *Wilmer*), which is so entirely different from all the other cases, would justify us in departing from the rule which was so well settled long before *Hodgson* v. *Bective* (*Earl*), and so clearly established by that case as to the title of the heir at law and next of kin respectively. I think the Vice-Chancellor could not do otherwise than follow that decision. Per James, L. J. S. C. on appeal, 35 L. T. 85, 86; 3 L. R., Ch. D., 374, 375; 45 L. J., Ch., 712.

5. *Silcox* v. *Bell* (1 Sim. & S. 301) explained and commented on in *Parker, Re, Bentham* v. *Wilson*, 15 L. R., Ch. D., 528; 49 L. J., Ch., 587; 43 L. T. 115; 28 W. R. 823.

6. *Silcock* v. *Farmer* (46 L. T. 404) explained and commented on in *Dyke, Exp, Morrish, Re*, 22 L. R., Ch. D., 410; 52 L. J., Ch., 570; 48 L. T. 303; 31 W. R. 278.

7. *Silver* v. *Barnes* (6 Bing. N. C. 180) followed in *Burbidge* v. *Cotton*, 5 De G. & Sm. 17; 21 L. J., Ch., 201; 15 Jur. 1070.

8. *Silvester* v. *Jarman* (10 Price 78) distinguished in *Field's Mortgage, Re*, 9 Hare 414; 15 Jur. 1004; 21 L. J., Ch., 175.

9. *Simmons* v. *Bolland* "has not been overruled by *Dean* v. *Allen*, 20 Beav. 1." Per Stuart, V.-Ch., in *Debney* v. *Eckett*, 4 Jur., N. S., 805, 807.

10. *Simmons* v. *Bolland* (3 Meriv. 547). In this case Sir W. Grant says, that the decree of the Court is no prohibition to the executor; but Mr. Beavan has given, in a note to *Dean* v *Allen*, 20 Beav. 1, what I think is the proper answer to that: "It appears from the argument in *Simmons* v. *Bolland*, that that suit was not for the general administration of the estate; and this circumstance might, therefore, justify the observations of Sir W. Grant, that the decree would not protect the executors." Now, this must be guarded against in my observations. I do not mean to say that where an executor is simply ordered to pay a sum of money, it will protect him from creditors; but where, in a suit for the administration of assets, the Court orders him to pay money, that is a perfect security to him. Unless that were so, it would paralyse the functions of this court." Per Romilly, M. R., in *Waller* v. *Barrett*, 4 Jur., N. S., 128, 129.

11. *Simpson* v. *Chapman* (4 De G. M. & G. 154). The plaintiffs seek to make the executor pay to them all the profits which have been made by him through this breach of trust. But the executor, on the authority of a decision of the Lords Justices, in the case of *Simpson* v. *Chapman*, insists that no inquiry can be directed on this subject in the absence of the persons whom he assumed as partners in the business in which he employed the assets. This proposition, supported by such authority, embarrassed me so much that I have taken time to consider the decision of the Lords Justices and the other authorities. It appears that no authority was quoted in the arguments before the Lords Justices, and no authority is referred to, in their Lordships' judgment, on this point. And the Vice-Chancellor cites *Freeman* v. *Fairlie*, 3 Meriv. 43, 45; *Docker* v. *Soames*, 2 Myl. & K. 655, 673; and *Palmer* v. *Mitchell*, 2 Myl. & K. 672. n.; and concludes thus: "If these authorities had been cited to the Lords Justices, it seems not probable that they would have overruled them, without stating clear and satisfactory grounds." Per Stuart, V.-Ch., in *Macdonald* v. *Richardson*, 1 Giff. 81, 87, 88; 5 Jur., N. S., 9.

12. *Simpson* v. *Howden* (*Lord*) (1 Keen 583; 3 Myl. & Cr. 9). The doctrine laid down in this case does not apply where, the bond being lost, the objection would not at law appear on the face of it. *Williams* v. *Flight*, 5 Beav. 41.

13. *Simpson* v. *Paul* (2 Eden 34). Certainly, in *Simpson* v. *Paul*, Lord Northington does seem to hold that, as a general proposition, the exercise of a primary power to a partial extent does preclude any exercise of

the secondary power. But Lord St. Leonards has expressed his opinion very strongly that the view of Lord Northington is wrong (see Sugden on Powers, vol. 2, pp. 218, 235, 6th edit.); and I think I am justified in adopting the view of Lord St. Leonards, that the partial execution of a primary power does not exclude the exercise of a secondary power. Per Kindersley, V.-Ch., in *Mapleton* v. *Mapleton*, 4 Drew. 515, 519.

1. *Sitwell* v. *Barnard* (6 Ves. 539) considered in *Macpherson* v. *Macpherson*, 16 Jur 847.

2. *Sivell* v. *Abraham* (8 Beav. 598) followed in *Hennet* v. *Luard*, 12 Beav. 479.

3. *Sivell* v. *Abraham* (8 Beav. 598) appears to have been misunderstood. All that was there described, was that a plaintiff might apply to the Court to stay proceedings, and order the defendant to pay the costs of the suit, and that if the defendant made no objection, the suit might be disposed of in that manner. Per Turner, L. J., in *Wilde* v. *Wilde*, 10 W. R. 503.

4. *Skidmore* v. *Bell* (2d Inst. 660), the second resolution in this case, to the effect that such houses as were never letten to farm, but inhabited by the owner, are a *casus omissus*, and shall pay no tithes by force of the decree, is not now law. *Vivian* v. *Cochrane*, 4 De G. M. & G. 818; 1 Jur., N. S., 809; 25 L. J., Ch., 553; 3 W. R. 254.

5. *Skinner, Exp.* (Mont. & Bli. 417; 3 Dea. & Ch. 332; 3 L. J., N. S., Bky., 72), corrected in *Collyer, Exp.*, 2 Mont. & A. 30; 4 Dea. & Ch. 520.

6. *Slade* v. *Fooks* (9 Sim. 386; 8 L. J., N. S., Ch., 41; 2 Jur. 981) followed in *Bonner, Re, Tucker* v. *Good*, 19 L. R., Ch. D., 201; 51 L. J., Ch., 83; 45 L. T. 470; 30 W. R. 58.

7. *Sligo* (*Lord*) v. *O'Malley* (Fl. & K. 300) disapproved of in *Abbott* v. *Stratton*, 3 J. & L. 603; 9 Ir. Eq. R. 233.

8. *Sloane* v. *Cadogan* (Sugd. on Vendors, App., 9th edit., No. 26) commented on in *Beatson* v. *Beatson*, 12 Sim. 281.

9. *Stubey* v. *Heyward* (2 H. Bl. 504). "I cannot understand this case." Per Bramwell, L. J., in *Falk, Exp., Kiell, Re*, 14 L. R., Ch. D., 446; 42 L. T. 780; 28 W. R. 765. Affirmed *sub. nom. Kemp* v. *Falk*, 7 L. R., App. Cas., 573; 52 L. J., Ch., 167; 47 L. T. 454; 31 W. R. 125.

10. *Small* v. *Oudley* (2 P. W. 247) overruled. See Eden, B. L. 34.

11. *Smith, Exp.* (2 Sim. 257), overruled in *Pott, Exp., Daintry, Re*, 12 L. J., N. S., Bky., 33; 7 Jur. 159.

12. *Smith, Re, Hutchinson* v. *Ward* (6 L. R., Ch. D., 692; 36 L. T. 178; 25 W. R. 452), followed in *Bowen, Re, Bennett* v. *Bowen*, 20 L. R., Ch. D., 538; 51 L. J., Ch., 825; 47 L. T. 114.

13. *Smith* v. *Anderson* (dictum of Brett, L. J.) (15 L. R., Ch. D., 247; 50 L. J., Ch., 39; 43 L. T. 329; 29 W. R. 21) not followed in *Padstow Total Loss and Collision Assurance Association, Re*, 20 L. R., Ch. D., 148; 51 L. J., Ch., 344; 45 L. T. 774; 30 W. R. 326.

14. *Smith* v. *Anderson* (15 L. R., Ch. D., 247; 50 L. J., Ch., 39; 43 L. T. 329; 29 W. R. 21), followed and approved in *Cronther* v. *Thorley*, 50 L. T. 43; 32 W. R. 330.

15. *Smith* v. *Biggs* (5 Sim. 391) overruled by *Piercy* v. *Robert*, 1 Myl. & K. 4; 2 L. J., N. S., Ch., 17. *Evans, Exp.*, 3 Dea. & Ch. 470; *Jones* v. *Yates*, 3 Y. & J. 373.

16. *Smith* v. *Buller* (19 L. R., Eq., 473). The rule in this case that the criterion for allowing refreshers is the length of time occupied by the trial, irrespective of the mode in which the evidence has been taken, dissented from. *Harrison* v *Wearing*, 11 L. R., Ch. D., 206; 48 L. J., Ch, 365; 27 W. R. 526.

17. *Smith* v. *Butcher* (10 L. R., Ch. D., 113; 48 L. J., Ch., 136; 27 W. R. 281) explained and commented on in *Stannard, Re, Stannard* v. *Burt*, 52 L. J., Ch., 355; 48 L. T. 660.

18. *Smith* v. *Collyer* (8 Ves. 89) declared not to be law. I very much doubt if that decision would be followed at the present day. Per Malins, V.-Ch., in *Carrow* v. *Ferrior*, 37 L. J., Ch., 569, 575; 16 W. R. 454; 18 L. T., N. S., 199.

19. *Smith* v. *Copleston* (11 Beav. 482). I am at a loss to understand the grounds of the decision in *Smith* v. *Copleston*, unless there were special circumstances in that case. Per Wood, V.-Ch., in *Knapp* v. *Burnaby*, 30 L. J., Ch., 844.

20. *Smith* v. *Dale* (18 L. R., Ch. D., 516; 50 L. J., Ch., 352; 44 L. T. 460; 29 W. R. 330) followed and not followed in *McEwan* v. *Crombie*, 25 L. R., Ch. D., 175; 53 L. J., Ch., 24; 49 L. T. 499; 32 W. R. 115.

21. *Smith* v. *Fitzgerald* (3 Ves. & B. 2) observed on in *Beavan* v. *Att.-Gen.*, 4 Giff. 361.

22. *Smith* v. *Garland* (2 Meriv. 120). *Semble*, that the principle of this case does not apply to a defendant who says he is willing to complete on having a good title. *Peter* v. *Nicolls*, 11 L. R., Eq., 391; 24 L. T., N. S., 381; 19 W. R. 618.

23. *Smith* v. *Great Western Railway* (dictum of Cairns) (3 L. R., App. Cas., 165; 47 L. J., Ch., 97; 37 L. T. 645; 26 W. R. 130) not followed in *Dixon* v. *Caledonian Railway*, 5 L. R., App. Cas. (Sc.), 820; 43 L. T. 513; 29 W. R. 249.

24. *Smith* v. *Horsfall* (24 Beav. 331) is a decision pronounced apparently without much discussion by Romilly, M. R., and somewhat reluctantly followed by Kindersley, V.-Ch., in *Ure* v. *Lord* (13 W. R. 41), to the effect that when one of several residuary legatees being co-plaintiffs dies, the suit is abated, and revivor necessary, notwithstanding the new procedure of the Court, under which one residuary legatee may obtain a decree without making the others parties, and which was not followed by Wood, V.-Ch., in *Hinde* v. *Morton*, 2 Hem. & M. 368.

25. *Smith* v. *Hull Glass Co.* (8 C. B. 668; 11 C. B. 897) observed upon in *Greenwood's case*, 3 De G. M. & G. 459; 18 Jur. 387; 23 L. J., Ch., 966.

26. *Smith* v. *Iliffe* (20 L. R., Eq., 666; 44 L. J., Ch., 755; 33 L. T. 200; 23 W. R. 851). "Report inaccurate." *Hanley* v. *Pearson*, 13 L. R., Ch. D., 545; 41 L. T. 673.

27. *Smith* v. *Lereaux* (1 Hem. & M. 123; 9 Jur., N. S., 1140; 8 L. T., N. S., 792). The rule that a bill for an account will not lie at the suit of an agent against his principal, except in cases of mutual accounts, or great complication, does not extend to a case where there have been receipts by the principal of the particulars whereof the agent is ignorant, on which a commission is payable to the

latter, overruled on appeal, S. C. 12 W. R. 13; 9 L. T., N. S., 313.

1. *Smith* v. *Kenrick* (7 C. B. 515) commented on in *Chasemore* v. *Richards*, 7 H. L. Ca. 349; 5 Jur., N. S., 873; 33 L. T. 350; 7 W. R. 685; 29 L. J., Exch., 81.

2. *Smith* v. *Lucas* (18 L. R., Ch. D., 531; 45 L. T., 460; 30 W. R. 451) followed in *Wilder* v. *Pigott*, 22 L. R., Ch. D., 263; 52 L. J., Ch., 141; 48 L. T. 112; 31 W. R. 377.

3. *Smith* v. *Morgan* (5 L R., C. P. D., 337) approved and followed in *Maggi, Re, Winehouse* v. *Winehouse*, 20 L. R., Ch. D., 545; 51 L. J., Ch., 560; 46 L. T. 362; 30 W. R. 729.

4. *Smith* v. *Phillips* (1 Keen 694). This case has been doubted by Mr. Fisher in his Treatise on Mortgages, but it is cited by Lord St. Leonards (Sugden's V. & P. 748, 14th ed.) as an authority for the proposition that, if a mortgagee purchases with notice of an assignment to grant a lease, he is bound by it, although, having been made subsequently to his mortgage, it could not have been enforced against him in his character of mortgagee; and I prefer to rely on the authority of Lord St. Leonards, who cites the case without any qualification Per Chatterton, V.-Ch., in *O'Loughlen* v. *Fitzgerald*, 8 L. R., Eq., 483, 485.

5 *Smith* v. *Sierra Leone* (*Justices*) (3 Moo. P. C. 361, and *Downie* and *Arrindell* (3 Moo. P. C. 414) were very special in their circumstances, and leave was given to appeal in those cases from some peculiar objections to the committals for contempt. But no case is to be found where there has been a committal for contempt by one of the colonial courts, where it appeared clearly upon the face of the order that the party had committed the contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which the Judicial Committee has ever entertained an appeal against the order. *M'Dermott* v. *British Guiana* (*Judges of*), 20 L. T., N. S., 47; 17 W. R. 352; 2 L. R., P. C., 341; 38 L. J., P. C., 1.

6. *Smith* v. *Smith* (12 Sim. 326, 327): the dictum of Shadwell, V. C. E., in this case disapproved of. *Saunder, Re*, 3 Kay & J. 152.

7. *Smith* v. *Smith* (5 L R., Ch., 342; 18 W. R. 742) approved of in *Pearks* v. *Moseley*, 5 L. R., App. Cas., 714; 43 L. T. 449; 29 W. R. 1.

8. *Smith* v. *Smith* (2 C. & M. 231) may be reconciled with *Timson* v. *Ramsbottom* (2 Keen 35), on the ground that, in the latter case, there was no subsisting notice at the time of the second incumbrancer giving notice. *Meux* v. *Bell*, 11 L. J., Ch., 77; 1 Hare 73.

9. *Smith* v. *Smith* (1 Dr. & Sm. 384). Having, on a former occasion, considered the 22 & 23 Vict., c. 35, not to be retrospective in the above case, I had occasion to observe that a different opinion was entertained in other branches of the Court, and that my view was therefore erroneous, and I have communicated with the other judges, and Lord St. Leonards, on the subject. Per Kindersley, V.-Ch., in *Dodson* v. *Sammell*, 30 L. J., Ch., 799, 800.

10. *Smith* v. *Vaughan* (8 Vin. Abr. 381; Dev, Z. C. pl. 32) is not an authority to be followed. *Kimberley* v. *Tew*, 2 Con. & L. 371; 4 Dr. & War. 139; 5 Ir. Eq. R. 389.

11. *Smith, Exp., London Marine Insurance Association, Re* (4 L. R., Ch., 611; 38 L. J., Ch., 681; 17 W. R. 941; 21 L. T., N. S., 97. Affirming 17 W. R. 784; 7 L. R., Eq., 176). The letter and the policy form parts of one agreement; the policy is properly stamped, and, therefore, the ground of the objection which was successfully taken in *Smith, Exp.*, where no policy was issued, is removed. Per Lord Romilly, M. R., in *Blyth & Co.'s case, Albert Average Association, Re*, 13 L. R., Eq., 529, 531; 20 W. R. 504.

12. *Smyth, Exp.* (3 M. D. & De G. 687), observed upon and distinguished in *Boulton, Exp.*, 1 De G. & J. 163; 26 L. J., Bky., 45. and see *Bartlett* v. *Bartlett*, 26 L. J., Ch., 577, *Rawbone, Re*, 26 L. J., Ch., 588, 589. Per Wood, V.-Ch.

13. *Snook* v. *Watts* (11 Beav. 105) commented on adversely to its reception as an authority. *Campbell* v. *Hooper*, 3 Sm. & G. 153; 3 Eq. Rep. 727; 1 Jur., N. S., 670; 24 L. J., Ch., 644.

14. *Soames* v. *Martin* (10 Sim. 287) overruled. *Gardiner* v. *Barber*, 18 Jur. 508; 2 W. R. 407; 2 Eq. Rep. 888.

15. *Soames* v. *Martin* (8 L. J., Ch., 367; 10 Sim. 287) approved and followed in *Wilkins* v. *Jodrell*, 13 Ch. D. 564; 49 L. J., Ch., 26; 41 L. T. 649; 28 W. R. 224.

16. *Solicitor, A, Re* (14 L. R., Ch. D., 152; 49 L. J., Ch., 295; 42 L. T. 310; 28 W. R. 529), distinguished in *Mann* v. *Perry*, 50 L. J., Ch., 251; 44 L. T. 248.

17. *Society of Practical Knowledge* v. *Abbott* (2 Beav. 559) distinguished in *British Seamless Paper Box Co, Re*, 17 L. R., Ch. D, 467; 50 L. J., Ch., 497; 44 L. T. 498; 29 W. R. 690.

18. *Sollory* v. *Leaver* (9 L. R., Eq., 22; 39 L. J., Ch., 72). But if it is said that I decided *Sollory* v. *Leaver* without having my attention drawn to *Foster* v. *Foster* (Pre. Ch. 122; 2 Vern. 386), *Manly* v. *Hawkins* (1 Dr. & Wal. 363), and *Cupit* v. *Jackson* (M'Clel. 495; 13 Price 721), I answer that the decision was not made in the absence of authority, for I proceeded upon the decision of Lord Eldon in the case of *Buxton* v. *Monkhouse* (Cooper 41), and here Lord Eldon gave the very reason upon which I decided *Sollory* v. *Leaver*, that the trustee had power to distrain. Per Malins, V.-Ch., in *Kelsey* v. *Kelsey*, 17 L. R, Eq., 495, 500; 30 L. T. 82; 22 W. R. 433.

19. *Southall, Exp. & Re* (Mont & Ch. 656; 4 Dea. 91, 95; 3 Jur. 1177; affirmed 4 Dea. 99). The Court, in referring the solicitor's bill of costs for taxation, will not direct the registrar to inquire into imputed negligence, unless in the instance of the bill of costs being a petitioning creditor's debt. *Southall, Exp. & Re*, being an authority to that extent only. *Semble. Exp. Billington*, 4 Jur. 1140.

20. *South Wales Atlantic Steamship Co., Re* (dictum of James, L. J.) (2 L. R., Ch. D., 763; 46 L. J., Ch., 177; 35 L. T. 294), not followed in *Padstow Total Loss and Collision Assurance Association, Re*, 20 L. R., Ch. D., 140; 51 L. J., Ch., 344.

21. *South Wales Railway Co., Re* (14 Beav. 418; 20 L. J., Ch., 534) (Costs of landowner), must be wrong, unless founded on some special clause in the contract not appearing in the report, and is overruled by Lord Romilly, M.R. (who decided that case) in *Liverpool Improvement Act, Re*, 37 L. J., Ch., 376; 5 J., R., Eq., 282; 16 W. R. 667. But see *Buck, Exp., Hampstead Junction Railway, Re*, 1 Hem. &

M. 519; 33 L. J., Ch., 79; 9 Jur., N. S., 1172; 12 W. R. 100; 9 L. T., N. S., 374.

1. *Spackman* v. *Timbrell* (8 Sim. 253; 7 L. J., N. S., Ch., 147). Observations on the practical consequences, in possible cases, of the doctrine established in this case, that an heir or devisee may, by alienation of the descended or devised estates, place them out of the reach of the ancestor's or devisor's creditors, while he remains personally liable to them for the value of the estates. *Pamm* v. *Insall*, 1 Macn. & G. 449; 1 H. & Tw. 487; 19 L. J., N. S., Ch., 1, 14 Jur. 357. Affirming 7 Hare 193; 17 L. J., N. S., Ch., 374; 12 Jur. 577.

2. *Spalding* v. *Ruding* (12 L. J., Ch., 503; 6 Beav. 376) followed in *Kemp* v. *Falk*, 7 L. R., App. Cas., 573; 31 W. R. 125; 52 L. J., Ch., 167; 47 L. T. 454; and in *Golding, Exp., Knight, Re*, 13 L. R., Ch. D., 628; 42 L. T. 270; 28 W. R. 481.

3. *Spalding* v. *Thompson* (26 Beav. 637) is a decision of my own, but I do not find that it has ever been reversed or doubted. I have reconsidered the point as to whether the decision is right; I think it is, and I must be bound by it on the present occasion. Per Lord Romilly, M. R., in *Haselfoot* or *Hazlefoot, Re, Chauntler's claim*, 13 L. R., Eq., 327, 331; 14 L. J., Ch., 286; 26 L. T. 146.

4. *Spargo's case, Harmony and Montague Copper Mining Co., Re* (8 L. R., Ch., 407; 42 L. J., Ch., 488; 28 L. T. 153; 21 W. R. 306), approved in *Barrow-in-Furness and Northern Counties Land and Investment Co., Re*, 14 L. R., Ch. D., 400; 42 L. T. 888; and distinguished in *Andress's case, Church and Empire Fire Insurance Fund, Re*, 8 L. R., Ch. D., 126; 47 L. J., Ch., 679; 38 L. T., N. S., 266; 26 W. R. 567.

5. *Sparrow* v. *Farmer* (28 L. J., Ch., 537; 26 Beav. 511) distinguished in *Harvey* v. *Muncipal Permanent Investment Building Society*, 26 L. R., Ch. D., 273; 53 L. J., Ch., 1126; 51 L. T. 408; 32 W. R. 557.

6. *Spencer* v. *Spencer* (8 Sim. 87; 5 L. J., N. S., Ch., 310) observed on in *Tennison* v. *Moore*, 13 Ir. Eq. R. 424.

7. *Spencer's case* (5 Rep. 16). *Semble*, that the principle laid down in the second resolution in *Spencer's case* is not law. *Minshull* v. *Oakes*, 2 H. & N. 793; 4 Jur., N. S., 169; 27 L. J., Exch., 194.

Semble, also, that the case is misreported, and is the same with the *Anonymous case* (Moore 159, pl. 300), which is of a later date, and states a different result. *Ib.*

But that resolution does not apply where the covenant is not absolutely to do a new thing, but to do something conditionally. *Ib.*

8. *Spicer* v. *James* (2 Myl. & K. 387) followed in *Thompson* v. *Cooper*, 1 Colly. 81; 13 L. J., N. S., Ch., 416; 8 Jur. 164.

9. *Spiller* v. *Paris Skating Rink Co.* (7 L. R., Ch. D., 368; 26 W. R. 456) not followed in *Empress Engineering Co., Re*, 16 L. R., Ch. D., 125; 43 L. T. 742; 29 W. R. 342.

10. *Spitalfields Schools and Commissioners of Woods and Forests, Re* (10 L. R., Eq., 671; 22 L. T. 569; 18 W. R. 799), in conflict with *Cherry, Re* (31 L. J., Ch., 351; 8 Jur., N. S., 446; 10 W. R. 305; 6 L. T., N. S., 31; 4 De G. F. & J. 333), and with a long line of other cases, and not followed by Wickens, V.-Ch., *Charity Schools of St. Dunstan-in-the-West, Re*, 12 L. R., Eq., 537; 24 L. T. 613; 19 W. R. 887.

11. *Spong* v. *Spong* (1 Dow & Cl. 365; 3 Bli. N. S. 84) approved of in *Conron* v. *Conron*, 7 H. L. Ca. 168.

12. In this state of things, an application had been made to the Master, on the authority of *Spottiswoode's case* (6 De G. M. & G. 345) in particular, and, on the tender of further evidence, for leave to review the decision of 1852 upon the recent decisions and upon such further evidence. It appeared that the evidence had not been looked at by the Master, but he decided upon the citation and argument of the cases, and the allegation of further evidence that there was enough to justify an order to review. On appeal, the Court confirmed this decision. *Curzon (Viscount), Exp.*, 3 Drew. 508.

13. *Staff, Exp. & Re* (20 L. R., Eq., 775; 44 L. J., Bky., 137; 33 L. T. 40; 23 W. R. 950), approved and followed in *Ball, Exp., Parnell, Re*, 20 L. R., Ch. D., 670; 51 L. J., Ch., 911; 47 L. T. 213; 30 W. R. 738.

14. *Staines* v. *Banks* (9 Jur., N. S., 1049; reversed on appeal Reg. Lib. 7 B. 1863, 176) not followed in *Union Bank of England* v. *Ingram*, 16 L. R., Ch. D., 53; 50 L. J., Ch., 74; 43 L. T. 659; 29 W. R. 209.

15. *Stanger* v. *Wilkins* (19 Beav. 626) explained in *Johnson* v. *Fesenmeyer*, 25 Beav. 88.

16. *Stanhope's Trusts, Re* (27 Beav. 201), followed in *Jackson, Re, Shiers* v. *Ashworth*, 25 L. R., Ch. D., 162; 53 L. J., Ch., 180; 50 L. T. 18; 32 W. R. 194.

17. *Stanley* v. *Chester & Birkenhead Railway Co.* (1 Rail. Ca. 58; 3 Myl. & Cr. 773) not approved of. *Caledonian & Dumbartonshire Junction Railway Co.* v. *Helensburgh Harbour (Trustees)*, 2 Macq. H. L. Ca. 391; 2 Jur., N. S., 695.

18. *Stanley* v. *Leigh* (2 P. W. 686) is impeached by the case of *Clare* v. *Clare*, Forrest 21, before Lord Talbot. *Gower* v. *Grosvenor*, 5 Madd. 346.

19. *Stanley's case, British Provident and Life Assurance Society, Re* (10 L. T., N. S., 674; 33 L. J., Ch., 535; 4 De G. J. & S. 407; 10 Jur., N. S., 712; 12 W. R. 894). The question in this appeal is whether a power in a deed of settlement of a joint stock company, authorising the directors to mortgage or charge the property of the company, gives them authority to include in such mortgage or charge future calls, or in other words, the unpaid capital of the company. There was a difference of opinion amongst the judges of the Supreme Court, before which the question was brought on appeal from the order of the primary judge. The majority was of opinion that the word "property" included future calls, and that the law had been so settled in this country by *Lishman, Exp., Colonial and General Gas Co., Re* (23 L. T., N. S., 759; 19 W. R. 344), a Vice-Chancellor's decision, cited from the Law Times. The dissentient judge who had made the order then under appeal, admitted that this was so, but thought that the context of the deed excluded that construction in this particular case. It is much to be regretted that the attention of the judges was not called to *Stanley's case* (*supra*), a decision of the Court of Appeal which has been followed in other cases, and has been cited and re-

ferred to in every text book as the leading case authoritatively setting the rule of law. In that case the words of the power were "property and funds," and it was held that a charge on future calls was *ultra vires* and void. It is impossible to distinguish that case from the one under appeal, and the contention on the part of the respondents was, that their lordships, or the ultimate Tribunal of Appeal, should review that decision, and overrule it, as not being a correct exposition of the law. Even if their lordships had any doubt as to that decision, they would not have felt themselves warranted in disturbing a rule which has been uniformly (with the exception of *Lishman, Exp.*) assented to and acted upon in this country. And it is to be noted, with respect to *Lishman, Exp.*, that, although it was after *Stanley's case* had been decided by the Court of Appeal, the Vice-Chancellor does not appear to have referred to that case, and *Lishman, Exp.* has not found its way into the authorised reports or text books. The decision in *Stanley's case* appears to be based on very intelligible and reasonable grounds. Per James, L. J., in *Bank of South Australia* v. *Abrahams*, 32 L. T., N. S., 277, 279; 44 L. J., P. C., 76, 78; 6 L. R., P. C., 265; 23 W. R. 668.

1. *Stansfield* v. *Habergham* (10 Ves. 273). According to Vesey, junior, a very careful and accurate reporter, Lord Eldon said, in *Stansfield* v. *Habergham*, "I should, by dissolving this injunction, contradict what has been understood to be the doctrine of this Court, that where there is an executory devise over, even of a legal estate, this Court will not permit the timber to be cut down." But this doctrine is not to be found in any text writer, and it has never been acted upon. Per Lord Campbell, C., in *Turner* v. *Wright*, 6 Jur., N. S., 809, 810.

2. *Stansfield* v. *Hobson* (22 L. J., Ch., 457; 20 L. T., N. S., 301; 1 W. R. 216; 3 De G. M. & G. 620) commented on in *Sanders* v. *Sanders*, 19 L. R., Ch. D., 373; 51 L. J., Ch., 276; 45 L. T. 637; 30 W. R. 280.

3. *Stanton Iron Co., Re* (25 L. J., Ch., 142). The decision of the Master of the Rolls, *Stanton Iron Co., Re*, seems to be quite contrary to that of this Court in *Hickman* v. *Cox*, 27 L. J., C. P., 129, which case was affirmed in the Exchequer Chamber. Per Willes, J., in *Moore* v. *Rawlings*, 28 L. J., C. P., 247, 253.

4. *Stanton* v. *Tattersall* (1 Sm. & G. 529). Mr. Pearson was very anxious to impress upon me that the Court never entertains a suit for the rescission of a contract unless it has been obtained by fraud. I expressed my strong impression, derived from many years' experience in cases of vendor and purchaser, that mistake, where it is satisfactorily established, as where a purchaser has been led by the conduct of the vendor to believe that he has been purchasing one thing when in fact he has been purchasing another, is just as good a ground for rescuing persons from a contract as fraud. A remarkable instance of this is *Stanton* v. *Tattersall*, which was a decision of Stuart, V.-Ch., never appealed from, but always acquiesced in, and accepted as a binding authority by Lord St. Leonards. . . . The clear doctrine of the Court is, that where contracts are entered into by mistake they must be rescinded. That is shown by the passage in Lord St Leonards on Vendors and Purchasers (14th edit., p. 120), where *Stanton* v. *Tattersall* is referred to, and the rule is laid down that mistake is a ground for rescinding a contract in this court just as much as fraud. Per Malins, V.-Ch., in *Torrance* v. *Bolton*, 14 L. R., Eq., 124, 132, 134; 41 L. J., Ch., 643; 27 L. T. 19; 20 W. R. 718.

5. *Steele* v. *McKinlay* (5 L. R., App. Cas., 754; 43 L. T. 358; 29 W. R. 17) distinguished in *Wilkinson* v. *Unwin*, 50 L. J., Q. B., 338; 29 W. R. 458.

6. *Steele* v. *McKinlay* (5 L. R., App. Cas., 754; 43 L. T. 385; 29 W. R. 17) distinguished in *Macdonald* v. *Whitfield*, 8 L. R., App. Cas., 733; 52 L. J., P. C., 70; 49 L. T. 446.

7. *Steele* v. *Phillips* (1 Hog. 49; Beat. 188) cannot now be considered law. *Piers* v. *Piers*, 1 Dr. & Wal. 265; Sau. & Sc. 379.

8. *Steinmetz* v. *Halthin* (1 G. & J. 64) overruled in *Wallace* v. *Auldjo*, 32 L. J., Ch., 748.

9. *Stephens, Exp.* (2 Mont & A. 31), disapproved in *Carr, Exp., Hoffman, Re*, 11 L. R., Ch. D., 62; 48 L. J., Bky., 69; 27 W. R. 435; 40 L. T. 299.

10. *Sterndale* v. *Hankinson* (1 Sim. 393) explained in *Greaves, Re, Bray* v. *Tofield*, 18 L. R., Ch. D., 554; 50 L. J., Ch., 817; 45 L. T. 464; 30 W. R. 55; and observed upon in *Bennett* v. *Bernard*, 12 Ir. Eq. R. 229.

11. *Stephens, Exp.* (4 Dea. & Ch. 117), questioned in *Cornwall, Re*, Ll. & G. *temp.* Plunk. 446.

12. *Stevens* v. *Keating* (15 Sim. 552; 5 H. L. Ca. 537, n., 550, n.) doubted in *Unwin* v. *Heath*, 5 H. L. Ca. 505, 550.

13. *Stevens* v. *Von Voorst* (17 Beav. 305) not followed and overruled in *Edwards, Re*, 9 L. R., Ch., 97; 29 L. T., N. S., 712; 22 W. R. 144; 43 L. J., Ch., 265.

14. *Stewart* v. *Garnett* (3 Sim. 398) observed upon in *Turner* v. *Barclay*, 9 Moo. P. C. 264.

15. *Stewart* v. *Jones* (3 De G. & J. 532). The only other case is *Stewart* v. *Jones*, where I am astonished to find the present Lord Chancellor (then Wood, V.-Ch.) held that the children of a parent who died before the date of the will and the testator's death were not entitled to take, and that decision Lord Chelmsford affirmed on appeal, stating that he entertained no doubt upon the case. There the language of the will was somewhat different to this, but the case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present, I should have decided the other way, in order that it might have been reconsidered. I think if the question ever came before the Court again, the decision would be totally different. Per Malins, V.-Ch., in *Potter, Re*, 39 L. J., Ch., 102 106; 8 L. R., Eq., 60.

16. *Stewart* v. *Jones* (3 De G. & J. 532). Mr. Glasse has drawn my attention to a passage in the judgment in *Potter, Re* (8 L. R., Eq., 60; 39 L. J., Ch., 102), bearing upon the decision in *Stewart* v. *Jones*, in which I made the following observations: "The only other case is *Stewart* v. *Jones*, where I am astonished to find that the present Lord Chancellor (then

V.-Ch. Wood) held that children of a parent who died between the date of the will and the testator's were not entitled to take; on appeal, Lord Chelmsford affirmed the decision, stating that he entertained no doubt upon the case. There the language of the will was different from this; but that case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present I should have decided the other way, in order that it might have been reconsidered. That is the opinion which I then expressed, and to which I adhere now. The construction adopted in *Stewart* v. *Jones* was one which certainly defeated the intention of the testator, and did the greatest injustice. Per Malins, V.-Ch., in *Re Shearman*, 4 L. R., Ch. D., 620, 624; 46 L. J., Ch., 608; 35 L. T. 731; 25 W. R. 225.

1. As to *Stileman* v. *Ashdown* (2 Atk. 477; Ambl. 13) see *Leahy* v. *Dancer*, 1 Moll. 313.

2. *Stillman* v. *Weedon* (16 Sim. 26). The case of *Stillman* v. *Weedon*, to which I was referred, seems to have a contrary tendency; but that case must be considered as resting on its own foundation exclusively. That case was very peculiar, and was affected by two different powers contained in it. Per Lord Romilly, in *Elgood* v. *Cole*, 21 L. T., N. S., 80, 81; 17 W. R. 953, 954.

3. *Stockton & Darlington Railway Co.* v. *Brown* (9 H. L. Ca. 246; 6 Jur., N. S., 1168). I think it very important that the principle laid down in this case should be considered as settled, and that the Court should be saved from a deluge of affidavits as to whether land is wanted or not, by simply saying that the Court will take the engineer's word for it when he gives it with a reasonable appearance of accuracy. Per Lord Hatherley, C., in *Kemp* v. *South-Eastern Railway Co.*, 7 L. R., Ch., 364, 375; 41 L. J., Ch., 404; 26 L. T. 110; 20 W. R. 306.

4. *Stockton Iron Furnace Co., Re* (10 L. R., Ch. D., 335; 48 L. J., Ch., 417; 40 L. T. 19; 27 W. R. 433), observed upon in *Jackson, Exp., Bowes, Re*, 14 L. R., Ch. D., 725; 43 L. T. 272; 29 W. R. 253.

5. *Stockton Iron Furnace Co., Re* (10 L. R., Ch. D., 335; 48 L. J., Ch., 417; 40 L. T. 19; 27 W. R. 433), commented on in *Voisey, Exp., Knight, Re*, 21 L. R., Ch. D., 442; 47 L. T. 362; 31 W. R. 19; 52 L. J., Ch., 121.

6. *Stokes* v. *Bridgman* (47 L. J., Ch., 759) followed in *Gilbert* v. *Whitfield*, 52 L. J., Ch., 210; 48 L. T. 383.

7. *Stokes, Re* (13 L. R., Eq., 333; 41 L. J., Ch., 290; 26 L. T. 181; 20 W. R. 396), approved in *Harford's Trusts, Re*, 13 L. R., Ch. D., 135; 41 L. T. 382; 28 W. R. 239.

8. *Stokes, Re* (13 L. R., Eq., 333; 41 L. J., Ch., 290; 26 L. T. 181; 20 W. R. 396), not followed in *Colyer, Re*, 50 L. J., Ch., 79; 43 L. T. 454.

9. *Stokes* v. *Deey* (Beat. 152; 2 Hog. 67; 1 Moll. 597), overruled. See *Jones* v. *Yates*, 3 Y. & J. 373, and *Evans, Exp., Dodgson, Re*, 3 Deac. & Ch. 470.

10. *Stokes* v. *Heron* (12 Cl. & F. 161). The opinion of Lord Brougham, expressed in this case, that the rule in *Weld's case* (6 Rep. 17), applies equally to personal as to real estate, not assented to, because it was not necessary for the decision in that case, and that the applicability of the rule to bequests of personalty has been disputed in a great variety of cases. Per Romilly, M. R., in *Audsley* v. *Horn*, 26 Beav. 195, 198; 28 L. J., Ch., 293.

11. *Stokes Bay Railway & Pier Co.* v. *London & South Western Railway Co.* (2 Nev. & Mac. 143) disapproved of in *Great Western Railway Co.* v. *Waterford & Limerick Railway Co.*, 17 L. R., Ch. D., 493; 50 L. J., Ch., 513; 44 L. T. 723; 29 W. R. 826.

12. *Stokoe* v. *Cowan* (29 Beav. 637) not followed in *Sargent's Trusts, Re*, 7 L. R., Ir., 66.

13. *Stone* v. *Parker* (1 Dr. & Sm. 212). The 30 & 31 Vict., c. 69, has done away with this decision. Per Malins, V.-Ch., in *Lewis* v. *Lewis*, 12 L. R., Eq., 218, 224; 25 L. T. 555; 20 W. R. 141; 41 L. J., Ch., 195.

14. *Stott* v. *Hollingworth* (3 Madd. 161) overruled in *Macpherson* v. *Macpherson*, 16 Jur. 847.

15. *Stoughton* v. *Crosbie* (5 Ir. Eq. Rep. 451) approved and followed in the doctrine of this case does not clash with the principle of *Garrard* v. *Lauderdale* (*Lord*) (2 Russ. & M. 451. Affirming 3 Sim. 1) and similar cases, preventing a stranger from taking advantage of a creditor's deed or the like, to which he is not a party. The two classes of authorities distinguished. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

16. *Stourton* v. *Stourton* (8 De G. M. & G. 760; 3 Jur., N. S., 587; 26 L. J., Ch., 354) considered in *Agar-Ellis, Re, Agar-Ellis* v. *Lascelles*, 10 L. R., Ch. D., 49; 48 L. J., Ch., 1; 27 W. R. 117; 39 L. T. 380.

17. *Street* v. *Rigby* (6 Ves. 821). Lord Eldon's *dictum* as to the reluctance of courts of equity to be ancillary to domestic tribunals, had no application:—Held, inapplicable. *British Empire Shipping Co.* v. *Somes*, 3 Kay & J. 433; 3 Jur., N. S., 883; 26 L. J., Ch., 759.

18. *Stringer, Exp., Mercantile Trading Co., Re* (4 L. R., Ch., 475; 38 L. J., Ch., 698; 20 L. T., N. S., 553; 17 W. R. 694), distinguished in *Alexandra Palace Co., Re*, 21 L. R., Ch. D., 149; 51 L. J., Ch., 655; 46 L. T. 730; 30 W. R. 771.

19. *Stringer* v. *Harper* (28 L. J., Ch., 643; 33 L. T., N. S., 232; 26 Beav. 585) not followed in *Middleton, Re, Thompson* v. *Harris*, 19 L. R., Ch. D., 552; 51 L. J., Ch., 273; 46 L. T. 359; 30 W. R. 293.

20. *Stringer* v. *Phillips* (1 Eq. Ca. Abr. 292) questioned in *Gregson, Re*, 34 L. J., Ch., 41, 45.

21. *Strode* v. *Russel* (2 Vern. 621) commented on in *Ulrich* v. *Litchfield*, 2 Atk. 372.

22. *Stuart, Re* (4 L. R., Ch. D., 213; 46 L. J., Ch., 86; 35 L. T. 788; 25 W. R. 295), distinguished in *Jegon, Exp., South Llanharren Colliery Co., Re*, 41 L. T. 567; 28 W. R. 194; 12 L. R., Ch. D., 503.

23. *Stuart* v. *London & North-Western Railway Co.* (1 De G. M. & G. 721) doubted in *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Ca. 331, 351, 355.

24. *Stunday* v. *Lingham* (5 Ves. 423) overruled. See 11 Ves. 362.

25. *Sturge* v. *Dimsdale* (6 Beav. 462; 7 Jur.

543) observed on in *Robinson* v. *Geldard*, 3 Macn. & G. 735. Reversing 3 De G. & Sm. 499; 18 L. J., N. S., Ch., 454; 14 Jur. 143.

1. *Sturge* v. *Eastern Counties Railway Co.* (7 De G. M. & G. 158; 1 Jur., N. S., 713) observed upon by Turner, L. J., in *Henry* v. *Great Northern Railway Co.*, 3 Jur., N. S., 1133.

2. *Sturgis* v. *Champneys* (5 Myl. & Cr. 97; 9 L. J., N. S., Ch., 10; 3 Jur. 1096) followed in *Hanson* v. *Keating*, 4 Hare 1; 8 Jur. 949; 14 L. J., N. S., Ch., 13.

3. *Sturgis* v. *Champneys* (5 Myl. & Cr. 97) not to be extended. See *Gleaves* v. *Paine*, 1 De G. J. & S. 92. And see *Clark* v. *Cook*, 3 De G. & Sm. 333.

4. *Sturgis* v. *Corp* (13 Ves. 190) discussed in *King* v. *Lucas*, 23 L. R., Ch. D., 712; 49 L. T. 216; 31 W. R. 904; 53 L. J., Ch., 64.

5. *Suffield* v. *Brown* (4 De G. J. & S. 185; 33 L. J., Ch., 249; 9 L. T. 627; 12 W. R. 356) observed upon in *Wheeldon* v. *Burrows*, 12 L. R., Ch. D., 31; 48 L. J., Ch., 853; 41 L. T. 327; 28 W. R. 196.

6. *Suffield* v. *Brown* (9 Jur., N. S., 999; 9 L. T., N. S., 192) (as to implied easements) reversed on appeal by Lord Westbury, C., 10 Jur., N. S., 111; and see leading article on this decision, 10 Jur., N. S., Part 2, p. 67.

7. *Sugden's* Vend. & P. 93. Fraud will, of course, be a sufficient ground for opening the biddings; therefore, if the parties agree not to bid against each other, the Court would open the biddings, although the report had been absolutely confirmed, disapproved of. Per Romilly, M. R., in *Carew, Re*, 4 Jur., N. S., 1290.

8. *Sullivan* v. *Metcalfe* (5 L. R., C. P. D., 455) followed in *Jury* v. *Stoker*, 9 L. R., Ir., 385. Affirmed 8 L. R., Ir., 404.

9. *Sutcliffe* v. *Booth* (32 L. J., Q. B., 136) considered and approved in *Roberts* v. *Richards*, 50 L. J., Ch., 297; 44 L. T. 271.

On appeal the order discharged on undertaking. See 51 L. J., Ch., 944.

10. *Sutherland* v. *Cooke* (1 Colly. 503) followed in *Morgan* v. *Morgan*, 14 Beav. 72.

11. *Sutton* v. *Moody* (1 Ld. Raym. 250; Comyns 34; 12 Mod. 144, 145) approved of. But Lord Chelmsford questions the declaration in the latter case, that if A. starts a hare on the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter. *Blades* v. *Higgs*, 11 H. L. Ca. 621.

12. *Sutton* v. *Sutton* (22 L. R., Ch. D., 511; 52 L. J., Ch., 333; 48 L. T. 95; 31 W. R. 369) followed in *Fearnside* v. *Flint*, 22 L. R., Ch. D., 579; 52 L. J., Ch., 479; 48 L. T. 154; 31 W. R. 318.

13. *Swaine* v. *Kennerley* (1 Ves. & B. 469) must be considered to have been shaken by subsequent decisions. Per Romilly, M. R., in *Edmunds* v. *Fessey*, 7 Jur., N. S., 282.

14. *Swan, Re* (12 W. R. 738: 2 Hem. & M. 34), questioned. Mr. Willis has attempted to justify the payment into court on the ground that one moiety of the fund is given to a married woman, and an authority has been cited which very much surprised me, for the position that in all cases where money is given to a married woman, whether she desires it or not, trustees are justified in paying it into court. certainly shall not follow that case unless I am obliged. I do not agree with the decision, and I hope some day it may be reconsidered. I wish it to be understood that I do not follow it. Per Malins, V.-Ch., in *Roberts, Re*, 17 W. R. 639, 640; 38 L. J., Ch., 708, 709.

15. *Swan* v. *North British Australian Co.* (7 H. & N. 603; 11 W. R. 862; 2 H. & C. 175). I do not think it necessary to remark particularly upon the cases at law on the effect of negligence which were cited by Mr. Rigby. I may, however, remark that some of them were not decided in accordance with the principles of this court. *Tayler* v. *Great Indian Peninsula Railway Co.* (4 De G. & J. 559) was decided as it was on the ground, that as the purchaser did not acquire a good title under the blank transfers, the ultimate transferees of the shares had notice of the transfers having been executed in blank. They, therefore, took with notice; and it was upon that ground only that the decision was come to. That decision contrasts in a remarkable manner, I am bound to say, with the case of *Swan* v. *North British Australian Co.* There all the judges, except Mr. Justice Keating, decided that the transfers executed in blank handed over to the transferee who neither had notice, nor possibly could have notice of the circumstances under which they were executed, did not give a good title. Mr. Justice Keating dissented from the rest of the Court, and I am bound to say, if I had been a member of the Court, that I should entirely have agreed with him. The case is in contrast with the case of *Tayler* v. *Great Indian Peninsula Railway Co*, where the decision was against transferees solely on the ground that they had notice that the transfers had been executed in blank. Per Malins, V.-Ch., in *Hunter* v. *Walters*, 11 L. R., Eq., 292, 319, 320.

It is still doubtful at law whether a person not being blind or illiterate, who executes a deed on a false representation of its contents, is not estopped from denying its validity as between himself and a person who innocently acts upon the faith of it. *Swan* v. *North British Australasian Co.* (*supra*), does not decide that a person cannot be estopped from denying the validity of a void deed. Per Mellish, L. J., in S. C. on appeal, 20 W. R. 218; 7 L. R., Ch., 75; 41 L. J., Ch., 175; 25 L. T. 765.

16. *Swan* v. *Swan* (8 Price 518) not followed in *Leslie, Re, Leslie* v. *French*, 31 W. R. 561; 23 L. R., Ch. D., 552; 52 L. J., Ch., 762; 48 L. T. 564.

17. *Sweetapple* v. *Horlock* (11 L. R., Ch. D., 745; 48 L. J., Ch., 660; 41 L. T. 272; 27 W. R. 865) corrected in *Jackson's Will, Re*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 28 W. R. 209.

18. *Sweet* v. *Meredith* (4 Giff. 207; 32 L. J., Ch., 147) not followed in *Henty* v. *Schroder*, 12 L. R., Ch. D., 666; 48 L. J., Ch., 792; 27 W. R. 833.

19. *Sweet* v. *Partridge* (5 Ves. 148) overruled by *Challnor* v. *Murhall*, 6 Ves. 118; *Newman* v. *Hodgson*, 7 Ves. 409; *Thomas* v. *Davies*, 12 Ves. 417.

20. *Swift* v. *Swift* (3 Knapp 303, reversed on appeal in the Privy Council, *nom. Swift* v.

Kelly, 3 Knapp 257). The judgment of the Court of Arches is reported in the Privy Council Reports (3 Knapp 303), without a statement that this judgment was reversed in the Privy Council, *nom. Swift* v. *Kelly*, as stated in the previous pages of Knapp's Report, the judgment in the Arches being, in fact, reported as a note or addendum to the judgment of the Privy Council overruling it.

1. *Swift* v. *Wenham* (10 L. R., Eq., 15; 39 L. J., Ch., 336; 21 L. T. 194; 18 W. R. 480) not followed by the Master of the Rolls in *Fitzgerald* v. *Chapman*, 1 L. R., Ch. D., 563; 45 L. J., Ch., 23; 33 L. T. 587; 24 W. R. 130.

2. *Swinbanks, Exp., Shanks, Re* (11 L. R., Ch. D., 525; 48 L. J., Bky., 120; 40 L. T. 825; 27 W. R. 898), approved and followed in *Butters, Exp., Harrison, Re*, 14 L. R., Ch. D., 265; 43 L. T. 28; 2 W. R. 876.

3. *Swinburne's Treatise* is a very useful compilation, giving a compendious view of the civil law from their text writers; but he is not to be considered an authority in our courts of equity. *Ashe* v. *Berry*, Beat. 259.

4. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (7 L. R., H. L., 697) considered in *Bonner* v. *Great Western Railway Co.*, 24 L. R., Ch. D., 1; 48 L. T. 619; 32 W. R. 190.

5. *Sydney, Re, Sydney and Wiggins, Exp.*, (10 L. R., Ch., 208; 44 L. J., Bky., 120; 31 L. T. 714; 23 W. R. 205), distinguished in *Watson, Exp., Roberts, Re*, 12 Ch. D., 380; 41 L. T. 516; 28 W. R. 205.

6. *Sykes, Re* (2 John. & H. 415), followed in *Pike* v. *Fitzgibbon*, 17 L. R., Ch. D., 454; 50 L. J., Ch., 394; 44 L. T. 562; 29 W. R. 551.

7. *Sykes* v. *Beadon* (11 L. R., Ch. D., 170; 48 L. J., Ch., 522; 40 L. T. 243; 27 W. R. 464) disapproved of in *Smith* v. *Anderson*, 15 L. R., Ch. D., 247; 50 L. J., Ch., 39; 43 L. T. 329; 29 W. R. 21.

8. *Sykes* v. *Sheard* (12 W. R. 117; 2 De G. J. & S. 6). He was as much surprised at the decision of the Lords Justices in *Sykes* v. *Sheard* as at any case ever cited to him. He should not follow it. It required reconsideration, and if the case were brought before him he should decide against it, that it might be taken to the Court above to be reconsidered. Per Malins, V.-Ch., in *Jefferys* v. *Marshall*, 19 W. R. 94, 95; 23 L. T. 548.

T.

9. *Taddy's Settled Estates, Re* (16 L. R., Eq., 532; 43 L. J., Ch., 191; 29 L. T. 243), not followed in *St. Mary Wigton (Vicar), Exp.*, 18 L. R., Ch. D., 646; 45 L. T. 134; 29 W. R. 883.

10. *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296) followed in *Zetland (Earl)* v. *Hislop*, 7 L. R., App. Cas. (Sc.), 427.

Semble, though *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296) does determine that the superior cannot enforce a restriction on property, unless he has some legitimate interest; that case does not lay down the doctrine, that an action at the superior's instance, which merely sets forth the condition of his feu right and its violation by the vassal, must be dismissed as irrelevant, because the pursuer has failed to allege interest. The vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore the onus is upon the vassal, who is pleading a release from his contract to prove that any legitimate interest which the pursuer may originally have had in maintaining the restriction has ceased to exist. *Ib.*

Taitt v. *Carwick* (2 Fowl. 30; and cited, Dick. 739) questioned. *Id.* 740.

11. *Talbot* v. *Hope Scott* (27 L. J., Ch., 273; 4 Kay & J. 139) not followed in *Berry* v. *Keen*, 51 L. J., Ch., 912.

12. *Talbot* v. *Marshfield* (2 Dr. & Sm. 549) followed in *Mason, Re, Mason* v. *Cattley*, 22 L. R., Ch. D., 609; 52 L. J., Ch., 478; 48 L. T. 631.

13. *Talbot* v. *Radnor (Earl)* (3 Myl. & K. 252). Persons claiming a title purely adverse to a trust cannot be made parties to a suit for the execution of the trust. The case of *Talbot* v. *Radnor (Earl)* (*supra*) is the only case of which I am aware at all bearing upon this point, and that case has been constantly disapproved of and never followed. Per Turner, L. J., in *Att.-Gen.* v. *Avon, otherwise Aberavon (Corporation)*, 3 De G. J. & S. 637, 651; 33 L. J., Ch., 172, 179.

14. *Talbot* v. *Radnor (Earl)* (3 Myl. & K. 254) examined and considered in *Fairtlough* v. *Johnstone*, 16 Ir. Ch. R. 442.

15. *Talleyrand* v. *Boulanger* (3 Ves. 447) commented upon by Lord Chelmsford, C., in *Liverpool Marine Credit Co.* v. *Hunter*, 16 W. R. 1090; 3 L. R., Ch., 479.

16. *Tanner* v. *Heard* (23 Beav. 555; 29 L. T., N. S., 257; 5 W. R. 420) explained and commented on in *Banner* v. *Berridge*, 18 L. R., Ch. D., 254; 50 L. J., Ch., 630; 44 L. T. 680; 29 W. R. 814; 4 Asp. M. C. 420.

17. *Tapling* v. *Jones* (11 H. L. Ca. 390, 290) applies to the equitable as well as to the legal remedy. *Staight* or *Straight* v. *Burn*, 5 L. R., Ch., 163; 39 L. J., Ch., 289; 18 W. R. 243; 22 L. T., N. S., 831.

18. *Tapling* v. *Jones* (11 H. L. Ca. 290; 20 C. B., N. S., 166; 34 L. J., C. P., 342) applies only to the right of the owner of the dominant tenement in such a case to recover damages at law, and is not to be extended to establish his right to relief in equity. *Heath* v. *Bucknall*, 8 L. R., Eq., 1; 38 L. J., Ch., 372; 17 W. R. 755; 20 L. N., N. S., 549.

19. *Tappen* v. *Norman* (11 Ves. 563) doubted and overruled by *Lushington* v. *Sewell*, 6 Madd. 28.

20. *Tarbuck* v. *Tarbuck* (4 L. J., N. S., Ch., 129) decides the question. Although I agree with Mr. Williams that, sitting here as a court of error, it would be quite competent to us to decide contrary to that case, which is a decision of the Master of the Rolls, if we saw fit so to do, yet the burden upon him is far heavier than it would have been had there been no such decision against him. Were the general question open, I should desire to look further into it, in order to ascertain the most correct view to take. It might be that, after consideration, I might come to the one

conclusion or to the other. But finding that Sir C. Pepys, then Master of the Rolls, decided the point one way so long back as thirty-seven years ago, and not finding that his decision was appealed against at the time, or that it has been, as far as I can ascertain, ever judicially attacked or shaken in any subsequent case, then, unless I have very clear and cogent grounds for upsetting the authority of that decision, I must say that I do not like to shake the rules on which conveyancers act, or to upset a case which has stood so long. Per Cockburn, C. J., in Exchequer Chamber in *Brookman* v. *Smith*, 26 L. T., N. S., 974, 978; 41 L. J., Exch., 114; 7 L. R., Exch., 271; 20 W. R. 906.

The learned counsel for the appellant was forced to admit that the case of *Tarbuck* v. *Tarbuck* is in point against him, and, moreover, that it is a decision which has never been judicially shaken. An attempt, indeed, was made to show that the case of *Doe* d. *Todd* v. *Duesbury* (8 M. & W. 514; 10 L. J., Exch., 410) had in some way shaken the authority of *Tarbuck* v. *Tarbuck*, but I confess that I cannot see it. For the reasons given by my Lord Chief Justice, it appears to me that *Tarbuck* v. *Tarbuck* was well decided. That decision, therefore, remains unimpeached; and, though we have the power to overrule it, yet I think that we ought not to do so, unless we entirely disagree with it. I think, on the contrary, that we are bound and ought to uphold that decision, and to affirm the judgment of the Court of Exchequer in the present case upon the first point on which they denied it. Per Keating, J. *Ib.*

Even if I felt inclined to question the authority of the case of *Tarbuck* v. *Tarbuck*, I should undoubtedly hesitate to do so upon considering the very eminent judge by whom it was decided, and the length of time that the decision has stood unquestioned by any other Court. But, so far from being disposed to question it, I entirely agree with it; and if there had been no such decision at all I may say for myself that I should have come to the same conclusion upon the words of this will. Per Lush, J. *Ib.*

1. *Tassell* v. *Smith* (27 L. J., Ch, 694; 32 L. T., N. S., 4; 6 W. R. 803; 2 De G. & J. 713) overruled in *Mills* v. *Jennings*, 13 L. R., Ch. D., 639; 49 L. J., Ch., 209; 42 L. T. 169; 28 W. R. 549. S. C. *nom. Jennings* v. *Jordan*, 6 L. R., App. Cas., 698; 51 L. J., Ch., 129; 45 L. T. 593; 30 W. R. 369.

2. *Tate* v. *Austin* (1 P. W. 264) disapproved of in *Hudson* v. *Carmichael*, 1 Kay 613; 18 Jur. 851; 23 L. J., Ch., 893.

3. *Tate* v. *Clarke* (1 Beav. 100) observed upon. *Wynch, Exp.*, or *Wynch's Trusts, Re*, 5 De G. M. & G. 188; 18 Jur. 659; 23 L. J., Ch., 930; 17 Jur. 588; 22 L. J., Ch., 750; 1 W. R. 426; 2 W. R. 570; 1 Eq. Rep. 521; 2 Eq. Rep. 1025; 1 Sm. & G. 427.

4. *Tatnall* v. *Hankey* (2 Moo. P. C. 342), marginal note of this report corrected. See *Alexander, In Goods of*, 1 S. & T. 454. n.; 6 Jur., N. S., 354.

5. *Taunton* v. *Royal Insurance Co.* (2 Hem. & M. 135; 33 L. J., Ch., 406; 10 L. T. 156, 12 W. R. 549) distinguished in *Hutton* v. *West Cork Railway Co.*, 23 L. R., Ch. D., 654; 52 L. J., Ch., 689; 49 L. T. 420; 31 W. R. 827. Reversing, in part, 52 L. J., Ch., 377; 48 L. T. 626; 31 W. R. 542.

6. *Taunton's Reports.* The 8th volume of these reports is of apocryphal authority. *Hadley* v. *Baxendale*, 18 Jur. 358. S. P. *Peto* v. *Reynolds*, 9 Exch. 410; 18 Jur. 472; 23 L. J., Exch., 98.

7. *Tawney* v. *Crowther* (3 Bro. C. C. 318) doubted whether the facts support the decree. *Clinan* v. *Cooke*, 1 Sch. & Lef. 33.

8. *Tawney* v. *Crowther* (3 Bro. C. C. 161). I do not hesitate to say that Lord Thurlow there was wrong; and from what Lord Redesdale afterwards says of that case, in *Clinan* v. *Cooke* (1 Sch. & Lef. 22), it appears that Lord Thurlow himself was not satisfied with it. Per Cranworth, C., in *Ridgway* v. *Wharton*, 4 Jur., N. S., 173, 175; 6 H. L. Ca. 265; 27 L. J., Ch., 48.

With respect to the case of *Tawney* v. *Crowther*, I can hardly say that Lord Redesdale and Lord Thurlow are in conflict, for I am strongly inclined, with Lord Redesdale, to think that Lord Thurlow had great distrust in the judgment given in that case; but, be that so or not, I am strongly inclined to agree with Lord Redesdale, and not with the judgment of Lord Thurlow. Per Lord Brougham. *Id.* 175.

As to the case of *Tawney* v. *Crowther*, it is not at all material whether Lord Thurlow was right in construing the words to amount to an acceptance of the agreement. It is an authority for this, that if terms be reduced to writing, and a man says that he will abide by those terms, and will sign the agreement, although he does not sign, he is bound by that agreement: that is what the case amounts to as an authority, and it is a very important case. Per Lord St. Leonards. *Id.* 178.

9. *Taylor, Exp., Railway Plant & Steel Co., Re* (47 L. J., Ch., 321; 8 L. R., Ch. D., 183; 26 W. R. 418; 38 L. T., N. S., 475), doubted in *Vron Colliery Co., Re*, 20 L. R., Ch. D., 442; 51 L. J., Ch., 389; 30 W. R. 388.

10. *Taylor* v. *Baker* (5 Price 306) followed in *Harvey* v. *Tebbutt*, 1 Jac. & Walk. 197.

11. *Taylor* v. *Clark* (1 Hare 161) followed in *Morgan* v. *Morgan*, 14 Beav. 72.

12. *Taylor* v. *Gillott* (20 L. R., Eq., 682; 44 L. J., Ch., 740; 32 L. T. 795; 24 W. R. 65) distinguished in *Smalley* v. *Hardinge*, 7 L. R., Q. B. D., 524; 50 L. J., Q. B., 367; 44 L. T. 503; 29 W. R. 554.

13. *Taylor* v. *Gorman* (1 Dr. & Wal. 235. n.) (relative to costs in a creditor's suit) qualified in *Kelley* v. *Kelley*, 1 Ir. Eq. R. 317.

14. *Taylor* v. *Harewood (Earl)* (3 Hare 372) approved of in *Harrison* v. *Round*, 17 Jur. 563; 22 L. J., Ch., 322; 2 De G. M. & G. 190; 1 W. R. 26.

15. *Taylor* v. *Heming* (4 Beav. 235). I was rather surprised at the language attributed to Lord Langdale in *Taylor* v. *Heming*, which I think cannot be taken as the law of this court. The law of the court is as stated by Lord Langdale in *Bate* v. *Bate* (7 Beav. 528), and probably was so intended to have been stated by him in *Taylor* v. *Heming*. Per Stuart, V.-Ch., in *Turner* v. *Burkinshaw*, 4 Giff. 399, 402.

16. *Taylor* v. *Hibbert* (1 Jac. & Walk. 308), *semble*, overruled in *Angerstein* v. *Martin*, T. & R. 232; 2 L. J., Ch., 88.

1. *Taylor* v. *Hughes* (2 J. & L. 24; 6 Ir. Eq. R. 480; 7 Ir. Eq. R. 529) followed in *Horn* v. *Kilkenny & Great Southern & Western Railway Co*, 1 Kay & J. 399; 24 L. J., Ch., 241.

2. *Taylor* v. *Martindale* (12 Sim. 15) followed in *Joynt* v. *Richards*, 11 L. R., Ir., 278.

3. *Taylor* v. *Neville* (3 Atk. 384) observed upon in *Pollard* v. *Clayton*, 1 Kay & J. 462; 1 Jur., N. S., 342.

4. *Taylor* v. *Portington* (7 De G. M. & G. 328; 1 Jur., N. S., 1057), a very peculiar case. See *Samuda* v. *Lanford*, 4 Giff. 42.

5. *Taylor* v. *Portington* (7 De G. M. & G. 328). This is a case in which there is evidence of a clear contract in writing, between the plaintiff and the defendant, signed by both. The defence is tested, first, upon the ground that there is an uncertainty in the terms of the written agreement, from the use of the language as to "painting, repairing, decorating, etc." I am of opinion that there is no uncertainty whatever occasioned by those words. They must have a reasonable interpretation; and being so interpreted they import what can be made perfectly certain. No doubt a decision of the Lords Justices has been reported, I mean the case of *Taylor* v. *Portington* (*supra*), in which there were very remarkable words in an agreement for a lease. The words were introduced to import a condition into the agreement, viz, that the lease would be granted if the plaintiff put the "premises into thorough repair, and the drawing-rooms were handsomely decorated according to the present style. Paint is required both inside and outside, although perhaps for some parts one coat might be sufficient." The Master of the Rolls, held, properly I think, that there was no uncertainty in these words. The Lords Justices, however, came to a different conclusion. Their conclusion, which is to be treated with every respect, is founded upon the particular circumstances of the case. But where a question arises whether particular expressions are certain or not in their meaning, and one man of judgment and experience considers the language to be certain, while two others consider it uncertain, the uncertainty cannot be very great. The case of *Taylor* v. *Portington* is, however, a very strong decision. When a judge has determined that to his mind the meaning of an agreement is sufficiently clear, and has decreed specific performance to be enforced in his chambers, it is a very strong thing for the Court of Appeal to reverse that decree on the ground of the uncertainty of the agreement. Perfect certainty is a thing very seldom attained in agreements. An agreement to paint a house with two coats of paint could not be considered as uncertain, although it is clear that, as to the colour, quality, and other circumstances, you may, if you are so determined, introduce into the agreement an element of uncertainty. But in these cases, what the Court looks at is, whether, according to the plain and sensible interpretation of the language used—as language ordinarily is understood—the real meaning and intention of the parties can be seen. Per Stuart, V.-Ch., in *Dear* v. *Verity*, 20 L. T., N. S., 268, 269, 270; 38 L. J., Ch., 297, 301, 302; 17 W. R. 567, 568.

6. *Taylor* v. *Stibbert* (2 Ves. 437) explained in *Harrison* v. *Dignan*, 2 Dr. & War. 295. S. C. *nom. Harrison* v. *Dignan*, 1 Con. & L. 376. S. C. *nom. Kyme* v. *Dignan*, 4 Ir. Eq. R. 562. And see *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. Rep. 12.

7. *Taylor* v. *Taylor* (1 L. R., Ch. D., 426; 45 L. J., Ch., 373; 35 L. T. 450) distinguished in *Harris's Settled Estates, Re*, 42 L. T. 583; 28 W. R. 721.

8. *Teague, Re* (11 Beav. 318), disapproved of by Jessel, M. R., in *Jarman, Exp.*, 4 L. R., Ch. D., 835; 46 L. J., Ch., 485.

9. *Tench* v. *Cheese* (6 De G. M. & G. 453) commented upon by James, L. J., in *Allan* v. *Gott*, 7 L. R., Ch.. 439; 41 L. J., Ch., 571; 26 L. T. 412; 20 W. R 427.

10. *Tennent* v. *City of Glasgow Bank* (4 L. R, App. Cas. (Sc.), 615; 40 L. T. 694; 27 W. R. 649), dicta of Cairns, L. C., approved in *Hull & County Bank, Re, Burgess' case*, 15 L. R., Ch. D., 507; 49 L. J., Ch, 541; 43 L. T. 45; 28 W. R. 792.

11. *Tennent* v. *City of Glasgow Bank* (4 L. R., App. Cas. (Sc.), 615) approved in *Houldsworth* v. *City of Glasgow Bank*, 5 L. R., App. Cas. (Sc.), 317; 42 L. T. 194; 28 W. R. 677

12. *Ternegan* v. *Glass*, Ambl. 62; 3 Atk. 409; Dick. 107. But see 6 Madd. 218. Overruled by *Pannell* v. *Tayler*, T. & R. 96. S. C. *nom.* —— v. *Taylor*, 3 L. J., Ch., 139.

13. *Terrell, Re* (4 L. R., Ch. D., 293; 46 L. J., Bky., 47; 35 L. T. 646; 25 W. R. 153), distinguished in *Hudson, Exp., Walton, Re*, 22 L. R., Ch. D., 773; 52 L. J., Ch., 584; 47 L. T. 674; 31 W. R. 372.

14. As to *Terrewest* v. *Featherby* (2 Meriv. 480) see 1 Sim. & S. 255.

15. *Terrin, Re* (2 Dru. & War. 147), distinguished in *Simpson* v. *Morley*, 2 Kay & J. 71.

16. *Tetley* v. *Taylor* (1 El. & Bl. 521; 21 L. J., Q. B., 346), as to the necessity of a *cessio bonorum* in cases of deeds of trust for the benefit of creditors, disapproved of in *Morgan, Exp., Woodhouse, Re* (9 Jur., N. S., 559; 32 L. J, Bky., 15), and a *cessio bonorum* is no longer necessary under deeds of arrangements between debtors and creditors. See *Clapham* v. *Atkinson*, 12 W. R. 342.

17. *Teversham* v. *Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Co.* (3 De G. & Sm. 296; 13 Jur. 333; 18 L. J., N. S., Ch., 177; 5 Rail. Ca. 492) observed upon in *Murray's Executors, case*, 18 Jur. 1063; 5 De G. M. & G. 746.

18. *Texira* v. *Evans* (cited 1 Anst. 228). The only case cited in favour of the validity of a deed in blank, afterwards filled in, is that of *Texira* v. *Evans*, where Lord Mansfield held, that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly cited by Mr. Preston, in his edition of Shepherd's Touchstone, 68, as it assumes there could be an attorney without deed, and we think it cannot be considered law. Per Parke, B., in *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, 215.

19. *Texira* v. *Evans* (1 Anst. 228) overruled by *Hibblewhite* v. *M'Morine*, 6 M. & W. 200. See *Taylor* v. *Great Indian Peninsula Railway Co.*, 5 Jur., N. S., 331, 333; 28 L. J., Ch., 285. Affirmed 4 De G. & J. 559; 5 Jur., N. S., 1087; 28 L. J., Ch., 709.

1. *Thames Ironworks Co.* v. *Patent Derrick Co.* (6 Jur., N. S., 1013). There Wood, V.-Ch., held that a judge's order made by consent, directing proceedings in an action to be stayed upon certain conditions, was not an agreement to perform the conditions, and a bill filed in a court of equity for specific performance would not lie. But see *Blackett* v. *Bates* (2 Hem. & M. 610; 11 Jur., N. S., 500), in which Wood, V.-Ch., held that, although the validity of an award must be decided by the Court, of which the submission is made a rule, yet when the award is once established, it may be enforced either by an action in any court of law, or by specific performance in equity. The Vice-Chancellor's decision was overruled, on appeal, by Lord Cranworth, C. (12 Jur., N. S., 151), on the ground that, in the case in question, a court of equity could not give relief to each party; but the decision of the Vice-Chancellor, that an award made after a submission to arbitration in a court of law can be enforced by a court of equity in a suit for specific performance, appears to remain untouched in the Court of Appeal. See 12 Jur., N. S., 874. n.

2. *Tharp, Re* (2 Sm. & Giff. 578. n.), commented on in *Leslie, Re, Leslie* v. *French*, 23 L. R., Ch. D., 552; 52 L. J., Ch., 762; 48 L. T. 564; 31 W. R. 561.

3. *Quære*, Per Parke, B., of the doctrine in *Thomas* v. *Cooke* (2 Stark. N. P. 408; 2 B. & Ald. 119), relative to surrender by act and operation of law. *Mines Royal Societies* v. *Magnay*, 18 Jur. 1028.

4. *Thomas* v. *Daw* (2 L. R., Ch., 1; 15 L. T. 200) distinguished in *Gard* v. *Commissioners of Sewers*, 49 L. T. 325.

5. *Thomas* v. *Jones* (29 L. J., Ch., 570; 8 W. R. 328; 1 Dr. & Sm. 134) approved in *Richardson, Re, Richardson* v. *Richardson*, 14 L. R., Ch. D., 611; 49 L. J., Ch., 612; 43 L. T. 279; 28 W. R. 942.

6. *Thomas* v. *Palin* (21 L. R., Ch. D., 360) followed in *Wallace* v. *Graham*, 11 L. R., Ir., 369.

7. *Thomas* v. *Pinnell* (15 Beav. 148) held not to be inconsistent with the former authorities and approved of in *Dunlevie* v. *Hort*, 6 Ir. Ch. R. 99.

8. *Thompson, Re* (12 Sim. 392), disapproved of in *Spunner* v. *Walsh*, 10 Ir. Eq. R. 214.

9. *Thompson* v. *Partridge* (4 De G. M. & G. 794) observed upon in *Scott* v. *Liverpool (Corporation)*, 3 Jur., N. S., 533.

10. *Thompson* v. *Waithman* (3 Drew. 628; 2 Jur., N. S., 1080) upheld by the Court of Queen's Bench in deference to the judgment of Kindersley, V.-Ch., in *Jackson* v. *Woolley*, 8 El. & Bl. 778; 4 Jur., N. S., 409; but the Court of Exchequer Chamber reversed the decision, 8 El. & Bl. 784; 4 Jur., N. S., 656.

11. *Thompson's Trusts, Re* (5 De G. M. & G. 28; 2 W. R. 218, 445; 2 Eq. Rep. 236), explained in *Jordan's Trusts, Re*, 2 N. R. 57.

12. *Thomson* v. *Waterlow* (6 L. R., Eq., 36; 37 L. J., Ch., 495; 18 L. T. 545; 16 W. R. 586) not followed in *Barkshire* v. *Grubb*, 18 L. R., Ch. D., 616; 50 L. J., Ch., 731; 45 L. T. 383; 29 W. R. 929.

13. *Thomson* v. *Waterlow* (6 L. R., Eq., 36) comes to little more than this: you have a way from the high road to your house, a way from the house to your garden, from your garden to your orchard, and from your orchard into your field, to which there is another approach. Nobody could say that a person who bought the field from you would have a right to use the way through your house, garden, and orchard. Per James, L. J., in *Watts* v. *Kelson*, 6 L. R., Ch., 166, 171; 40 L. J., Ch., 126; 24 L. T. 209; 19 W. R. 338.

14. *Thorneycroft* v. *Crockett* (16 Sim. 445; 12 Jur. 1081) followed the principle acted upon in this case in *Hood* v. *Easton*, 2 Giff. 692; 2 Jur., N. S., 729.

15. *Thornhill* v. *Thornhill* (4 Madd. 377) questioned in *Smith* v. *Smith*, 8 Sim. 353; 6 L. J., N. S., Ch., 175.

16. *Thornton, Exp., Barned's Banking Co., Re* (15 W. R. 189), decided that the Court of Chancery will not vacate the registration of a winding-up order by the official liquidator, as a *lis pendens* against a shareholder in the company. But on appeal, the registration of the order was directed to be vacated by the Lords Justices, as s. 114 of the Companies Act 1862 was intended only to enable the registration of a winding-up petition to be made as against the company, and not against the persons who were, or were alleged to be, contributories. S. C. 15 L. T., N. S., 523; 36 L. J., Ch., 190; 2 L. R., Ch., 171; 15 W. R., 292.

17. *Thorpe* v. *Jackson* (2 Y. & C. Exch. 533) dicta in observed upon in *Jones* v. *Beach*, 2 De G. M. & G. 886; 32 L. J., Ch., 425.

18. *Thorpe* v. *Jackson* (2 Y. & C. Exch. 553) went the longest way in favour of the notion that notes of this kind might be held joint and several; but it seems to me a mere *obiter dictum;* and I confess I cannot but hesitate to assent to the proposition laid down in that case as law, especially when I consider that the present Lord Chancellor (Lord Cranworth) and Lord Justice Knight Bruce seem to have questioned the doctrine. (See *Jones* v. *Beach*, 2 De G. M. & G. 886, 888, 889.) When I find this, I cannot take it to be the law, that where B. lends money to three persons on a joint cheque, or note, or bond, he is entitled to proceed against one of those parties in the same manner as if the instrument had been joint and several; that is, looking at the case on the footing of the instrument itself. Per Kindersley, V.-Ch., in *Other* v. *Iveson*, 3 Drew. 177; 1 Jur., N. S., 568; 24 L. J., Ch., 654.

19. *Thynne (Lady)* v. *Glengall (Earl)* (2 H. L. Ca. 131) doubted, so far as the decision seems to warrant the view that interests actually acquired under a settlement may be defeated subsequently by the operation of the doctrine of satisfaction. Per Wood, V.-Ch., in *Coventry* v. *Chichester*, 10 Jur., N. S., 435; 33 L. J., Ch., 361.

20. *Tidwell* v. *Ariel* (3 Madd. 403) was decided when *Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n., had not been published. Per Wood, V.-Ch., in *Porter, Re*, 27 L. J., Ch., 196.

21. *Tilleard, Exp., Barnes, Re* (30 W. R. 568), not followed in *Quilter, Exp., Barnes, Re*, 30 W. R. 739.

22. *Tilleard, Re* (32 L. J., Ch., 765; 8 L. T. 587; 11 W. R. 764; 3 De G. J. & S. 519), distinguished in *Rotherham Alum and Chemical Co., Re, Peace, Exp.*, 25 L. R., Ch. D., 103; 53 L. J., Ch., 290; 50 L. T. 219; 32 W. R. 131.

23. *Tilley* v. *Bridges* (Pre. Ch. 292) doubted in *Curtis* v. *Curtis*, 2 Bro. C. C. 690.

1. *Tillstone's Trust, Re* (9 Hare, App. lix.), observed upon in *Hodgson's Trust, Re*, 2 W. R. 539.

2. *Tinker, Exp., France, Re* (9 L. R., Ch., 716; 43 L. J., Bky., 147; 30 L. T. 806; 22 W. R. 794), distinguished in *Wainwright* or *Greener, Exp. & Re*, 19 L. R., Ch. D., 140; 51 L. J., Ch., 67; 45 L. T. 562; 30 W. R. 125. Affirming 30 W. R. 62.

3. *Titley* v. *Wolstenholme* (7 Beav. 425) considered in *Macdonald* v. *Walker*, 14 Beav. 566, and followed in *Hall* v. *May*, 3 Kay & J. 585; 3 Jur., N. S., 907; 26 L. J., Ch., 791; 5 W. R. 869.

4. *Todd* v. *Bielby* (27 Beav. 353) followed in *Potts* v. *Smith*, 8 L. R., Eq., 683; 17 W. R. 1083; 39 L. J., Ch., 131.

5. *Tomkins* v. *Colthurst* (1 L. R., Ch. D, 626; 33 L. T. 491; 24 W. R. 267). The decisions of V.-Ch. Stuart in *Collins* v. *Lewis*, 8 L. R., Eq., 708, and V.-Ch. Malins in *Dugdale* v. *Dugdale*, 14 L. R., Eq., 334, and *Tomkins* v. *Colthurst* (*supra*), are in accordance with the decision of Lord Cottenham in *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695, and I shall follow them. I do not consider that in so doing I am acting in opposition to the authority of the Court of Appeal in *Lancefield* v. *Iggulden*, 10 L. R., Ch., 136; 44 L. J., Ch., 303; 31 L. T. 813; 23 W. R. 223. Per Hall, V.-Ch., in *Farquarson* v. *Floyer*, 3 L. R., Ch. D., 109, 111; 45 L. J, Ch., 750; 35 L. T. 355.

6. *Tomkins* v. *Saffery* (3 L. R., App. Cas., 213; 47 L. J., Bky., 11; 37 L. T. 758; 26 W. R. 62) distinguished in *Grant, Exp., Plumbly, Re*, 13 L. R., Ch. D., 667; 42 L. T. 387; 28 W. R. 755.

7. *Tomlinson* v. *Gill* (Ambl. 330) approved in *Lloyd's* v. *Harper*, 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 419.

8. *Tomlinson, Re* (5 L. T., N. S., 13), is inapplicable to the state of the bankrupt law, under the Bankruptcy Act of 1861, the 185th section of the 12 & 13 Vict., c. 106 having been repealed thereby, and no corresponding discretion given to the commissioners under the new Act. Per Goulburn, Com., in *Strong, Exp., Comber, Re*, 12 W. R. 767; 10 L. T., N. S., 387.

9. *Tooker* v. *Annesley* (5 Sim. 235). Form of order in this case adopted in *Consett* v. *Bell*, 1 Y. & Coll. C. C. 569; 11 L. J., N. S., Ch., 401; 6 Jur. 869.

10. *Topham* v. *Portland* (*Duke*) (11 H. L. Ca. 32; 32 L. J., Ch., 257). (Obligation of the decisions of the House of Lords.) My duty is simply therefore to abide by the decision of the House of Lords. That decision is binding on every Court in the kingdom, including the House itself in its judicial character. Some old writers have said that even the great Zeus himself submitted to the decrees of fate. Perhaps the Duke of Portland, illustrious member as he is of the House of Lords, may be persuaded to submit to the decision of that House, and to feel that he ought not to struggle any more against the irreversible fiat of the law, even in his pious and honourable desire and resolve to do what he believes and knows (as, if it were permitted to me to speak otherwise than in my judicial capacity, I should say I believe and know) to have been the real wish of his deceased father, the creator of the power reposed in him. Per James, V.-Ch., in *Topham* v. *Portland* (*Duke*), 38 L. J., Ch., 513, 522; 17 W. R. 911.

11. *Topping, Exp., Levy, Re* (34 L. J., Bky., 13; 12 L. T., N. S., 3; 4 De G. J. & S. 551; 12 Jur., N. S., 210; 13 W. R. 445). Now the trustee of Roger Allday Kerrison seeks to prove against the separate estate of Sir R. Harvey for his contribution as co-surety. This is endeavoured to be supported by the reasoning contained in the case before Lord Westbury, of *Topping, Exp.* I do not express any opinion as to that case, though it surprised me considerably when cited to me on Saturday; but it does not govern this case. Per Lord Romilly, M. R, in *Lacey* v. *Hill*, 27 L. T., N. S., 504. 505; 21 W. R. 153.

12. *Torquay Bath Co., Re* (32 Beav. 581; definition of the words "unregistered company," in Companies Act of 1862, in Part 8), overruled in *Bowes* v. *Hope Mutual Life Insurance & Honesty Guarantee Society*, 11 Jur., N. S., 643; and when used, mean companies registered antecedently to that Act.

13. *Totty, Exp., Northumberland and Durham District Banking Co., Re* (2 L. T., N. S., 687, 1 Dr. & Sm. 273; 29 L. J., Ch., 702; 8 W. R. 624; 6 Jur., N. S., 849), was decided on the grounds of the secrecy of the terms of compromise, and has no application to the present case, where there was no agreement for, nor attempt at secrecy, but where, on the contrary, all matters were completely laid before or known to the Court. *Bank of Hindustan, China, & Japan* v. *Eastern Financial Association*, 20 L. T., N. S., 889; 17 W. R. 554; 2 L. R., P. C., 489.

14. *Toulmin* v. *Steere* (3 Meriv. 210). The plaintiff and his brother were jointly and severally liable for the prior mortgage debts, and the plaintiff contended, on the authority of *Toulmin* v. *Steere*, that when the equity of redemption was bought by the defendant, the prior charge was merged, and the subsequent one might be set up, and that the effect of the transaction was to release him from his covenant to pay. The case of *Toulmin* v. *Steere* was a very strong one, and there would have been an appeal, but that a compromise was made. But this would be much stronger if, when an estate was subject to two mortgages, and the first mortgagee got in the equity of redemption, he not only released his own charge, but let in the second mortgagee to a better position. *Toulmin* v. *Steere* clearly was not intended to go that length. Per Romilly, M. R., in *Hayden* v. *Kirkpatrick*, 13 W. R. 1010, 1011; 13 L. T., N. S., 56, 57.

15. *Toulmin* v. *Steere* (3 Meriv. 210) is said not to be the law of the Court; but it is of great importance that cases should not be shaken and their authority weakened. There is nothing in Lord St. Leonards' great work upon Vendors and Purchasers to impugn the authority of *Toulmin* v. *Steere*, although the decision was given against his own argument and that of Sir S. Romilly. Per Stuart, V.-Ch., in *Wilkins* v. *Sibley*, 4 Giff. 442, 448.

16. *Tracy* v. *Hereford* (*Lady*) (2 Bro. C. C. 128) commented upon in *Sharshaw* v. *Gibbs*, 1 Kay 333; 18 Jur. 330; 23 L. J., Ch., 451.

17. *Trafford* v. *Boehm* (3 Atk. 440) explained as to the liability of a *cestui que trust* to indemnify trustees concurring in an authorised investment of trust fund. *Browne* v. *Mansell*, 5 Ir. Ch. R. 351.

18. *Trappes* v. *Harter* (2 Cr. & M. 153), Lord

Lyndhurst's observations in, explained in *Barclay, Exp.*, 5 De G. M. & G. 403; 1 Jur., N. S., 114.

1. *Trollope* v. *Routledge* (2 De G. & Sm. 662) approved in *Moore* v. *Dixon*, 15 L. R., Ch. D., 566; 49 L. J., Ch., 807; 29 W. R. 12.

2. *Trotter* v. *Maclean* (13 L. R., Ch. D., 574; 49 L. J., Ch., 256; 42 L. T. 118; 28 W. R. 244) followed in *Joicey* v. *Dickinson*, 45 L. T. 643.

3. *Troughton* v. *Gitley* (plaintiff examined as witness) overruled by Lord Thurlow. *Hewatson* v. *Tookey*, Dick. 799.

4. *Troughton* v. *Gitley* (Ambl. 629) distinguished in *Russell, Exp., Winn, Re*, 2 L. R., Ch. D., 424; 45 L. J., Bky., 85; 24 W. R. 802; 34 L. T., N. S., 295.

5. *Trulock* v. *Roby* (2 Phil. 395). The correctness of the proposition laid down by Lord Cottenham in this case, that bills of review are confined to cases in which the decree is contrary to the forms and practice of the Court, doubted by Turner, L. J., in *Green* v. *Jenkins*, 6 Jur., N. S., 515, 517.

6. *Trye* v. *Gloucester* (*Corporation*) (14 Beav. 173) remarked on in *Cawood* v. *Thompson*, 17 Jur. 798; 22 L. J., Ch., 835.

7. *Trye* v. *Gloucester* (*Corporation*) (14 Beav. 173) overruled in *Philpott* v. *St. George's Hospital*, 3 Jur., N. S., 1269; 6 H. L. Ca. 338.

8. *Tucker* v. *Sanger* (M'Clel. 439. S. C. *nom. Tucker* v. *Tucker*, 13 Price 607) observed upon and disapproved of as an authority, in *Birley* v. *Birley*, 25 Beav. 299, 306; 4 Jur., N. S., 315; 27 L. J., Ch., 569; 6 W. R. 400; and see 2 Sug. Pow. 282.

9. *Tulk* v. *Moxhay* (18 L. J., Ch., 83; 12 L. T., N. S., 469; 2 Ph. 774) commented on in *London & South-Western Railway* v. *Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 530; 46 L. T. 449; 30 W. R. 620. Reversing 45 L. T. 505, and explained in *Haywood* v. *Brunswick Permanent Building Society*, 8 L. R., Q. B. D., 403; 51 L. J., Q. B., 73; 45 L. T. 699; 30 W. R. 299.

10. *Tulk* v. *Moxhay* (2 Ph. 774) commented on in *Patching* v. *Dubbins*, 1 Kay 1; 17 Jur. 1113; 2 W. R. 2; 23 L. J., Ch., 45. Affirmed 2 Eq. Rep. 71.

11. *Tullett* v. *Armstrong* (4 Myl. & C. 377; 9 L. J., N. S., Ch., 41; 4 Jur. 34. Affirming 1 Beav. 1; 8 L. J., N. S., Ch., 19; 5 *id.* 303) approved of in *Russell* v. *Dickson*, 2 Dr. & War. 133; 1 Con. & L. 284; 4 Ir. Eq. R. 339.

12. *Turner and Skelton, Re* (13 L. R., Ch. D., 130; 49 L. J., Ch., 114; 28 W. R. 312), not followed in *Allen* v. *Richardson*, 13 L. R., Ch. D., 524; 49 L. J., Ch., 137; 41 L. T. 615; 28 W. R. 313; approved of in *Phelps* v. *White*, 7 L. R., Ir., 160.

13. *Turner, Exp.* (3 Ves. 243), followed in *Getynog Llantrwit Colliery Co., Re, Gray* v. *Seckham* 20 W. R. 920; 27 L. T., N. S., 290; 7 L. R., Ch., 680.

14. *Turner, Re, Waller* v. *Turner* (33 L. J., Ch., 232; 9 L. T. 750; 12 W. R. 337; 10 Jur., N. S., 174), followed in *Van Gheluwe* v. *Nerincks*, 21 L. R., Ch. D., 189; 51 L. J., Ch., 929; 47 L. T. 46; 30 W. R. 789.

15. *Turner* v. *Doubleday* (6 Madd. 94) is the same with *Turner* v. *Robinson*, 1 Sim. & S. 313; but in 6 Madd. the facts are incorrectly stated. See 1 Sim. & S. 315. n.

16. *Turner* v. *Hancock* (20 L. R., Ch. D., 303; 51 L. J., Ch., 517; 46 L. T. 750; 30 W. R. 480) distinguished in *Dutton* v. *Thompson*, 23 L. R., Ch. D., 278; 52 L. J., Ch., 661; 31 W. R. 596.

17. *Turner* v. *Maule* (15 Jur. 761). On a trustee becoming bankrupt, a new trustee may be appointed, and the above case to the contrary is overruled in *Re Rensham*, 17 W. R. 1035; 4 L. R., Ch., 783. Per Giffard, L. J.

18. *Turner* v. *Robinson* (1 Sim. & S. 313) doubted by Vice-Chancellor in *Marcos* v. *Pebrer*, 3 Sim. 466.

19. *Turner* v. *Sargent* (17 Beav. 515) approved in *Wise* v. *Piper*, 13 L. R., Ch. D., 848; 49 L. J., Ch., 611; 41 L. T. 794; 28 W. R. 442.

20. *Turner* v. *Turner* (4 Jur., N. S., 57; 27 L. J., Ch., 232) was not a correct decision. See S. C. 4 Jur., N. S., 127; 27 L. J., Ch., 272; and 21 & 22 Vict., c. 77, s. 6.

21. *Turnley, Re* (1 L. R., Ch., 152), not followed in *Marner, Re*, 15 W. R. 99; 36 L. J., Ch., 58. And the costs of a petition by a tenant for life of a fund paid into court under the Trustee Relief Act, asking that the dividends may be paid to the petitioner during his life, must be paid out of the income, not out of the corpus of the fund.

22 *Tweedale* v. *Tweedale* (10 Sim. 453). Mr. Jacob was very much dissatisfied with that decision, and it was intended to appeal, but it was compromised. Per Wood, V.-Ch., in *Hill* v. *Potts*, 8 Jur., N. S., 555; 10 W. R. 411.

23. *Twyne's case* (3 Rep. 80 b). I think the principle of *Twyne's case*, as to non-delivery of possession, is to be applied in much the same way as the rule in bankruptcy with respect to order and disposition—which is, that the goods must remain in the order and disposition of the bankrupt up to the time of the bankruptcy, and when possession is given before the bankruptcy there is no ground for saying that it is fraudulent. Per James, L. J., in *Wilson, Exp.*, 22 W. R. 241, 242; 29 L. T. 860.

24. *Tyson* v. *Fairclough* (2 Sim. & S. 142) remarked upon in *Searle* v. *Smales*, 3 W. R. 437.

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25. *Ulrich* v. *Litchfield* (2 Atk. 372). Described by Lord Brougham, C., in *Sherratt* v. *Bentley* (2 Myl. & K. 162), as a case reported in a very slovenly way; but it is also reported in 2 Purton Cooper, tempore Cottenham, C., p 531, under the name of *Francis* v. *Ditchfield*, where it is stated from the Jodrel MSS., and in substance to the same effect as in the report in 2 Atk. 372. Per Brady, C., *Jessop, Re*, 11 Ir. Ch. R. 424, 428.

26. *Unity Joint Stock Mutual Banking Association, Exp.* (3 De G. & J. 63; 6 W. R. 640), distinguished Per M. R., in *Jones, Exp. & Re*, 18 L. R., Ch. D., 109; 50 L. J., Ch., 673; 45 L. T. 193; 29 W. R. 747.

27. *Unsworth* v. *Speakman, Speakman, Re* (4 L. R., Ch. D., 620; 46 L. J., Ch., 608; 35 L. T. 731; 25 W. R. 225), disapproved in *Roberts, Re*, 27 L. R., Ch. D., 346; 53 L. J., Ch., 1023; 32 W. R. 986.

28. *Upfill's case* (1 Sim., N. S., 395; 15 Jur.

481; 20 L. J., N. S., Ch., 480). (Debts in respect of which the call is made.) Followed in *Dale's case, Wolverhampton, Chester, & Birkenhead Junction Railway Co., Re*, 1 De G. M. & G. 510; 21 L. J., N. S., Ch., 341; 16 Jur. 207.

1. *Upfill's case* (2 H. L. Ca. 674) followed in *Markwell's case*, 5 De G. & Sm. 528; 16 Jur. 989.

2. *Upfill's case* (2 H. L. Ca. 674; 14 Jur. 843) distinguished in *Conway's case, Brighton, Lewes, & Tunbridge Wells Direct Railway Co., Re*, 5 De G. & Sm. 150; 21 L. J., N. S., Ch., 461; 16 Jur. 120.

3. *Upfill's case* (2 H. L. Ca. 674; 6 Rail. Ca. 338; 14 Jur. 843) observed upon in *Sichell, Exp.*, 1 Sim., N. S., 187; 20 L. J., N. S., Ch., 129; 15 Jur. 53.

4. *Uruguay Central and Hygueritas Railway Co. of Monte Video, Re* (11 L. R., Ch. D., 372; 48 L. J., Ch., 540; 27 W. R. 571), approved in *Chapel House Colliery Co., Re*, 24 L. R., Ch. D., 259; 52 L. J., Ch., 934; 49 L. T. 575; 31 W. R. 933.

5. *Upton* v. *Brown* (12 L. R., Ch. D., 872; 48 L. J., Ch., 756; 41 L. T. 340; 28 W. R. 38) disapproved and not followed in *Emmins* v. *Bradford, Johnson* v. *Emmins*, 13 L. R., Ch. D., 493; 49 L. J., Ch., 222; 42 L. T. 45; 28 W. R. 531.

6. *Usticke, Re* (35 Beav. 338). With regard to this case which was also pressed upon me, I confess that I should have come to a different conclusion upon the construction of that will in that case from that of the Master of the Rolls; but his lordship proceeded upon the particular language of the will, and did not profess to decide in opposition to *Eyre* v. *Marsden* (4 Myl. & C. 231). I do not, therefore, feel pressed by that case. Per Malins, V.-Ch., *Arnold, Re*, 10 L. R., Eq., 252, 258; 39 L. J., Ch., 875; 23 L. T. 837; 18 W. R. 912.

V.

7. *Vaisey* v. *Reynolds* (6 L. J., Ch., N. S., 172; 5 Russ. 12), not followed in *Roose, Re, Evans* v. *Williamson*, 17 L. R., Ch. D., 696; 50 L. J., Ch., 197; 43 L. T. 719; 29 W. R. 230.

8. *Vane* v. *Vane* (2 L. R., Ch. D., 124; 45 L. J., Ch., 589; 34 L. T. 613; 24 W. R. 602) questioned in *Bligh, Re*, 12 L. R., Ch. D., 364; 27 W. R. 876; 49 L. J., Ch., 56; 41 L. T. 570.

9. *Vane* v. *Vane* (2 L. R., Ch. D., 124; 45 L. J., Ch., 381; 34 L. T. 613; 24 W. R. 602) observed upon in *Brandon's Trusts, Re*, 13 L. R., Ch. D., 773; 41 L. T. 755.

10. *Van Ghelwive* v. *Nerincks* (21 L. R., Ch. D., 189; 51 L. J., Ch., 929; 47 L. T. 46; 30 W. R. 789) approved in *Davidson* v. *Illidge*, 27 L. R., Ch. D., 478; 53 L. J., Ch., 990; 33 W. R. 18.

11. *Vaughan* v. *Vanderstegen* (2 Drew. 165) (part) not followed in *Godfrey* or *Gilbert* v. *Harben, Harvey's Estate, Re*, 13 L. R., Ch. D., 216; 49 L. J., Ch., 3; 42 L. T. 58; 28 W. R. 73.

12. *Vaughan* v. *Vanderstegen* (2 Drew. 165). The principle as to the liability of the property of a married woman to her contracts explained and acted upon in *Hobday* v. *Peters*, 6 Jur., N. S., 754; 28 Beav. 354.

13. *Vaughan* v. *Vanderstegen* (2 Drew. 176), *Johnson* v. *Gallagher* (7 Jur., N. S., 273) does not impeach it. Per Kindersley, V.-Ch., in *Blachford* v. *Woolley*, 9 Jur., N. S., 568, and *Hobday* v. *Peters*, 28 Beav. 354; 6 Jur., N. S., 794, upholds the principles of that decision.

14. *Vauxhall Bridge Co.* v. *Spencer* (*Lord*) (2 Madd. 356) distinguished in *Caledonian & Dumbartonshire Junction Railway Co.* v. *Helensburgh* (*Magistrates*), 2 Macq. H. L. Ca. 391; 2 Jur., N. S., 695.

15. *Vavasseur* v. *Krupp* (15 L. R., Ch. D., 474; 28 W. R. 366) not followed in *Beddall* v. *Maitland*, 17 L. R., Ch. D., 174; 50 L. J., Ch., 401; 44 L. T. 249; 29 W. R. 484.

16. *Vavasseur* v. *Krupp* (15 L. R., Ch. D., 474; 28 W. R. 366) not followed in *McGowan* v. *Middleton*, 11 L. R., Q. B. D., 464; 52 L. J., Q. B., 353; 31 W. R. 835.

17. *Veal* v. *Veal* (29 L. J., Ch., 321; 2 L. T. 228; 8 W. R. 2; 27 Beav. 303) followed in *Mead, Re, Austin* v. *Mead*, 15 L. R., Ch. D., 651; 50 L. J., Ch., 30; 43 L. T. 117; 28 W. R. 891.

18. *Veitch* v. *Russell* (Car. & M. 362; 3 Q. B. 928). It is very important to observe that, although, by reason of the general custom of physicians not to charge, it has been held that they could not sustain an action for their services, the ground being that the patient dealt on the faith of the general custom, still they can, by special contract, charge. This was decided in *Veitch* v. *Russell*. There seems to have been cited there a much older case, of *Style* v. *Smith*, a case cited by Popham, J., in *Marsh* v. *Rainsford* (2 Leon. 111), where it was said to have been determined "that if a physician, in the absence of a father, give his son medicine, and the father, in consideration thereof, promise to pay him, an action will lie for the money." I have looked at the original authority in Leonard, and it does not say "giving him medicine," but it says "attending on him." It might have made a considerable difference, in my mind, in the case, if the law of the land had been that a physician could under no circumstances charge in respect of the pains and attention that he bestowed; because the bye-law does not prohibit physicians from making a charge, but only from selling drugs. The power of charging on special contract therefore remained; and if physicians had the power of charging for their practice, then, I apprehend, the moment they repealed their bye-law, their licensee would go forth entitled both to attend a case and to supply the medicines which he should prescribe. Per Wood, V.-Ch., in *Att.-Gen.* v. *Royal College of Physicians*, 1 John. & H. 561, 591; 7 Jur., N. S., 511, 515; 30 L. J., Ch., 757.

19. *Venner's Settled Estates, Re* (6 L. R., Eq., 249; 16 W. R. 1033). I cannot in this case follow the order in that case. By reliance on that case the parties here have, on my view of it, been led astray. Per Lord Justice James, in *Clough, Re*, 15 L. R., Eq., 284, 288; 42 L. J., Ch., 393; 28 L. T., N. S., 261; 21 W. R. 452.

20. *Venour's Settled Estates, Re, Venour* v. *Sellon* (dictum) (2 L. R., Ch. D., 525; 45 L. J., Ch., 409; 24 W. R. 782), not followed in *Sutton* v. *Sutton*, 22 L. R., Ch. D., 511; 52 L. J., Ch., 333; 48 L. T. 95; 31 W. R. 369.

21. *Vernon*. The cases reported in the second volume of Vernon are very inaccurate. They were published after the death of Mr.

Vernon, which may perhaps be the reason. Per Turner, L. J., in *Mornington* v. *Keene*, 2 Jur., N. S, 982. n.

1. *Viant, Re* (22 W. R. 686; 18 L. R, Eq., 436; 43 L. J., Ch., 832, 30 L T. 540). I regret to have to add one more to the many decisions upon a point which V.-Ch. Kindersley considered, and which I considered, to be concluded by authority, but which has, unfortunately, been re-opened by the decision of V.-Ch. Bacon, in *Viant, Re*. . . . All the modern cases on the subject, four of which have been cited by Mr. Rogers, concur; the line of authority is unbroken down to the latest case, that of *Viant, Re*. I am bound to say that, in my opinion, that decision was erroneous, and I cannot follow it. Per Jessel, M. R., *Jones, Re*, 24 W. R. 697, 698; 2 L. R., Ch. D., 362; 45 L. J., Ch., 428; 35 L. T., N. S., 25.

2. *Villareal* v. *Galway* (*Lord*) (Ambl. 682; 1 Bro. C. C. 292), an authority not to be followed upon the abstract question, whether the devise of an annuity to a widow, charged upon lands out of which she is dowable, is a bar to her claim of dower out of those lands. *Hall* v. *Hill*, 1 Con & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

3. *Viner's* Abridgment, tit. Distress (1): "If there are several joint tenants, and one grants a rent charge out of the land, the grantee may distrain the cattle of the grantor. But he cannot distrain the cattle of the other joint tenants. But he may distrain the cattle of a stranger that come upon the land." To the last proposition, however, it is added *quære*. Brady on Distress (2nd edit., pp. 41, 76) repeats the same proposition. Per Winslow, Q.-C., *arguendo*. The authorities which have been referred to do not, in my opinion, in the slightest degree touch this case, except that dictum upon which Mr. Winslow very properly relied, that cattle of a stranger being upon land which is held in joint tenancy may be distrained for rent due from one of the joint tenants. I cannot follow that dictum. Before I could adopt it as an exposition of the law I must find it distinctly stated, and have the authority of some decided case for it. I can see reasons against it. Per Bacon, V.-Ch., in *Park, Exp., Potter, Re*, 18 L. R., Eq., 381, 385; 43 L. J., Bky., 139; 30 L. T. 618; 22 W. R. 768.

4. *Viney, Exp., Gilbert, Re* (4 L. R., Ch. D., 794; 46 L. J., Bky., 80; 36 L. T. 43; 25 W. R. 361), distinguished in *Hall, Exp*, *Alven, Re*, 16 L. R., Ch. D., 501; 50 L. J., Ch., 400; 44 L. T. 8; 29 W. R. 298.

5. *Vint* v. *Padgett* (28 L. J., Ch., 21; 31 L. T., N. S., 21; 6 W. R. 641; 2 De G. & J. 611) distinguished in *Harter* v. *Colman*, 19 L. R., Ch. D., 630; 51 L. J., Ch., 481; 46 L. T. 154; 30 W. R. 484.

6. *Vizard, Re* (35 L. J., Ch., 804; 1 L. R., Ch., 588; 12 Jur., N. S., 680; 14 W. R. 1000; 1 L. R., Eq., 667; 35 L. J., Ch., 460; 14 W. R. 496; 14 L. T., N. S., 182), reluctantly followed by Malins, V.-Ch., in *De Serre* v. *Clarke*, 43 L. J., Ch., 821; 18 L. R., Eq., 587, 588; 31 L. T. 161; 23 W. R. 3.

7. *Voet*, lib. xx., lit. I., s. 13, the reference by Burge's Commentaries on Colonial and Foreign Laws, vol. iii., p. 572, as an authority for the proposition that, even in a concursus of creditors, the contract of hypotheca alone does not give the creditors any preference on lien, unless the mortgage had been followed by delivery, is not borne out by the text of Voet. *Tatham* v. *Andree*, 1 Moo. P. C., N. S., 386.

8 *Vyse* v. *Foster* (42 L. J., Ch., 245; 8 L. R, Ch., 309, and on appeal, 44 L. J., Ch., 37; 7 L. R.. H. L., 318). As to the extent of the decree in this case, see S. C. 44 L. J., Ch., 344; 10 L. R., Ch., 236.

W.

9. *Wackerbath, Exp.* (5 Ves. 574), overruled, *semble*, by *Lambert, Exp*, 13 Ves. 179.

10. *Wade* v. *Paget* (1 Bro. C. C. 363). The report of that case seems in many respects to be imperfect. Per Romilly, M. R., in *Carver* v. *Richards*, 5 Jur., N. S., 1412, 1415.

11. *Wainman* v. *Field* (Kay 507) distinguished in *Blight, Re, Blight* v. *Hartnoll*, 19 L. R., Ch. D., 294; 51 L J., Ch., 162; 45 L. T. 524; 30 W. R. 513. Affirmed 23 L. R., Ch. D., 218; 52 L. J., Ch., 672; 48 L. T. 543; 31 W. R. 535.

12. *Wakefield* v. *Brown* (9 Q. B. 209; 15 L. J., Q. B., 373) followed in *Magnay* v. *Edwards*, 13 C. B. 479; 17 Jur 839; 22 L. J., C. P., 171.

13. *Walburn* v. *Ingilby* (1 Myl. & K. 61) not followed in *Kearsley* v. *Philips*, 10 L. R., Q. B. D., 36; 52 L. J., Q. B., 8; 31 W. R. 92.

14. *Walker* v. *Beauchamp* (*Countess*) (6 Carr. & P. 552) considered in *Reilly* v. *Fitzgerald*, 1 Dr. 122; 6 Ir. Eq. R. 335.

15. *Walker* v. *Eastern Counties Railway Co.* (6 Hare 594; 12 Jur. 787) not maintainable. Per Kindersley, V.-Ch., in *Haynes* v. *Haynes*, 30 L. J., Ch., 578.

16. *Walker* v. *Eastern Counties Railway Co.* (6 Hare 594) disapproved of in *Hill* v. *Great Northern Railway Co.*, 1 Jur., N. S., 102; 24 L. J., Ch., 212.

17. *Walker* v *Eastern Counties Railway Co.* (6 Hare 594) doubted in *Adams* v. *Blackwall Railway Co.*, 2 Macn. & G. 118; 2 Hall & Tw. 285; 19 L. J., Ch., 557; and commented on in *Regent's Canal Co* v. *Ware*, 26 L. J., Ch., 566.

18. *Walker* v. *Mottram* (19 L. R., Ch. D., 355; 51 L. J., Ch., 108; 45 L. T. 659; 30 W. R. 165) followed in *Dawson* v. *Beeson*, 22 L. R., Ch. D., 504; 48 L. T. 407; 31 W. R. 537.

19. *Walker* v. *Walker* (29 L. J., Ch., 856). With regard to the case of *Walker* v. *Walker*, which has been cited, the report was very meagre, and he could not help thinking that the decision turned a good deal on the request referred to in the case; but anyhow he did not think it applied to this case. Per Wickens, V.-Ch., in *Middleton* v. *Windross*, 21 W. R. 822; 42 L. J., Ch., 555; 21 W. R. 822.

20. *Walker* v. *Woodward* (1 Russ.) observed upon in *Tomlin* v. *Tomlin*, 1 Hare 236.

21. *Walker's case* (3 Co. Rep. 22 *a*) explains very clearly the difference between a lessee and an assignee. Between lessor and lessee there are two privities—privity of estate, and privity of contract. Between lessee and assignee there is only one privity, that of estate. Per Malins, V.-Ch., in *Russell Road Purchase Moneys, Re*, 12 L. R., Eq., 82; 40 L. J., Ch., 673; 19 W. R. 520, 706; 23 L. T., N. S., 839.

22. *Wall* v. *Wall* (15 Sim. 520) overruled. The case of *Wall* v. *Wall* is certainly a direct

authority in favour of the petitioner, but, in my opinion, that case was decided through some oversight, for the decree cannot be reconciled with the remarks in the judgment. The Court cannot bind Mrs. William on the doctrine relating to fraud, as there could be no legal fraud where she had no power to give up what she purported to deal with. On this point *Nicholl* v. *Jones* (3 L. R., Eq., 701) is a strong authority. Although in so doing I must overrule *Wall* v. *Wall*, I must hold that a married woman cannot by election, any more than by any other means, deal with her reversionary choses in action. Per Walsh, M. R., in *Williams* v. *Mayne*, 16 W. R 173.

1. *Wall* v. *Wall* (15 Sim. 513) observed upon in *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535, 546.

2. *Wallace* v. *Pomfret* (11 Ves. 542) not maintainable. *Hall* v. *Hill*, 1 Dr. & War. 94; 1 Con. & L 120; 4 Ir. Eq. R. 27.

3. *Wallace* v. *Pomfret* (11 Ves. 542). The decision of Lord Eldon in this case has been much disapproved of. Lord St. Leonards, in *Hall* v. *Hill*, 1 Dr. & War. 94, 122; 1 Con & L. 147; 4 Ir. Eq. Rep. 27, says he does not see how it is possible to maintain that decision consistently with the authorities. I confess I do not quite understand the force of that observation Per Wood, V.-Ch., in *Ferris* v. *Goodburn*, 27 L. J., Ch. 574, 576.

4. *Wallis* v. *Taylor* (8 Sim. 241). I think I have heard this case unfavourably commented upon from the bench. Per Kindersley, V.-Ch., in *Johnson* v *Routh*, 3 Jur., N. S., 1048, 1049.

5. *Wallworth* v. *Holt* (4 Myl. & C. 619) followed in *Deeks* v. *Stanhope*, 13 L. J., N. S., Ch., 453.

6. *Wallwyn* v. *Coutts* (3 Meriv. 707) has been much doubted. 3 Sim 1. n., and see a full statement of that case, *id.* 14.

7. *Walmsley* v. *Foxhall* (32 L. J., Ch., 672; 8 L. T. 559; 11 W. R. 792; 1 De G. J. & S. 451) distinguished in *Curtis* v. *Sheffield* (No. 2), 21 L. R., Ch. D, 1; 51 L. J., Ch., 535; 46 L. T. 177; 30 W R. 581.

8. *Walrond* v. *Hawkins* (10 L. R., C. P., 342) commented on in *Lawrie* v. *Lees*. 7 L. R., App. Cas., 19; 51 L. J., Ch., 209; 46 L. T. 210; 30 W. R. 185. Affirming 14 L. R., Ch. D., 249; 49 L. J., Ch., 636; 42 L. T. 485: 28 W. R. 779.

9. *Walsh* v. *Trevannion* (16 Sim. 178) observed upon in *Rooke* v. *Kensington* (*Lord*), 2 Kay & J. 753; 25 L. J., Ch., 795.

10. *Walsingham* (*Lord*) v. *Goodricke* (3 Hare 122) distinguished in *Manser* v. *Dix*, 1 Kay & J. 451; 1 Jur., N. S., 466; 24 L. J., Ch., 497.

11. *Walstab* v. *Spottiswoode* (15 M. & W. 505) commented upon in *Baird* v. *Ross*, 2 Macq. H. L. Ca. 61.

12. *Want* v. *Stallibrass* (8 L. R., Exch., 175) followed in *Tanqueray-Willaume and Landau, Re*, 45 L. T. 181. Affirming 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

13. *Warburton* v. *Hill* (Kay 470; 2 W. R. 365; 23 L. J., Ch., 633) might, if the authorities which were afterwards cited in *Scott* v. *Hastings* (*Lord*) (4 Kay & J. 633) had been cited to me, have been placed upon higher ground than that on which I rested the case. It might have rested on the ground that a charging order against the debtor could not affect property which had previously been dealt with by the debtor. I said in the course of my judgment that the date to be looked at was not that of obtaining the order nisi, but subject to the operation of the 15th section of the 1 & 2 Vict., c. 110, as to intermediate charges, that the real charge was acquired when the charging order was made absolute. The expressions I then used were not necessary for my judgment, and were perhaps erroneous. The statute does this: it directs the judge to make an order nisi; this, if sufficient cause is shown, falls to the ground, but if not it remains in force; in the meantime, however, it is not inoperative; it takes the fund out of the control of the debtor, and the only question is, whether sufficient cause can be shown. Per Wood, L. J., in *Haly* v. *Barry*, 37 L. J., Ch., 723, 725; 3 L. R., Ch, 452, 456, 457; 16 W. R. 654, 656, 657. I think the strongest point made in this case on the part of the appellant was the reference to one passage in the judgment of my learned brother in *Warburton* v. *Hill*. I think the explanation he has given is corroborated by a short passage in the subsequent judgment in *Scott* v. *Hastings* (*Lord*). Per Selwyn, L. J.

14. *Warde, Re* (2 John. & H. 191) I cannot understand the decision in this case. Per Bacon, V.-Ch., in *Clergy Orphan Corporation, Re*, 30 L. T., N. S., 806, 807; 18 L. R., Eq., 280; 22 W R. 789.

15. *Ware* v. *Cumberlege* (20 Beav. 503; 1 Jur. N. S., 745; 24 L. J., Ch., 630) overruled. *Edwards* v. *Hall*, 6 De G. M. & G. 74; 25 L. J., Ch., 82; 1 Jur., N. S., 1189. Affirming 11 Hare 6; 17 Jur. 593; 22 L. J., Ch., 1078.

16. *Ware* v. *Polhill* (11 Ves. 257) observed upon in *Lantsbery* v. *Collier*, 2 Kay & J. 709; 25 L. J, Ch., 672; 4 W. R. 826.

17. *Ware* v. *Rowland* (15 Sim. 587, 593). Where the words of gift are "to the next heir," or "to the heir at law," there seems to be comparatively little difficulty; but where the word is "heir" only, considerable doubt arises; and here, I confess, I was struck with the remark in the judgment in the case of *Ware* v. *Rowland*, where the Vice-Chancellor of England observes that it cannot be argued, with any show of reason, that there is any substantial difference between the words "heirs at law" and "heirs." I should be very sorry to pronounce an opinion at variance with one of Sir Lancelot Shadwell, who was so remarkable for his powers of construing ambiguous instruments; but although I do not concur in the learned Vice-Chancellor's observation, I find sufficient peculiarity in the circumstances of the case to prevent my regarding it as a binding authority in the present instance. There the gift upon which the question turned was "to and among the heirs at law" of the testator himself, "share and share alike;" here it is to the heirs of a stranger. Per Bacon, V.-Ch., in *Steevens, Re*, 15 L. R., Eq., 110, 113.

18. The principle of *Waring, Exp.* (19 Ves. 345; 2 Rose 182; 2 G. & J. 404), that where A. and B. are acceptor and drawer of bills, and property of the one comes to the hands of the other, as security against the bills, and then both become bankrupt, the billholders have a right to have the property applied, in the first instance, in payment of the bills, is applicable

as well to cases of double insolvency as of double bankruptcy; and the principle is applicable, although the property held as an indemnity is not sufficient to pay the bills in full. *Powles* v. *Hargreaves*, 17 Jur. 1083; 3 De G. M. & G. 430; 23 L. J., Ch., 1.

1. The rule in *Waring, Exp.* (19 Ves. 345), only applies to cases of double bankruptcy or insolvency, in which the estates of both parties are subject to an obligatory administration, and are under the control of the Court. It has no application, therefore, to a case where one of the parties residing abroad had entered into a composition with his creditors which did not operate to bring him or his estate within the jurisdiction of the Court. *General South American Co., Exp., Yglesias, Re*, 45 L. J., Bky., 54; 10 L. R., Ch., 635; 23 W. R. 843; 33 L. T., N. S., 112.

2. The doctrine of *Waring, Exp* (19 Ves. 345), established a special mode for the payment of creditors, applicable to the administration of the estate in the bankruptcy, but not to the administration of the trust in equity. *Laycock* v. *Johnson*, 6 Hare 199; 16 L. J., N. S., Ch., 350; 11 Jur. 688.

3. The doctrine of *Waring, Exp.* (19 Ves. 345), does not apply to a case where the bills drawn by one of the insolvent firms on the other have not been accepted, nor in any other case in which the holder of the bills has no right of double proof against the two firms. *Vaughan* v. *Halliday*, 9 L. R., Ch., 561, 22 W. T. 886; 30 L. T., N. S, 741. Reversing 22 W. R. 503; 30 L. T., N. S., 249.

4. The principle laid down in *Waring, Exp.* (19 Ves. 345), only applies where specific securities are deposited to secure specific bills, and not to the case of a deposit of securities to answer a general credit. *Levi, Exp., New Zealand Banking Corporation, Re*, 17 W. R. 565: 20 L. T., N. S., 296; 7 L. R., Eq., 449.

5. *Waring, Exp.* (19 Ves. 345), distinguished in *Lambton, Exp., Lindsay, Re*, 32 L. T, N. S., 380; 23 W. R. 662; 10 L. R., Ch., 405; 44 L. J., Bky., 81. Affirming S. C. *nom Greener, Exp., Lindsay, Re*, 32 L. T., N. S., 205; and in *New Zealand Banking Corporation, Re, Levi, Exp.*, 7 L. R., Eq., 449; 17 W. R. 565; 20 L. T., N. S., 296; and in *General Rolling Stock Co., Re, Alliance Bank, Exp.*, 4 L. R., Ch., 423; 38 L. J., Ch., 714; 17 W. R. 631; 20 L. T., N. S., 685.

6. *Waring, Exp.* (19 Ves. 345; 2 Rose 182; 2 G. & J. 404). Of course, we know perfectly well that, upon the principle of *Waring, Exp.*, if both the drawer and the acceptor of the bills under those circumstances become bankrupt, then the holders of the bills are entitled to stand upon what is called the equity of the drawer with reference to any security which may have passed between the other parties to the transaction. But it has always been most carefully said that that right is not a right founded on contract; it does not spring out of the contract, but it springs out of the necessities connected with the administration of the two insolvent estates. Per Lord Cairns, in *Banner* v. *Johnston*, 5 L. R., H. L., 157, 174; 40 L. J., Ch., 730; 24 L. T. 542.

We know very well that the doctrine of *Waring, Exp.*, will raise that equity where it is necessary to be raised, in consequence of a double insolvency, or an insolvency of both sides, in order that the one whose estate is being administered in bankruptcy may not be injured by another bankrupt from getting the benefit of the securities, whilst at the same time it cannot discharge the obligation it has incurred to pay the bills. But it is only in that case that the holders of bills or securities of this description have ever been held to be entitled to such an equity as is here asserted. Per Lord Hatherley, C., 5 L. R., H. L., pp. 168, 169.

7 *Waring, Exp.* (19 Ves. 345), explained in *Powles* v. *Hargreaves* (3 De G. M. & G. 430; 23 L. J., Ch., 1, 17 Jur. 1083). Now, we know what was said in *Waring, Exp.*, but how far that has been acted upon must be gathered from the subsequent authorities. One cannot say with certainty that they are uniform; we believe that doubts have been expressed as to the extent of the doctrine, but the case of *Powles* v. *Hargreaves* is an authority directly in point, and shows that the bank is entitled to file a bill, and to have the security applied in the manner I have mentioned. Per Cleasby, B., in the case of *Ireland (Bank of)* v. *Penny*, 41 L. J., Exch., 9; 7 L. R., Exch., 14; 25 L. T. 845; 20 W. R. 300.

8. *Waring, Exp.* (19 Ves. 344), the principle established in, is not to be restricted to cases of judicial insolvency *Powles* v. *Hargreaves*, 3 De G. M. & G. 430; 17 Jur. 1083; 23 L. J., Ch., 1.

9. *Waring, Exp.* (19 Ves. 345; 2 Rose 182). The rule of the English bankruptcy system fixed by this case, and as extended in subsequent cases, has not been adopted in Scotland, and is inconsistent with Scotch bankruptcy law. *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 L. R., App. Cas. (Sc.), 366; 47 L. T. 360; 31 W. R. 49.

Semble, assuming that the positive rule of administration which has been accepted as the law in England since the rule in *Waring, Exp.*, was made, must be understood in accordance with the determination in *Powles* v. *Hargreaves* (3 De M. & G. 453), still so far as it is a positive rule, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland, merely because it is so in England. *Ib.*

The reasons assigned by Lord Cranworth in *Powles* v. *Hargreaves* (3 De M. & G. 453), to justify the extension of *Waring, Exp.*, to the case of a deficient security are unsatisfactory if applied to such a contract as this, and appear to overlook the fact that, when the whole benefit of a deficient security is given to the billholder, the estate of the bankrupt acceptor may lose some part of the indemnity to which, by the contract, he is entitled. *Ib.*

10. *Warrant Finance Co.'s case, Joint Stock Discount Co., Re* (5 L. R., Ch., 86; 39 L. J., Ch., 122; 21 L. T. 626; 18 W. R. 102), and S. C., No. 2 (5 L. R., Ch., 88; 39 L. J., Ch., 185; 18 W. R. 102), distinguished in *Findlay, Exp., Collie, Re*, 17 L. R., Ch. D., 334; 50 L. J., Ch., 696; 45 L. T. 61; 29 W. R. 857.

11. *Warrant Finance Co., Exp., Humber Iron Works Co., Re* (18 W. R. 154), followed in *Ebbw Vale Co., Exp., Contract Corporation, Re*, 18 W. R. 222; 5 L. R., Ch., 112; 39 L. J., Ch., 363.

12. *Warren* v. *Richardson* (Younge 1). Form of the decree in this case adopted in *Simpson* v. *Sadd*, 4 De G. M. & G. 665; 1 Jur., N. S.,

457; 24 L. J., Ch., 562; 2 W. R. 578; 2 Eq. Rep 798.

1. *Warrender* v. *Warrender* (2 Cl. & F. 488) followed in *Harvey* v. *Farnie*, 8 L. R., App. Cas., 43; 52 L. J., P., 33; 48 L. T. 273; 31 W. R. 433 Affirming 6 L. R., P. D., 35; 50 L. J., P., 17; 43 L. T. 737; 29 W. R. 409.

2. *Warrington, Exp.* (3 De G. M & G. 159; 22 L. J., Bky., 90), overruled. *Langton* v. *Haynes*, 1 H. & N. 366; 25 L. J., Exch., 319

3. *Warrington, Exp.* (3 De G. M. & G. 159), followed in *Thomas* v. *Cooper*, 18 Jur. 688; 2 Eq. Rep. 1185.

4. *Warner* v. *Willington* (3 Drew 523; 25 L. J., Ch., 662) confirmed by *Smith* v. *Neale*, 2 C. B., N. S., 67; 26 L. J., C. P., 143.

5. *Waterer* v. *Waterer* (15 L. R., Eq., 402) observed on and distinguished in *Murtagh* v. *Costello*, 7 L. R., Ir., 428.

6. *Waterton* v. *Croft* (5 Sim. 502; 4 L. J., N. S., Ch., 7, considered in *Wigley* v. *Whitaker*, 1 Beav. 349; 8 L. J., N. S., Ch., 103.

7. *Wathen* v. *Smith* (4 Madd. 325), its authority impugned in *Cole* v. *Willard*, 25 Beav. 568.

8. *Watson, Re* (19 L. R., Ch. D., 384), considered in *Ray, Re*, 47 L. T. 500.

9. *Watson* v. *Row* (18 L. R., Eq., 680; 43 L. J., Ch., 664; 22 W. R. 793) not followed in *Smith* v. *Dale*, 18 L. R., Ch. D., 516; 50 L. J., Ch., 352; 44 L. T. 460; 29 W. R. 330.

10. *Watson* v. *Row* (43 L. J., Ch., 664; 18 L. R., Eq., 680; 42 W. R. 793) not followed in *McEwan* v. *Crombie*, 25 L. R., Ch. D., 175; 53 L. J., Ch., 24; 49 L. T. 499; 32 W. R. 115.

11. *Watts* v. *Bullas* (1 P. W. 60) controverted. *Goring* v. *Nash*, 3 Atk. 189.

12. *Watts* v. *Porter* (3 El. & Bl. 743; 23 L. J., Q. B., 345) observed upon in *Beavan* v. *Oxford (Lord)*, *Oxford (Lady)*, *Exp.*, 2 Jur., N. S., 121; 25 L. J., Ch., 299.

13. *Watts* v. *Porter* (3 El. & Bl. 743) observed upon in *Kinderley* v. *Jervis*, 22 Beav. 1; 2 Jur., N. S., 602; 25 L. J., Ch., 538.

14. *Watts* v. *Martin* (1 Bro. C. C. 113) disapproved of by Vice-Chancellor, in *Goodall* v. *Pickford*, 6 Sim. 379; 3 L. J., N. S., Ch., 23.

15. *Watts's Settlement, Re* (9 Hare 106), overruled in *Smith* v. *Smith*, 18 Jur. 1047; 3 Drew. 72; 3 W. R. 95; 24 L. J., Ch., 229; 3 Eq. Rep 126.

16. *Watts's Settlement, Re* (9 Hare 106), so far as this case decides that an order under the 10th section of the Trustee Act 1850, to vest the trust in continuing new trustees, would sever the joint tenancy, is overruled by *Bute (Marquis), Re*, Johns. 15; 5 Jur., N. S., 487; 33 L. T. 178.

17. *Waugh* v. *Waddell* (16 Beav. 521) commented on in *Thomas* v. *Cross* (5 N. R. 148), 10 Jur., N. S., 1163; 13 W. R. 166; 11 L. T., N. S., 430.

18. *Waugh* v. *Waugh* (2 Myl. & K. 41). The case is directly in conflict with my opinion. In that case the testator gave a sum of money in the event of the death of his nephew John Waugh, without leaving issue, to be equally divided among all the brothers and sisters of John Waugh who should be living at the time of his death, and the children then living, if any, of his brothers and sisters who should have previously departed his life, but so that the children of such deceased brother and sister should take only the shares which their parent would have taken if living. The Master of the Rolls observed, that it was plain that the words used in the first part of the bequest would comprise Eleanor Waugh, for she was the child of Alexander Waugh, a brother of John, who had died before John; but by the subsequent part of the gift it was expressed that the children of a deceased brother of John were to take only the share which their parent would have taken if living, and the parent of Eleanor being dead at the date of the will could not share in the bequests, and therefore Eleanor took nothing. I take the liberty of not concurring in that reasoning, which I conceive is not sound for the solution of the case, and indeed *Waugh* v. *Waugh* has been considered as overruled, which in effect it was in *Tytherleigh* v. *Harbin* (6 Sim. 329), in which case Shadwell, V.-Ch., observed, that the decision in *Waugh* v. *Waugh* might have been supported on the ground of the evident intention of the testator, and therefore that he did not consider that he was overruling that case. I think that the decision in *Waugh* v. *Waugh* has been commented on in such a manner that it is no longer to be considered as an authority. Per Kindersley, V.-Ch., in *Loring* v. *Thomas*, 1 Dr. & Sm. 497, 521, 522; 30 L. J., Ch., 789, 795.

19. *Weall* v. *Rice* (2 Russ. & M. 251) considered in *Hall* v. *Hill*, 1 Con. & L. 120; 1 Dr. & War. 94; 4 Ir. Eq. R. 27.

20. *Webb* v. *Bird* (13 C. B. 841; 31 L. J., C. P., 335) followed *Bryant* v. *Lefever*, 48 L. J., Ch., 380; 27 W. R. 592; 40 L. T. 579.

21. *Webb* v. *Direct London & Portsmouth Railway Co.* (9 Hare 129; 1 De G. M. & G. 521) doubted in *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Ca 331.

22 *Webb* v. *Hewitt* (3 Kay & J. 438) explained The question in this case is whether the plaintiff, who is surety is released or not. If he is released, of course he is entitled to an injunction; if he is not released his bill must be dismissed. Now, the first and main authority relied upon on the part of the plaintiff is *Webb* v. *Hewitt*. I have only to say this as to the decision in *Webb* v. *Hewitt*, that it seems to me to proceed entirely upon this view of the transaction, that there had been a contract between the principal debtor and the principal creditor that a certain transaction should amount to payment and to extinguishment; and that being so, it renders it unnecessary to allude to that case further, for it has no application to the present. Per Giffard, V.-Ch., in *Green* v. *Wynn*, 38 L. J., Ch., 76, 77, 78, and see S. C. on appeal 38 L. J., Ch., 220, 222.

23. The dicta of James and Cotton, L.JJ., in *Webster* v. *British Empire Mutual Life Assurance Co.* (15 L. R., Ch. D., 169) commented on in *Curtius* v. *Caledonian Fire and Life Insurance Co.*, 19 L. R., Ch. D., 534; 51 L. J., Ch., 80; 45 L. T. 662; 30 W. R. 125.

24. *Webster* v. *Cook* (15 W. R. 140; 36 L. J., Ch., 753) (Sale of Reversion) reversed, on appeal, 2 L. R., Ch., 542; 36 L. J., Ch., 753; 15 W. R. 1001; 16 L. T., N. S., 82. But contrary to *Croft* v. *Graham*, 2 De G. & Sm. 155, and *Tottenham* v. *Emmet*, 14 W. R. 3. *Webster* v. *Cook* lately came before the Master of the Rolls, and was decided by him on the principles which have governed the Court in similar

cases; but his decision was afterwards, on appeal, overruled by Lord Chancellor Chelmsford. Under the circumstances of the case, however, I should not be justified were I to treat it as an authority for overruling the law, already so well settled. Per Stuart, V.-Ch., in *Wyatt* v. *Cook*, 18 L. T., N. S., 12, 13; 16 W. R. 502, 503.

1. *Webster* v. *Whewall* (15 L. R., Ch. D., 120; 49 L. J., Ch., 704; 42 L. T. 868; 28 W. R. 951) not followed in *Quilter* v. *Heatley*, 23 L. R. Ch. D., 42; 48 L. T. 373; 31 W. R. 331.

2. *Weeks* v. *Evans* (7 Sim. 546; 5 L. J., N. S., Ch., 16. And see S. C. 12 Sim. 6) overruled. *Brown* v. *Weatherby*, 10 Sim. 125; 10 L. J., N. S., Ch., 190; 5 Jur. 384.

3. *Weldon* v. *Dicks* (in part) (10 L. R., Ch. D., 247; 48 L. J., Ch., 201; 39 L. T. 467; 27 W. R. 639) considered in *Dicks* v. *Yates*, 18 L. R., Ch. D., 76; 50 L. J., Ch., 809; 44 L. T. 660.

4. *Weldon* v. *Dicks* (39 L. T., N. S., 647; 10 L. R., Ch. D., 247; 48 L. J., Ch., 201; 27 W. R. 639) followed in *Coote* v. *Judd*, 23 L. R., Ch. D., 727; 48 L. T. 205; 31 W. R. 423.

5. *Wellesley* v. *Wellesley* (15 Sim. 59). *Quære*, whether this case ought to be followed. See *Mornington* (*Countess*) v. *Keane*, 2 De G. & J. 292.

6. *Wensley, Exp.* (1 De G. J. & S. 273; 11 W. R. 241), overruled. Lord Westbury, C., did not wish to be held as agreeing with the decision in this case; it would take a good deal of argument to convince him of the soundness of that decision. Per Lord Westbury, C., in *Potter, Exp., Barrow, Re*, 13 W. R. 182; 11 L. T., N. S., 435, 11 Jur., N. S., 49; 34 L. J., Bky., 46.

7. *West of England & South Wales District Bank, Re, Dale & Co., Exp.* (11 L. R., Ch. D., 772), dissented from in *Hallett's Estate, Re, Knachbull* v. *Hallett*, 13 L. R., Ch. D., 696; 49 L. J., Ch., 415; 42 L. T. 421; 28 W. R. 732. Reversing 41 L. T. 186; 48 L. J., Ch., 734.

8. *Western Bank of Scotland* v. *Addie* (1 L. R., H. L. (Sc.), 145) discussed in *Houldsworth* v. *City of Glasgow Bank*, 5 L. R., App. Cas., 317; 42 L. T. 194; 28 W. R. 677.

9. *West Jewell Tin Mining Co., Re, Little's case* (8 L. R., Ch. D., 806), distinguished in *Collins* v. *Paddington* (*Vestry*), 5 L. R., Q. B. D., 368; 49 L. J., Q. B., 612; 42 L. T. 573; 28 W. R. 588.

10. *Westzinthus, Re* (5 B. & Ad. 817), followed in *Kemp* v. *Falk*, 7 L. R., App. Cas., 573; 52 L. J., Ch., 167; 47 L. T. 454; 31 W. R. 125.

11. *Wharton* v. *Lisle* (3 Lev. 365), Lord Chancellor J. Holt, dictum of commented on in *Smith* v. *Wyatt*, 2 Atk. 364; 9 Mod. 336.

12. *Wheate* v. *Hall* (17 Ves. 80) distinguished in *Wise* v. *Piper*, 13 L. R., Ch. D., 848; 49 L. J., Ch., 611; 41 L. T. 794; 28 W. R. 442.

13. *Wheatley* v. *Westminster Brymbo Coal and Coke Co.* (9 L. R., Eq., 538; 39 L. J., Ch., 175; 22 L. T. 7; 18 W. R. 162) not followed in *Kinsman* v. *Jackson*, 42 L. T. 80; 28 W. R. 337. Affirmed 42 L. T. 558; 28 W. R. 337.

14. *Wheeldon* v. *Burrows* (12 L. R., Ch. D., 31; 48 L. J., Ch., 853; 41 L. T. 327; 28 W. R. 196) explained and commented on in *Allen* v. *Taylor*, 16 L. R., Ch. D., 355; 50 L. J., Ch., 178.

15. *Wheeldon* v. *Burrows* (12 L. R., Ch. D., 31) distinguished in *Russell* v. *Watts*, 47 L. T. 245.

16. *Whetstone* v *Dewis* (1 L. R., Ch. D., 99; 45 L. J., Ch., 49; 33 L. T. 501; 24 W. R. 93) not followed in *Gledhill* v. *Hunter*, 14 L. R., Ch. D., 492; 49 L. J., Ch., 333; 42 L. T. 392; 28 W. R. 530.

17. *Whitchurch* v. *Golding* (2 P. W. 541) distinguished in *Caton* v. *Coles*, 1 L. R., Eq., 581; 12 Jur., N. S., 205; 35 L. J., Ch., 836; 14 L. T., N. S., 51.

18 *White, Exp.* (2 Dea. & Ch. 334), commented on in *Greenwood, Exp., Baillie, Re*, 3 Dea. & Ch. 398; 1 Mont. & A. 65; 3 L. J., N. S., Ch., 6, 24.

19. *White* v. *Chitty* (1 L. R., Eq., 372; 35 L. J., Ch., 343) questioned in *Samuel* v. *Samuel*, 12 L. R., Ch. D., 152; 51 L. J., Ch., 129; 45 L. T. 593; 30 W. R. 369. Affirming S. C. *nom. Mills* v *Jennings*, 13 L. R., Ch. D., 639; 49 L. J., Ch., 208; 42 L. T. 169; 28 W. R. 549; 47 L. J., Ch., 716; 26 W. R. 750.

20. *White* v. *Hillacre* (3 Y. & C., Exch., 597) followed in *Jennings* v. *Jordan*, 6 L. R., App Cas., 698, and in *Harter* v. *Colman*, 19 L. R., Ch. D., 630; 51 L. J., Ch., 481; 46 L. T. 154; 30 W. R. 484.

21. *Whitehead* v. *Whitehead* (16 L. R., Eq., 528; 29 L. T., N. S., 289). There Malins, V.-Ch., said, "I think that a specific legacy is not within the Apportionment Act 1870." In *Pollock* v. *Pollock* (44 L. J., Ch., 168; 30 L. T., N. S., 779; 18 L. R., Eq., 329; 22 W. R. 726), Malins, V.-Ch., said, with regard to the report of the case of *Whitehead* v. *Whitehead*, he certainly did not intend to lay down the rule so broadly as there stated; on the contrary, he did not think that, as a general rule, a specific bequest was not apportionable.

22. *Whitley's Trade Mark, Re* (29 W. R. 235. n.), followed in *Sykes' Trade Marks, Re*, 43 L. T. 626; 29 W. R. 235.

23. *Whiting* to *Loomes* (17 L. R., Ch. D., 10; 50 L. J., Ch., 463; 44 L. T. 721; 29 W. R. 435) distinguished in *Birkbeck Freehold Land Society, Exp.*, 24 L. R., Ch D., 119; 52 L. J., Ch., 777; 49 L. T. 265; 31 W. R. 716.

24. *Whitlock* v. *Waltham* (1 Salk. 157) distinguished in *Clyde* (*River*) *Trustees* v. *Duncan*, 17 Jur. 701.

25. *Whitmore, Exp., Warwick, Re* (3 Dea. 365; 3 Mont. & A. 627), confirmed in *Jackson, Exp., Warwick, Re*, 3 Dea. 651; Mont. & Ch. 263, 271; 8 L. J., N. S., Bky., 36.

26. *Whitmore* v. *Wakerley* (3 H. & C. 538; 11 Jur., N. S., 182; 34 L. J., Exch., 83; 13 W. R. 350; 11 L. T., N. S., 683) commented on in *Hartley* v. *Mare*, 6 N. R. 204; 19 C. B., N. S., 85; 11 Jur., N. S., 625; 34 L. J., Ch., 187; 13 W. R. 777; 12 L. T., N. S., 424.

27. *Whitworth* v *Gaugain* (1 Ph. 728; 3 Hare 416; 13 L. J., N. S., Ch., 288; 15 *id.* 433; 8 Jur. 374; 10 *id.* 531) approved of in *Abbott* v. *Stratten*, 3 J. & L. 603; 9 Ir. Eq. R. 233.

28. *Wickenden* v. *Royson* (25 L. J., Ch., 162). It is possible that I may have used the expressions imputed to me in this case, at the same time I think that they go much further than what I intended to say; if I said that nothing would warrant the vacating an enrolment short of *mala fides*, I stated the practice too narrowly. Per Cranworth, C. *Backhouse* v. *Wylde*, 3 Jur., N. S., 398; 26 L. J., Ch., 812.

1. *Wickens* v. *Townshend* (1 Russ. & Myl. 361) followed in *Birt, Re, Birt* v. *Burt*, 22 L. R., Ch. D., 604; 52 L. J., Ch., 397; 48 L. T. 67; 31 W. R. 334.

2. *Wier, Exp.* (7 L. R., Ch., 319), approved and followed in *Ward or Harris, Exp., Ward, Re*, 20 L. R., Ch. D., 356; 51 L. J., Ch., 752; 47 L. T. 106; 30 W. R. 560. Affirming 19 L. R., Ch. D., 356.

3. *Wilde* v. *Gibson* (1 H. L. Ca. 605) explained in *Beale* v. *Billing*, 13 Ir. Ch. R. 250.

4. *Wild's case* (6 Co. Rep. 17). *Semble*, that the rule in this case, that "if A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail," is inapplicable to personalty. *Stokes* v. *Heron*, 12 Cl. & F. 161.

5. *Wild's case* (6 Co. Rep. 17). *Semble*, the rule there laid down is inapplicable to bequests of personal estate. *Heron* v. *Stokes*, 2 Dr. & War. 89; 1 Con. & L. 270; 4 Ir. Eq. R. 284. Reversing 3 *id.* 163.

6. *Wild's case* (6 Co. Rep. 17) does not apply to personal estate. Per Lord Campbell, C., in *Audsley* v. *Horn*, 6 Jur., N. S., 205, 206; 1 De G. F. & J. 226; 29 L. J., Ch., 201; 8 W. R. 150

7. *Wild's case* (6 Co. Rep. 17). I think that Wild's case does not apply here. The devise there, according to the report in 6 Rep. 17, was to Rowland Wild and his wife, and after their decease to their children. Here the gift is to Amelia Rossiter, and her children, but if they should die without issue, then over, and this distinction seems to have been commented on in the case of *Stokes* v. *Heron*, 12 Cl. & F. 183, at least according to Lord St. Leonards' note of that case in his comments upon the decision of the House of Lords (page 236); but I have not been able to find any case, except that of *Stokes* v. *Heron*, where it has been laid down, or even stated obiter, that the rule in Wild's case applied to personal estate. In the case of *Stokes* v. *Heron*, this point was not decided by the House of Lords, although Lord Brougham expressed his opinion to that effect strongly; he thought that the rule applied equally to personal estate as well as to real estate. But it should be observed, that it was not necessary for the decision in that case, and that the applicability of this rule to bequest of personalty has been disputed in a great variety of cases, such as *Knight* v. *Ellis*, 2 Bro. C. C. 570, *Buffar* v *Bradford*, 2 Atk. 220, and *Stone* v. *Maule*, 2 Sim. 490. Upon a review of the whole of the cases upon this subject, I think that, setting aside some contradictory decisions, which it is not very easy to reconcile, the tendency of modern decisions has been, in cases like the present, to hold that, in personalty, the bequest gives an interest for life to the mother, with an interest in remainder to the children. Per Romilly, M. R., in *Audsley* v. *Horn*, 26 Beav. 195, 198; 28 L. J., Ch., 293; 4 Jur., N. S., 1267.

8. The rule in *Wild's case* (6 Co. Rep. 17) is not inflexible, and will not be applied where its application would defeat the manifest intention of the testator as collected from the whole will. *Grieve* v. *Grieve*, 36 L. J., Ch., 932; 4 L. R., Eq., 180; 16 L. T., N. S., 201; 15 W. R. 577.

9. The rule *Wild's case* (6 Co. Rep. 17), even if only a rule of construction, is not now to be departed from. *Clifford* v. *Koe*, 5 L. R., App. Cas., 447; 43 L. T. 322; 28 W. R. 633.

10. *Wild's case* (6 Co. Rep. 17) observed upon in *Byng* v. *Byng*, 10 H. L. Ca. 171; 7 Jur., N. S., 1125; 31 L. J., Ch., 470; 10 W. R. 633; 7 L. T., N. S., 1. Affirming S. C. *nom. Webb* v. *Byng*, 26 L. J., Ch., 107; 8 De G. M. & G. 633; 5 W. R. 64; 2 Jur., N. S., 1243; 2 Kay & J. 669; 4 W. R. 657.

11. *Wilkes, Exp.* (5 De G. M. & G. 418). It may be right also to add, that the case of *Wilkes, Exp.*, seems to me to have been pushed, in the argument in *Irving* v. *Gray*, 3 H. & N. 34, far beyond not only what was intended, but what was expressed. The judgment of the Court, however, takes a more correct view of the case. All that was meant to be said in it was, that the property must be devoted to the creditors, not that it must be assigned in trust for them. Per Turner, L. J., in *Calvert, Exp.* 3 De G. & J. 95, 112.

12. *Wilkins* v. *Fry* (1 Meriv. 244) considered in *Buxton, Exp., Muller, Re*, 15 L. R., Ch. D., 289; 43 L. T. 183; 29 W. R. 28.

13. *Wilkins* v. *Hogg* (3 Giff. 116) followed in *Pass* v. *Dundas*, 43 L. T. 665; 29 W. R. 332.

14. *Wilks* v. *Davis* (3 Meriv. 507) followed in *Vickers* v. *Vickers*, 4 L. R., Eq., 529; 36 L. J., Ch., 946.

15. *Willan, Re* (9 W. R. 689), not followed by the Master of the Rolls, in *Re Jones*, 22 W. R. 837.

16. *Willesford* v. *Watson* (8 L. R., Ch., 473; 42 L. J., Ch., 447; 28 L. T. 428; 21 W. R. 350) distinguished in *Piercy* v. *Young*, 14 L. R., Ch. D., 200; 42 L. T. 710; 28 W. R. 845.

17. *Willesford* v. *Watson* (14 L. R., Eq., 572; 42 L. J., Ch., 90; 28 L. T. 428; 20 W. R. 32), dicta of Wickens, V.-Ch., dissented from in *Russell* v *Russell*, 14 L. R., Ch. D., 471; 49 L. J., Ch., 268; 42 L. T. 112.

18. *Williams, Exp., Thompson, Re* (7 L. R., Ch. D., 138; 47 L. J., Bky., 26; 37 L. T. 764; 26 W. R. 274), observed upon in *Jackson, Exp., Bowes, Re*, 14 L. R., Ch. D., 725; 43 L. T. 272; 29 W. R. 253.

19. *Williams, Exp., Thompson, Re* (7 L. R., Ch. D., 138; 47 L. J., Bky., 26; 37 L. T. 764; 26 W. R. 274), commented on in *Voisey, Exp., Knight, Re*, 21 L. R., Ch. D., 442; 47 L. T. 362; 31 W. R. 19; 52 L. J., Ch., 121.

20. *Williams, Re* (8 L. R., Ch. D., 183; 38 L. T. 475), distinguished in *Rudow* v. *Great Britain Mutual Life Assurance Society*, 17 L. R., Ch. D., 600; 44 L. T. 688.

21. *Williams* v. *Bayley* (1 L. R., H. L., 200) explained and commented on in *Flower* v. *Sadler*, 10 L. R., Q. B. D., 572.

22. *Williams* v. *Bristol Marine Insurance Co.* (39 L. J., Ch., 504) not followed in *Western and Brazilian Telegraph Co.* v. *Bibby*, 42 L. T. 821.

23. *Williams* v. *Cooke* (4 Giff. 343) distinguished in *Newton's Trusts, Re*, 23 L. R., Ch. D., 181.

24. *Williams* v. *Davis* (2 Sim. 461). Lord Cottenham, in his judgment, in *Rawson* v. *Samuel* (1 Cr. & Ph. 161) does not give implicit faith to the correctness of the decision in this case. Per Watson, B., in *Stimson* v. *Hall*, 1 H. & N. 831, 836.

3. *Williams* v. *Games* (10 L. R., Ch., 204; 44 L. J., Ch., 145; 32 L. T. 414; 23 W. R. 279) approved in *Pitt* v. *Jones*, 5 L. R., App. Cas., 651; 49 L. J., Ch., 795; 43 L. T. 385; 29 W. R. 33

2. *Williams* v. *Millington* (1 H. Bl. 81) approved in *Davis* v. *Artingstall*, 49 L. J., Ch., 609; 42 L. T. 507; 29 W. R. 137.

3. *Williams* v. *Owen* (13 Sim. 597; 13 L. J., Ch., 105) said to be overruled by *Bowker* v. *Bull*, 1 Sim., N. S., 29; 20 L. J., Ch., 47, but adopted and acted on in *Farebrother* v. *Wodehouse*, 23 Beav. 18; 2 Jur., N. S., 1178; 26 L. J., Ch., 81; but decree in the latter case slightly varied on appeal. See 26 L. J., Ch., 240.

4. *Williams* v. *Owen* (13 Sim. 597), which is a case about which I desire to say as little as may be, has a very remote application to this case, if it has any. It would, in my opinion, as I read it at present, be at variance entirely with the principle of *Hopkinson* v. *Rolt*, 9 H. L. Ca. 514. . . . I should find it difficult, if it were necessary, to reconcile *Williams* v. *Owen* with that universal principle in the law of suretyship, that the surety is entitled to the benefit of any security which the secured creditor may hold. It is true that the surety there had not been a party to the transaction. I cannot conceive that that makes any difference if the law be, as I take it to be, that a surety is entitled to the benefit of any security held by the mortgagee in the transaction in respect of which the surety incurs an obligation. Per Bacon, V.-Ch., in *Dawson* v. *Whitehaven* (*Bank*), 4 L. R., Ch. D., 639, 649, 650; 36 L. T., N. S., 310, 312; 46 L. J., Ch., 545; 25 W. R. 582. But see S. C. reversed on appeal; 6 L. R., Ch. D., 218; 46 L. J., Ch., 884; 26 W. R. 34; 37 L. T., N. S., 64.

5. *Williams* v. *Owen* (13 L. J., Ch., 105; 13 Sim. 597) not followed in *Forbes* v. *Jackson*, 19 L. R., Ch. D., 615; 51 L. J., Ch., 691; 30 W. R. 652; 48 L. T. 722.

6. *Williams* v. *Teale* (6 Hare 239) followed in *Southern* v. *Walluston*, 22 L. J., Ch., 664; 16 Beav. 276; 1 W. R. 86.

7. *Williams* v. *Thorp* (2 Sim. 257). The rule in this case recognised in *Pott, Exp., Daintry, Re*, 12 L. J., N. S., Bky., 33; 7 Jur. 195.

8. *Williams* v. *Williams* (15 Ves. 419) considered and explained in *Creagh* v. *Blood*, 3 J. & L. 133; 8 Ir. Eq. R. 688.

9. *Williams on Executors* (1604, 5th edit.) and *Smith's M. L.* (425, 4th edit.) It is laid down in these treatises:—"If a man enters into a continuing guarantee and dies, his executor, it seems, is not liable upon it for advances made after the testator's death, which operates as a revocation." This statement is incorrect, as the authorities cited for it do not support it. *Bradbury* v. *Morgan*, 31 L. J., Exch., 462; 7 L. T., N. S., 104.

10. *Willingale* v. *Maitland* (3 L. R., Eq., 103). Being, therefore, driven to see what *Willingale* v. *Maitland* decided—without attempting for a moment to say that I can or that I should wish to overrule it, it being decided by my predecessor in the year 1866, I must see what it did decide. Now what it decided was this, that a Crown grant to the inhabitants of a parish to take certain profits *à prendre* out of a royal manor was valid; and that the effect of the grant was to incorporate the inhabitants for the purpose of enabling them to exercise the rights. That is all *Willingale* v. *Maitland* decided. Per Jessel, M. R., in *Chilton* v. *London Corporation*, 7 L. R., Ch. D., 735, 741; 38 L. T., N. S., 498, 500; 47 L. J., Ch., 433; 26 W. R. 474.

11. *Willis* v. *Evans* (2 Ball. & B. 225) questioned in *Fitzpatrick* v. *Power*, 1 Hog. 24.

12. *Willis* v. *Plaskett* (4 Beav. 208) disapproved of by Wood, V.-Ch., in *Sander, Re*, 1 L. R., Eq., 675.

13. *Willis* v. *Stone* (1 Y. & J. 262) is questionable. See *Hadow* v. *Barnett*, 1 Y. & C. 164.

14. *Willoughby* v. *Middleton* (in part) (10 W. R. 460; 2 John. & H. 344) not followed in *Smith* v. *Lucas*, 18 L. R., Ch. D., 531; 45 L. T. 460; 30 W. R. 451.

15. *Willoughby* v. *Middleton* (in part) (2 John. & H. 344) not followed in *Smith* v. *Lucas*, 18 L. R., Ch. D., 531; 45 L. T. 460; 30 W. R. 451.

16. *Wilson, Exp.* (11 Ves. 410), explained in *Scholefield* v. *Templer*, Johns. 155; 5 Jur., N. S., 619, 621; 28 L. J., Ch., 452, 456.

17. *Wilson, Exp., Douglas, Re* (7 L. R., Ch., 490; 41 L. J., Bky., 46; 26 L. T. 489; 20 W. R. 564), approved in *Banco de Portugal* v. *Waddell*, 5 L. R., App. Cas., 161; 49 L. J., Bky., 33; 42 L. T. 698; 28 W. R. 477, and followed in *Re Pim*, 7 L. R., Ir., 458.

18. *Wilson* v. *Atkinson* (33 L. J., Ch., 576; 11 L. T. 220; 4 De J. & S. 455) observed upon in *Emmins* v. *Bradford, Johnson* v. *Emmins*, 13 L. R., Ch. D., 493; 49 L. J., Ch., 222; 42 L. T. 45; 28 W. R. 531.

19. *Wilson* v. *Church* (11 L. R., Ch. D., 576; 48 L. J., Ch., 690; 41 L. T. 50; 27 W. R. 843) commented on in *Otto* v. *Lindford*, 18 L. R., Ch. D., 394; 51 L. J., Ch., 102; 30 W. R. 418.

20. *Wilson* v. *Eden* (11 Beav. 237) reversed by *Wilson* v. *Eden*, 16 Beav. 153.

21. *Wilson* v. *Hart* (1 L. R., Ch., 463; 35 L. J., Ch., 569; 14 L. T. 499; 14 W. R. 748), dicta of Turner, L. J., explained and commented on in *Patman* v. *Harland*, 17 L. R., Ch. D., 357; 50 L. J., Ch., 642; 44 L. T. 729; 29 W. R. 707.

22. *Wilson* v. *Lloyd* (16 L. R., Eq., 60; 42 L. J., Ch., 599; 28 L. T. 331; 21 W. R. 507). In the case of *Wilson* v. *Lloyd*, the chief judge in bankruptcy held that a surety was discharged by the creditor voting in favour of accepting a composition from the principal debtor. There were, however, a great many points in that case, and we think that the difference between a composition by a voluntary deed or agreement and by composition under the Bankruptcy Act was not sufficiently considered. On the other hand, in the case of *Megrath* v. *Gray* (9 L. R., C. P., 216), the Court of Common Pleas appears to have come, after great consideration, to a directly contrary conclusion. In that case, among the liabilities of the firm of Megrath and Highton were two acceptances; the partnership between the two was dissolved, Highton undertaking to pay all debts and to indemnify Megrath. Highton filed his petition under the Bankruptcy Act, and the Adelphi Bank, the holders of the bills, voted in favour of the resolution, and it was held that they had not,

by so doing, discharged Megrath. We entirely agree in the decision of the Court of Common Pleas, and in the reasons they have given for it. We think that the discharge of a debtor under a liquidation or a composition is really a discharge in bankruptcy by operation of law. Per James, L. J., in *Jacobs, Exp. & Re*, 23 W. R. 251; 10 L. R., Ch., 211; 44 L. J., Bky., 34; 31 L. T. 745.

1. *Wilson* v. *Moore* (1 Myl. & K. 337) followed in *Foxton* v. *Manchester and Liverpool District Banking Co.*, 44 L. T. 406.

2. *Wilson* v. *Northampton and Banbury Junction Railway Co* (9 L. R., Ch, 279) considered and distinguished in *Todd* v. *Midland Great Western Railway Co.*, 9 L. R., Ir., 85.

3. *Wilson* v. *Northampton and Banbury Junction Railway Co.* (14 L R., Eq., 477; 27 L. T. 507; 20 W. R. 438) explained and commented on in *Wheeler* v. *Le Marchant*, 17 L. R., Ch. D., 675; 50 L. J., Ch., 793; 44 L. T. 62.

4. *Wilson* v. *Peake* (3 Jur., N. S, 155) distinguished in *Emmett's Estate, Re, Emmett* v. *Emmett* (No. 2), 17 L. R., Ch. D., 942; 50 L. J., Ch., 341; 44 L. T. 172; 29 W. R. 164.

5. *Wilson* v. *Wilson* (1 De G. & Sm. 152) is a very peculiar case, and I cannot conceive that the Vice-Chancellor could have meant to decide, that an unattested will would put an heir-at-law to his election. But if the case really did go to that length, I should not follow it. Per Kindersley, V.-Ch., in *Middlebrook* v. *Bromley*, 9 Jur., N. S., 614, 615; 11 W. R. 712.

6. *Wilson* v. *Wilson* (5 H. L. Ca. 40; 23 L. J., Ch, 697). This case does not alter the rule that husband and wife cannot effectually contract for a separation without the intervention of a third party. *Hope* v. *Hope*, 25 L. J., Ch., 682; 26 L. J, Ch., 417; 3 Jur., N. S., 454; 8 De G M. & G. 734.

7. *Wilson* v. *Wilson* (28 L. J., Ch., 95; 4 Jur, N. S, 1076) approved in *Herbert* v. *Webster*, 15 L. R, Ch. D., 610; 49 L. J., Ch., 620.

8. *Wilson, Re, Shaw, Re* (1 L. R., Eq., 247; 35 L. J., Ch., 243; 13 L T. 576; 14 W. R. 161), approved in *Goodman's Trusts, Re*, 14 L. R., Ch. D, 619; 49 L. J., Ch., 805; 43 L. T. 14; 28 W. R. 902.

9. *Wilton* v. *Colvin* (3 Drew. 617). I am very glad to have this opportunity of correcting an impression as to what I said in *Wilton* v. *Colvin*. In *Macturcan* v. *Lane* (5 Jur., N. S., 591), Stuart, V.-Ch, considered that I had expressed a doubt whether *Blythe* v. *Granville* (13 Sim. 190) was properly decided. Now, that was a case of reversionary interest, and Sir. L. Shadwell held, that it came within the meaning of the covenant; and I had not the smallest idea of intimating that I felt the smallest dissatisfaction with that decision, and I am of opinion that a reversion which falls into possession does come within the covenant. The objection I made applies to one part of the judgment, in which he says, "The covenant, therefore, plainly applies to that property which the wife would become entitled to as soon as the coverture took effect. The coverture was the futurity referred to; and immediately on the marriage taking place the wife became entitled to the property during the coverture." The reasoning, therefore, is, that though she was entitled before coverture, yet after coverture she is become entitled during coverture, and therefore there is a change of condition; and from that I ventured most respectfully to dissent. And this appears from the report of *Wilton* v. *Colvin* (25 L. J., Ch, 850; see also 2 Jur., N. S., 867, 4 W. R. 759), in which it is clear that the only observation I made intimating any dissent related to that particular part." Per Kindersley, V.-Ch, in *Archer* v. *Kelly*, 6 Jur., N. S., 814, 815.

10. Form of order made in *Wilton* v. *Hill* (2 De G. M. & G. 807) adopted in *Macann* v. *Borradaile*, 17 L. T., N. S., 298; 16 W. R. 175; 37 L. J., Ch., 124.

11. *Wiltshire* v. *Rabbits* (14 Sim. 76). The only doubt I have felt arises from the decision in *Wiltshire* v. *Rabbits* But in *Foster* v. *Blackstone* (1 M. & K. 297) the House of Lords decided that money to be produced by the sale of land is within the doctrine of notice. *Wiltshire* v. *Rabbits* cannot easily be reconciled with *Foster* v *Blackstone*. Per Stuart, V.-Ch., in *Consolidated Investment & Insurance Co.* v. *Riley*, 1 Giff. 371, 375, 376.

12. *Winchester (Bishop)* v. *Mid-Hants Railway Co.* (17 L. T., N. S, 161; 5 L. R., Eq., 17; 37 L. J., Ch., 64) followed in *Drax* v. *Somerset and Dorset Railway Co.*, 19 L. T., N. S., 626; 38 L. J., Ch., 232.

13. *Winder, Exp., Winstanley, Re* (1 L. R., Ch. D., 290; 45 L. J., Bky., 14; 33 L. T., N. S., 615, affirmed, *nom. Sheen, Exp.*, 45 L. J., Bky., 89; 1 L. R., Ch. D., 560; 24 W. R. 685; 34 L. T., N. S., 48. Explained and commented on in *Dann*, or *Thorpe, Exp*, *Parker, Re*, 17 L. R., Ch D., 26; 44 L. T. 760; 29 W. R. 771.

14 *Windham* v. *Graham* (1 Russ. 331) seems to be a case which was decided the other way; but I think, upon examining that case, that the distinction taken by Mr. Jessel is a correct one, and that *Windham* v. *Graham* does not affect the rule at all. I repeat again that it has always been a contest between the two rules of the vesting of the estate and the period when the class is to be ascertained. In *Windham* v. *Graham* there were two funds, 4,000*l.* and 6,000*l.*; and the Master of the Rolls (Lord Gifford) determined that with respect to one of those sums there could be no question, because the words of the settlement were distinct and positive that it should become a vested interest on birth and treated specially. Lord Gifford considered that this indication of what was to be done with respect to the sum of 4,000*l.* was a clue to show what the intention was with respect to the 6,000*l.*, and that they must both go in the same way. Therefore he determined that the rule of vesting applied in that case, and not the period of distribution. Of course it is admitted, in all these cases, that the settlor or the testator, whichever it is, can fix the time if he pleases, and give directions exactly as he likes; and any directions given by him will control the rule of law upon the subject. It is, therefore, really a question of intention. In *Windham* v. *Graham* Lord Gifford determined that the intention was shown by the words which were used in the direction for the vesting of the property. In this case I think that the intention to be gathered from

the settlement is the other way. I think that the rule of construction is the same whether in a will or a settlement. I do not think there is any difference. I admit there might be some distinction if it were an executory settlement, as in the singular case which Mr. Hall referred to, in which articles of settlement were executed on the same day; but there is no question of that sort upon the present occasion. Per Lord Romilly, *Bailey, Re*, 21 L. T., N. S., 195, 196, 197; 39 L. J., Ch., 388; 18 W. R. 481; 9 L. R., Eq., 491.

1. *Winter* v. *Homan* (6 Ir. Eq. R. 479) overruled in *Sweeny* v. *Fleming*, 14 Ir. Ch. R. 23.

2. *Wintour* v. *Clifton* (3 Jur., N. S., 74) followed in *Usticke* v. *Peters*, 4 Kay & J. 437; 4 Jur., N. S., 1271.

3. *Withy* v. *Mangles* (10 Ch. & F. 215; 10 L. J., Ch., 391). To entitle the next of kin according to the Statute of Distributions there must, in order to take the case out of the authority of this case, be an express reference to the statute, and not one which has to be spelt out of the words of the will. *Halton* v. *Foster*, 3 L. R., Ch., 505; 37 L. J., Ch., 547; 18 L. T., N. S., 623; 16 W. R. 683.

4. *Wolfe* v. *Findlay* (6 Hare 66) disapproved of in *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 L. R., Ch. D., 421; 46 L. J., Ch., 65; 36 L. T. 285; 25 W. R. 264.

5. *Wolley* v. *Jenkins* (23 Beav. 53; 26 L. J., Ch., 379; 3 Jur., N. S., 321) discussed in *Vine* v. *Raleigh*, 24 L. R., Ch. D., 238; 49 L. T. 440; 31 W. R. 855.

6. *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (16 L. R., Eq., 433) considered in *Donnell* v. *Bennett*, 22 L. R., Ch. D., 835; 52 L. J., Ch., 414; 48 L. T. 68; 31 W. R. 316.

7. *Womersley* v. *Church* (17 L. T. 190) explained in *Ballard* v. *Tomlinson*, 26 L. R., Ch. D., 194; 50 L. T. 230; 32 W. R 589.

8. *Wood, Exp.* (1 Rose 298), overruled by *Rowe, Exp.*, 2 Rose 339.

9. *Wood, Exp.* (1 M. D. & De G. 92), overruled by *Steward* v. *Greaves*, 10 M. & W. 711; and *Davison* v. *Farmer*, 6 Exch. 242.

10. *Wood, Exp* (4 De G. M & G. 875), approved and followed in *Ward* or *Harris, Exp., Ward, Re*, 20 L. R., Ch. D., 356; 51 L. J., Ch., 752; 47 L. T. 106; 30 W. R. 560. Affirming 19 L. R., Ch. D., 356.

11. *Wood, Re* (3 Myl. & C. 266; 7 L. J., Ch., 144), overruled in *Blewitt, Re*, 6 De G. M. & G. 187; 12 Jur., N. S., 217; 25 L. J., Ch., 393.

12. *Wood* v. *Patteson* (10 Beav. 541) explained and distinguished in *Fitzpatrick* v. *Waring*, 11 L. R., Ir., 35.

13. *Wood* v. *Sutcliffe* (12 Sim., N. S., 173) commented upon in *Att.-Gen.* v. *Bradford Canal Co.*, 15 L. T., N. S., 9.

14. *Wood* v. *Woad* (9 L. R., Exch., 190; 43 L. J., Exch., 190; 30 L. T. 815; 22 W. R. 709) distinguished in *Russell* v. *Russell*, 14 L. R., Ch. D., 471; 49 L. J., Ch., 268; 42 L. T., 112.

15. The rule in *Woodcock* v. *Dorset* (*Duke*) (3 Bro. C. C. 569) is an artificial rule, and ought not to be extended. It is founded on an implied agreement that the children of a child dying in the lifetime of his parents should be provided for. *Jeyes* v. *Savage*, 33 L. T., N. S., 139; 23 W. R., 764; 44 L. J., Ch., 706; 10 L. R., Ch., 555. Reversing 23 W. R. 742.

16. *Woodgate* v. *Unwin* (4 Sim. 129) not reconcilable with *Innes* v. *Skillern* (14 Sim. 428), or, as it appears to me, with the general current of authorities. Per Wood, V.-Ch., *Kenworthy* v. *Ward*, 11 Hare 198, 199; 17 Jur. 1047; 1 W. R. 493; 1 Eq. Rep. 389.

17. *Woolridge* v. *Woolridge* (28 L. J., Ch., 689; 33 L. T., N. S., 254; Johns. 63) distinguished in *White* v. *White, White, Re*, 22 L. R., Ch. D., 555; 52 L. J., Ch., 232; 48 L. T. 151; 31 W. R. 451.

18. *Woolstencroft* v. *Woolstencroft* (2 Giff. 192; 6 Jur., N. S., 866, 29 L. J., Ch., 511; 8 W. R. 405; 2 L. T., N. S., 526. Reversed on appeal, 6 Jur., N. S., 1170; 9 W. R. 42; 3 L. T., N. S., 388. See 6 Jur., N. S., Part 2, 447; 2 De G. F. & J. 350; 30 L. J., Ch., 22), and *Eno* v. *Tatham* (32 L. J., Ch., 311), were two decisions of equal authority, and it was his business to reconcile them if he could. *Pembroke* v. *Friend* (1 John. & H. 132) gave him the opportunity. A direction to pay out of personal estate pointed out a particular fund out of which debts were to be paid; there was none such here, and he must follow *Woolstencroft* v. *Woolstencroft*, and hold that there was no signification of a contrary intention within the meaning of the Act 17 & 18 Vict., c. 113. But as between the two properties included in the mortgage securities, he thought that the residuary devise must bear the burden of the debt in exoneration of that specifically devised, for the fact of making a specific devise signified a contrary intention. Per Lord Romilly, M. R., in *Brownson* v. *Lawrance*, 37 L. J., Ch., 351, 353.

19. *Wootton's Estate, Re* (1 L. R., Eq., 589; 35 L. J., Ch., 305), followed in *Wilkes' Estate, Re*, 16 L. R., Ch. D., 597; 50 L. J., Ch., 199.

20. *Wormald* v. *Maitland* (35 L. J., Ch., 69) questioned in the *Agra Bank* v. *Barry*, 7 L. R., H. L., 135.

21. *Worrall* v. *Johnson* (2 Jac. & Walk. 214) overruled by *Bozon* v. *Bolland*, 4 Myl. & C. 354; 9 L. J., N. S., Ch., 123; 4 Jur. 763; 3 *id.* 884.

22. *Wortham* v. *Pemberton* (1 De G. & Sm. 644) dissented from. Malins, V.-Ch., said that he considered the interpretation of the Act 18 & 19 Vict., c. 43, Infants Settlement Act, given by Mr. Pearson to be the correct one, and that no jurisdiction was given by it to the Court to entertain applications made against infants, or without their consent. The object of the Act was this; seeing that infants under twenty-one were capable of contracting valid marriages, but were not capable of doing that which is incidental to marriage, settling their property, the law gave them this power, subject to the sanction of the Court of Chancery, and with certain restrictions. Then, had the Court any jurisdiction over this young lady, independently of that Act. He thought not; certainly *Wortham* v. *Pemberton* seemed to be in favour of the application on behalf of an infant married woman without her consent; but he had been counsel in that case, and was of opinion that Knight Bruce, V.-Ch., the judge who decided it, had been induced by his strong sense of the husband's misconduct to go beyond the strict limits of the law; in fact, the case was an instance of the proverb, that hard cases made bad law; he must decline,

therefore, to follow *Wortham* v. *Pemberton*, and as the present application seemed altogether misconceived and unjustifiable he should dismiss the petition with costs of all parties to be paid by the next friend. Per Malins, V.-Ch., in *Potter, Re*, 17 W. R. 347, 348: 20 L. T., N. S., 355; 7 L. R., Eq., 484.

1. *Worthington* v. *Jeffries* (44 L. J., C. P., 209; 10 L. R., Eq., 379) was not followed in *Chambers* v. *Green* (44 L. J, Ch, 600), not reconcilable with *Forster* v. *Forster* (4 B. & S 187; 32 L. J., Q. B., 312).

2. *Worthington's Trade Mark, Re* (14 L R, Ch. D., 8; 49 L. J., Ch., 646; 42 L. T. 563; 28 W. R 747), observed upon in *Robinson's Trade Mark, Re*, 29 W. R. 31.

3. *Wright* v. *Bolton* (18 Ves. 292) followed in *Jones* v. *Thomas*, 2 Sm. & G. 186; 18 Jur. 460.

4. *Wright* v. *Callendar* (2 De G M. & G 652; 21 L. J., Ch., 781) adopted in *Carmichael* v. *Gee*, 5 L. R., App. Cas, 588; 49 L. J., Ch., 829; 43 L. T. 227; 29 W. R. 293; 11 L. R, Ch. D, 891; 48 L. J., Ch., 657; 27 W. R. 843; 40 L. T. 663.

5. *Wright* v. *Callendar* (2 De G M. & G. 652) distinguished in *Baker* v. *Baker*, 1 Jur., N. S., 491.

6. *Wright* v. *Monarch Investment Building Society* (5 L. R., Ch. D., 726; 46 L. J, Ch., 649) approved and followed in *Hack* v. *London Provident Building Society*, 23 L. R, Ch. D, 103; 52 L. J., Ch., 541; 48 L. T. 247; 31 W. R. 392. Affirming 52 L. J., Ch., 225; 31 W. R. 378.

7. *Wright* v. *Nutt* (3 Bro. C. C. 326; 1 H. Black 136) dissented from by the Lord Chancellor in *Wright* v *Simpson*, 6 Ves. 714.

8. *Wright* v. *Vernon* (22 L. J, Ch., 447; 1 Drew. 344) distinguished in *Lyell* v. *Kennedy*, 27 L. R., Ch. D., 1; 53 L. J., Ch., 937; 50 L. T. 730.

9. *Wright* v. *Wakeford* (17 Ves. 454) cannot be considered to be in force since *Burdett* v *Spilsbury* (10 Cl. & F. 340). *Vincent* v. *Sodor and Man* (*Bishop*), 4 De G. & Sm. 294; 20 L. J., N. S, Ch., 433; 15 Jur. 365. And see S. C. at law 5 Exch. Rep. 683.

10. *Wrixon* v. *Vize* (3 Dr. & War. 104) followed in *Pugh* v. *Heath*, 7 L. R., App. Cas, 205; 15 L. J., Q. B., 367; 46 L. T. 321; 30 W. R. 553.

11. *Wyllie* v. *Ellice* (6 Hare 505) observed upon in *Att.-Gen.* v. *Cooper*, 8 Hare 166.

12. *Wynch's Trusts, Re* (17 Jur. 388; 22 L. J., Ch., 750; 1 W. R. 426; 1 Eq. Rep. 521; 1 Sm. & G. 427. Affirmed 18 Jur. 659; 2 W. R. 570; 2 Eq. Rep. 1025; 23 L. J., Ch., 930. S. C. *nom. Wynch, Exp.*, 5 De G. M. & G. 188), approved and followed in *Goldney* v. *Crabb*, 2 W. R. 579; 19 Beav. 338.

13. *Wynne* v. *Hughes* (26 Beav. 383). *Bradley* v. *Stelfox* (3 De G. J. & S. 402) is not very favourable to *Wynne* v. *Hughes*. Per Jessel, M. R., in *Longdendale Cotton Spinning Co., Re*, 38 L. T., N. S., 776; 8 L. R., Ch. D., 150; 26 W. R. 491.

Y.

14. *Yates, Exp.* (2 De G. & J. 191; 4 Jur., N. S. 649; 27 L. J., Bkr., 9). In the case of *Yates, Exp.*, the Lords Justices on overruling the case in the Queen's Bench, seem to have altogether overlooked the distinction between a bill of exchange and a promissory note. They lay down what is contrary to the common law, without hearing argument on the point, and apparently without thinking of the point at all, although they are overruling a decision of a court of law on a point of law. Per Willes, J., in *Leeman* v. *Kirkman*, 6 Jur., N. S., 17.

15 *Yates* v. *Jack* (1 L. R., Ch., 295; 14 W. R. 618; 14 L. T., N. S, 152) has made it clear that the right of a person living in a town to protection from interference with his light is not different from the right of a person living in the country. The observation of the Lord Chancellor in that case, that he was to regard the possible uses to which the plaintiff's house might be put, may be reconciled with the malt-house case (*Martin* v *Goble*, 1 Camp. 320), by supposing that his lordship meant the uses of the house as it stands at the time of the complaint, and not if and when rebuilt for some other and totally different purposes. Per Wood, V.-Ch., in *Dent* v. *Auction Mart Co.*, 14 W. R. 709; 2 L. R, Eq., 238; 12 Jur., N. S., 417; 35 L. J., Ch., 555; 14 L. T., N. S., 827.

16. *York* (*Mayor*) v. *Pilkington* (2 Atk. 302). Why ought a court of equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in *Saull* v. *Browne* (10 L. R., Ch., 64; 44 L. J., Ch., 1; 13 Cox C. C. 30; 23 W. R. 50; 31 L. T. 493), where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in *York* (*Mayor*) v. *Pilkington*. My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a court of equity has interfered in criminal proceedings. I do not say that the Court might not interfere in a possible case, but, as a general rule, it will not. Per Jessel, M. R., in *Kerr* v. *Preston* (*Corporation*), 6 L. R., Ch. D., 463, 467; 46 L. J., Ch, 409; 25 W. R. 264.

17. *Young* v. *Brassey* (1 L. R., Ch. D., 277; 45 L. J., Ch., 142; 24 W. R. 110) not followed in *Stigand* v. *Stigand*, 19 L. R., Ch. D., 460; 51 L. J., Ch., 446; 30 W. R. 312.

18. *Young* v. *Hassard* (1 Jones & Lat. 467) not consistent with *Boughton* v. *Boughton*, 1 H. L Ca. 406. *Simmons* v. *Rose*, 6 De G. M. & G. 411; 2 Jur., N. S., 73; 25 L. J., Ch, 615.

19. *Young* v. *Robertson* (4 Macq. H. L. Ca. 314), although apparently acted upon by the Lords Justices in *Gregson, Re* (2 De G J. & S., 428, 442; 10 Jur., N. S., 1138; 3 L. J., Ch., 41; 5 N. R. 99; 13 W. R. 198; 11 L. T., N. S., 460), was not followed by the Court of Exchequer in *Richardson* v. *Power*, 11 Jur., N. S., 739.

20. *Young* v. *Waterpark* (*Lord*) (13 Sim. 199) distinguished in *Balfour* v. *Cooper*, 23 L. R., Ch. D., 472; 52 L. J., Ch., 495; 48 L. T. 323; 31 W. R. 569.

21. *Young* v. *Young* (13 L. R., Eq., 175, n.). Form of decree in this case not adopted in *Davey* v. *Wiethbach*, 15 L. R., Eq., 269.

Z.

22. *Zouch* v. *Parsons* (3 Burr. 1794) is sound law. *Allen* v. *Allen*, 2 Dr. & War. 307; 1 Con. & L. 427; 4 Ir. Eq. R. 472.